Disability discrimination: offering a trial period in an apparently unsuitable role may be a reasonable adjustment

In Rentokil Initial UK v Miller, the EAT held that offering a trial period in a new role may constitute a reasonable adjustment for a disabled employee. This may be the case even where the employer considers that the employee is not particularly well-suited to the role.

What happened in this case?

The claimant was employed by Rentokil as a pest control technician in April 2016. The role was physically demanding and required him to work at height for a substantial part of his working time. Sadly, around a year into the role, he was diagnosed with multiple sclerosis. Various adjustments were made to his role but, by the end of 2018, Rentokil decided that no other adjustments were possible, and it was no longer safe for him to continue in his role. He was told to remain at home on full pay and efforts were made to find him an alternative role.

In February 2019 the claimant applied for a service administrator role. All candidates were asked to complete maths and spelling assessments. The claimant did not perform well in the tests and, after an interview, it was decided that he did not have the right skills or experience for the role. In particular, he was not proficient at using

Excel. Rentokil did not consider offering retraining or a trial period in the role. The claimant was dismissed the following month.

The claimant brought various claims, including a claim for failure to make reasonable adjustments. The Employment Tribunal upheld the claim, finding that it would have been a reasonable adjustment to transfer the claimant into the service administrator role for a four-week trial period. On the facts, there was a reasonable chance that he would have performed better "on the job" than he had in the tests and interview. Further, he could have been provided with training on Excel. The failure to offer the trial period meant that his dismissal was almost inevitable, whereas if he had been offered the trial period there was, in the Tribunal's view, at least a 50:50 chance that it would have succeeded, and he would have remained in work.

Rentokil appealed to the EAT.

What was decided?

Rentokil argued that the Tribunal had gone wrong by regarding a trial period as a reasonable adjustment, instead of a mere process or tool. The EAT rejected this ground of appeal, holding that where a disability means an employee cannot continue in their present job, and is at risk of dismissal, there is nothing in law that provides that it cannot be a reasonable adjustment to give them a trial period in a new role. Nor is there any legal rule that says that it must certain or likely that the employee would succeed in the trial period before it had to be offered.

This does not mean that in *every* case it will be a reasonable adjustment for an employer to offer a trial period in a new

role. It will depend on all the circumstances, including the suitability of the role and prospects of the employee succeeding in the trial period and avoiding the possibility of dismissal. In this case, the Tribunal had estimated there was a 50:50 chance that the trial period offered the *"…prospect of the axe being lifted entirely".*

Rentokil also argued it could not be a reasonable adjustment to require an employer to appoint an employee to a particular role where the employer genuinely and reasonably concludes that the employee is not qualified or suitable for it. The EAT also rejected this ground of appeal, holding that whether it would have been reasonable to offer a role on a trial basis is an *objective* question for the Tribunal to consider. This means that it will usually be relevant to consider the essential requirements of the role, and the employer's evidence for considering the employee to be ill-suited and/or ill-qualified. Having considered this, a Tribunal may come to a different view to the employer. In this case, it was not enough for Rentokil to show that the claimant did not perform well by reference to the usual standards that it required from candidates. Rather, it needed to satisfy the Tribunal that the claimant's performance was such that it would not have been reasonable to have at least given him the role on a trial basis – and it had failed to do this.

What does this mean for employers?

This decision signals that offering a trial period in a new role may constitute a reasonable adjustment. This may be the case even where, at first sight, the employee does not appear to be particularly well qualified for, or suited to, the role. Employers must grapple with the employee's experience and skill set and consider to what extent they are applicable to the new role. This will require the recruiting manager to have a good understanding of the employee's actual experience

and skills in order to make a fair assessment.

Where the experience and skills are relevant, offering the role on a trial basis may be a reasonable adjustment, even if some degree of retraining is required. However, if after such an assessment it is clear that the employee is not appointable (e.g. because they fail to meet the essential criteria for the role, such as lacking a necessary professional qualification), then it may *not* be a reasonable adjustment to offer a trial period.

Where an employer is "on the fence" about the employee's ability to perform the role, the safest course of action would be to assume that it would be a reasonable adjustment to offer a trial period. During the trial, if the employee then failed to perform to an acceptable standard (even with appropriate support and training in place) then the employer will be better able to justify not offering the role to the employee on a permanent basis.

Rentokil Initial UK Ltd v Miller

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.