Is it discriminatory to retract a secondment offer made to a disabled employee on health and safety grounds?

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In Judd v Cabinet Office the Employment Appeal Tribunal upheld a decision that the withdrawal of an overseas secondment opportunity on health and safety grounds was not disability discrimination. The appeal turned on whether the employer had acted disproportionately in withdrawing the opportunity, rather than allowing the employee to go with safeguards in place.

What happened in this case?

The claimant applied for an overseas secondment to Montenegro and was offered a placement in September 2018. A few months earlier, she had been the victim of a crime, which had had a negative impact on her health and wellbeing. In fact, she had had two significant health episodes which had resulted in her attending hospital on an emergency basis.

The claimant was required to undergo medical clearance. This was undertaken by Healix, a contractor which provided risk assessments for proposed transfers and secondments abroad. In October 2018, Healix advised the employer that the claimant was “high risk” and should not travel to Montenegro for the time being.

In November 2018, the claimant was then assessed by the employer’s occupational health service. She did not disclose her complete medical history, including the two emergency trips to hospital. Based on incomplete information, Occupational Health assessed her as fit to travel but made certain recommendations, such as registering with a local doctor who could liaise with her GP, taking out appropriate

medical insurance, and producing a wellbeing and contingency plan for repatriation in the event of an emergency. Healix disagreed with this assessment and highlighted that these measures were undeliverable. As a result, the employer withdrew the secondment offer.

In January 2019, Occupational Health issued another report following two further assessments and having reviewed a letter from the claimant's consultant which referred to one of the two episodes that had resulted in emergency hospital admission. The report said the claimant was fit to undertake the secondment, subject to the implementation of its proposals

The employer refused to reinstate the secondment offer and the claimant brought a claim for disability discrimination.

What did the EAT decide?

It was not disputed that the claimant had a disability, nor that the withdrawal of the secondment opportunity constituted unfavourable treatment because of something arising in consequence of her disability. The dispute centred on whether that unfavourable treatment could be justified. If it could, the claim would fail. It was agreed that the employer's aim was to protect the health, safety and wellbeing of its employees when working abroad. The key question was whether it had acted proportionately. In other words, could it have achieved the health and safety aim by less discriminatory means?

The Employment Tribunal had found that Healix had classified the claimant as "high risk" which was highly unusual and, indeed, a first for the employer. The Tribunal accepted that if the same medical emergency happened to the claimant in Montenegro as had happened in the UK, she would not have had the same joined-up services available. The Tribunal accepted that the assessment was not a permanent restriction but one that could be reviewed after about a year and it was likely

that more secondment opportunities would arise. The Tribunal concluded that there was no alternative action that would have overcome the obstacles and so it dismissed the claim. It also dismissed the claim that there had been a failure to make reasonable adjustments.

At appeal, the claimant sought to argue that the Tribunal had failed to consider other factors relevant to proportionality when dismissing her case. However, the EAT went on to find that the Tribunal's findings were not perverse and there was no legal error in its approach. It dismissed her appeal.

What does this mean for employers?

This case does not mean that disabled employees can be excluded from secondment opportunities, even those which carry risk to them. There may be reasonable steps that an employer can take to mitigate the risk. It will depend on the particular circumstances of the case. Here, there was nothing the employer could reasonably do.

What this case does show is that employers must be careful when making offers to employees in situations where risk assessments are required. Offers should be made conditional upon satisfactory clearance being obtained. This should be spelt out in any secondment policy and in the secondment offer letter itself.

Even where an employer genuinely believes it is acting in an employee's best interests, the withdrawal of an opportunity is likely to cause bad feeling. Having clear and open lines of communication may help to manage expectations and defuse a difficult situation which might otherwise arise.

Judd v Cabinet Office

If you would like to discuss any issues arising out of this decision please contact James Hockley (jameshockley@bdbf.co.uk) or your usual BDBF contact.

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