Croner Briefing

Is pay protection a reasonable adjustment?
The case of G4S Cash Solutions (UK) Ltd v Powell UKEAT/0243/15/RN
By Amanda Beattie

Employers have a duty (under Section 20 of the Equality Act 2010) to take such steps that are reasonable to avoid a disabled worker being at a substantial disadvantage – this is often called the employer's 'duty to make reasonable adjustments'. A worker's consent to an adjustment and protecting a worker's pay as a reasonable adjustment has recently been examined in the Employment Appeal Tribunal; ("EAT") case of G4S Cash Solutions (UK) Limited and Powell.

What happened in this case?

Mr Powell worked for G4S as an engineer, who had the principal responsibility of maintaining ATM machines in London. Over a period of time Mr Powell suffered from back problems, so much so that by 2012 he was unable to work in confined spaces or do any heavy lifting. At this time Mr Powell had a period of sick leave and on his return to work he started working in a new position within the company as a 'key runner', which was essentially delivering components from the company's depot to the ATM engineers in the field. Mr Powell travelled by public transport to do this and remained on the same level of salary he was on as an engineer – however it was understood that Mr Powell would not be carrying out this role on a long-term basis.

In 2013, G4S began consulting with Mr Powell in relation to discontinuing the key runner role and they provided him with alternative vacancies within the company to consider. G4S informed Mr Powell that if the alternative vacancies were not suitable then he would be dismissed on medical grounds.

Mr Powell submitted a grievance to the company, outlining that they were trying to change his terms and conditions of employment. G4S subsequently decided to continue with the key runner role, albeit at a lower salary than before due to the lower skill set required for the position. Mr Powell refused to accept the reduction in salary and in October 2013 he was dismissed from his employment. Mr Powell went on to issue a claim at the Employment Tribunal.

How did the tribunal progress?

The Employment Tribunal rejected Mr Powell's claim in relation to the key runner role being an agreed variation to his contract of employment which entitled Mr Powell to his original engineer's salary on a permanent basis. Although the Employment Tribunal did determine that Section 20 of the Act obliged G4S to make a reasonable adjustment of employing Mr Powell as a key runner on the same salary he received as an engineer. G4S appealed this decision to the EAT and Mr Powell cross-appealed on the variation of contract issue.

In relation to Mr Powell's cross-appeal, the EAT determined that the Employment Tribunal had based their decision that there was no contractual variation on the incorrect notion that an employer did not need the worker's consent when fulfilling their statutory duty to make reasonable adjustments and were entitled to insist on a specific adjustment. The EAT outlined that if an employer suggests an adjustment which is incompatible with the terms and conditions of the worker's contract of employment, the worker is permitted to decline it – therefore the adjustment will not be effective without an agreed variation to the contract of employment.

In the current case, the EAT considered that there had been a variation of Mr Powell's contract when he became a key runner in 2012. Although the terms of the variation, such as the period of time of the adjustment and how it could be changed were not clear, there was no need to remit the question back to the Employment

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Tribunal due to the EAT's judgment on the reasonable adjustment issue raised as an appeal by G4S.

The EAT determined that the Employment Tribunal were not incorrect in concluding that G4S were obliged to employ Mr Powell as a key runner and pay him his original salary as a form of reasonable adjustment. The EAT considered there was no principle which excluded protecting a worker's pay in these circumstances, as part of the employer's duty to make reasonable adjustments to avoid substantial disadvantage to a disabled worker. The issue is always whether it is reasonable for that employer to make that adjustment, in the same way as adapting the workplace and the like. The EAT considered that although it would not be commonplace for an Employment Tribunal to conclude long-term pay protection was needed, it was certainly conceivable that in some cases, it may be a reasonable adjustment for an employer to make this amendment in order to facilitate getting a worker back to work or keeping them in work. However, the EAT also outlined that if circumstances changed, the adjustment may no longer be reasonable, such as economic reasons or the changes within the business.

What can be learnt from this case?

This case highlights that even where there is significant financial cost to a business in making the adjustment; this can still be considered as a reasonable adjustment and compliant with the legislation in certain circumstances.

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