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Recommendations – how wide can they be?

In successful discrimination claims, one remedy available to a Tribunal is an appropriate recommendation. In this case of Hill v Lloyds Bank plc, the Employment Appeal Tribunal (EAT) has considered the scope of a recommendation sought by an employee.

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Recommendations as a remedy

In successful discrimination claims, one remedy available to a Tribunal is an appropriate recommendation which is:

"…a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate…" (section 124, Equality Act 2010).

If a respondent fails to comply with a recommendation without reasonable excuse, the Tribunal has the ability to increase the amount of compensation to be paid to the claimant (or, if no such order for compensation was originally made, to make one).

In the case of Hill v Lloyds Bank plc, the Employment Appeal Tribunal (EAT) has considered the scope of a recommendation sought by an employee.

The background

Mrs Hill suffered from reactive depression which she asserted was due to bullying and harassment at work. This was held to amount to a disability within the meaning of the Equality Act 2010. Mrs Hill had brought a grievance against her line manager, alleging bullying and harassment; this grievance and her subsequent appeal were not upheld. She also had issues with her line manager's manager but did not raise a formal grievance against him. Mrs Hill did not want to work for either of these two individuals, and they did not want to work with her.

On her return to work, Mrs Hill was based in Bristol; the two managers were based in Glasgow and London respectively. She did not in fact have to work with either of them. However, Mrs Hill remained anxious (or fearful) that at some point in the future she might have to work with one or both of them again. She sought an undertaking (a promise) from her employer that she would not have to work under their control again. It is unclear from the EAT's judgment whether Mrs Hill sought to add financial "teeth" to this undertaking at this stage (see below), although the employer's response to the request suggested that she did – the employer confirmed to her that although it would "make some efforts" to ensure that she did not have to work with the two individuals again, this could not be guaranteed for various reasons, and that redundancy or severance would not be offered as an alternative if she was required to work with them as Mrs Hill would not be redundant.

The Tribunal decision

Mrs Hill issued Tribunal proceedings asserting that Lloyds Bank plc had failed to make reasonable adjustments by refusing to provide an undertaking. This undertaking was recorded in the list of issues as being an undertaking in writing that:

"[Lloyds Bank plc] would not rearrange duties or roles so that [Mrs Hill] has to work with or report to [either of the managers]; and In the event that business demands leave it with no practical alternative, it will offer [Mrs Hill] a redundancy/severance payment under the full terms applying to employees of [Mrs Hill's] contractual status at the time of the offer of dismissal."

The Tribunal upheld Mrs Hill's claim. It determined that Lloyds Bank plc had a practice of not giving binding undertakings but only words of comfort, that this placed Mrs Hill at a substantial disadvantage (a state of fear) compared to others who had also made allegations of bullying but who were not disabled. The Tribunal declined to make a recommendation on the terms set out in the list of issues but chose to make one on different terms; however, following a reconsideration application, the recommendation was withdrawn all together. At the EAT, therefore, there was in fact no recommendation in place.

The EAT decision

The EAT upheld the Tribunal's findings in respect of liability. In respect of the issue of a recommendation, the EAT expressed a number of concerns in respect of the Tribunal's initial recommendation. Although the EAT did not decide the terms of any recommendation (referring this issue back to the Tribunal to determine), it did state that it was "puzzled" as to why the Tribunal did not simply adopt the recommendations requested by the Claimant as this reflected precisely the reasonable adjustments that she was suggesting should be made; such a comment may well influence the Tribunal when the case returns.

But is this correct?

The EAT commented that it could not see any difficulty in principle with a requirement that a particular employee should be treated as redundant in certain circumstances. It also could not see any reasons why a recommendation could not have financial implications. Lastly, it appeared to accept that the purpose of this part of the undertaking was in effect to hold the employer to the basic principle that Mrs Hill should not be required to work with either of these individuals again – in the EAT's words, it was to provide an "incentive" to the employer.

As mentioned above, the wording of the recommendation has not yet been determined but has been referred back to the Tribunal. The first part of the undertaking (a promise that Mrs Hill would not have to work with the two managers) would seem to alleviate the disadvantage claimed by Mrs Hill. And for many employers, this already would appear to be a significant step to require them to take – particularly in circumstances where the allegations against the two individuals were not upheld, and as no Tribunal claim was ever presented in respect of the bullying and harassment allegations, those allegations have never been independently considered by the Tribunal.

If the employer was to breach this undertaking, then as the EAT pointed out, Mrs Hill may have other remedies available to her – such as a constructive unfair dismissal claim. However, the second part of the requested undertaking goes much further than this – it attaches specific financial penalties to the employer's breach; and those financial penalties (an amount equivalent to redundancy or severance pay) appear to simply be a method of calculation selected by Mrs Hill; she would not actually be redundant in these circumstances or otherwise entitled to this money. Is it reasonable for an employee to simply pick a method of compensation that would provide her with a sufficient degree of confidence that her employer would adhere to the first undertaking, or alternatively, a sufficient degree of compensation in the event that they did not? If so, at what point (if any) would the level of the figure claimed be so high so as to no longer be reasonable (in this case, Mrs Hill estimated the payment under the redundancy scheme to be in the region of £130,000)? And if an employer was to refuse to comply with the recommendation issued (i.e. it refused to provide the undertaking), would the compensation then awarded by the Tribunal under section 124(7) of the Equality Act 2010 be calculated by reference to the "penalty" figure included in the recommendation?

The recommendation issued, and the rationale for it, will make interesting reading when this case returns to the Tribunal.

The EAT did provide some comfort to employers suggesting that recommendations to provide undertakings would arise only in "suitable (perhaps rare) cases". And it will not always be the case that a decision by an employer not to provide a requested undertaking will amount to a "practice" (as opposed to a one-off decision). However, the basic factual background to this case – an employee who remains unhappy with the outcome of internal grievance and appeals procedures – is not unusual. Where complainants are (or may be) disabled, employers will need to be mindful of the potential for reasonable adjustment claims and the wide-ranging recommendations that individuals may seek.

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