Disability discrimination: EAT holds expectation of working long hours could be a PCP

In an article first published by Thomson Reuters, Managing Associate, Annabel Mackay, examines the recent EAT decision in Carreras v. United First Partners Research in which it was confirmed that an expectation that an employee would work long hours could be a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage compared to a non-disabled person.

The financial services sector has embarked on a series of initiatives over the last two years in an effort to break the culture of long hours and improve recruitment and retention. JP Morgan Chase launched “Pencils Down” in January 2016 where their staff can take every weekend off unless they are working on a live deal. Credit Suisse have recently introduced “Protecting Friday Night” which stipulates that employees should leave by 7pm on a Friday and not return until Saturday lunchtime, again, unless they are working on a big deal. UBS employees can take two hours personal time per week while Morgan Stanley has started to offer four-week paid sabbaticals to new Vice Presidents. It is important that these efforts continue as working long hours can be damaging to physical and mental health and research shows that long hours do not necessarily translate into increased productivity. The long hours culture can also give rise to discrimination complaints. In **Carreras v. United First Partners Research** the Employment Appeal Tribunal confirmed that an expectation that an employee would work long hours could be a provision, criterion or practice (**PCP**) which puts a disabled person at a substantial disadvantage compared to a non-disabled person.

Mr Carreras was a high performing analyst at an independent brokerage and research firm. He had worked long hours (from around 8.00-9.00am until 9.00-11.00pm) before he suffered serious injuries in a cycling accident. He returned to work within a few weeks. The Respondent did not receive any medical reports but was aware that Mr Carreras experienced dizziness, fatigue and headaches and difficulty in focusing and concentrating. They also knew that Mr Carreras found it difficult to work in the evenings.

In the first six months after his return, Mr Carreras worked a maximum of eight hours per day. He began to increase those hours with colleagues covering for him in the evenings. After that initial period, Mr Carreras complained that he had been forced to work later and that his hours were “unsuitable.” From October 2013, Mr Carreras began to request late working, up until 9pm only. However, that arrangement developed so that requests were being made of him to work late and there was an assumption that he would be working one or two later nights during the week. The Respondent asked Mr Carreras when he would be working late rather than whether he was prepared to work late. Mr Carreras maintained that he was under pressure to work late.

His relationship with the Respondent deteriorated and was affected by matters which were unrelated to his hours. There were delays in the timing of bonus payments due to Mr Carreras. The Respondent also failed to provide accurate information in connection with a personal injury claim that Mr Carreras was pursuing in relation to his bike accident. Matters came to a head on 14 February 2014 when Mr Carreras emailed to object to working late in the evenings due to fatigue. A heated exchange took place later in the day between Mr Carreras and one of the Respondent’s owners, Mr Mardel. During the exchange, Mr Mardel said that if he did not like it, he could leave. Mr Carreras left the office, returning two hours later to collect his belongings. He told the Respondent’s HR officer that Mr Bardel’s behaviour was unacceptable and that he was resigning. This was confirmed in writing. Mr Carreras brought a disability discrimination complaint (failure to make reasonable adjustments) and a constructive dismissal claim.

Mr Carreras argued that the Respondent had a PCP of requiring him to work late. The Respondent maintained that Mr Carreras had been asked but not required to work late-any late working had been voluntary. The Tribunal noted that the Respondent had moved from making open requests of Mr Carreras to assuming that he would work late once or twice a week. It also acknowledged that there were commercial and political reasons why he would agree to work late. However, the Tribunal did not accept that he had been required to work late, which was the way in which Mr Carreras had characterised the PCP.

The Employment Appeal Tribunal found that this was "an overly technical approach" to the PCP, having regard to the protective nature of the legislation. The Employment Tribunal had recognised that employees might feel compelled to work long hours even though it was damaging to their health. In that context, the way in which Mr Carreras had characterised the Respondent's expectation that he would work long hours as a requirement was understandable. The EHRC Code of Practice made it clear that a PCP had to be construed broadly: "Adopting a real world approach, whilst "requirement" might be taken to imply some element of compulsion, an expectation or assumption placed upon an employee...might well suffice." The Tribunal's approach had been too restrictive and the Employment Appeal Tribunal decided that Mr Carreras had made out his case that the expectation to work long hours was a PCP.

The case was remitted for the same Tribunal to consider the nature and extent of the disadvantage suffered by Mr Carreras and the reasonable adjustments that the Respondent might have been obliged to take. With regard to the constructive dismissal complaint, the Employment Appeal Tribunal found that Mr Carreras' complaint was made out as the breach of contract only had to be one of the reasons for his resignation rather than the sole reason.

The Employment Appeal Tribunal's decision illustrates that employers must be careful that unspoken rules and other aspects of the workplace culture do not put employees with protected characteristics at a disadvantage. This case concerned a disabled employee but the same complaint might arise in relation to employees who require flexibility in their working hours to accommodate caring responsibilities or periods of religious observance. As the Employment Tribunal recognised, employees can feel under pressure to conform for commercial or political reasons, irrespective of whether or not their employer expressly requests that they work in a certain way.

The case also demonstrates the importance of careful management of any return to work after periods of sickness absence, whether for a physical or mental impairment. The Respondent had not received any medical reports regarding Mr Carreras health and prognosis. It relied upon his assessment of what he could do when increasing his hours following a short phased return. This appears to have caused difficulties when Mr Carreras initially requested late work, leading to an assumption that this no longer presented him with any difficulties.

While the efforts being made by the financial services sector to break the long hours culture are welcome, some of the initiatives also acknowledge that such flexibility cannot be guaranteed when a deal is underway. This is understandable but strikes a note of caution as to whether "commercial and political" realities will take precedence and employees will continue to work excessive hours to meet their expectations of their employers, whether or not such expectations are communicated as a request or a requirement. In the Carreras case, the employer had initially requested late working before assuming that this would happen. It would be interesting to explore whether an employer who made no requests but rewarded employees who did work long hours, through promotion or other opportunities, would also be operating a PCP.

Carreras v United First Partners Research