Clarity required in identifying the elements of reasonable adjustments

_Croft Vets Ltd v Butcher_ UKEAT/0562/12, [2013] EqLR 1170, October 2, 2013;
_Environment Agency v Donnelly_ UKEAT/0194/13, [2014] EqLR 13, October 18, 2013;
_Secretary of State for Work and Pensions v Higgins_ UKEAT/0579/13, [2013] EqLR 1180, October 25, 2013

Implications for practitioners
This case note reviews three recent cases, each decided within three weeks of one another at the EAT. The cases provide useful clarity on the EAT’s current approach to the question of reasonable adjustments.

_Croft Vets Ltd v Butcher_

**Facts**
Ms Butcher (B) was a receptionist for Croft Vets Limited (C). Following a reorganisation her responsibilities were extended. She was signed off sick and was diagnosed with work related stress and depression. C offered a return to work either with her newly increased responsibilities, or alternatively with her original, core functions but a reduced salary. B declined. C referred B to a private psychiatrist (P) to aid a return to work.

P suggested that B undergo further treatment and that C continue to pay privately for this, though P acknowledged that there was no guarantee that this would result in B being able to return to work. C did not follow P’s recommendation and declined to pay for further treatment. B resigned and claimed, among other claims, that the refusal to pay for private treatment was an unlawful failure to make a reasonable adjustment.

**Employment Tribunal**

The ET found in favour of B. The tribunal:
1) identified the provision, criteria or practice (PCP) as the requirement for B to return to work to perform the essential functions of her job which had caused her disability.
2) found that C had not complied with the requirements set out in _SofS for Work and Pensions v Alam_ [2010] ICR 665 [see Briefing 561] when considering whether to make reasonable adjustments to the PCP.
3) held that failing to pay for private medical treatment was a failure to make a reasonable adjustment.
4) found that there was a duty to consult with B during her absence, which C had ignored.

_Employment Appeal Tribunal_

C appealed on the basis that the ET had identified the wrong PCP. The EAT found that:
1) the ET was entitled to identify the PCP and the reasonable adjustments finding against C was upheld.
2) C had failed to properly implement _Alam_: P’s report put C on notice of B’s disability and the PCP would put her at substantial disadvantage.
3) the reasonable adjustment was job related in the required sense, notwithstanding that P had identified that further treatment might not be successful and result in a return to work; it was enough that there was a reasonable prospect that the treatment would be successful.
4) there was no statutory duty to consult. The duty arose from the mutual term of trust and confidence.

_Environment Agency v Donnelly_

**Facts**
Ms Donnelly (D) was disabled by osteoarthritis and spondylitis. She worked flexitime hours for the Environment Agency (EA). She was assessed as being unable to carry out her job. She returned on varied hours, with the effect that the car park closest to her office was often full when she arrived to work. She therefore had to park further away and walk, which was problematic because of her disability. It was agreed she could use a disabled parking bay close to the office if it was free on the basis that she would give it up if a blue badge holder required it. After two weeks, D was absent again, due to stress. Approximately a year later D was dismissed by reason of capability due to absence and poor prospects of a return to work. A capability procedure had been followed.

D lodged several claims, including a failure to make reasonable adjustments in respect of the parking arrangement and unfair dismissal.

**Employment Tribunal**

The ET found in favour of D. The parking arrangement was identified by the tribunal as a PCP. The ET found
that EA ought to have provided a space to D in the main car park near the office and it was a failure to make a reasonable adjustment not to have done so. It also found that D was unfairly dismissed.

**Employment Appeal Tribunal**

EA’s appeal was that the correct PCP ought to have been whether or not D should have come to work earlier when the car park was less busy. The EAT disagreed. D’s contract was clear; she was entitled to flexitime. Accordingly, the ET was entitled to identify the PCP.

The EAT did however find that the ET failed to apply the range of reasonable responses test to the dismissal and accordingly the finding of unfair dismissal could not stand. It remitted the case back to the ET on this point.

**Secretary of State for Work and Pensions v Higgins**

**Facts**

Mr Higgins (H) had a heart condition and chronic obstructive pulmonary disease, a disability under the Disability Discrimination Act 1995 and the Equality Act 2010 (EA). Following a lengthy forced absence a disagreement arose about his return to work. The employer (S) wanted H to phase his return over 13 weeks back to his normal contractual hours of 23 hours per week. H said he thought it would take 26 weeks. S dismissed him on the basis of capability.

**Employment Tribunal**

The ET found in favour of H. S had failed to make a reasonable adjustment by refusing to adjust the 13-week period. It also found that S had not been reasonable in citing capability as the reason for the dismissal.

**Employment Appeal Tribunal**

S appealed and was successful. The EAT found that the ET identified the wrong PCP. The ET’s PCP was the ability of H to undertake work. The correct PCP was H’s need to get back to his contractual hours. The EAT found that although the ET’s reasoning was based on this PCP, the ET was not explicit about this in its reasons. Accordingly, it could not make the finding that the PCP placed H at a substantial disadvantage in comparison with non-disabled persons, because it had not properly considered this question, and therefore its finding that S had behaved unlawfully could not stand.

The EAT also rejected the ET’s approach to unfair dismissal. The ET had considered whether S was reasonable in dismissing H for rejecting the 13-week offer. However, the EAT found that the correct question was whether S was entitled to dismiss H for remaining absent following H’s rejection of the 13-week offer. This question had not been addressed by the ET and therefore the finding of unfair dismissal could not stand.

**Comment**

On the face of it, the unsuccessful reasonable adjustment in Higgins – a phased return to work – might seem less onerous on an employer than the successfully-pleaded adjustment of paid private medical treatment in Croft. The finding that paying for a private psychiatrist is a reasonable adjustment is eye catching.

In Donnelly, even though the EAT found against the ET’s handling of some elements of the D’s case, including the unfair dismissal claim, it approved of her reasonable adjustments claim because of the ET’s focus on the correct PCP.

These cases are a lesson for claimants in taking extreme care over how they identify the component parts of s20(3) EA when making reasonable adjustments claims. The statute is straightforward – the PCP, the adjustment, and the significant disadvantage all need to be clearly identified.

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