# Long working hours and disability discrimination

**By Dónall Breen** - 28 March 2018

*A recent Court of Appeal decision has raised concerns about potential discrimination claims resulting from workplace cultures of long hours.*

We have all been there. Late in the evening, on the phone to your partner or family, trying to explain why you must stay late at work despite no one actually asking you to do so. It can be frustrating and tiresome, but for many it is a fact of life.

Now the recent Court of Appeal decision in *United First Partners Research v Carreras* has confirmed that a workplace culture of long hours can amount to a 'provision, criterion or practice' (PCP) for the purposes of the Equality Act 2010. The significance of this is that employers are under an obligation to make reasonable adjustments where a particular PCP puts disabled employees at a substantial disadvantage.

In this case, Mr Carreras was a successful analyst who was involved in a cycling accident which caused physical and emotional injuries. This made it hard for him to work long hours safely. Mr Carreras argued that there was a culture of long working hours at the company which meant he was regularly required to stay late despite his health issues. The main question was whether Mr Carreras was 'forced' to work late, or whether he chose to do so of his own free will. The key passage from the judgment is as follows:

*[It] is not that the Claimant was explicitly ordered to work in the evenings, or subjected to other explicit pressures which had the effect of depriving him of any real choice; rather it is that it was made clear by a pattern of repeated requests that he was expected to do so, and that that created a pressure on him to agree.*

The Court of Appeal found Mr Carreras was 'required' to stay late as the reality of the situation had to be appreciated.

**What does this mean for employers?**

This decision is not itself particularly controversial, it informs the law on PCPs rather than change it. However, it is clear authority from the Court of Appeal that you don't need to 'require' an employee to work long hours for it to be established that employees are

expected to.

Professional services firms may be particularly susceptible to disability discrimination claims where employees with disabilities such as stress or lower back pain may be adversely affected by long working hours.

Disability, for the purposes of equality legislation, can be particularly wide and includes visible and invisible impairments which the employer knows, or ought to have known, about.

**What can employers do?**

The reality is that long hours are part and parcel of working life, especially in high paying jobs. Therefore, what can employers do to reduce the risk of disability claims?

The first would be to make reasonable adjustments for disabled employees. Where a PCP puts a disabled person at a substantial disadvantage, if the employer takes reasonable steps to avoid the disadvantage this will mitigate the risk of a claim. This may mean the employer having a strict 'clock in, clock out' system for affected employees, channelling their work through a single line manager or scheduling regular catch ups with HR to discuss and manage workload.

If this is not possible or practical, the requirement to work long hours will need to be objectively justified should an employee bring a disability discrimination claim. We advise caution here as this is a high standard to meet. An employer will need to show that there is a legitimate aim (a real business need), having employees work long hours is a proportionate means to achieve that aim and there are no less discriminatory means available. The courts have said that it is doubtful whether cost alone is a legitimate aim for these purposes.

**What does this mean more broadly?**

Authority suggests that long working hours can be a PCP affects other groups of employees with protected characteristics, such as pregnant woman. The judgment may be a signpost for claimants bringing similar claims in the future. Although it is unlikely the 'floodgates have been opened', it is certainly a straw in the wind of the types of cases employers may start to face.

In the meantime, lawyers will continue to work long into to the night to scrutinise the significance of this judgment.