UK: EMPLOYMENT INSIGHT IN-DEPTH – JUNE 2017

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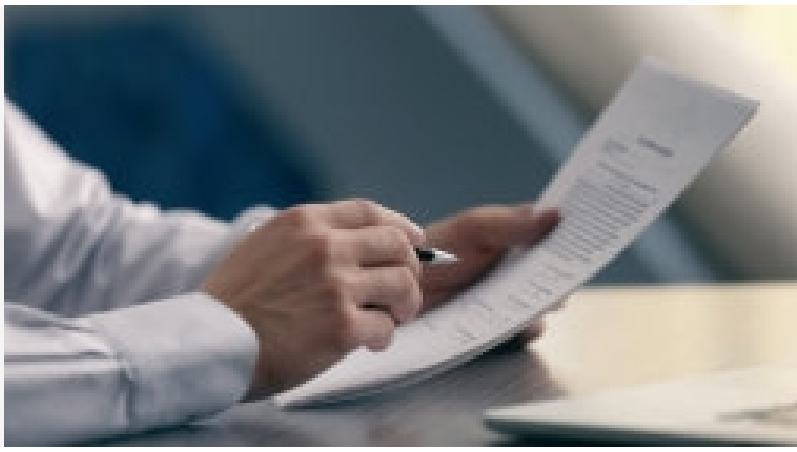

Section 15 of the Equality Act 2010 introduced a new provision that made it unlawful for an employer to treat an employee unfavourably because of something "arising in consequence of" his or her disability where the employer knows, or could reasonably be expected to know, that the employee has a disability. An employer may successfully defend a claim if it can justify the unfavourable treatment on the basis that it is a proportionate means of achieving a legitimate aim. There have been a number of decisions where this provision has been considered in the context of selection for redundancy.

In *Waddingham v NHS Business Services Authority*, W, who had been made redundant, was part of a redeployment exercise. This involved matching redundant staff to new roles and interviewing them. W had been diagnosed with cancer and was undergoing radiotherapy treatment. He agreed to go ahead with an interview, even though he was still undergoing cancer treatment. The NHS trust was flexible with the date and time of the interview, and let him take breaks or call a halt to the interview. W did not perform well in answering the interview questions and was not appointed. A tribunal held that the failure to appoint W to the post amounted to discrimination arising from his disability. He was not appointed because of poor performance at interview, and his performance was adversely affected by his condition. He could have been assessed without the need for a competitive interview.

In a case based on similar facts, *London Borough of Southwark v Charles*, C was one of several employees at risk of redundancy who was placed in a redeployment pool. Shortly after receiving notice of the termination, C was signed off sick for threemonths with a medical condition that affected his sleep and caused depression. Southwark referred C to occupational health, which told the local authority that he was unfit to attend administrative meetings. As part of the redeployment exercise, Southwark asked C, by email, if he was well enough to attend an interview for an alternative position, which was two grades lower than his current role. C failed to confirm his interest in the role. He also did not respond to a further email from his employer attaching the details of another four vacancies for which he might be considered if he expressed an interest in them. As a consequence, Southwark wrote to C confirming his dismissal "in the absence of receiving an expression of interest" and because it had received "no indication as to whether he was able to attend interviews". The EAT upheld C's complaint of disability discrimination on the basis that the requirement that he attend an interview for the alternative roles amounted to discrimination arising from a disability and a failure to make reasonable adjustments. Southwark was aware that C was unfit to attend administrative meetings and was criticised for failing to dispense with the need for him to attend an interview. The council could have made the reasonable adjustment of an informal assessment of his capabilities at his home or it could have asked for information from him about his suitability for the vacant posts in a different format.

In the latest case, *Charlesworth v Dransfields Engineering Services Ltd*, C managed a branch of DES Ltd's business. While C was on sick leave with cancer, DES Ltd identified the opportunity to save around £40,000 by deleting his post and absorbing his responsibilities into other roles at the branch. C was notified of his potential redundancy and, as no suitable vacancy could be identified, was dismissed. C brought a number of claims, including discrimination by reason of disability.

An employment tribunal rejected all of C's claims. In relation to discrimination arising in consequence of disability, the tribunal noted that there was some link between C's absence and his dismissal because his absence gave DES Ltd an opportunity to identify the ability to manage without him. However, this was not the same as saying that C was dismissed because of his absence. In the tribunal's view, C's absence was not an effective or operative cause of his dismissal, it merely allowed DES Ltd to identify something that it might very well have identified in other ways and in other circumstances. The EAT, in dismissing the appeal, stated that when considering discrimination by way of disability there is a two-stage approach: (i) there must be something arising in consequence of the disability; and (ii) the unfavourable treatment must be because of that "something". Applying that approach to this case, the tribunal had permissibly concluded that C's absence was merely the occasion on which DES Ltd was able to identify its ability to manage without him, not the cause of his dismissal.

The first two cases demonstrate that an employer cannot insist on following a redundancy selection procedure that a disabled employee is unable to comply with and the last case illustrates that a disabled employee can be dismissed, provided that the dismissal is not a consequence of the disability. It is also worth noting that there is a certain overlap between discrimination arising out of disability and a failure to make reasonable adjustments and the claimants in the first two cases pleaded both.

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