Disability Discrimination Law Express

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Legislative Developments

Key Cases in Last Twelve Months

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"Here is the latest disability law bulletin from the team at Russell Jones & Walker. It includes a summary of key developments in the last 12 months or so and a reminder of our free advice service for disabled people.

We do hope you enjoy it."

Paul Daniels, Partner, Russell Jones & Walker

FAREWELL TO THE DRC

A reminder that the DRC disbanded and was replaced by the Equality and Human Rights Commission ("EHRC") as of 1 October 2007. More news on this will follow in our next briefing. In the meantime, if you have any comments or concerns about the EHRC, we would be interested in your views. So, please do drop us an email at enquiries@rjw.co.uk.

RECENT CASES

Holiday Pay for Employees on Long-term Sick Leave

In April 2005 the Court of Appeal in *Commissioners for the Inland Revenue v Ainsworth* decided that the right to four weeks' statutory paid holiday under the Working Time Regulations does not continue to accrue when an employee is off on long-term sick leave. This appeared to decide what had been the subject of much dispute and confusion among employers and employees for a number of years.

However, the employees then appealed to the House of Lords which decided in December 2006 to refer the issue to the European Court of Justice (the case now being known as *HMRC v Stringer*). We await their decision with interest.

Expert Evidence in DDA cases

In the case of the *Hospice of St Mary of Furness v Howard*, the EAT considered the issue of whether parties in a disability discrimination claim should be allowed to instruct their own rather than a joint expert.

The primary issue in the case was whether Mrs Howard was disabled for the purposes of the DDA. The parties had originally agreed to instruct a joint orthopaedic expert in relation to Mrs Howard's back condition. That expert had concluded that Mrs Howard had an organic condition although the expert was unable to state the cause of it. After they had asked questions of the expert which did not satisfy them, Mrs Howard's employer sought permission of the Tribunal to have her examined by and to call their own expert. Their request was refused by the Tribunal which said that it was not necessary under the DDA to establish the cause of an organic condition.

However, when this decision was appealed by the employer, the EAT held that they were entitled to instruct their own expert, particularly in light of the absence of any demonstrable cause for the condition. The absence of a cause for the condition could support the

employer's argument that there was no genuine physical impairment and therefore the employer had a good reason for seeking their own expert. Also relevant to the EAT's decision was the potentially very substantial size of the claim which again supported the employer's argument for instructing their own independent expert in relation to whether a disability existed.

Statutory Grievance Procedures and the Disability-related Dismissals

The EAT decision in *Lawrence v HM Prison Service* has resolved an issue arising under the statutory dispute resolution procedures. Mr Lawrence was a prison officer who suffered from eczema which meant he had intermittent absences from work, for which he was eventually dismissed. Mr Lawrence then brought a claim of unfair dismissal alleging that the dismissal was unfair because of disability discrimination.

The Prison Service argued that in order to rely on the allegations of disability discrimination, Mr Lawrence should have a raised a grievance of discrimination before submitting his claim and that his failure to do so meant that his claim was barred. The Employment Tribunal originally agreed and said that Mr Lawrence could only pursue his claim for unfair dismissal and not for disability discrimination.

Mr Lawrence appealed to the EAT. The EAT's answer turned on the construction of regulation 6(5) of the Employment Act 2002 (Dispute Resolution) Regulations 2004. This provides that the grievance procedures do not apply where the employer has dismissed or is contemplating dismissal.

The EAT gave the Prison Service's argument short shrift and said that where it is argued that a dismissal was in breach of the DDA, it was likely that this would be aired as part of the dismissal procedures and the employee was not required to raise a grievance before the tribunal could hear the claim.

This will make it easier for disabled people to bring claims regarding discriminatory dismissals.

Reasonable Adjustments on Redundancy

In November 2006 the Court of Appeal decided the case of *NTL Group v Difolco* which relates to the duty to make reasonable adjustments in redundancy situations. Mrs Difolco worked part-time because she was partially paralysed. NTL Group made her redundant and offered her the chance to apply for another "suitable alternative" role. The job was advertised on a full-time basis but Mrs Difolco was told that if she got it NTL would consider making it part-time. Mrs Difolco refused to apply unless the role was made part-time before she applied. Mrs Difolco claimed that the failure to change the job description to part-time was a breach of the employer's obligation to make reasonable adjustments. The Court of Appeal sent the case back to the Employment Tribunal on other grounds and strongly indicated that no duty to make reasonable adjustments arises before a job application is made. To say otherwise would mean that the "mere fact of advertising for a full-time job" would potentially discriminate against all disabled applicants.

Practically speaking, this means a disabled job applicant will need to apply for a role (even if it appears unsuitable because it is advertised as full-time or for other reasons) and only then make a request for reasonable adjustments to be made, in order to get the protection of the DDA.

Disability Discrimination and Carers' Rights

Attridge Law v Coleman, an important case about the rights of carers was referred by the Employment Tribunal and EAT to the European Court of Justice in December 2006. Miss Coleman's young son is disabled but she is not. She requested flexible working in order to care for him. This was refused by her employer, allegedly in contrast to mothers of non-disabled children working for the same employer who had requests granted. Miss Coleman resigned because of this and claimed that she was unlawfully discriminated against by her employer due to her son's disability. The ECJ will now have to consider whether the Equal Treatment Framework Directive and therefore the DDA covers discrimination against an employees on grounds of somebody else's disability. This could have significant implications for carers of and other people who are associated with disabled people.

An important development for carers this year was that since 1 April 2007 carers for adults also have the right to request flexible working. However, like the other "rights to request" this does not in itself give carers the right not be discriminated against due to their caring responsibilities. The decision in the Attridge case will, therefore, be significant for carers of both disabled children and adults. The case has now been heard and we await the ECJ's decision.

Victimisation

The House of Lords in *St Helens Borough Council v Derbyshir*e held that forceful and intimidating letters sent by an employer to a group of employees claiming Equal Pay can amount to victimisation.

The House of Lords held that the employer, who had written unpleasant letters to 39 equal pay Claimants - pointing out that they might be responsible for the loss of their colleagues' jobs if they won their equal pay claims - had subjected those Claimants to a detriment on the grounds they had brought a tribunal claim.

Whilst acknowledging that the employer was entitled to take legitimate steps to try to settle claims, the House of Lords stated that the employment tribunal was entitled to find that Derbyshire Borough Council had crossed the line, and actively subjected the Claimants to a detriment.

So a further warning shot to employers who victimise staff who bring claims for discrimination.

Paying Salary as a Reasonable Adjustment under the DDA

The Court of Appeal has handed down its decision in *O'Hanlon v HM Revenue & Customs*. It agreed with the EAT's decision that an employer is not necessarily obliged to pay salary to disabled employees who are not able to work pursuant to its duty to make reasonable adjustments.

The basis of this decision appears to be social policy in that the courts should not interpret the DDA in a way which encourages people to stay away from (rather than return to) work. Also, the courts clearly do not consider it reasonable for employer to subsidise indefinitely its long-term sick employees who also qualify as disabled.

Whilst return to work should be encouraged, it seems to us that each case should turn on its own facts, and what may be a reasonable adjustment in one case, may not be so in another.

Failure to perform risk assessment for/consult disabled employees on adjustments

There have been conflicting decisions on issue of whether a failure to perform a risk assessment would amount to a failure to make a reasonable adjustment under the DDA. The EAT ruled in the case of *Tarbuck v Sainsburys Supermarkets Ltd* in 2006 said that it was necessary to perform a risk assessment under the DDA.

In *Spence v Intype Libra Ltd*, an IT manager had become disabled and claimed that his employer had failed to make a reasonable adjustment by not obtaining and consulting on a medical report before dismissing him. It was argued on his behalf that the Tarbuck case had been wrongly decided or, alternatively, that it did not apply here. He lost, but given that there are conflicting decisions of the EAT on the point and that it is of some importance, the EAT gave leave to Mr Spence to appeal to the Court of Appeal.

During the course of its judgment, the EAT confirmed that it would be good practice for an employer to carry out a risk assessment, whether by consultation or obtaining a medical report related to the disabled employee. Indeed, a failure to consult could result in liability for unfair dismissal.

It is understood that the Disability Rights Commission (and after them, we assume the EHRC) will be seeking to intervene in the appeal to the Court of Appeal, as it believes this case to be wrongly decided.

However, another recent case, *Scottish & Southern Energy plc v Mackay* [2007], has made it even more difficult for employee to claim that it is a reasonable adjustment to consult a disabled employee about alternatives to dismissal. Therefore, it is now increasingly difficult to argue that an employer who fails to investigate redeployment or reasonable adjustments (by way of a risk assessment) is in breach of the DDA.

It is advisable, therefore, for employees to establish precisely what reasonable adjustments need to be made in order to retain him/her in the workplace, and to present this to the employer. This way, the employer cannot rely on these recent cases which suggest that employers are not required to consult as to alternative to dismissal, nor to investigate reasonable adjustments.

Dyslexic Policeman is Disabled

This was a case conducted by one of RJW's solicitors in which the EAT held that a senior policeman diagnosed with minor dyslexia was disabled within the meaning of the DDA.

After over 15 years in the police force, and promotion to the rank of Chief Inspector, the Claimant discovered he was dyslexic. He had not previously had difficulties with report writing, financial literacy or any of the other aspects in his complex and demanding job. However, medical evidence suggested that he ought to be given 25% extra time in his examinations for promotion to the rank of Superintendent as a result of his (newly diagnosed) dyslexia.

The tribunal reminded itself that a diagnosis was not a disability, and that the important thing to look at was what the Claimant *could* do, rather than what he could not do. They concluded that the dyslexia had only a minor/trivial impact upon the Claimant's day-to-day activities, and that he was therefore not disabled.

The EAT overturned this finding and substituted a finding of disability. It stated that a tribunal should not compare the performance of the employee with the average person in the

population (as this tribunal had done). Rather, it is the comparison between what the individual can do and would be able to do without the impairment which is important in determining whether someone is disabled. The EAT concluded it was self-evident that a person who needed 25% longer to complete an examination because of his dyslexia was at a substantial disadvantage to the position if he did not have dyslexia, and he was therefore disabled. The EAT added that any finding to the contrary would undermine the whole purpose of the DDA.

Dismissals following Bullying Induced Stress Absence

The Court of Appeal upheld the EAT's decision in *McAdie v Royal Bank of Scotland* .

The case considers the fairness of a dismissal where the employee was on long-term stress-related sick absence, caused by bullying and mismanagement at work.

The Court of Appeal ratified the EAT's reasoning, holding that:-

- the fact that the employer has caused the incapacity in question, however culpably, does not preclude it from fairly dismissing the employee
- the real question is whether the employer acted reasonably "in all the circumstances" - and the circumstances include the fact that the employer was responsible for the original absence
- where the employer is responsible for an employee's incapacity, it should normally be expected to "go the extra mile in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable".

This will help disabled people bring unfair dismissal claims where the disability is caused by work.

Stress at Work

The Court of Appeal limited the scope of stress at work claims in *Deadman v Bristol City Council*. After 30 years' good employment, the Claimant developed depression after an allegation of sexual harassment was made against him. The investigation that followed was substandard. The Court of Appeal, overturning the High Court's decision, held:

- a policy requiring the employer to handle complaints of harassment "sensitively" was an aspiration and did not form part of the Claimant's contract of employment
- although the convening of a panel with two, rather than three, members was a breach of a contractual term, it was not reasonably foreseeable that the Claimant would suffer a psychological reaction as a result
- it was not negligent of the employer to inform the Claimant of its decision "by leaving a bald letter on his desk" - in this case, it was the content of the decision, not the manner of transmission which is important

Unfair Dismissal Compensation - Sick Employees

The EAT has handed down an important decision, *GAB Robins v Trigg*, dealing with the calculation of compensation for a constructively dismissed employee who had been off sick.

The issue was whether such an employee's loss of earnings has been caused by the constructive dismissal or, instead, caused by her long-term sick absence. The employer argued that since the employee had been off work for four months before her dismissal, her absence after the dismissal had not been caused by that dismissal.

The EAT distinguished an 'actual' dismissal, where loss of earnings might not be awarded, from a 'constructive' dismissal. The constructive dismissal covered a whole series of events, some of which were incidents of bullying and overwork which gave rise to the sickness absence in the first place.

In those circumstances, the course of conduct by the employer amounted to a breach of the implied term of trust and confidence, which formed part of the constructive dismissal. Therefore, the Claimant's ill-health, caused by that breach, is to be treated as a consequence of the dismissal. Accordingly, the loss of earnings are attributable to action taken by the employer and can be recovered by the employee.

Mental health and DDA

In *McDougall v Richmond Adult Community College UKEAT/0589/06,* the EAT held that someone who had been sectioned under the Mental Health Act 1983 (i.e. compulsory admission) was not automatically "disabled" for the purposes of the Disability Discrimination Act 1995. Each case would need to be considered under the definition of disability to ensure that it was satisfied.

The EAT also held that, when deciding whether an impairment has a long-term effect, tribunals should consider all information available at the hearing. They should not restrict themselves to asking what the likelihood of recurrence was at the date of the alleged discriminatory act.

It is, therefore, important for those employees who have been sectioned to recognise that they may not automatically qualify for protection under the DDA.

A free and confidential opinion

A reminder of our new user-friendly service for people who are concerned that they are suffering from discrimination. The service is free and entirely confidential.

In order to get an initial view whether the treatment being experienced amounts to discrimination in legal terms, all that is required is to log onto our website at www.rjw.co.uk and click on EqualityXpress, to complete some brief details, and our solicitors will then provide initial advice on the prospects of succeeding in a claim.

We consider that this will be of particular assistance to organisations that offer their members a telephone helpline, but are unable to give legal advice themselves. In this situation, it is possible to direct callers to EqualityXpress, for a speedy response from a qualified solicitor. If the claim has merit, we may then be able to provide further assistance under insurance arrangements or on a "no win no fee" basis in strong cases.

Please also feel free to circulate this within your organisation!

Russell Jones & Walker
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To find out more about how we may be able to help you, or for an initial consultation to discuss a particular problem, please don't hesitate to call us.

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