SUMMARY

2018/24 Discrimination arising from a disability – no need for knowledge (UK)

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Background

The Claimant, Mr Grosset, was a teacher and the head of the English Department at a secondary school in Yorkshire. He has cystic fibrosis and disclosed this to the school when he applied for the role in 2011. There was no question that this was a disability and the employer put in place reasonable adjustments.

Unfortunately no records were made, either of the Claimant's disability, or the adjustments that had been made to accommodate it. Therefore, when a new Head Teacher, Mr Crane, joined in 2013, he was not told about the Claimant's disability, nor about the reasonable adjustments.

Increased workload

At the start of the new school year in 2013, the performance standards applied to schools changed, with a new emphasis on individual pupil progress rather than overall GCSE results (standardised exam results). The English Department was identified as underperforming and the strategy implemented to address this increased the Claimant's workload significantly. In

addition, the new Head Teacher also introduced bi-weekly meetings called "Focus Fortnights", which were designed to encourage greater reflection within the school. This further addition to the Claimant's workload, coupled with the prospect of criticism of him and his department, placed a lot of pressure on him and increased his stress levels substantially. This stress was intensified by the need for the Claimant to balance his work with a time-consuming exercise regime that he needed to complete on a daily basis to clear his lungs.

The Claimant's health suffered as a result of this and this in turn exacerbated his stress levels further. Within a week of the "Focus Fortnight" meetings being introduced, the Claimant wrote to the Head, raising concerns about his increased workload and pressure. In this letter he referred to the need to balance the treatment for his cystic fibrosis with his increased workload as a reason for his concerns. A meeting was arranged in mid-October and the Claimant asked the Head to consider reducing or prioritising his tasks and workload. The Head agreed to refer the Claimant to Occupational Health (this appointment was in fact delayed until December). However, the Head refused to reduce the Claimant's hours and offered the Claimant days out from teaching to catch up with his workload instead.

In this context, in early November the Claimant showed an 18-rated horror film, Halloween, to a class of 15/16 year old students. These students belonged to what is described as a "nurture group". This meant that, for various reasons, they needed more attention than other students. Indeed, some of the children were particularly vulnerable to self-harming. Three were known to self-harm and two had even spoken about suicide. The motivation for showing the film was as a vehicle to discuss the construction of narrative. However, crucially, the Claimant did not obtain prior approval from the school or consent from the pupils' parents.

The Claimant met with the Head again at the end of November. By this point his health had deteriorated to the point where he could no longer remain at work. He explained that the stress that he had been under had impacted his lung function to the extent that he may have needed a double lung transplant. He was signed off sick with stress.

While covering some of the Claimant's classes, the Head became aware that the Claimant had shown the students the 18-rated film. Having taken advice from his HR department, the Head suspended the Claimant and a formal investigation was conducted.

Disciplinary proceedings

During the investigation the Claimant acknowledged that showing the film was wrong, but described it as an error of judgment brought on by the stress that had been exacerbated by his

disability. The Claimant denied being aware of the extent of the children's vulnerabilities.

The investigation recommended that the matter be addressed at a disciplinary hearing to consider that:

The Claimant had shown a class of vulnerable 15 and 16 year olds an 18-rated film featuring extreme violence;
The Claimant had shown the film in breach of the British Board of Film Classification's recommendations that the approval of the school or parental consent should be sought prior to showing such a film; and
The Claimant had breached the school's safeguarding policy.

At the disciplinary hearing, the school did not accept that showing the film was a momentary error of judgment, nor did it believe that the Claimant's expressions of regret were sincere. The Claimant was therefore summarily dismissed for gross misconduct. He appealed this decision, but the appeal was dismissed. The Claimant later brought a number of claims in the Employment Tribunal, including claims for discrimination because of something arising in consequence of his disability and unfair dismissal.

Legal background

Section 15 of the Equality Act 2010 (EqA) sets out how a person may be discriminated against because of something arising in consequence of his or her disability:

A person (A) discriminates against a disabled person (B) if:

A treats B unfavourably because of something arising in consequence of B's disability; and
A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Employment Tribunal judgment

The Employment Tribunal unanimously found in favour of the Claimant's claim under section15:

The daily exercises that the Claimant's disease necessitated severely restricted both his time and energy and meant that adapting to sudden or significant changes in his workload was particularly difficult for him.
The stress caused by this change to his workload exacerbated the Claimant's illness, which in turn heighten his stress and meant that he was unable to cope with his workload.
Owing to these high levels of stress, the Claimant was suffering from an impaired mental state at the time that he showed the film, meaning that errors of judgment could be expected to arise.

Based on this the Tribunal was satisfied that the Claimant's error arose from his disability. It was because of that error that he was dismissed. Therefore his dismissal was clearly an act of unfavourable treatment because of something arising in consequence of his disability.

Legitimate aim?

The school argued that it could justify the decision to dismiss the Claimant based on the legitimate aim of protecting and safeguarding children. The Tribunal agreed that safeguarding children was a legitimate aim. However, dismissal was not a proportionate means of achieving that aim. In the circumstances a final written warning would have been sufficient. The Claimant's error was as a result of stress, he clearly demonstrated his remorse, which the Tribunal believed to be sincere and there was therefore no real risk of repetition.

The Tribunal also took note of the fact that the Claimant's stress was exacerbated by the employer's failure to put in place reasonable adjustments to moderate his workload.

Unfair dismissal

The Claimant's unfair dismissal claim was dismissed. The school's decision to dismiss the Claimant was a result of the information that was available to it at the time. Further medical evidence was obtained from the Claimant as part of the Tribunal process which provided a more full account of the Claimant's condition and was taken into account when the Tribunal came to its decision with regards to section15. However, based on the more limited information that was available to the employer at the time of its decision to dismiss the Claimant, the Tribunal held that it acted within the range of reasonable responses and the Claimant had been fairly dismissed.

Both parties appealed the Tribunal's decision to the Employment Appeal Tribunal (EAT). The EAT dismissed these appeals and the school appealed the Claimant's section15 claim to the

Court of Appeal.

Court of Appeal judgment

The Court of Appeal dismissed the school's appeal, focusing on the correct interpretation of section 15(1)(a):

Person X treats person Y unfavourably because of an identified 'something'
That 'something' arose in consequence of person Y's disability.

The Court of Appeal held that here:

Person X (the school) treated person Y (the claimant) unfavourably by dismissing him because of something (showing the movie)
That something (showing the movie) arose in consequence of the Claimant's exceptionally high stress levels which had arisen because of the effect of his disability exacerbated by his workload.

The judge disagreed with the school's argument that the phrase "*treats* unfavourably" implies that the school needed to have been aware that the 'something' was a product of the claimant's disability (i.e. that his error of judgment in showing the film was a consequence of his illness). The Court of Appeal noted that such an interpretation would obviate the need for section 15(2) and so was clearly not the intention of the legislation.

Commentary

The Court of Appeal's decision has confirmed that:

For section15 claims there is no need for the employer to have knowledge that the 'something' arose as a consequence of the Claimant's disability.
The only relevant question of knowledge is whether the employer knew (or could reasonably have been expected to know) that the employee has a disability at all.
Assessing whether something arose from the disability is objective and information may be considered that was not available to the employer at the time.
Unlike the leeway available to employers in unfair dismissal cases, Tribunals can take into account information obtained during the Tribunal proceedings when determining whether the unfavourable treatment was justified.
Employers should take requests to implement reasonable adjustments seriously. It may be

that tribunals are more favourable where an employer can demonstrate that they have supported a claimant in their disability.

Comments from other jurisdictions

Belgium (Pieter Pecinovsky, Van Olmen & Wynant): It is very likely that a Belgian labour tribunal or court would come to the same conclusion, i.e. that the dismissal was discriminatory on grounds of disability. First, the Belgian judge would have to consider whether the situation the claimant was in should be treated as a disability in the light of ECJ case law (i.e. *Ring*, C|335/11 and *Skouboe Werge*, C|337/11). If this is the case (and it would seem likely), reasonable accommodation should have been made to enable the teacher to work. In this specific case, it seems clear that the school should have known about the disability and that the teacher's dismissal was connected to it. However, it is unlikely that a Belgian judge would have accepted a dismissal for gross misconduct if discrimination had been found.

The Netherlands (Peter Vas Nunes, BarentsKrans N.V.): Dutch disability discrimination law transposes the Framework Directive more or less one-on-one. Disability discrimination can be either direct ('type 1') or indirect ('type 2'). If it is direct, absent a few narrow exceptions, it is unlawful, given that direct discrimination cannot be justified. If discrimination is indirect, it can always be justified by a proportionate means of achieving a legitimate aim. My impression of Section 15 of the UK Equality Act is that it introduces a type 3 disability discrimination. It overlaps type 2, in that it covers indirect discrimination, but goes beyond the concept of indirect discrimination as Dutch courts and the ECJ construe and apply that concept. It also covers conduct by an employer that does not discriminate indirectly, but arises *as a consequence of* a particular employee's disability. This would seem to be an instance of 'gold plating' EU law. The Dutch Human Rights Board and Dutch courts have fewer instruments at their disposal than do the English courts to deal with these type of cases. The only way a Dutch court could have found in favour of Mr Grosset would have been to argue that actions such as those taken by the school (increased workload, suspension, disciplinary hearing and, ultimately, summary dismissal) qualify as a PCP that puts disabled employees at a particular disadvantage. Although the Dutch courts do sometimes stretch the limits of the concept of indirect discrimination in order to help employees such as Mr Grosset, I doubt whether a Dutch court would have been willing to go so far in this particular case. Therefore, the school's actions would not have been considered discriminatory (but Mr Grosset's dismissal may have been considered invalid on the basis of other law).

I had a brief look at the Court of Appeal's judgment. It quotes extensively from the explanatory notes to the Equality Act and from the Code of Practice. That Code gives the following example of a type 3 discrimination: "An employer dismisses a worker because she has had

three months' sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer's decision to dismiss is not because of the worker's disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave). ...". A Dutch court would see this as a classic example of a type 2, i.e. indirect, discrimination. Dismissal for reasons of sickness absence is a practice that puts disabled employees at a particular disadvantage.

Section 15 strikes me as useful addition to the type 1 and 2 toolbox.

Subject: Disability discrimination

Parties: City of York Council – v – P. J. Grosset

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