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PEOPLE & LEADERSHIP SOLUTIONS

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Disability Discrimination

One of the relatively few innovations introduced by the Equality Act 2010 was a new form of disability discrimination set out in section 15. The Act calls it 'discrimination arising from a disability' but in some ways that title is misleading. It gives the impression that unfair treatment can be discriminatory just because disability forms part of the backdrop. In ***Dunn v Secretary of State for Justice****, however the Court of Appeal reminds us that there is rather more to it than that.*

What section 15 actually deals with is unfavorable treatment 'because of something arising in consequence of' the claimant's disability. In recent cases we have seen how very wide this concept can be. Take an employee whose disability leads to long-term sickness absence. If the time eventually comes when the employer wants to dismiss then that will be unfavorable treatment. The treatment will be 'because of' the absence and, clearly, the absence arises 'in consequence' of the disability which caused it. To avoid a finding of discrimination, therefore the employer will have to show that the treatment was a proportionate means of achieving a legitimate aim.

But while the scope of section 15 is wide, it is nevertheless precise. We must identify the unfavorable treatment complained of and ask why it took place – what it was 'because of'. When we have identified that we must ask whether that specific reason for the treatment arose in consequence of the disability. Only then will the question of justification arise.

The latest case to look at this is Dunn v Secretary of State for Justice. Mr Dunn was a prison inspector who developed a depressive illness in 2012 and then a serious heart condition in 2015. He took ill-health early retirement from February 2016 but had first made an application for early retirement, based on his depression, in November 2014. The process for making an application was elaborate and bureaucratic involving a range of outside organisations to which various stages of the process had been outsourced – including an HRE contractor, an Occupational Health Service, and the medical advisors to the pension scheme. The application was delayed in part because of the number of outside bodies involved and it was not until March 2015 that medical opinions were even sought. His worsening heart condition led to further complications and delays and there were errors in the initial calculation of his entitlement. A decision to allow him to retire on health grounds was not made until December 2015.

The Employment Tribunal found that there were three aspects of the employer's handling of his sickness absence and early retirement application that amounted to direct discrimination and also to discrimination under section 15. Firstly, the employer had not acted on the recommendations of the OH report that there should be regular review meetings with Mr Dunn and that the employer should carry out a stress risk assessment.

Secondly the employer had failed to provide additional support to Mr Dunn when he had returned from periods of stress-related ill-health. Thirdly, the Tribunal held that there was unreasonable delay in the way in which Mr Dunn's application for ill-health early retirement was handled and no clear explanation for why the delay took place.

There was no doubt that Mr Dunn's ill-health and application for retirement had been handled badly. But the EAT held that this did not justify the Tribunal's conclusion that he had been discriminated against. The essential point in a direct discrimination claim is the reason for the treatment complained of. If somebody has been treated badly you have to ask whether that is 'because of' a protected characteristic. The protected characteristic has to be the reason for the treatment. In Mr Dunn's case his disability was an essential part of the background – for the employer to handle his absence badly, he had to have the underlying condition that led to that absence. But that was not the same as saying that his disability was the reason for the treatment.

The same flaw lay behind the findings on section 15. There too the Tribunal needed to focus on the reason for the treatment and ask whether the treatment was 'because of something' that arose in consequence of the disability. It was not enough that the treatment was related in some way to the fact that the employee was disabled.

While Mr Dunn's absence arose from his disability, and the employer's unreasonable treatment of him arose from the way in which they dealt with that absence – that did not mean that absence was the reason for unreasonable treatment. The EAT found that there was no evidence that Mr Dunn's poor treatment was in itself because of something that could be said to have arisen from his disability – indeed the Tribunal had expressly found that much of it was due to straightforward incompetence. They dismissed his claim.

The Court of Appeal agreed. Even in section 15 cases there was a need to focus on the mental processes of the employer to determine why it had acted as it did. Unreasonable treatment was not the same as discriminatory treatment. Just because someone with a disability has been treated badly, that does not mean that they will succeed in a discrimination claim.

Of course, employers should make sure that the process for dealing with long-term ill health is humane and efficient. Quite apart from the moral case, unreasonable delay can exacerbate an employee's ill-health and may amount to a breach of mutual trust and confidence. There can be legal consequences to failing to handle an application for ill-health retirement in a reasonable manner – even if there are no grounds for finding discrimination.

It is also worth considering one argument that the Court of Appeal refused to consider because it was brought up too late in the day. What if the process for considering an application for ill-health early retirement was so inherently bureaucratic and drawn out that it inevitably amounted to unfavorable treatment? If that was true, then the reason for the unfavorable treatment would not depend on the motivation of the individuals involved but would simply be the fact that the application had been made. You could certainly argue that the application was something that arose in consequence of the employee's disability. The question would then be whether the process itself was a proportionate means of achieving a legitimate aim – and it is difficult to imagine the employer succeeding on that point. This may not be the last case we see where delays in considering ill-health retirement lead to a section 15 claim.

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