Case report: Professor Roya Sheikholeslami v The University of Edinburgh [2018] WL 04853748

In this judgment, the employment appeal tribunal (EAT) overturns an earlier decision of the employment tribunal (tribunal) to dismiss disability and sex discrimination and victimisation claims. In this article, Laura Hutchison, Senior Enforcement Officer in the EHRC Scotland Legal Team, explains why the EAT was correct in finding that the tribunal was wrong in law to dismiss the disability discrimination claims.

Facts

Professor Sheikholeslami (the claimant) was employed by the University of Edinburgh (the respondent) in the School of Engineering from 2007 until she was dismissed in April 2012. In January 2010 she was diagnosed with work related stress and depression and was absent from work until she was dismissed. As part of the discussions about returning to work, the claimant suggested moving out of the School of Engineering. However, the respondent was of the view that a return to the existing laboratories would be preferred.

Meanwhile, the University HR department began considering possible options to extend the claimant’s stay in the UK because her work permit was due to expire in April 2012. The respondent did not take steps to allow the claimant to stay in the UK. In January 2012, the respondent wrote to the claimant to give formal notice that her contract of employment would terminate because her work permit expired in April 2012.

It was accepted that the claimant was a disabled person from January 2010 when she went off work with stress and depression and that the respondent knew that she was a disabled person by April 2010.
The reasonable adjustment claim

The reasonable adjustment claim was argued on the basis that the respondent had applied a provision, criterion or practice (PCP) requiring the claimant to attend work at the School of Engineering, and that this placed her at a substantial disadvantage compared with people who are not disabled. The respondent was therefore required to take reasonable steps to avoid the substantial disadvantage caused, but it had failed to do so.

The tribunal agreed that the respondent did apply a PCP to the claimant requiring her to attend work at the School of Engineering. However, it then went on to consider whether the PCP placed the claimant at a substantial disadvantage because of her disability. In answering this question, its position was that the claimant had to prove the PCP placed her at a substantial disadvantage and show that this was because of her disability.

The EAT found that in taking this approach the tribunal made a number of errors in law. In particular, the EAT found that the tribunal may have fallen into the ‘trap’ of thinking, mistakenly, there is a requirement to identify a comparator who is in the same, or materially similar, circumstances in order to show that a disabled person is put at a substantial disadvantage compared to those who are not disabled. It held that there is no strict causation test for determining whether the substantial disadvantage was because of the disability, referred us back to Griffiths v Secretary of State for Work, Pensions [2015] EWCA Civ 1265 for the correct approach, and gave the following helpful guidance:

“Even in a case where disabled and non-disabled employees are treated in the same way and are both subject to the same sanction when absent from work, that does not eliminate the discrimination: if the PCP bites more harshly on the disabled employee, putting that employee at a substantial disadvantage compared to the non-disabled, that is sufficient” (para 52).

The EA 2010, and the Disability Discrimination Act 1995 before it, recognise that the difficulties faced by disabled people are very different to those experienced by people subjected to other forms of discrimination. Baroness Hale made this point in Archibald v Fite [2004] UKHL 32, para 47 and the Court of Appeal reiterated it in Griffiths:
“The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment” (para 15).

Section 20 (the duty to make reasonable adjustments) of the EA 2010 does require a comparison of some kind between the disabled person and non-disabled people. However, case law has established the purpose of the comparison with non-disabled people is to identify the disadvantage caused by the PCP.

In Griffiths, the PCP was the requirement to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary action. To identify if this put Mrs Griffiths at a substantial disadvantage, the correct comparators were non-disabled employees who were absent from work due to ill health but were less likely than Mrs Griffiths to be absent as frequently and for as long. Disabled employees, such as Mrs Griffiths, found it more difficult than non-disabled employees to comply with the requirements relating to absenteeism and, therefore, were disadvantaged by it.

For the purposes of the claimant’s reasonable adjustment claim, the correct comparators were non-disabled employees who could attend work and as a result were not at risk of dismissal. The PCP therefore put the claimant at a substantial disadvantage because, as the EAT pointed out, “it is not difficult to see how a requirement to return to the place where the perceived discrimination occurred might bite more harshly on a mentally impaired person than on a person with stress but who is not mentally impaired” (para 52).

The claim of discrimination arising from disability

Discrimination arising from disability (s.15 of the Equality Act 2010) occurs when:

- There is unfavourable treatment,
- The unfavourable treatment is because of something arising in consequence of a person’s disability,
- The alleged discriminatory knows, or can reasonably be expected to know the person was disabled, and
• The treatment is not justified.

The tribunal accepted that the claimant had been subjected to unfavourable treatment. However, it found there was no evidence of any link between the claimant’s disability and her absence or refusal to return to her post in the School of Engineering.

The EAT held that the tribunal erred in law in its approach to identifying what caused the unfavourable treatment and whether this was something that was linked to the claimant’s disability. In particular, it found the tribunal imposed too strict a causation test. This was because the tribunal asked itself, wrongly, whether the claimant’s refusal to return to her previous role was because of her disability or because of some other reason, such as she considered she had been badly treated in her department.

The correct approach requires consideration of whether the unfavourable treatment is because of something arising in consequence the claimant’s disability. Therefore, the claimant’s refusal to return to work in the School of Engineering must have arisen in consequence of her disability. It is not necessary to identify if the unfavourable treatment was because of her disability.

To understand the correct approach to discrimination arising from disability claims it is worth reminding ourselves of the purpose behind the introduction of s.15 EA 2010. It was ensure protection from disability-related discrimination, following the House of Lords judgment of London Borough of Lewisham v Malcolm [2008] UKHL 43. As the EA 2010 Explanatory Notes explain:

“This section provides that it is discrimination to treat a disabled person unfavourably not because of the person’s disability itself but because of something arising from, or in consequence of, his or her disability…

This section is aimed at re-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises because of his or her disability, and providing an opportunity for an employer or other person to defend the treatment” (paras 69-70, p22).
Conclusion

The EAT judgment is particularly helpful because it offers a clear explanation of the different ‘because of’ causation tests that apply in reasonable adjustment and discrimination arising from disability claims and how these are different from the ‘because of’ causation test in direct discrimination claims under s.13 of the EA 2010.

This should help raise awareness of the potential ‘trap’ that courts and tribunals may fall into when considering complex disability discrimination cases, involving more than one type of disability discrimination claim.