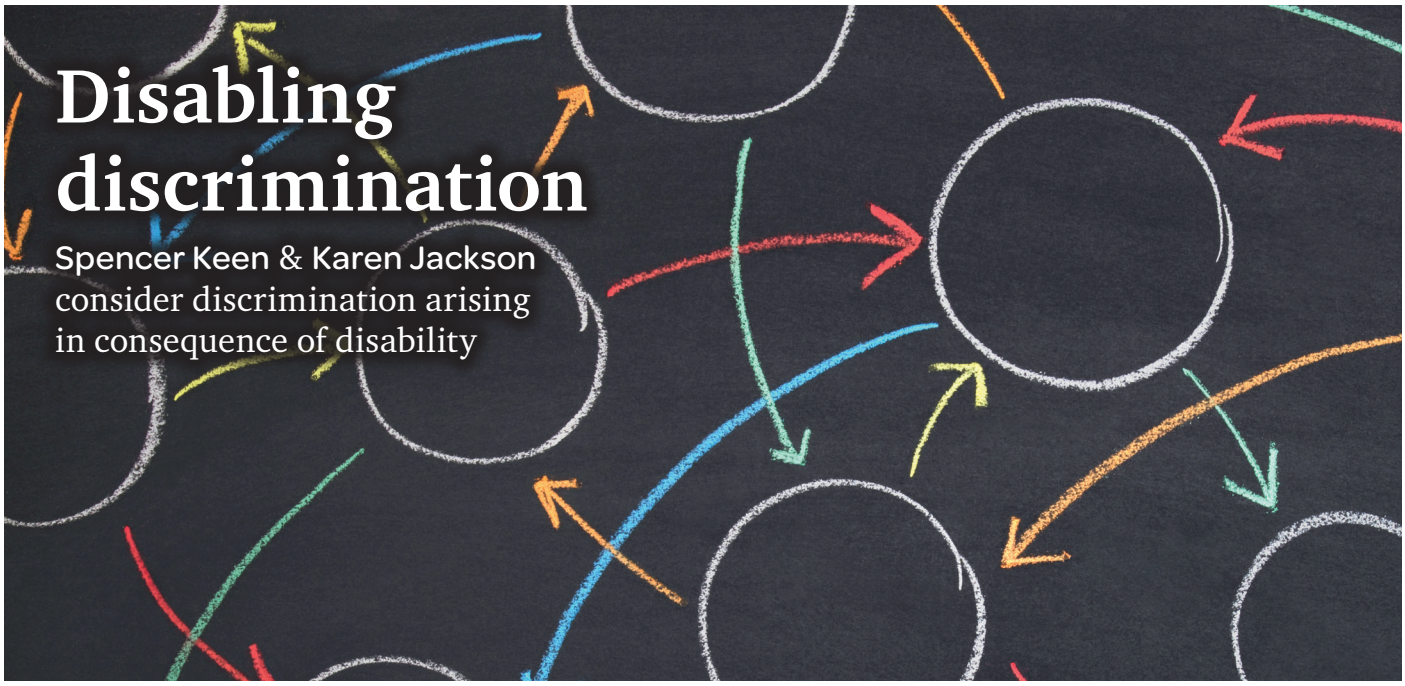

Disabling discrimination

Spencer Keen & Karen Jackson consider discrimination arising in consequence of disability

IN BRIEF

- How many links can be included in the chain of causation for disability discrimination claims under EqA 2010, s 15?
- To what extent does the disability need to be the effective cause of the treatment?

The notion of discrimination against a disabled person "because of something arising in consequence" of disability was introduced by s 15 of the Equality Act 2010 (EqA 2010) in October 2010. Unusually, the explanatory notes to EqA 2010 make explicit reference to the legislature's attempt to reverse the legal consequences of a decision of the House of Lords: that of *London Borough of Lewisham v Malcolm* [2008] UKHL 43, [2008] 4 All ER 525. The notes say that, following *Malcolm,* the equivalent provisions of the Disability Discrimination Act 1995 "no longer provided the degree of protection from disability-related discrimination that is intended for disabled people" and go on to explain that the new s 15 of EqA 2010 "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".

EqA 2010 has now been in force for over half a decade and it has taken some time for cases on s 15 to make their way through to the higher courts and tribunals. However, following a slew of interesting cases, 2016 looks set to be the first year in which some of the complexities of this powerful section are explored in detail. It will also see the first Court of Appeal decision on the meaning of "unfavourable treatment" under s 15 (*Trustees of Swansea University Pension Scheme & Anor v Williams* UKEAT/0415/14/DM). This article discusses some of those recent decisions, culminating with a consideration of *Risby v London Borough of Waltham Forest* UKEAT/0318/15/DM.

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Bonuses

In *Land Registry v Houghton and others* UKEAT/0149/14 [2015] All ER (D) 284 (Feb) a group of claimants argued that their employer had contravened s 15 when they did not receive a bonus as a result of the amount of disability-related absence that they had taken. The employer's policy stated that employees who had received a warning for sickness absence were not eligible to receive a bonus. Although the Land Registry had adjusted the normal trigger point for being given a warning, all the claimants still received warnings and so did not receive bonuses.

The Land Registry argued that the connection between the claimants' disabilities and the non-payment of their bonuses was too remote. It argued that non-disabled persons would also have received warnings for sickness absence and so the warnings did not arise in consequence of disability. The employment tribunal rejected this argument and the Employment Appeal Tribunal (EAT) dismissed the appeal. In each case the absences leading to the warning were disability related. Since the warning automatically disentitled the claimants to a bonus that was plainly sufficient to amount to unfavourable treatment arising in consequence of the claimants' disabilities.

Interestingly, the EAT also rejected the argument that the treatment was not afforded because of anything to do with disability because the administrative staff, who implemented the bonus policy, did not know about the claimants' disabilities. HHJ Clark stated that it was important to identify the reason for the treatment and then to ask the "reason why" that treatment was afforded (referring to Baroness Hale in the case of *R (on the application of E) v Governing Body of JFS (Secretary of State for Children, School and Families, interested parties) (United Synagogue intervening)* [2009] UKSC 15, [2010] 1 All ER 319). It was the claimants' disability related absences that led to the disqualifying warning and accordingly "the motives of the HR staff member who carried out the administrative task of linking the warning to the non-payment of bonus was irrelevant to the true 'reason why' enquiry in this case". It was sufficient that the respondent knew that the claimants were disabled and that its absence warnings were connected to the claimants' disability.

Absence-related dismissals

In *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* UKEAT0397/14/RN the employment tribunal and EAT considered the case of a surgeon who was absent from work with a lung disorder. This was a fluctuating condition and the surgeon was able to attend interviews and professional courses abroad while on sick leave but was unable, when requested, to meet with his clinical director. The Trust thought that there had been a lack of probity and assumed (wrongly) that the claimant had been fit to meet with his director. The respondent instituted disciplinary proceedings and dismissed the claimant who then brought proceedings claiming (among other things) that the instigation of disciplinary proceedings was less favourable treatment because of something arising in consequence of his disability.

The ET upheld his claim and the respondent appealed to the EAT, putting forward three arguments. First, that the ET had incorrectly asked whether there was a link between the disability and the treatment rather than whether the claimant had been treated unfavourably because of something arising in consequence of his disability. Second, the ET had not properly identified what the "something arising in consequence of" the claimant's disability was. Third, where the ET had identified the "something," it had then incorrectly held that the something had arisen in consequence of disability.

The EAT allowed the appeal. Langstaff P (as he then was) set out in his judgment what he considered the correct approach to be: "There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something'—and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

The EAT required the ET first to identify the something giving rise to the unfavourable treatment and second, whether that something arises in consequence of the claimant's disability. The ET in *Houghton* had erred in law by not considering both steps.

Voluntary redundancy

In *T-Systems v Lewis* UKEAT/0042/15/JOJ the respondent was introducing a new shift pattern and was seeking volunteers for redundancy. The respondent was unsure whether the claimant, because of her diabetes, was fit to work the shift pattern and so commissioned a medical report. The claimant did not want to decide whether to take voluntary redundancy until she had seen the report. Because of a delay in the production of the report her employer decided simply to go ahead and dismiss her.

The claimant claimed that she was dismissed because of her inability to decide whether to take voluntary redundancy and that this indecision arose in consequence of her disability. Both the ET and EAT held that the claimant's inability to decide was "something arising in consequence of" her disability. HHJ Richardson, in the EAT, noted that the question of causation was a question of fact for the ET and that, even if there were many links in the chain of causation, it was for the ET to determine, using its "good sense" whether the chain of causation had been broken.

References

In *Pnaiser v NHS England & Anor* UKEAT/0137/15/LA Ms Pnaiser was a manager at Coventry City Council. She was disabled and had had extended sickness absences. In March 2013 she was made redundant and an agreed reference was provided as part of her settlement agreement. In July 2013 Ms Pnaiser applied for a job with NHS England. Coventry City Council provided the agreed reference but gave a negative oral reference that referred to her time off work. NHS England withdrew the job offer and Ms Pnaiser brought a s 15 claim. Simler J in the EAT adopted the approach set out by Langstaff P in *Houghton* and held that since the sickness absence of Ms Pnaiser was one of the key factors in the negative oral reference and since the absences were almost exclusively related to disability her claim for s 15 discrimination had been made out. Importantly, Simler J also held that that the knowledge required in s 15 was of the disability only, and did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

Behaviour at work

The most recent s 15 case is that of *Risby v London Borough of Waltham Forest* UKEAT/0318/15/DM. Mr Risby had been a paraplegic since a road traffic accident in 1981. He used a wheelchair. His employer organised a workshop for managers, including the claimant, in a venue that was not accessible to people who used wheelchairs. Mr Risby, who also had a short temper, was understandably upset and complained, using inappropriate and inflammatory language, upsetting several people. He was summarily dismissed.

The ET rejected Mr Risby's s 15 claim because, it said, there was no direct link between the disability and the conduct that led to the appeal. Mr Justice Mitting in the EAT allowed the appeal stating that there was "no requirement" in s 15 for a direct linkage between the disability and the conduct. All that the claimant had to establish was that the claimant's disability was an effective cause, or one of the effective causes, of his conduct. According to Mr Justice Mitting, if Mr Risby had not been disabled by paraplegia, he would not have been angered by the respondent's decision to hold the workshop in an inaccessible venue. His misconduct was the product of indignation caused by that decision and "his disability was an effective cause of that indignation and so his conduct, as was of course, his personality trait or characteristic of shortness of temper, which did not arise out of his disability". Although there were two causes of the conduct, giving rise to the dismissal, and only one cause arose out of the claimant's disability, this was sufficient to prove s 15 discrimination. The case was remitted to the ET to determine whether the discrimination was justified.

The future?

The questions of how many links can be included in the chain of causation in s 15 cases, and the extent to which the "something" needs to be the effective cause of the treatment, are difficult ones. They are unlikely to be resolved in the near future. HHJ Richardson's reliance in *T-Systems,* on the "good sense" of employment tribunals is understandable. These issues have the potential to be ferociously complex if over-analysed. In other difficult areas (such as the comparison exercise in direct discrimination claims) the higher courts have, after a good many difficult cases have been argued, reached similar pragmatic conclusions. Although HHJ Richardson's approach may well be right, it is more likely than not that these issues will have to be considered by the Court of Appeal and the Supreme Court before a clearer picture emerges. In the meantime s 15 will, in all likelihood, continue to be interpreted very broadly, and provides a very powerful tool for disabled claimants. **NLJ**

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