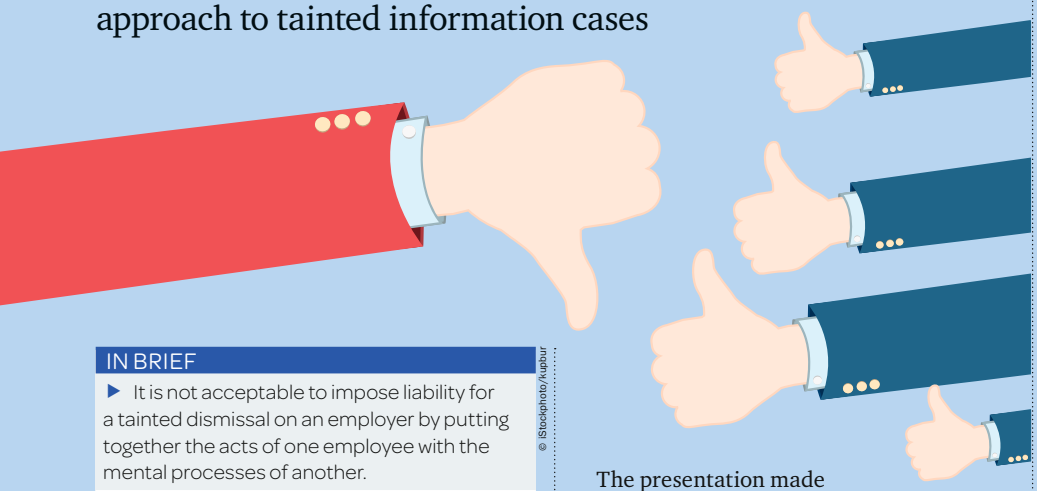
Tainted dismissals

Spencer Keen reports on the correct approach to tainted information cases



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IN BRIEF

- It is not acceptable to impose liability for a tainted dismissal on an employer by putting together the acts of one employee with the mental processes of another.
- A directly discriminatory dismissal requires the person doing the dismissing to have the protected characteristic in his mind at the time of dismissal.

Where a line manager prepares a damning report on an employee because of a protected characteristic such as age and the report is used by another manager to dismiss the employee, is the dismissal itself an act of direct discrimination? This was the question in the case of *CLFIS (UK) Ltd v Dr Reynolds OBE* [2015] EWCA Civ 439.

Dr Mary Reynolds was, for many years, the Chief Medical Officer of Canada Life. She started work for them in 1968. In 2006 she ceased being an employee and entered into a consultancy contract with CLFIS, a company in the Canada Life Group. Her consultancy agreement was terminated on 31 December 2010 when the Claimant was 73 years old.

Dr Reynolds claimed that her termination was an act of direct age discrimination. She made a claim in the Bristol Employment Tribunal (EAT) which was dismissed. She appealed to the Employment Appeal Tribunal and Singh J allowed her appeal. On 30 April 2015 the Court of Appeal re-instated the decision of the tribunal and overturned the decision of the EAT.

The facts

In February 2010 Mr Gilmour, the general manager of Canada Life in the UK, was given a presentation by Mr McMullan, the managing director of the Group Insurance Division in Bristol. The presentation was prepared with the assistance of Mr Mike Newcombe, the director of claims management and Ms Tracey Deeks, the executive director of corporate resources.

The presentation made it clear that Mr McMullan, Mr Newcombe and Ms Deeks were not happy with the service provided by Dr Reynolds and that Dr Reynolds was not delivering the service that the group needed. Mr Gilmour understood, from the presentation, that they were recommending dispensing with Dr Reynolds's services.

Mr Gilmour gave evidence to the tribunal that he had decided to terminate the claimant's employment based on a number of factors but, in particular he had decided that Dr Reynolds:

- did not attend the Bristol office and so had a limited input into staff development and training;
- required face to face discussion to be conducted at her house in Wales;
- did not use e-mail and required things to be faxed;
- would not accept recorded delivery;
- was not prompt in her turnaround times; and did not provide her advice in writing but preferred to dictate it over the phone.

Mr Gilmour took the decision to dismiss her but did not consider whether she should be given the opportunity of changing her approach. He didn't consider this because he believed that she would not change.

The tribunal at first instance found after hearing the evidence that the burden of proof had shifted to require Canada Life to provide an explanation for its treatment of Dr Reynolds. However, the tribunal accepted the explanation that Canada Life gave. The decision to terminate the claimant's employment had been taken by Mr Gilmour, alone and he had not taken into account Dr Reynolds's age. He had not assumed that Dr Reynolds would be resistant to changing her working practices because she was old but had drawn that conclusion from his own personal knowledge of her. He held a genuine belief that she was not providing Canada Life with the service that it required. The tribunal found therefore that there was no direct discrimination because of age

The EAT

In the EAT Dr Reynolds argued that the tribunal had misdirected itself by only considering Mr Gilmour's mental processes. Dr Reynolds argued that the tribunal should have also examined the mental processes of the other employees who contributed to Mr Gilmour's decision. Singh J allowed the appeal even though he rejected the argument that Mr Gilmour was not the only decision maker.

The appellant argued that where a person (A) makes a decision about an employee (B) based on reports that have been prepared by another (C), a tribunal cannot confine itself to considering the mental processes of A but must also consider those of C.

Singh J accepted this argument and rejected Canada Life's assertion that this was a new argument that had only been raised on appeal. According to Singh J, the burden of proof had shifted and so the respondent was required to provide an explanation for its treatment. Singh J held that the tribunal had misdirected itself on how to approach the respondent's explanation. When the respondent was attempting to discharge the burden of proof it should have explained the motivation not only of Mr Gilmour's conduct, but also of those compiling the reports that Mr Gilmour had used to decide that Dr Reynolds should be dismissed.

The Court of Appeal

The Court of Appeal allowed Canada Life's appeal against the decision of the EAT. The court described this sort of case as a "tainted information" case. A tainted information case occurs where a claimant is subjected to a detriment by an innocent employee who is relying upon or was influenced by information or views expressed by others whose motivation was discriminatory. What is the correct approach to tainted information cases?

The Court of Appeal considered two possible approaches. The appellant's argued that the correct approach was a "composite approach." This involved bringing together A's act and C's motivation and considering whether, together, they amounted to discrimination. The respondent argued that this was incorrect and that each act and the mental processes behind it should be considered separately.This meant that the initial provision of tainted information by C

would be discriminatory but the dismissal would only be discriminatory if A's mental processes were discriminatory. The Court of Appeal called the respondent's approach the "separate acts approach."

The Court of Appeal held that the right approach was the separate acts approach. They rejected the composite approach because it would make A liable even though he was personally blameless.

Although liability is imposed on employer's for the acts of their employees this did not mean that it was permissible to combine employee's acts and by doing so to impose a composite liability on the employer.

Lord Justice Underhill gave the following example of direct discrimination:

- by making an adverse report about B, C subjects her to a detriment;
- in making the report B was motivated by C's age and it therefore constitutes direct discrimination;
- if the act was done in the course of B's employment, B's employer would be liable;
- B would also be liable for his own act;and the losses caused to A by her dismissal could be claimed as part of the compensation for B's discriminatory conduct and would not be too remote.

The Court of Appeal rejected the argument that the separate acts approach was overly-analytical an would lead to undesirable complexity. It stated that tainted information cases were less typical and that ordinarily claimants were well aware of the history of their treatment and could plead their cases accordingly. Where a claimant is unaware of the tainted information but becomes aware of it during proceedings, the Court of Appeal considered that she would be able to amend her claim form to include the discrimination arising from the making of the tainted information.

The Court of Appeal accepted that a tribunal would be faced with a difficult case management decision if a claimant only appreciated at a late stage that the true discriminator was C not A. But, the court emphasised, the tribunal has power to extend time where it is just and equitable to do so, even during the course of the final hearing.

Comment

In *CLFIS v Reynolds* the Court of Appeal has provided some interesting observations on the correct approach to tainted information cases. A claimant will not be able to argue that a dismissal was, itself, age discrimination if the mental processes of the person dismissing her were not affected by age. The Court of Appeal has made it clear that it is not acceptable to impose liability for a tainted dismissal on an employer by putting together the acts of one employee with the mental processes of another.

A directly discriminatory dismissal requires the person doing the dismissing to have the protected characteristic in his mind at the time of dismissal. In tainted information cases, the compilation of the tainted information will be the discriminatory act, even if that information is later used as the basis for a dismissal and even if that dismissal occurs several years later.

This has some significant practical consequences both on the way in which cases should be pleaded and on time limits. Practitioners must take care to identify tainted discrimination cases as early as possible and to take particular care, in such cases, to identify the right detriment and to advise their clients of the correct limitation periods. **NLJ**

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