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Albion Chambers EMPLOYMENT NEWSLETTER

Causation and the compensatory award

The EAT has recently considered the approach to calculating the compensatory award in the case of *Adey-Jones v O'Dowd [2008] EAT 0098/08*. Mrs O'Dowd managed a care home operated by Mrs Adey-Jones. The care home was inspected by Cheshire County Council's Social Services Department and the Commission for Social Care Inspection (CSCI). Following reports to the police by the Council and CSCI, Mrs O'Dowd was arrested on suspicion of stealing benefits from vulnerable adults. A lengthy police investigation followed.

As a consequence of investigations undertaken by Cheshire and CSCI and under pressure from the Council, Mrs Adey-Jones suspended Mrs O'Dowd. The disciplinary investigation did not consider the matters which were the subject of the police investigation nor did they concern all the matters raised by the Council or CSCI. However, the list of matters which were the subject of the disciplinary investigation had, in part, been extracted from a letter from Cheshire.

Mrs O'Dowd was dismissed after disciplinary proceedings and an unsuccessful appeal. She was unemployed for approximately nine weeks after her termination date. Thereafter she secured a temporary post at a lower wage. Whilst in her new employment Mrs O'Dowd fell ill. This was some 20 weeks after dismissal. Mrs O'Dowd then received sick pay for nine months followed by Jobseekers Allowance.

The Employment Tribunal found the dismissal to have been unfair with no contributory fault. It was noted that Mrs O'Dowd became ill because of issues relating to the dismissal and the police investigation. The illness was a form of depression. No medical evidence was given though. The Employment Tribunal concluded that the dismissal process was at least one cause of Mrs O'Dowd's illness, and thus awarded compensation to include a sum to cover Mrs O'Dowd's losses as a consequence of her illness.

The EAT found that the Employment Tribunal had failed to give careful consideration to the matters which may have contributed to Mrs O'Dowd's illness in determining whether it could be said that the illness was sufficiently caused by the actions of Mrs Adey-Jones so as to justify a finding that Mrs Adey-Jones was responsible for the illness and the consequent the loss of earnings. The EAT drew attention to *Seafield Holdings Ltd (trading as Seafield Logistics) v Drewett [2006] ICR 1413* as authority for the proposition that future losses should not be determined on an all or nothing causation approach but by assessing the percentage likelihood that the underlying condition may have prevented the Claimant from working in any event. The EAT stated that it was such a percentage approach which may be the appropriate approach to take in a case such as the instant one where a Tribunal had to determine what proportion of the illness was a result of Mrs Adey-Jones' conduct, and that of Cheshire, CSCI and the Police.

The EAT also considered the need to determine whether a claim for loss arising from illness can be brought as an unfair dismissal claim. Compensation can only be recovered in an unfair dismissal claim where the loss has been caused by the unfair dismissal. In the event that the loss is found to have been caused by a failure to provide adequate support for the Claimant, losses would not be recoverable other than by way of a breach of contract claim; *GAB Robins (UK) Limited v Triggs [2008] EWCA Civ 17, GMB Trade Union v Brown [2007] UKEAT/0621/06.*

Comment

Employment Tribunals should be invited to apportion losses in percentage terms where there are a number of possible contributory causes to the losses sustained. Clear findings should be made as to the aspects of the employee's conduct which may have contributed to the loss. Detailed analysis will need to be undertaken where a number of other factors have contributed to the loss. Medical evidence may also be needed. Further complexity could arise where the *Seafield Holdings* argument is run alongside that which arises from *O'Dowd*. (i.e. the underlying condition may have prevented the Claimant from working in any event and a number of factors have contributed to the illness arising).

Gemma Borkowski

Changes to the law on disability discrimination

London Borough of Lewisham v Malcolm [2008] UKHL 43

It has been argued that this case changes 'everything' but the reach of the findings made their lordships has, since July, remained relatively untested. That said, clearly there are significant changes for potential claimants in DDA cases. Specifically, the DDA's scope and its reach has been reduced. Of particular note is the change to the definition of discrimination in section 3A of the 1995 Act.

After *Clark v Novacold*, we got used to the requirement that a DDA comparator was someone to whom the relevant disability did not apply. Now though,

a claimant is going to have to find a comparator to whom the relevant disability does not apply and who was treated (or *would* have been treated in the case of a hypothetical comparator) in a different way. Are we going to find it as easy to do this?

In the work place how, in reality, are we going to find comparators – hypothetical or real, that enable a claim to proceed? A disability discrimination claim will only succeed if it is ON THE GROUNDS of the claimant's disability, because their lordships (Hale dissenting) have read the words of the 1995 Act *"for a reason relating to..."* to mean *"on the grounds of ..."*. To date, in practice, in most DDA cases the respondent employers concede that the claimant suffered less favourable treatment but they have run the defence of justification. Now, that concession need not be made. The typist who was slow for a reason other than a disability would, the employers will say, be treated in exactly the same way as the one who was slow as a result of longstanding arthritis; the reason for the treatment (the dismissal) is the unacceptability of slow typing, not the disability.

If an employee is late for work every day for six months because of a recognised disability (about which his employer knows) and is dismissed, the comparator for a successful DDA claim must now be someone who was late everyday but not for no disability related reason. In reality of course, the employer is going to be clear that the employee who is repeatedly late for a non disability related reason would *also* have been dismissed and so the claim will now fail.

Take the worker who has a disability that caused her to be off work for six months of the year and is then dismissed, a comparator must be found who has had six months out of twelve off work for a reason that is nothing to do with a disability. It's hard to think of one; but we can be confident that any employer is going to say that this employee too would be treated in the same way so no 'less favourable treatment has taken place'.

In what circumstances, other than disability related ones, is someone NOT going to be able to carry out their job and NOT be dismissed? Surely the employer is going to deal with the hypothetical comparator by saying 'we would have dismissed that person too, so we have treated you in exactly the same way; there has been no less favourable treatment so there has been no discrimination'.

It seems that the position post *Lewisham* is that those with disabilities are not going to be treated more favourably, which was the effect of the test in *Clark v Novacold.* Rather, their position is drawn into line with other groups who benefit from anti-discrimination legislation laws, namely that they seek to *prevent less favourable* treatment.

The most likely consequence of the change in the definition of discrimination is that more claims will be made under s.4A DDA 1995 which sets out the duty of the employer to make reasonable adjustments. All of the examples above lend themselves to such a claim, but it will be interesting to see the practical effect. It is likely to increase the already heavy emphasis on the need to have well-trained staff and progressive Human Resources personnel to implement and enforce consistent, anti-discriminatory performance review and management processes.

Liz Cunningham

Redundancy – the dreaded 'R' word

These turbulent times have led to an increased number of briefs coming into Chambers requesting advice on behalf of organisations contemplating redundancies, and from individuals whom have been made redundant. We have been asked to give a number of seminars on the subject, both to lay delegates and our instructing solicitors. It would appear to be a good time to review the legal framework.

This article does not seek to give definitive advice on the issue of redundancy but does seek to signpost the potholes organisations often fall into and, further, it seeks to identify those areas where an employee may make inroads into an ostensibly fair redundancy process.

Framework

For a dismissal to 'qualify' as a redundancy it must fall within one of three categories;

(i) "Business Closure" - ceasing or intending to cease to carry on the business for the purposes of which the employee was employed by it;
(ii) "Workplace Closure" – ceasing or intending to cease to carry on that business in the place where the employee was so employed;
(iii) "Reduced Requirement" – having a reduced requirement for employees to carry out work of a particular kind or to carry out work of a particular kind at the place where the employee was employed to work.

If the reasons for a contemplated dismissal do not fall within one of those three categories, it may well prove to be unfair, subject to the possibility of arguing another substantive reason for dismissal (usually, in this context, 'some other substantive reason').

There are three primary areas of risk (or, if a redundant employee contemplating litigation, areas of opportunity) that must be addressed during any redundancy process to render the eventual decision to dismiss, fair;

(i) warning & consultation;
(ii) the choice and application of fair selection criteria; and
(iii) consideration of the possibility of redeployment.

Warn and Consult

The method and extent of consultation is organisation dependant but, in broad terms, under The Trade Union and Labour Relations (Consolidation) Act 1992 'TULRCA', if the workforce has representatives, either Union based or independently elected, they must be consulted and provided with particular information (s.188(4) as amended). Where a 'collective redundancy' is contemplated (20 or more employees within a period of 90 days or less), such representatives must be consulted and if the work force has no such representatives, they should be encouraged to elect. It should be noted at this stage, that a notice to terminate cannot be given prior to the conclusion of the consultation process (188(1A)), although there is some support within the case law for the proposition that a 'substantive completion' is sufficient.

Where an individual employee is considered for redundancy, where a 'job' is redundant, an employer should ensure that the SDDP's are followed (likewise in collective redundancy situations) and therefore the right to be accompanied during the relevant meeting is preserved.

The consultation process should follow similar lines to that of the collective process; reference to representatives and so forth. But in addition, the employee should be provided with any provisional selection criteria, he should be allowed to comment on any selection assessment and to suggest ways to avoiding his redundancy. In both individual and collective redundancy consultations, a predominant aspect will be the devising of fair selection criteria.

In either of the above consultation circumstances, part of the process should also consider alternatives to redundancy and an employer should be able to show what alternatives were considered and why they were rejected.

However, where an employer considers alternatives such as recruitment freezes, reviewing terms and conditions, wage freezes and the cessation of discretionary bonuses, early retirement and or flexible part-time working, but nevertheless reasonably concludes that redundancy is the only viable option, this will go a long way to satisfying the fairness test.

Selection Criteria

As part of the consultation process the selection criteria should be discussed and made clear to the relevant employees and/or representatives. Above all, it should be objective, fair and justifiable. Those who are acting on behalf of an employer or an employee may wish to examine;

(i) whether other groups of employees are doing similar work to the group from which the selections were made or contemplated;

(ii) whether a wider pool may be appropriate, in circumstances where an employee's job is interchangeable; whether the selection pool was agreed or devised in consultation with the unions or employee representatives.

In relation to point (ii), if an organisation has previously invested in the drafting of job descriptions to help with equal pay etc, such information may well prove useful in these circumstances also.

Of course, any hint of sex, race, religion, disability, part-time/full-time status and in most circumstances, age, will render any selection criteria unfair.

In terms of the criteria itself, for a number of years LIFO ('last in first out') had been used as a fair selection criteria. Since the introduction of the age discrimination legislation, it has been argued successfully that this policy discriminates against the younger members of the workforce as such employees would not have had the opportunity to accrue the length of service to avoid the cull. However, one would expect that over the coming years, as the age discrimination legislation begins to 'bite', the discriminatory effects of a LIFO policy will diminish and may well become reliably fair once again. It is not the case that LIFO will be automatically unfair, simply that caution should be exercised when examining LIFO in any given organisation.

Take the very recent High Court decision in *Rolls Royce v Unite the Union* for example, in which the Court held that a points scoring system reflecting length of service was not discriminatory (because it could be objectively justified), but that a simple application of LIFO might have been (obiter).

There is not sufficient space within this article to address all of the areas where extra caution in selection should be exercised and why but, in short, where an employee has been involved in health and safety, Sunday working, TUPE, Working Time Regulations, pension scheme trustees, protected disclosures, flexible working, trade union membership and pregnancy or maternity/paternity/adoption or dependant care leave, specific advice should be sought.

Redeployment

As part of a fair redundancy process the opportunity of alternative employment should always be examined. If alternative employment *can* be offered it *should* be offered, although there is no duty on the employer to create a role, simply to offer an appropriate role if available. If that alternative employment is accepted, or unreasonably refused, the employee may lose his or her entitlement to a redundancy payment.

However, where a new job is accepted but it differs in a material respect from the old one, a statutory 'trial period' of four weeks preserves the employee's redundancy rights. If the employee continues to work after that period, the redundancy dismissal 'vanishes' and no redundancy rights are preserved thereafter.

As an extension to redeployment, it is worth pausing for a moment to consider the process of 'bumping'. It is relevant in relatively few circumstances but the EAT has endorsed the process through which a senior employee can 'bump' a more junior employee out of his or her employment (that other employee would then become redundant or could be redeployed elsewhere; see *Leventhal v North (2004)*. In essence, bumping is redeployment in the absence of an available position. The concept may not sit easily with the lawyer and lay person alike but, when it comes to fairness, the buzz word in all dismissals, no doubt the 'bumped' employee would have something to say on the subject.

SDDP's

As stated above, a redundancy is a dismissal like any other and as such, the three step process of letter, meeting and right of appeal must be followed in all cases, otherwise any dismissal will be automatically unfair and a compensatory uplift may be applied to any subsequent award.

In terms of the letter, it must set out the reason for the redundancy proposal and also the proposal for the selection of the employee(s). The letter must invite the employee to a meeting and state that he or she has the right to be accompanied.

The redundancy meeting must take place before any final decision is made or action taken. In addition, the usual SDDP meeting requirements of sufficient notice and the duty on the employee to take reasonable steps to attend, apply.

Redundancy Payments

Redundancy payment are payable when an employee has accrued two years of service as per the legislation. Of course, an organisation's contract may provide more generous terms in relation to accrued service and the calculation of redundancy payments; however, the following represents the statutory minimum.

First, calculate the number of whole calendar years the employee has worked for the organisation (counting backwards from the employee's last day of employment), subject to the maximum of 20 years.

Secondly, multiply the above figure by the employee's weekly pay, subject to the current statutory maximum of £330 (expected to rise to £370 from February 2009).

Next, reference must be made to the age of the employee: for the years under the age of 22, the employee receives half a week's wage; between 22 and 41, one week's pay; and for 41 and over, one week's pay.

An alternative method of calculation would be to visit www.berr.gov.uk, where a calculation table takes the mathematical strain.

Finally, it is worthy of note and in attempt to end at least on a small high, the first £30,000 of any redundancy payment is tax free.

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