Disability Discrimination: Was the Discrimination ‘Because Of’ Disability or ‘But For’ Disability?

In Robinson v Department for Work and Pensions [2020] EWCA Civ 859, the Court of Appeal provided helpful guidance on the test to be used to establish claims of disability ‘arising from disability’.

Ms Robinson worked for the Department for Work and Pensions (DWP) as an administrator. She suffered from blurred vision and it was accepted that she was disabled for the purposes of U.K. anti-discrimination law. Due to her disability, she was unable to use the software which was required to perform her job. The DWP attempted to make adjustments but was unable to do so. Ms Robinson lodged two grievances regarding the way in which she was being treated by DWP, at which time
DWP transferred her to a paper-based role in a different department. Ms Robinson brought claims in the Employment Tribunal, including for discrimination arising from a disability.

The Court of Appeal dismissed Ms Robinson’s claim of disability arising from discrimination as it found that, on the facts, the treatment complained of was not caused or carried out because of her disability or the symptoms arising from her disability. The Court held that it was not sufficient for Ms Robinson to show that, ‘but for’ her disability, she would not have been subjected to the treatment complained of. Instead, the Court found that the motivation of the alleged discriminator was relevant and that, for claims of direct discrimination and discrimination arising from disability, Employment Tribunals should consider whether the treatment complained of was ‘because of’ the disability.

**TUPE: Validity of Beneficial Contractual Variations**

In *Ferguson and others v Astrea Asset Management Ltd* UKEAT/0139/19/JOJ, the Employment Appeal Tribunal (EAT) considered whether contractual variations made to employees’ terms of employment prior to a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) could be valid if they were beneficial to the employees.

The claimants were both senior employees and directors of Lancer Property Asset Management Ltd (Lancer). Prior to a service provision change under TUPE, under which their employment would transfer to Astrea Asset Management Ltd (Astrea), they varied their own employment contracts to give themselves guaranteed bonuses and generous termination payments. The intention behind these variations was for Astrea to be bound by the enhanced terms following the transfer. However, upon discovering the variations, Astrea dismissed the claimants for gross misconduct. The claimants brought claims against Astrea, including for the termination payments under the varied employment contracts.

The Employment Tribunal held that the variations were void under TUPE because the sole or principal reason for them had been the TUPE transfer. The claimants appealed to the EAT, claiming that the contractual variations should not be void because they were beneficial to the claimants. The EAT held that TUPE’s restrictions on contractual variations extend to all variations, not just those which are adverse to the employees. The variations that the claimants had made to their own employment contracts were therefore void.

It is unclear whether the EAT’s decision would have been different if the claimants had not been involved in the variation of their contracts. In any event, however, employers should ensure that adequate protection is included in any outsourcing agreement to cover, to the extent possible, any employment liability arising from a service provision change.

**Unfair Dismissal: Can a Dismissal Ever Be Fair in the Absence of Any Procedure?**

In the case of *Gallacher v Abellio Scotrail Limited* UKEATS/0027/19/SS, the EAT
considered an appeal as to whether a dismissal which took place without any procedure was fair.

Ms Gallacher, a senior manager at Abellio Scotrail Limited (Abellio), was dismissed during an appraisal meeting with no fair procedure, prior warnings, or right of appeal. Both Ms Gallacher and her manager acknowledged that there was an irretrievable breakdown in their relationship, and Ms Gallacher did not have any interest in repairing the relationship. In the circumstances, Abellio did not feel that any procedure would serve a useful purpose and may make the situation worse. Ms Gallacher brought claims against Abellio, including for unfair dismissal.

The EAT found the dismissal to be fair. The dismissal was due to the breakdown of trust and confidence between the parties and was within the band of reasonable responses open to Abellio in all the circumstances. The EAT noted, however, that cases where an employer can dispense with any procedure because it reasonably considers following a procedure would be futile are extremely rare, and that cases where no procedure has been followed will always be subject to extra scrutiny by Employment Tribunals.

While employers will no doubt welcome this decision, it should be noted that it was very fact specific. It was also significant that the dismissal was caused by the lack of mutual trust and confidence between the parties, rather than any disciplinary issue, in which case the dismissal would almost certainly have been unfair for failure to follow a disciplinary process.

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