Should dismissals for disability-related absences be pleaded as direct discrimination?

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South Gloucestershire Council v Ms Hundal [2024] EAT 140

References to [x] are to paragraphs in the EAT's judgment.

1. **South Gloucestershire Council v Ms Hundal** [2024] EAT 140 concerns the Employment Tribunal (**"ET"**)'s decision to uphold complaints of direct discrimination and discrimination because of something arising in consequence of disability following the Claimant's dismissal due to disability-related absences.

2. This case provides a useful reminder of the distinction between sections 13 and 15 in relation to dismissals due to absences; and the Employment Appeal Tribunal (**"EAT"**) clarifies that a failure to make reasonable adjustments (**"FMRAs"**) may inform the ET's analysis of justification under s. 15(1)(b), notwithstanding that a claimant has not brought a separate claim for FMRAs.

Factual background

3. The Claimant was disabled by reason of endometriosis. She had a number of absences as a result of her disability and was ultimately dismissed due to her attendance record.

4. The Claimant was an agency social worker who joined the Respondent on 8 July 2019 under a fixed term contract, which was due to end on 6 September 2019 **[4]**. The Claimant was line managed by Petros Careswell.

5. Despite having absences during the Claimant's first stint of employment, on 6 September 2019 her engagement was extended to 29 December 2019 **[5]**. The Claimant had further absences after her contract was extended, e.g., between 10 to 15 October 2019 (which was her longest period of absence) (**"the Absence"**) **[6-7]**.

6. At a supervision meeting on 3 October 2019, the ET noted that the Respondent did not refer "*to [the Claimant's] health affecting the quality of her work*". However, following the Absence, on 17 October 2019, Mr Careswell and Caryn Desmond (Social Care Locality Service Manager) had a meeting (**"the Meeting"**), where the following was said about the Claimant **[8]**:

> "… **[she] continues to have sporadic sickness which is a significant issue due to impact on children and families and on colleagues and Petros**. She can be high maintenance but does have skills in working and engaging with families, she presents as very competent however files do not reflect this as she is behind in her paperwork. Families really like her, however, she is a locum who is not currently able fully fulfil her role. **Petros is meeting with her tomorrow and will discuss that this is not sustainable and will give her a timeframe in which to complete all her paperwork and outstanding tasks as she is behind with these. As we have permanent worker starting Petros will now look to give Poppy her notice as position will no longer be available.**"

7. The Claimant was subsequently dismissed.

Before the ET

8. The ET found that Mrs Desmond had decided to terminate the Claimant's position during the Meeting **[9]**. Mrs Desmond's rationale for dismissal was set out at para 8 of her witness statement, which reads as follows:

> "The decision to terminate Poppy's contract was made in the Supervision meeting I had with Petros on 17 October. As I was Poppy's line manager's manager I had little direct contact with her. The AYSE whose post Poppy was covering was shortly to start work and we no longer needed Poppy to cover the post. **There were two other locums in the team at the time, one of whom had been working with the Council for several years entirely satisfactorily, and the other, although recruited at a similar time to Poppy had proven more reliable.** One locum was no longer needed because of the arrival of the AYSE and there was no reason to terminate one of the other locums rather than Poppy. **Even had Poppy's absences not caused problems her contract would still have been terminated. Had she been an exceptional social worker I might have tried to find another role for her but she was not – she was good but not that good.** The decision was reached in discussion with Petros but **at the end of the day it was my decision as the Head of the Service."**

9. The ET found (at para 55 of its judgment) that Mrs Desmond's reasoning was flawed, as the Claimant was not covering a specific permanent post **[9]**. The ET went on to find that, at the outset of the Claimant's employment, "*Mrs Desmond had been keen to secure the Claimant to a permanent post*".

10. The ET stated (at para 56 of its judgment) that the Respondent's premise was that one of the three locums was no longer needed with the arrival of a permanent member of staff. The question was then whether the reason(s) given for selecting the Claimant, as opposed to one of the other locums, was discriminatory. In summary, paras 57-58 of the ET's judgment held that:

    a. Mrs Desmond considered the Claimant to be a good social worker but did not consider that the Claimant was "exceptional". Importantly, however, Mrs Desmond had not suggested that either of the other two locums were exceptional. Indeed one of the locum's performance was described as "satisfactory". The material difference with this locum was that they had been employed by the Respondent for a number of years.
    b. The other locum started at a similar time to the Claimant. There was no suggestion that they were an exceptional social worker, only that they were more "reliable" than the Claimant in terms of attendance. The ET stated that the only difference between this locum and the Claimant was that the Claimant had had periods of absence due to her disability.
    c. The ET found that the Respondent's reason for dismissing the Claimant was due to her sickness absences.

11. The ET upheld the Claimant's complaint in relation to direct discrimination as the Claimant "*was treated worse than the comparator whose circumstances were the same as the Claimant save for the Claimant's disability*"; "*[T]his less favourable treatment was because of the Claimant's disability*" **[11]**. At para 69, the ET stated that:

    > "Mrs Desmond decided to terminate the Claimant's contract because the Claimant was less reliable than the comparator. This was a direct reference to her sickness absence record, which was due to her disability, of which the Respondent was aware".

12. In relation to the s. 15 EqA complaint (discrimination arising), the Respondent had pleaded that any unfavourable treatment (the dismissal) which arose in consequence of the Claimant's disability (her sickness absences) was a proportionate means of achieving a legitimate aim. The Respondent pleaded the following **[2]**:

> "The termination of the Claimant's placement, if unfavourable, was for the legitimate aim(s) of the efficient management of the service, and was an appropriate and reasonably necessary means of achieving that aim. **There was a new permanent employee arriving, and the need for agency cover reduced correspondingly**. There were **two other agency workers** on the Westgate Team whose placements might have been terminated instead. **One had been with the service for an extended period, was a consistent worker and was managing her cases with appropriate oversight and support. She had a full caseload. The other** had joined around a similar time to the Claimant. **There were no issues of sickness and he had some court work** which Mr Careswell did not wish to reallocate [emphasis added in the EAT's judgment]".

13. The ET found that the legitimate aim (the efficient management of the service) was undermined by Mrs Desmond's witness statement, which said that the decision to terminate the Claimant's contract was because the role was no longer available (para 70 of the ET's judgment). The ET placed emphasis on the fact that the Respondent had considered the Claimant to be able to manage complex cases well. In addition, Mr Careswell had suggested some adjustments to manage the Claimant's disability (such as amendments to her working pattern), but these adjustments were not ultimately taken into account. The ET therefore upheld the Claimant's s. 15 EqA complaint, stating at para 81 that:

> "Terminating the Claimant's agency placement because of her sickness absences, without considering what additional support could be provided to the Claimant was not an appropriate and reasonably necessary way to achieve the aim of the efficient management of the service."

Before the EAT

14. The Respondent appealed on the following grounds **[12; 21]**:

a. The Tribunal misdirected itself as to and/or misapplied ss. 13, 23 and 136 EqA 2010, and/or reached a perverse conclusion, in finding direct disability discrimination when it found that the reason for the impugned treatment was solely the Claimant's absences.
b. The Tribunal misdirected itself in relation to, and/or misapplied s. 15(1)(b) EqA 2010, and/or reached a perverse conclusion in deciding that the termination of the Claimant's agency placement was not objectively justified.

Ground 1 – direct disability discrimination (s. 13 EqA)

15. HHJ Tayler pithily summarises the distinction between sections 13 and 15 in **Bennett v MiTAC Europe Ltd** [2022] IRLR 25 in the following terms:

> "40. Because in the case of disability discrimination the circumstances include a person's abilities, when assessing a claim of direct disability discrimination it is necessary to compare the treatment of the complainant with an actual or hypothetical person with comparable abilities. Thus, if the consequence of a disability is a reduction in a person's ability to do a job and that reduction in ability is the reason for adverse treatment it will not be possible to make out a claim of direct discrimination because the comparator would have the same level of ability as the disabled person. That is why s 15 EqA 2010 is necessary, which provides for discrimination because of something arising in consequence of disability. However, if stereotypical assumptions are made about the ability and/or likely future ability of a disabled person this can amount to direct disability discrimination: *Chief Constable of Norfolk Constabulary v Coffey* [2019] EWCA Civ 1061, [2019] IRLR 805, [2020] ICR 145."

16. HHJ Tayler considered that the ET's finding on direct discrimination, i.e., that the "*decision to terminate the Claimant's contract as opposed to the second locum, was taken solely in relation to her sickness absences*" conflated treatment *because* of the Claimant's disability with a *consequence* of the disability **[18]**. Applying a "but for" test, i.e., the absences would not have arisen but for the Claimant's disability was inapt when considering the *reason why* the Respondent had dismissed the Claimant **[19]**. The absences could not be treated as a proxy for the disability itself and the ET did not make any findings in relation to Mrs Desmond making stereotypical assumptions as to the Claimant's future attendance record.

17. The EAT therefore set aside the ET's finding on direct discrimination **[19]**.

Ground 2 – discrimination arising in consequence (s. 15 EqA)

18. On Ground 2, the Respondent's challenge was to the ET's treatment of its justification defence (i.e., the efficient management of the service). HHJ Tayler stated that the burden was firmly on the Respondent to establish the justification for dismissal and the ET was "*required objectively to assess the material provided by the respondent to decide whether justification was established applying "critical scrutiny"*" **[24]**.

19. The EAT found that the Respondent's justification, i.e., that one of the three agency staff members had to be dismissed to make way for the new permanent staff member, and that

that should be the Claimant given her attendance record, was flawed. Firstly, the Respondent had not considered one of the agency member's attendance record at all. Secondly, the ET doubted whether the Respondent had in fact applied the legitimate aim of efficient management of the service, as Mrs Desmond referred to terminating "*the Claimant's contract because the role was no longer available*" **[26]**. Even if this aim had been applied, the ET found that it did not justify dismissal. The EAT found that, in reaching this conclusion, the ET was entitled to consider:

a. The quality of the Claimant's work;
b. The assistance that might help the Claimant achieve better attendance;
c. The ET was also entitled to have regard to the possibility that occupational health might assist (which the Respondent had not considered because the Claimant was an agency staff member).

20. In addition, the EAT clarified the interrelationship between justification under s. 15(1)(b) EqA and a FMRAs under ss. 20-21 EqA. HHJ Tayler stated that **[26]**:

> "If an Employment Tribunal has found that, at the time of the asserted discriminatory treatment, the employer failed to make a reasonable adjustment, justification generally cannot be made out. If a failure to make a reasonable adjustment has been asserted and the complaint has failed, the failure to make the specific adjustment is highly unlikely to be relevant to the analysis of justification. However, it does not follow that a complaint of failure to make reasonable adjustments must have been made out for the possibility of an adjustment to be relevant to the assessment of justification. A claim of failure to make reasonable adjustments might be out of time, but the possibility of the adjustment being made might still be relevant to justification … the possibility of steps to assist the claimant improve her attendance is relevant to the question of whether the respondent has established that the termination of the claimant's engagement was a proportionate, in the sense of being appropriate and reasonably necessary, means of achieving the asserted legitimate aim."

21. The EAT found that the ET had been entitled to find that the Respondent's justification for dismissal (the efficient management of the service) came up short. The EAT therefore upheld the ET's finding on the s. 15 EqA complaint.

Take aways

22. **South Gloucestershire Council v Ms Hundal** is an important case for claimants and respondents alike. Representatives acting on behalf of claimants should carefully consider whether unfavourable treatment for disability-related absences is more persuasively pleaded under s. 15 EqA, where it does not appear that the respondent has made stereotypical assumptions about a claimant's future absences based on their disability and is in fact motivated by the absences themselves.

23. Equally, the EAT's clarification on the relevance of a FMRAs to s. 15 EqA claims is a matter that those representing respondents will want to consider. In particular, given that a ss. 20-21 claim does not need to be brought in its own right before it becomes relevant to the justification defence under s. 15(1)(b), there is a degree of uncertainty as to whether a claimant needs to plead the relevance of a FMRAs as part of his or her stated case, or whether such an argument could be deployed for the first time in submissions. Respondents will want to consider all eventualities, including their response to any assertion that they could have made reasonable adjustments, when formulating their justification defence.

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