Employment

City of York Council v Grosset

Posted on 22 May, 2018 by | Katya Hosking

In *City of York Council v Grosset* [2018] EWCA Civ 1105 the Court of Appeal has approved the approach of the Employment Appeal Tribunal to discrimination arising from disability under the Equality Act 2010 (EqA 2010), s 15. The court has confirmed that:

- for a finding of unlawful discrimination to be made under s15 the employer must have treated the employee unfavourably because of something arising from the employee's disability, but the employer does *not* have to be aware that the 'something' arises from the disability;
- a tribunal is to assess objectively whether the 'something' arose from the disability, and may consider evidence which was not available to the employer in doing so, and
- whether the unfavourable treatment was justified is also an objective question, unlike the fairness of dismissal, so it is possible for a dismissal to be fair under s 98 of the Employment Rights Act 1996 but not justified under s15 EqA 2010.

The outcome is no surprise, but the court's robust confirmation of the purpose of s15 EqA 2010 provides clarity, and a helpful reminder of the proper approach to discrimination arising from disability.

Background

The claimant, Mr Grosset, was Head of English at a secondary school in York. He has cystic fibrosis and until 2013 reasonable adjustments to his working pattern enabled him to follow a time-consuming daily exercise and self-management regime alongside turning around the fortunes of the English department.

In 2013 a new head teacher, Mr Crane, was appointed and new performance standards were introduced. Mr Crane was not briefed about the claimant's reasonable adjustment agreement, and as a result of management innovations and a new syllabus the claimant's workload increased significantly. The claimant wrote a letter of complaint, but no effective steps were taken, and he became increasingly stressed. At the end of October his lung function was the worst it had ever been and he feared he might have to have a double lung transplant. By the end of November his health had deteriorated to the point where he was signed off as unfit for work.

A few weeks before that, the claimant had shown the 18-rated film Halloween to a small group of 15-16 year olds as the subject matter for a discussion about the construction of narrative. He had not told the school nor obtained parental consent. Mr Crane discovered this after the claimant had been signed off, and there was a formal disciplinary investigation.

The claimant accepted that showing the film had been inappropriate and regrettable but said that it was an error of judgment caused by the stress he was under, and that his cystic fibrosis had contributed to the stress.

Neither the disciplinary panel nor the appeal panel accepted that the incident was the result of an error of judgement caused by stress. They also found that the claimant had not properly recognised the seriousness of what he had done. In April 2014 he was summarily dismissed, and his appeal against dismissal was rejected.

Discrimination arising from disability

Section 15 of the Equality Act 2010, provides:

1. A person (A) discriminates against a disabled person (B) if—
    a. A treats B unfavourably because of something arising in consequence of B's disability, and

    b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

2. Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

The EAT set out the proper approach to s15(1)(a) EqA 2010 in *Pnaiser v NHS England* [2016] IRLR 170 at paragraph 31. Having identified unfavourable treatment of B by A the tribunal must first determine what caused the treatment. Answering that question requires examining the reason which was in A's mind. The second question is an objective one, whether that reason or cause was 'something arising in consequence' of B's disability. The causal chain between the disability and the 'something' may have more than one link, although the longer the chain the harder it is likely to be to establish the required connection.

Findings in *Grosset*

The employment tribunal accepted that the claimant's self-management regime meant it was very difficult for him to adapt to sudden or significant increases in workload, and that the additional stress in turn exacerbated his medical condition.

It held that the respondent had failed to make reasonable adjustments for the claimant during the autumn of 2013 when his workload increased significantly. It also held that the respondent's treatment of him during that time had been unfavourable treatment because of something arising in consequence of his disability, which the respondent could not justify, and which therefore contravened s15 EqA 2010. These findings were not challenged before the Court of Appeal.

In relation to the claimant's dismissal, the tribunal accepted that the stress he was under had resulted in an impaired mental state which in turn led to his error of judgement in showing the film. Importantly, in finding this causal link between the claimant's disability and his misconduct it took account of evidence which had not been available to the school's disciplinary or appeal panels. It accepted that the respondent had not known that the misconduct arose from the claimant's disability, but held that that knowledge was not required by s15(1)(a). Taking into account the failure to make reasonable adjustments, the ET found that dismissal was a disproportionate response and so was unlawful discrimination arising from disability contrary to s15. It was this finding which the respondent challenged before the Court of Appeal. The tribunal also held that the claimant had not been unfairly dismissed. Given the seriousness of the misconduct, and the information available to the respondent at the time, dismissal was within the range of reasonable responses.

The EAT upheld the tribunal's findings, as did the Court of Appeal.

Comment

Section 15 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… to defend the treatment…" (Explanatory Notes, cited in *Grosset* at paragraph 45, per Sales LJ). That balance had been lost when its predecessor under the Disability Discrimination Act 1995 was given an extremely narrow interpretation in *Lewisham London Borough Council v Malcolm* [2008] UKHL 43.

Grosset is the first time the Court of Appeal has considered the proper interpretation of s15(1). It confirms that it is not necessary, for a finding of unlawful discrimination, that the respondent knows that the 'something' arises from the disability. The causal link between the disability and the 'something arising' is an objective matter and the tribunal is to make its own assessment on the evidence before it.

Importantly, the Court of Appeal has also confirmed that a link between a failure to make reasonable adjustments and the unfavourable treatment under s15(1)(a) may be an important factor to take into account when considering justification.

The predecessor provisions under the Disability Discrimination Act 1995 explicitly stated that an employer who had failed to comply with a duty to make a reasonable adjustment would be unable to establish a justification defence unless it could show that the treatment would have been justified even if it had complied with the duty (s 3A DDA 1995). In the EqA 2010 the relationship between justification and the duty to make reasonable adjustments is relegated to the Equality and Human Rights Commission's Code of Practice (paragraph 5.21, cited in *Grosset* at paragraph 49).

In *Grosset* Sales LJ emphasises that the Code of Practice should be taken into account by a tribunal in any case in which it appears to the tribunal to be relevant (paragraph 57, citing s15(4) EqA 2006). In upholding the tribunal's finding that dismissal was disproportionate he notes the significance of its unchallenged assessment that the claimant's error of judgement would have been 'unlikely in the extreme' if the school had put reasonable adjustments in place. In practice, where there has been a failure to make a reasonable adjustment, it will now be essential to take that into account when considering a defence of justification under s15.

Katya Hosking is rapidly developing her employment practice and has experience in unfair dismissal, discrimination, harassment and victimisation, whistleblowing, employee status and unlawful deduction of wages. Having worked as a university equality officer before coming to the Bar, she retains a particular interest in discrimination and disability, and recently drafted pleadings in a complex reasonable adjustments claim against a university.