

DISABILITY DISCRIMINATION

GOOD AND BAD NEWS

In recent months, two land mark cases have been decided in this already complex area of employment law.

GOOD NEWS

It feels like it has been a while since employers have had any good news, but it appears that the House of Lords has, in a housing case, made it harder for employees to claim disability discrimination.

It firstly held that employers can only be liable for disability discrimination if they know an employee is “disabled”. It secondly held that “a reason that relates to the disabled person’s disability” has to be construed narrowly and that the correct comparator is someone to whom the “underlying reason” does not apply. What does this mean?

To give an example of how this may work; currently (or previously) if a “disabled” employee is absent and is dismissed, he/she would argue that a non-disabled colleague who is at work has not been treated in the same way, and the only difference between them is his/her disability. Therefore, he/she has been discriminated against.

However, the reason for dismissal now has to be construed narrowly, so employers should have an argument that the reason for dismissal was the absence, not the disability. This is based on the “underlying reason” being argued as the absence, not the disability. Also, employers can now argue that the correct comparator is a non-disabled employee who is absent, not a non-disabled employee who is at work. Provided both the disabled and non-disabled employees are treated the same (i.e. dismissed), the employee’s claim should fail.

This assumes, however, that the Tribunal accepts the reason for dismissal is the absence and not the disability. It also does not remove your other obligations under the Disability Discrimination Act (DDA), including the need to make reasonable adjustments.

BAD NEWS

The European Court of Justice had to decide if UK employees were protected by “discrimination by way of association”.

In this case, the employee was criticised for being “lazy” and manipulating her working conditions in order to care for her disabled son. She was not disabled, but claimed that the European Equal Treatment Framework Directive (ETFD) was intended to outlaw discrimination in her circumstances.

The European Court of Justice held that this was the intention of the ETFD, so the matter was passed back to the Tribunal to see if the DDA wording covered such a claim. Our view had been that on a strict interpretation of the wording such claims are not covered. However, in November 2008 the Tribunal held that the wording of the DDA sufficiently covered such claims (thereby avoiding the need for Parliament to amend the DDA).

So, as a result, we now have discrimination by way of association. It does not just stop at disability discrimination. It extends to other areas of discrimination covered by the ETFD - religious and belief, sexual orientation and age.

Therefore, if your employees are discriminated against because, e.g. their sibling is gay, their partner is a different religion or old/young, they may well have claims.

It is now more important than ever to train your employees on diversity issues to make them aware of what is acceptable. This is something with which Downs can help you.

If you would like further advice with regard to these or other employment related topics, contact either Matthew Kilgannon on 01306 502217, email m.kilgannon@downslaw.co.uk or Lisa Martin on 01306 502218, email l.martin@downslaw.co.uk.