A busy month for discrimination law

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It's been a busy few weeks for judgments; we round up the most recent discrimination cases below.

When is cancer a disability?

Certain conditions – including cancer – are specifically deemed to be disabilities for the purpose of protection under the Equality Act 2010 (EqA). In such cases, claimants are released from the usual requirement to demonstrate an impairment with a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

The claimant in *Lofty v. Hamis* suffered from a "lentigo maligna", which her consultant described as a "pre-cancerous lesion which could result" in skin cancer. She had successful treatment to remove the malignant cells before they had spread. The employment tribunal decided that the successful treatment meant that the claimant did not have cancer. On appeal, the Employment Appeal Tribunal (EAT) overturned that decision, holding that:

- The relevant point of determination is the point of diagnosis (and not after treatment).
- The evidence before the tribunal was that the claimant had "in situ" or "stage 0" melanoma i.e. cancerous cells in the top layer of her skin.
- "Pre-cancer" was on the evidence to be viewed as medical shorthand for a particular stage in the development of cancer. It did not mean that there was no cancer for the purposes of the EqA.
- The law does not distinguish between invasive and other forms of cancer, and "there is no justification for … a tribunal to disregard cancerous conditions because they have not reached a particular stage".

The EAT therefore substituted a finding that the claimant had a deemed disability – cancer – under the EqA. This makes it important that employers do not rely on medical shorthand. Pre-cancer is still cancer for the EqA.

What happens if an employer does not know an employee is pregnant when deciding to dismiss her but finds out before the dismissal takes effect?

The employer in *Really Easy Car Credit v. Thompson* decided to dismiss the claimant during her probationary period because of her "emotional volatility" and work ethic. It took this decision on 3 August 2016 but did not immediately inform the claimant. The next day, the claimant notified her employer that she was pregnant. On 5 August 2016, she was given a dismissal letter dated 3 August 2016. The claimant alleged that the dismissal letter had been falsely

backdated and that the decision to dismiss her had been taken after the employer knew about her pregnancy and for that reason.

The employment tribunal rejected the claimant's factual account and held that the decision to dismiss had been taken on 3 August 2016. However, it went on to decide that, once the employer learned of the pregnancy, it should have been obvious that her behaviour and conduct was pregnancy related. On that basis, the employer had failed to establish that the dismissal was not related in any way to the claimant's pregnancy.

The EAT disagreed, holding that:

- To be liable for a pregnancy related dismissal, the employer had to know, or believe, that the claimant was pregnant when it took the decision to dismiss.
- Based on the tribunal's findings of fact, the employer could not have known about the claimant's pregnancy when it took the decision to dismiss on 3 August 2016.
- The first instance employment tribunal appeared to have found the employer liable by omission – for failing to take positive steps to revisit its decision having learnt of the pregnancy. That was wrong and no such obligation exists in law.

Nonetheless, the case was sent back to the employment tribunal to consider the reason for the dismissal, whether it was because of the claimant's pregnancy, and whether that was the reason or the primary reason as at 5 August 2016 (no findings of fact had been made in this regard by the tribunal).

As always, be very careful in such situations. Even if the employer is not aware of the pregnancy, it may be difficult to prove that.

Was forfeiture of LTIP awards unlawful age discrimination?

In *Air Products v. Cockram* the claimant resigned at the age of 50. This meant that he forfeited his right to an unvested award under the rules of his employer's long-term incentive plan (LTIP).

The LTIP rules did however contain an exception to the general principle of forfeiture on termination. This exception allowed employees who left employment on or after a customary retirement age – which was fixed at age 55 – to retain their awards.

On that basis, had the claimant been 55 (and not 50) at the time of resignation he would have retained his award. He brought a claim alleging that this rule amounted to unlawful direct age discrimination. Unlike all other forms of direct discrimination, direct age discrimination claims can be defended on the basis that the discrimination in question is, broadly, a proportionate means of achieving a legitimate aim.

The Court of Appeal (CA) reinstated the decision of the employment tribunal – reversing the decision of the EAT – holding that (among other things):

- The employment tribunal had been entitled to find that the employer's aim of consistency between those defined benefit pension members (such as the claimant) who could draw their pension at 50 and defined contribution members who could not draw their pension at 50 was "a legitimate social policy aspect of intergenerational fairness".
- In addition, the CA agreed that on the evidence available the tribunal had been entitled to find that the LTIP rule

was a proportionate means of achieving that aim.

The claim for age discrimination did not therefore succeed. Detailed evidence to support the claim and its impact was produced in this case. Without it the decision is likely to have been different.

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