

Network: 2 July 2008

Unreasonable delay meant that dismissal was automatically unfair

Yorkshire Housing v Swanson

In this case the Employment Appeal Tribunal held that a dismissal is automatically unfair when the employer delays unreasonably in following the statutory dismissal procedures. The EAT stated "with some unease" that the delay provisions were mandatory rules that had to be followed which would lead to a finding of automatic unfair dismissal. The EAT acknowledged the difficulty in construing unreasonable delay as amounting to non completion as provided for in the rules, but stated that although the procedure would be completed, albeit late, for policy reasons there should be a finding of automatic unfair dismissal.

In this case the employer had delayed for five months between holding the disciplinary meeting and sending the letter dismissing the Claimant and on the facts this was found to have been unreasonable delay.

Positive Discrimination

Last week the Equality Minister Harriett Harman announced that the new Equalities Bill will permit positive discrimination on grounds of sex and race. She said that firms should be able to choose a woman over a man of equal ability if they wanted to, or vice versa.

The new Equalities Bill proposed would also force employers to disclose salary structures in a bid to close the gender pay gap. Ms Harman said that the proposed bill due later this year would "address the serious inequalities that still exist" in the UK. Ms Harman told the BBC last week that female part-time workers still earn forty percent less per hour than their full-time male counterparts.

It is also proposed to extend the legislation on age discrimination to the provision of goods and services. However it is likely that there would be exemptions, for example for holidays aimed at certain age groups.

Disability Discrimination

Mayor and Burgesses of the London Borough of Lewisham v Malcolm House of Lords

In this case the House of Lords handed down a judgment setting down a far more logical approach to the Disability Discrimination Act and in light of which it will be more difficult for Claimants to succeed in a disability discrimination case.

The case concerned a housing law issue, namely whether an individual had been discriminated against so far as the letting of a property to him was concerned. However the issues and judgment itself is highly relevant to employment law cases.

According to the 1995 Act it is unlawful for a person to discriminate against a disabled person for a reason which relates to the disabled person's disability, if he "treats them less favourably than he treats or would treat others to whom that reason does not or would not apply", if he cannot show that the treatment in question is justified.

The House of Lords commented that this was an ambitious and complex Act, the purpose of which was to prevent disabled people being treated disadvantageously because of their disability.

The issues to be considered in this case included for example what was the reason for the treatment (the treatment in this case being the claim for possession of the property), whether the reason related to the individual's disability and whether it was relevant that the London Borough Lewisham knew of the individual's disability.

In this case Lewisham said that the reason for seeking possession of the property was that Mr Malcolm had sublet the property and moved elsewhere and that that was a pure housing Management decision which had nothing to do with his mental disability. Was Mr Malcolm discriminated against on the grounds of his disability?

The difficult and important question as to the appropriate comparator was considered i.e. with whom should Mr Malcolm be compared? Should he be compared with (a) people without a mental disability who have let the Lewisham flat and gone to live elsewhere; (b) tenants of Lewisham flats who have not sublet and gone to live elsewhere and; (c) some other comparator group and if so what?

On the basis of previous case law the approach to be taken has been comparator (b). The House of Lords challenged this approach by showing how illogical it was. After all if a tenant had not sublet and gone elsewhere, the question of discrimination would not have arisen. A better and more appropriate comparison is with comparator (a) i.e. the individual has acted in exactly the same way as Mr Malcolm did but who does not have a mental disability. A majority of the House of Lords found this to be the correct approach.

The House of Lords also found that a person can only be liable for discrimination if they know that the individual is disabled and "know" will also include imputed knowledge if necessary.

If you have any questions about these or other employment issues please call [Heather Cowley](#) on 01582 731161.

The information given in this newsletter was, at the time of publication, believed to be a correct statement of the law. However, readers should seek specific legal advice on matters arising, and no responsibility can be accepted for action taken solely in reliance upon such information.