

Wage fixing for the disabled sick?

Ten years on from the introduction of disability discrimination into employment law, the legislation still has the power to make headlines, most recently in relation to sick pay. This issue was first raised in *Nottinghamshire County Council v Meikle* [2004], which addressed the extent of an employer's obligation to continue paying full sick pay to a disabled employee beyond the requirements of the employer's normal policy.

In the *Meikle* case, the employee suffered from deteriorating vision but the employer failed to make any adjustments to accommodate her difficulties. She was absent due to her deteriorating vision and put on half pay on the basis of the employer's policy, which was to reduce pay after a certain length of sickness absence. The Court of Appeal held that the cause of Mrs Meikle's absence was the employer's failure to make reasonable adjustments and placing her on half pay put her at a substantial disadvantage. A reasonable adjustment would have been to retain her on full pay but, as the employer failed to do so, putting her on half pay was less favourable treatment for a disability-related reason and this was unjustified.

To many this decision was counterintuitive. It seemed logical that a failure to make reasonable adjustments would lead to compensation and that compensation would include loss of earnings once sick pay was reduced to half pay. But a finding that the reduction in sick pay was itself a failure to make a reasonable adjustment seemed a step too far. The unions were quick to argue that *Meikle* meant that any absence related to disability had to be paid at full pay until the employee recovered regardless of whether or not the sickness resulted from any failure by the employer to make reasonable adjustments. Given the likely cost of such a finding to employers it was only a matter of time before a test case came along.

Some clarity has now been provided by the EAT's recent decision in *O'Hanlon v The Commissioners for HM Revenue and Customs* [2006], as to the extent to which a disabled person should be treated more favourably than a non-disabled person for the purposes of paying sick pay.

Disability discrimination legislation

The *O'Hanlon* case primarily addresses two main provisions of the Disability Discrimination Act 1995 (the DDA): an employer's duty to make reasonable adjustments and disability-related discrimination.

Under section 3(A)(2) and 4(A)(1) of the DDA, where a provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage in comparison with non-disabled persons, the employer has a duty to take such steps as is reasonable, in all the

circumstances of the case, to prevent that provision, criterion or practice, or feature, having that effect. If an employer fails to comply with this duty, this will constitute disability discrimination. There is no longer any justification defence for an employer's failure to make reasonable adjustments. Rather than asking was the employer's failure reasonable and justified, the question is now was it reasonable?

The DDA expands on the issue of reasonable adjustments under section 18B, which lists examples of the factors which should be considered when deciding whether or not it would be reasonable for an employer to make an adjustment. These factors include the extent to which it is practicable for an employer to take the step, the financial and other costs which would be incurred and the nature of the employer's activities and the size of his undertaking.

Disability-related discrimination falls under section 3(A)(1) of the DDA. An employer will discriminate against a disabled person if, for a reason which relates to that person's disability, he treats him or her less favourably than he treats or would treat others to whom that reason does not or would not apply. Only this strand of disability discrimination can be justified, and then only where the reason for it is both material to the circumstances of the particular case and substantial.

The O'Hanlon case

Mrs O'Hanlon had been employed by Her Majesty's Revenue and Customs (HMRC) since 1985. She had suffered from clinical depression since 1988, which was accepted between the parties as amounting to a disability under the DDA. She took significantly long periods of absence and, from 1988 to 2002, her total sickness absence was 365 days, only 45 of which did not relate to her disability.

Under HMRC's sick pay rules, employees were entitled to receive full pay for up to 6 months' sickness absence in any period of 12 months, and half pay for a further maximum period of 6 months. This was subject to an overriding maximum of 12 months' paid sickness absence in any period of 4 years. HMRC's rules then provided that employees may receive the lesser of their equivalent pension rate of pay, or half pay. The application of the rules meant that Mrs O'Hanlon was on pension rate for all absences after October 2002. The HMRC sick pay scheme also provided for a further 40 days' additional sick absence with full pay. Mrs O'Hanlon applied for this but HMRC would not grant this on a retrospective basis.

Mrs O'Hanlon brought a tribunal claim under the DDA. She claimed that she should have received full pay for all her disability-related sickness absences. She claimed that she was substantially disadvantaged by the sick pay rules, compare to a non-disabled person, and that HMRC had failed to make any reasonable adjustments to counter that disadvantage, to enable her to continue to receive full pay during her absence. She claimed that she had also been

subject to disability-related discrimination, as her absence was related to her disability, and the failure to continue paying her was not justified.

The tribunal decision

The tribunal, at first instance, held that HMRC's sick pay scheme placed Mrs O'Hanlon at a substantial disadvantage but HMRC had taken such steps as were reasonable in all the circumstances. To pay her full pay would have required HMRC to change the policy and provide all disabled people with the right to full pay on sick leave. It considered that this would be a costly exercise and had the potential to cause a sense of animosity and unfairness between disabled and non-disabled sick employees. Therefore, whilst Mrs O'Hanlon was placed at a substantial disadvantage, it was not reasonable to expect HMRC simply to pay her salary in full.

The tribunal also concluded that Mrs O'Hanlon was not being treated less favourably because of her disability, on the basis that her pay was reduced because she was not at work after 6 months and she was therefore treated the same as a non-disabled person who was absent for the same period of time. They also found that even if the treatment did amount to unlawful discrimination, it would be justified. Mrs O'Hanlon appealed to the EAT.

The EAT decision

The EAT allowed Mrs O'Hanlon's appeal in part only. Its decision emphasises the parameters and purpose of the DDA and provides useful guidance for employers going forward.

Reasonable adjustments

The EAT found that the sick pay rules constituted a provision, criterion or practice potentially placing Mrs O'Hanlon at a disadvantage and a duty to make reasonable adjustments was applicable. However, it held that it would be a "very rare case indeed" for an employer to be obliged, as a reasonable adjustment, to give more sick pay to a disabled employee than it would otherwise give to a non-disabled employee who in general does not suffer the same disability-related absences.

The EAT commented that such an obligation would mean that tribunals would be entering into a form of "wage fixing for the disabled sick" and would fall foul of the purpose of disability discrimination legislation, which is to assist the disabled to obtain employment and to integrate them into the workforce. The EAT noted that the provisions of section 18B of the DDA, relating to the scope of reasonable adjustments, reinforce this approach. None of the provisions suggest that it will ever be necessary simply to put more money into the wage packet of the disabled. The EAT also stated that the DDA is designed to recognise the dignity of the disabled and to require modifications which will enable the disabled to play a full part in the world of work, not to treat them as "object of charity".

The EAT in the O'Hanlon case did not consider that the *Meikle* case led to an automatic finding that the payment of full pay would be required as a reasonable adjustment. It noted that it was never suggested in *Meikle* that the adjustment lay simply in granting full pay. The EAT proposed an alternative analysis of *Meikle*, which was that there was a failure to make reasonable adjustments and the loss flowing from that breach was the loss of pay flowing from the fact that she was absent sick.

Disability-related discrimination

The EAT held that the tribunal had erred in its finding that there was no disability-related discrimination. The tribunal had relied on *London Clubs Management Ltd v Hood* [2001], where the employer decided to stop offering sick pay to all employees, including Mr Hood, who had been absent due to his disability. It was held in this case that this did not constitute disability-related discrimination. However, the EAT noted that Mrs O'Hanlon's claim was based on HMRC's failure to pay full pay, rather than a decision to withdraw sick pay, where no such pay is awarded to anyone. The reason for HMRC's failure to pay Mrs O'Hanlon full pay under its sick pay rules was clearly related to her disability.

Justification

Although the EAT differed from the tribunal by finding that there had been disability-related discrimination, it held that the discrimination was justified. As it was found that it was not a reasonable adjustment for HMRC to adjust the sick pay rules, it followed that the disability-related discrimination could be justified.

The EAT noted that there were powerful economic reasons for the employer to adopt its sick pay rules. It would have cost a very significant sum to pay full pay to all disabled employees who were absent sick in circumstances where their pay would otherwise be reduced. There was therefore a material and substantial reason for the discrimination. The EAT also added that the justification could simply be the fact that the employer considered it appropriate to pay those who attend work and contribute to the operation more than those whose absence prevents that.

There is no doubt, that the *O'Hanlon* case will come as a relief to those who have to budget for sickness absence, by limiting the obligation to pay full pay to a disabled employee during sick leave, after contractual entitlement has been exhausted. The judgment does rely on emotive language to emphasise the parameters of employers' obligations towards disabled employees, and it remains to be seen how this will be applied in other decisions under the DDA.

Public duties

It has always been central to disability discrimination legislation that an employer's duty to make reasonable adjustments for disabled employees entails an element of more favourable treatment. This is also mirrored in the forthcoming disability "general duty" which, from December 2006, will place a duty on public authorities, amongst other things, to "take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons." In *O'Hanlon*, the tribunal were concerned that extending full sick pay to the disabled sick had the potential to cause a sense of animosity and unfairness between disabled and non-disabled sick employees. The new general duty on public authorities however, unlike the comparable general duty in race legislation, contains no duty to promote good relations between the disabled and the non-disabled.

The public duty is also a step ahead of the case law in relation to the way employers interact with the disabled. In *Tarback v Sainsbury's Supermarkets Ltd* [2006], the EAT noted that an employer does not have a separate and distinct duty to consult such employees in relation to the duty to make reasonable adjustments. Whilst this may constitute good practice, the key question was considered to be whether, on an objective basis, the employer complies with its obligation to make reasonable adjustments in the circumstances. Public authorities currently working away on their Disability Equality Schemes will know that under the Disability Discrimination (Public Authorities)(Statutory Duties) Regulations 2005, they must "involve" disabled people in the development of their Scheme – a more interactive process than consultation.

Summary

O'Hanlon provides welcome clarification that no disabled employee on long term sickness absence has an automatic right to full pay by virtue of the DDA. However, no automatic right does not mean no right at all and the circumstances of each case will always need to be considered. The law will continue to develop and it will be interesting to see what impact the duties on the public sector from December 2006 will have on both case law and practice.

Case references

O'Hanlon v The Commissioners for HM Revenue and Customs [2006] EAT 0109/06
Tarback v Sainsbury's Supermarkets Ltd [2006] IRLR 664
Nottinghamshire County Council v Meikle [2004] IRLR 703
London Clubs Management Ltd v Hood [2001] IRLR 719

(First published in Employment Law Journal in October 2006)

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