

Newcastle upon Tyne NHS Hospitals Trust v Armstrong and ors IDS Brief 898

A large number of female domestic ancillary workers at a hospital claimed that they should receive the same pay as porters who were principally male and who received bonus payments which the domestic workers did not. The background to the difference was that in 1985 the domestic work was contracted out and the domestic ancillary workers lost their bonus payments whilst the porters remained employed by the hospital and retained their bonus payments. The period covered by the claims extended six years back from the commencement of proceedings, i.e. to 1994/5. The Trust argued that the difference in contracting out arrangements amounted to a 'genuine material factor' (GMF) and that therefore they had a good defence against the claim.

The Employment Tribunal found that the decision not to put the porters' function out to competitive tender was tainted by sex discrimination and as such the decision had to be objectively justified. The Trust argued that the decision was justified by a number of factors including the fact that it had been compulsory to engage in a Compulsory Competitive Tendering (CCT) exercise in respect of domestic work but not porter work. It had not been possible to remove the differential subsequently. The Trust argued that given this position the GMF was justifiable as a proportionate means to achieve a legitimate purpose.

These arguments were tried as preliminary issues but were rejected by the Tribunal which found in favour of the female domestic workers. The Trust appealed to the EAT and then to the Court of Appeal which remitted various aspects back to the original tribunal for reconsideration (*Armstrong v Newcastle upon Tyne NHS Hospital Trust* [2006] IRLR 124).

When the case came back to it in 2007, the employment tribunal found that: (i) the factor relied on by the Trust was "tainted by sex" because it originated in an intention to match market rates which, as it appreciated, were depressed by factors peculiar to women; and (ii) the continuation of the resulting differential in the period to which the complaint related had not been shown to be objectively justified by the costs or industrial relations implications of removing it or by the employer's attempts to phase it out. The Trust appealed to the EAT.

The EAT dismissed the Trust's appeal. If market rates of pay for a job are affected by the fact that most people doing the type of job in are women, that means that a decision to take market rates into account in deciding pay levels for that job is "tainted by sex". The pay policy provision will therefore be in breach of the Equal Pay Act 1970 unless objectively justified - which in this case it was not.

Keeping You One Step Ahead

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Patel v Oldham Metropolitan Borough Council [2010] IRLR 280

In order to fall within the DDA's definition of disability, the effect of an impairment has to be "long term". This can be satisfied by showing that the period for which it lasts is likely to be at least 12 months.

Between February 2005 and December 2005, Mrs Patel suffered myelitis (inflammation of the spinal cord). During that time she had three periods of absence from work totalling 112 days. By January 2006, she developed myofascial pain syndrome (painful muscular trigger points). In September 2006, she suffered an injury whilst restraining a pupil at a swimming lesson. She developed pain in the left shoulder and neck; and the pain in her left groin and leg increased. She was absent from work from 5 October 2006 for 141 days until her dismissal by reason of capability.

The employment judge held that she was not disabled, on the basis that she had suffered from two different impairments, myelitis and myofascial pain syndrome.

Each impairment had lasted for less than 12 months, and it was not "likely" that either would have lasted for at least 12 months. Although the two impairments had cumulatively lasted for more than 12 months, the judge held that they could not be taken together for the purposes of considering whether Mrs Patel was disabled for the purposes of the DDA.

The EAT upheld Mrs Patel's appeal, ruling that the duration of related consecutive impairments can be aggregated for the purpose of meeting the long-term threshold. When deciding whether a person is disabled, fine distinctions between one medical condition and its development into another are to be avoided.

The effect of an illness or condition likely to develop or which has developed from another illness or condition forms part of the assessment of whether the effect of the original impairment is likely to last or has lasted at least 12 months.

Secretary of State for Work and Pensions v Alam [2010] IRLR 283

This ruling by the EAT is a correction to the test for determining whether an employer is relieved of the duty of reasonable adjustment by virtue of S.4A(3)(b) of the DDA, which provides that there is no duty "if the employer does not know, and could not reasonably be expected to know ... that that person has a disability and is likely" to be placed at a substantial disadvantage in comparison with persons who are not disabled as set out in S.4A(1). In *Eastern and Coastal Kent PCT v Grey*, the EAT held that an employer had to satisfy four conditions, accumulatively, to be relieved of the duty to make adjustments, but this division of the EAT held that there are only two relevant questions.

First: "Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in S.4A(1)?" If not: "Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4A(1)?" In particular, according to this division of the EAT, knowledge of the disability is not sufficient to impose a duty. If the employer could not reasonably have been expected to be aware of the relevant effect, no duty to make reasonable adjustments arises because the reasonableness of his ignorance would make it unreasonable to impose on him the duty to adjust.