



On The Case

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No entitlement to wages where remanded in custody

Mr Burns was arrested and charged with 13 criminal offences. He was remanded in custody for six months pending trial. During that period, Santander did not pay him. Mr Burns claimed unlawful deduction from wages. The central issue was: is an employee who is remanded in custody pending the outcome of criminal charges entitled to be paid his contractual pay? The general rule is that if a worker is ready and willing to perform their contract, but is unable to do so by reason of sickness or injury, or some other unavoidable impediment, then depending on the terms of the contract, they may be able to claim their pay. Mr Burns argued that he had been ready and willing to perform his contract but had been prevented from doing so because of the unavoidable impediment of being remanded in custody. So, a further question arose: if someone is remanded in custody, is that unavoidable or avoidable?

The tribunal held that as Mr Burns had not been able to work because his own conduct had led to the court remanding him in custody pending trial, there was no unlawful deduction from wages. The EAT agreed. Mr Burns' remand in custody was an avoidable impediment. Therefore, it was implied that he was not entitled to his wages for the period of remand. Although the decision to remand him in custody was the court's and not Mr Burns', the question was whether, by his own voluntary actions, he had contributed to that state of affairs. The tribunal's analysis on that issue could not be faulted. Mr Burns had conducted himself in such a way that, according to the criminal court, he should be deprived of his freedom and therefore deprived of his right to attend work.

Case: Burns v Santander UK plc [2011] IRLR 639

Finding of direct disability discrimination impossible on the facts

Under the Disability Discrimination Act 1995, 'direct disability' discrimination occurs where a disabled person, with the same abilities as a non-disabled person, is treated less favourably than a non-disabled person was, or would have been, treated in like-for-like circumstances, purely because he or she is disabled and for no other reason. 'Direct disability' discrimination can never be justified. 'Direct disability-related' discrimination occurs where a person is treated less favourably for a reason relating to his or her disability compared to how another person to whom that reason relating to disability does not apply was, or would have been, treated in the same circumstances. Here, the focus is on the reason relating to the person's disability – not just because the person is disabled. However, 'direct disability-related' discrimination can be justified, if, the reason for the treatment is both relevant to the circumstances of the particular case and substantial.

Mr Chweiden (C) claimed that his dismissal for redundancy constituted direct discrimination and/or disability-related discrimination because he had been selected for not putting in the hours necessary to extend his client base, and it was his disability which prevented him from working those hours. A tribunal dismissed the disability-related discrimination claim on the basis that a non-disabled person in the same position who had not been able to put in the hours would also have been dismissed. However, it upheld the direct discrimination claim as C's disability contributed to the dismissal. The EAT found it difficult to see how a tribunal could find that C had suffered direct discrimination where the disability-related discrimination claim had been rejected, but nevertheless remitted the case to the employment tribunal to consider whether direct disability discrimination had occurred. The Court of Appeal upheld the employer's appeal. The tribunal had found that the reasons for C's treatment were related to his disability, not because of the disability itself. Therefore, a claim for direct disability discrimination could not possibly succeed and there was no point in remitting the decision to the tribunal.

Under the Equality Act 2010, the test for direct disability discrimination is the same. However, the concept of direct disability-related discrimination no longer applies and this case highlights how the law has changed, in particular, removing the need for a comparator. Now such a claim would be brought under S.15 "Discrimination arising from disability", where discrimination occurs if a disabled person is treated unfavourably because of something arising from, or in consequence of, the disability, e.g. in this case the inability to put in extra hours to build the client base. However, the defence of justification remains, if it can be shown that the treatment is a proportionate means of achieving a legitimate aim.

Case: JP Morgan Europe Ltd v Chweidan [2011] IRLR 673

Treatment based on how behaviour 'appeared' was not discrimination

Constable Aitken (A) was found to have a tendency to binge drink and was also diagnosed as having anxiety and obsessive compulsive disorder (OCD). At a work Christmas party A, having drunk heavily, acted in a sexist, aggressive and threatening manner to his colleagues. The Force's chief medical officer reported that A was fit only for restricted duties and an office-based role with little public contact. There were continuing concerns about his behavior. A consultant psychiatrist, advised that while A did not present a specific risk while working in an office-based role with women, A could pose a danger to himself and others. Following a management meeting, A was moved to a role that involved close supervision and no public contact. The force decided to proceed with medical retirement as medical opinion then showed that A's OCD was likely to be indefinite and that he was incapable of performing ordinary duties as a police officer. However that decision was reversed on appeal, but a psychiatrist recommended that A remain absent from work and have further treatment for his OCD.

A alleged that the Force's handling of the Christmas party incident, its reliance on that incident in deciding to medically retire him, and acting on assumptions about mental illness amounted to disability discrimination. The Court of Appeal agreed with the tribunal's decision to reject A's claim. There was, in reality, no reason for A's colleagues to have feared him. However, the force acted not on the basis of stereotypical assumptions about mental illness, but on the basis of how A appeared to others, and would have treated a non-disabled person whose behavior also appeared to be threatening and aggressive in an identical way. The Court also declined to address A's argument that the Force had acted on the basis of his perceived disability. The tribunal had expressly rejected that allegation, finding instead that the employer acted on the basis of how A appeared to others. That was fatal to the contention that A was treated less favourably because of a mistaken belief, based on his behaviour, that he was suffering from a disability that he did not in fact have.

Case: Aitken v Commissioner of Police of the Metropolis IDS Brief 930