Social security appellant can bring disability discrimination claim under EA

Kurtagja v Department of Work and Pensions Sheffield County Court Case No. 3SE507111

Implications for practitioners

The Equality Act 2010 (EA) prohibits discrimination in the exercise of a public function. Although not a judgment on the merits of the claim, this judgment explores the capacity of the EA to challenge the operation of the social security system. It also has some useful comments on the courts' evolving approach to challenges on 'abuse of process'.

Facts

Mr Kurtagja (K) was granted employment support allowance (ESA) in March 2011 on the basis that he had depression and post traumatic stress disorder. In August 2012 the Department of Work and Pensions (DWP) instructed him to attend a medical assessment. He failed to attend.

In response to a letter from DWP asking the reason for this, K stated that he had forgotten the appointment due to the side effects of medication for depression. DWP subsequently informed him that his benefit would be stopped because of his failure to attend. K's appeal against this decision was rejected by DWP in a letter dated November 27, 2012 on the basis that he had failed to show good cause for failing to attend the assessment. In June 2013 K's appeal was heard by the Social Entitlement Chamber of the First Tier Tribunal (FTT). The appeal was allowed, on the basis that a side effect of K's medication caused memory loss and in any event this was the first failure by K to attend an appointment and was rectified by him when it was brought to his attention.

County Court

K brought EA claims for direct and indirect disability discrimination, for discrimination arising from a disability and for failure to provide reasonable adjustments in relation to the exercise of a public function. Whist the success of his FTT appeal meant that his benefit had been re-instated and arrears paid, K had suffered feelings of helplessness, frustration and anxiety as a result of the decision to stop his benefits, lost out on a community care grant (due to the absence of passporting benefits) and experienced the extreme stress of risk of homelessness due to rent arrears resulting from suspended benefits.

K sought:

- a declaration that he had been discriminated against;
- an order that the DWP change its policies to take into account existing medical evidence of those who miss medical assessment appointments in determining 'good cause' and to routinely offer a second medical to those with recorded mental health issues unless exceptional circumstances apply; and
- damages for injury to feelings.

DWP's application to strike out

DWP applied for the claim to be struck out under Civil Procedure Rules: CPR 3.4(2) provides that a court may strike out a statement of case if it appears to the court:

a) that it discloses no reasonable grounds for bringing or defending the claim;
b) that it is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

There were five strands to the DWP's argument; specifically it argued:

1. This was an attempt to re-litigate previously decided issue. *Henderson v Henderson* [1843] established that the parties should bring forward their entire case during the course of one set of proceedings. The appeal before the FTT was a hearing at which K had had his concerns ventilated and been granted a remedy.

   However, the judge ruled that *Henderson* did not apply here. The issue before the FTT was whether the K was entitled to ESA, whereas the issue presented in this claim is whether the DWP acted in a discriminatory manner so as to give rise to a cause of action under the EA. That claim could not have been brought before the FTT.

2. DWP claimed abuse of process in that the claim should have been brought by way of judicial review.

The DWP argued that K's claim sought 'sweeping mandatory orders' affecting a wide class of people such that it should have been brought by way of judicial review. This claim, it was suggested, was an attempt to circumvent the time-limit for judicial review, which is shorter than that for EA claims (3 as opposed to 6 months)

The judgment emphasised that this issue of choice of proceedings should be considered in the light of the recent changes brought about by the CPR, such that parties are now under an obligation to help the court ensure that cases are dealt with expeditiously and fairly. In principal the plaintiff may choose the court and the procedure which suits him best. The onus lies upon the DWP to show an abuse of process and *'the burden is not a light one to discharge.'* Unjustified delay can be taken into account, as can the nature of the claim. Here the claim is for damages rather than review a discretionary remedy (where judicial review might be more suitable).

Furthermore, s119 EA states that if a claim is brought in the county court, then the range of potential remedies includes not only those remedies which could be awarded in proceedings in tort, but also the type of remedy available on a claim for judicial review. Thus in relation to the EA, parliament has expressly stated that proceedings in the county court under the Act may seek judicial review type remedies. Taking these factors into account the judgment held that there was no abuse of process in failing to bring a judicial review.

3. The DWP operates a scheme offering *'Financial Redress for Maladministration'*, which includes cases where there had been mistakes. The DWP submitted that this was the correct route of redress, and on that basis these proceedings were an abuse of process. The judgment ruled that since the scheme had no statutory basis there was nothing before the court to suggest an abuse of process to bring this claim.

4. Social Security Administration Act 1998

   S17 of this Act provides for the finality of decisions made under it. The DWP cited *Jones v Department of Employment* [1989] 1 QB 1 as establishing that no claim for damages could arise out of decisions which are subject to appeal rights to the FTT.

   However, the judgment distinguished *Jones* as a case in which the court considered whether there was a common law duty of care in making a decision (establishing that there was not). Here there was a clear statutory right to compensation under the EA.

5. Statutory authority

   Schedule 22 Paragraph 1 EA provides that there is no contravention of certain parts of the Act if a person does anything which they *'must do pursuant to a ... requirement in an enactment'*. The DWP sought to rely on this exception.

   In rejecting this submission, the judge described it as 'startling' because the exception does not provide for immunity where there is simply a statutory underpinning for action. It applies only where the actor is compelled by statute to act in the manner complained of. Here the statute vests a discretion in the decision-maker. It does not compel them to make a decision which is discriminatory.

For the increasing number of claimants whose benefits are suspended, the distress and economic consequences are not redressed even where benefits are subsequently reinstated and backdated. This case raises the prospect of securing compensation through the EA where disability discrimination can be established.

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