TALK BY ADRIAN LYNCH Q.C.
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Introduction

1. The central issue with which this short talk is concerned is how can employers successfully conduct capability and absence procedures that may result in dismissals in the context of employees who fall within a protected characteristic. As to those characteristics the three primary areas in the context of capability and absence issues are:

   (1) gender;
   (2) disability;
   (3) age.

2. In terms of gender, naturally, this refers to the implications of pregnancy and childbirth and maternity in regard to attendance and health. However, the rules relating to these issues are now very clear and very detailed and I will not seek to deal with them in this talk. Hence, I will focus on capability and age discrimination.

The Conundrum

3. The difficulty facing employers in the context of dismissals for capability or absence reasons, and disability discrimination is clear. The protections for those with disabilities are founded on the very fact that workers with disabilities can and do, through no fault of their own, experience difficulties in performing work related tasks and/or coping with the work environment and,

of course, can be prone to levels of absence in excess of other workers. In the light of that, clearly the application of capability procedures and absence management policies to such workers is a very delicate matter requiring a sensitive and understanding approach by the employer.

4. As to age, once again it is recognised that different ages in regard to the overwhelming majority of people bring different but very real effects in terms of work, both in terms of the inexperience of the young and the failing powers of the older staff. What is more, age discrimination is complicated by the relationship between generations. Encouragement of attracting young workers can negatively impact on the old. Protecting the old can block the young.

A General Word of Caution

5. There is no escaping the pervasive need placed on employers in regard to the issue of dismissals in connection with those with disabilities and those reflecting common feature of ageing (for example forgetfulness) to justify the actions taken. As always that issue of justification is tested by reference to the identification by the employer of the pursuit of a legitimate aim and doing so through proportionate or "reasonably necessary" measures. Uniquely, in age discrimination justification can be a defence to direct discrimination (for example the setting of a fixed age for retirement). It has been held in many cases that the test for justification is more strict in direct discrimination cases in terms of the scope of the "legitimate aims". However, in my view, in practice that apparent restriction will have little practical effect.

6. This is because of the fluidity or elasticity of the legitimate aims recognised in the EU for justifying direct age discrimination. By Article 6 of the Framework Directive 2000/78 those aims "include" "legitimate employment policy, labour market and vocational training objectives". These are supposed to be in contrast to more limited aims, such as encouraging competitiveness. However, in my view, in practice that dichotomy is likely to be illusory. What could be broader than the concepts of "employment policy" and "labour market objectives".

7. In terms of justification both in age and disability discrimination in my experience, and as is seen repeatedly in case-law, defences fail not because the employer cannot point to some "legitimate aim" that is being pursued by a particular policy or rule but because the means adopted to reach that aim are found not to be proportionate and appropriate. Employers should focus their attention on the steps necessary to demonstrate that the means used to achieve the aim are indeed proportionate and appropriate.

The EU

8. It would be impossible not to comment on the EU in these tumultuous, and to many profoundly worrying, times. The UK's prohibition of age discrimination comes through the implementation of the Framework Directive 2000/78. Disability discrimination was originally introduced by the UK outside of European influence. However, disability discrimination is part of the Framework Directive and there are multiple cases on it in the CJEU that have been applied by the UK Courts. Obviously, what is to happen in these areas remains to be seen as the effects of the Brexit vote become clearer over time.

However, at least for some two years or thereabouts the status quo will remain and, thereafter, it would require the repeal of UK legislation to change many of the current rules. However, after that two year period presumably the CJEU decisions will cease to be relevant to the UK's legal system, if there is still a "UK" at that time, other than in terms of a possible source of comparative law jurisprudence. Further, UK decisions taken on the basis of the EU law whilst the UK belonged to the EU will, of course, continue to be binding on UK authorities. That will not be affected by the UK's departure from the EU.

Disability Discrimination

9. The Equality Act 2010 which post dated the Framework Directive redefined aspects of disability discrimination in the light of EU law and UK case-law. In particular it introduced Section 15 which introduced a form of discrimination where the employer acts unfavourably towards a worker with a disability "because of something arising in consequence of the disability", and cannot justify that action. The effect of this is to be rid of any need to compare the disabled Claimant with a worker who does not have a disability. Hence, in short, Section 15 provides for claims for disability discrimination in circumstances that would have been excluded by the House of Lords' decision in Lewisham LBC v Malcolm [2008] IRLR 700 because under that case a non disabled worker would have been treated in the same way as the worker with the disability had the former worker acted in the same way.

10. As to the law on disability, whilst I am very aware of the familiarity of my audience with employment law, just to recap, in addition to section 15, the

standard provisions relating to direct and indirect discrimination apply to disability, see Sections 13 and 19 and Section 20 deals with reasonable adjustments.

Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216

11. I will turn now to a recent decision of the Court of Appeal in regard to disability discrimination. It provides an immensely helpful examination of the typical kind of problem faced by employers in regard to employees with disabilities. In particular the case deals with what is so often the central issue in such cases i.e. to what extent is the employer obliged to apply special rules to workers with disabilities, particularly in terms of the management of absence or the worker's inability to work effectively?

12. Ms Griffiths suffered from post viral fatigue, which was a disability in her case. The employer's policy on absence provided for the issue of a "written improvement warning" after 8 days' absence in any 12 month period. However, the policy allowed for (but did not require) an extension of that period of 8 days as a reasonable adjustment in cases of staff with disabilities.

13. Ms Griffiths had 66 days of absence in the relevant period. 62 of those days were because of her disability. The employer issues a written improvement warning to her. She appealed but those appeals were dismissed by the employer. Ms Griffiths argued that the employer was obliged to extend the period of permissible absence so as to allow her the 62 days of disability related absence before any such warning was issued as a result of further absence.

The Court of Appeal's Judgment

14. In essence the CA's Judgment seems to me, on the one hand, apparently to extend the scope of protection for workers with disabilities but, on the other, in practice allows employers to include absences resulting from disabilities in the calculation of relevant absence for, potentially, dismissal purposes.

15. As to the apparent extension of protections, the CA held the following:-

(1) First, in Griffiths the facts reflected a general rule that appeared to apply equally to all employees i.e. the risk of a warning after 8 days' absence. The ET and EAT had held that there could be no disability discrimination in such circumstances because there was equal treatment of all employees. The CA rejected this. The reality was that employees with disabilities, and Ms Griffiths in particular, were more at risk at exceeding the 8 day period than non-disabled colleagues. Hence, the apparent equality of the rule was illusory in practice.

(2) Secondly, an issue in Griffiths was whether the duty to make reasonable adjustments was engaged at all. In Griffiths that turned on whether the 8 day absence rule was a provision, criteria or practice that put a disabled person at a substantial disadvantage in comparison with the non-disabled. The ET and EAT had held that where a rule was applied equally to all employees the duty to make reasonable adjustments did not apply. All workers were treated the same hence there was no disparate impact or relevant "substantial disadvantage" of the rule and, as a result, there was no disability discrimination. The

CA rejected this view. The CA held that the duty to make reasonable adjustments did arise because in practice the 8 day absence rule had a greater negative impact on the workers with disabilities and, as a result, the duty to make reasonable adjustments arose because they faced a particular and substantial disadvantage. In the same way, the duty under Section 15, not to act unfavourably in consequence of a disability, applied, subject to justification, despite the rule about warnings being applied, on its face, equally to all workers.

(3) The EAT had accepted in Griffiths that the "steps" required by way of reasonable adjustments where there was a duty to make reasonable adjustments were confined to assisting a worker back to active service. In Griffiths, the EAT held the opposite was the case on the facts in that case and, as a result, there was no duty on the employer to make adjustments. In particular, the EAT accepted that the adjustment sought i.e. extending the permitted period of absence, would encourage the worker with disabilities not to work. The CA rejected that view.

Griffiths So Far

16. Clearly, the findings by the CA set out above in regard to the duty to make reasonable adjustments in that case increase the burden on employers and appear to be the opposite of assisting the employer in terms of being able to dismiss staff with disabilities even where those workers are absent for protracted periods.

17. However, the concluding finding of the CA reverses the above apparent effect of the CA's findings. In particular, the CA held that whilst reasonable adjustments could in theory include steps which were not directed at assisting the workers back into active service, it was very unlikely that an employer would be obliged to take such steps under Section 20 of the Equality Act. The CA in Griffiths adopted the same approach as the CA in the case of O'Hanlon [2007] IRLR 404. In that case the CA accepted in principle that allowing workers with disabilities not to have their disability based absences count for the purposes of calculating the expiry of the right to sick pay could, in principle, be a reasonable adjustment required by Section 20. In that regard, the CA in O'Hanlon recognised that, in practice, employees with disabilities were disadvantaged against their non-disabled colleagues despite the apparent equality of the rule as to sick pay in that case applying to all employees in the same way. However, the CA in O'Hanlon, just as in Griffiths, then held that there was in fact no duty on the employer to make that adjustment. It was not a "reasonable" adjustment.

18. In sum, and in the result, the CA accepted in Griffiths that there was no reason why the employer should not be free to take into consideration all the absences of an employee including those which resulted from a disability. That was in my view a general principle which applied not only to the issue of reasonable adjustments under Section 20 but also to Section 15 discrimination claims and Section 19 (indirect discrimination claims) in terms of justification as a defence to those claims. The same point of counting and including all absences whether or not they are the result of a disability is made in Royal Liverpool NHS Trust v Dunsby [2006] IRLR 351.

Lessons from the Above

19. Hence the question becomes what are the lessons from the above as to how employers should deal with the potential dismissal of employees for capability and absence reasons when those employees have disabilities which cause the difficulties?

20. In my view, when employers are faced with staff with disabilities who are subject to long and potentially repeated absences, they should, first, consider whether there are steps which are reasonable for them to take that would or might mean that the worker would be able to work more effectively and not be absent. However, if there are no such steps then the employer is fully entitled to take into account all absences and difficulties in working effectively whether or not they result from disabilities. That is true both in regard to the defining of the scope of reasonable adjustments and in terms of establishing justification in cases of indirect discrimination and Section 15 discrimination.

21. I would only add that I have emphasised above the need to focus on the use of proportionate means to achieve legitimate aims (which aims can include having effective, working staff) in regard to justification That applies, of course, to disability cases as in age discrimination. However, that does not mean that the mere fact that some less discriminatory alternative course might exist demonstrates a lack of proportionality in terms of the means adopted, see Kapenova v Department of Health [2014] ICR 884, a case concerned with the freedom of movement of workers.

22. However, I would add here that in addition to the above comments the other crucial element to focus upon in addition to proportionate means in justification is the need for consultation and discussion with the employee. That need to consult and discuss matters with the disabled employee can apply as part of the duty to make reasonable adjustments. That is reflected, by way of example, in the case of Rothwell EATS/0008/05 where the need to consult and discuss with the employee formed part of the duty to make reasonable adjustments and the employer in that case was in breach of that duty.

23. However, the main point about the discussion above is the following i.e. that, in my view, employers are permitted to act so as to ensure that employees can contribute active service and employers can take steps including dismissal when that end cannot be achieved without undue difficulty in terms of the risk of facing liability. In my view the crucial lesson from the case-law is that the Tribunals and Courts are very sympathetic to the employers' need to have staff in active service, and employers who dismiss when that cannot be achieved will not readily be found liable for disability discrimination by Courts or Tribunals.

Age Discrimination

24. That same point of a general approach of sympathy towards the needs of employers is true in my experience in regard to age discrimination.

25. In the context of this talk the focus in cases on age discrimination is on employers seeking to deal with the negative aspects of ageing in terms of

employees' performance. In particular, it is simply a fact that, as is true for almost all of advanced years, their memories and concentration spans diminish. So too can their energy. The issue is "What can employers do about that?".

Protecting the Dignity of Older Workers

26. It is very well established both in EU case-law and domestic law that a legitimate aim in the context of age discrimination and justification is the protection of the dignity and feelings of older members of the workforce in terms of how to deal with the above type of failings. The acceptance of the legitimacy of that aim is seen, by way of example only, in the decisions of the CJEU in Fuchs [2012] ICR 93 and Hornfeldt [2012] 3 CMLR 37. Both of those cases concerned the legitimacy of fixed retirement age in order, as the Court put it in Fuchs, to prevent disputes about the fitness to work for workers beyond a particular age.

27. The above principles are, of course, also approved by the Supreme Court in Seldon [2012] ICR 716 in terms of "preserving the dignity of older workers from unseemly debate about their ability" again in the context of a fixed retirement age. Hence, there is no doubt that that is a legitimate aim and can form the basis for justifying a fixed retirement age (all such retirement ages having to be justified in the UK law since 2011).

28. However, first, in regard to the above, and considering it in the circumstances where an employer is faced with a failing, ageing worker in the light of the above case-law, introducing a blanket retirement age may well not be

attractive to an employer. Such rules run the risk of challenge and, in any event, may be considered too crude and undifferentiating a technique. Further, it does not, of course, focus on particular issues that arise in regard to specific employees. What is more, as the case of Seldon itself illustrates, it is perhaps particularly difficult in regard to relying on the aim of protecting older workers' dignity to establish that the specific retirement age selected was a proportionate and appropriate means of achieving the aim, although the ET upheld the age selected in Seldon when the case was remitted to that ET after the House of Lords' decision.

29. If the employer is not attracted to a fixed retirement age, or that mechanism does not deal with a particular case, the question is, of course, what is an employer to do when faced with an employee exhibiting the kind of forgetfulness and lapses associated with ageing.

30. The blunt truth is that the rules do not provide any simple route to dealing with this. In effect the employer must rely on the usual principles relating to capability dismissals i.e. the principles of discussion, consultation, possibly trial periods and medical enquiries and the like. However, I do believe that the general and sympathetic approach that characterises such cases a Fuchs and Seldon in terms of assisting employers to avoid unseemly disputes and investigations about a worker's abilities at the end of workers' careers is helpful in the context of individual cases as well as the introduction of fixed retirement ages.

31. It is, perhaps, a bold generalisation but my experience is that ETs are very widely sympathetic to employers facing these types of problems with ageing workers and the age discrimination provisions and I would advise employers not to be too cautious in this regard. One specific point I would emphasise is that in cases of employees with failing abilities such as forgetfulness, rather unattractive though it can seem, it would clearly be very helpful for employers to keep some kind of note or record of relevant incidents evidencing the problem. It will not be sufficient simply to testify to some kind of general impression that an employee is failing is his or her powers. However, it would be best to raise the concern with the employee and, in my view, inform that employee that it is necessary to keep that kind of note of difficulties. That avoids any allegations of some kind of spying on or trapping of the employee.

32. The last point leads to my next.

Disability and Ageing Not The Employees' Fault

33. One matter rightly emphasised by the CA in Griffiths is that, obviously, workers facing difficulties in attendance or performance because of some disability (or because of the common effects of ageing) are not in any way at fault. The opposite is the case. They are the ones suffering from those causes of the difficulties. That obvious truth must be the lodestar for employers in their handling of such cases. It means, just by way of one example, that vocabulary redolent of disciplinary processes such as "warnings" should be avoided.

34. In my view for so long as the employer reveals that humanity and includes the employee in the process through discussion and consultation and openness, ETs will be very sympathetic to employers faced with problems in the performance of staff as a result of old age (or disabilities). In those circumstances establishing justification should be relatively straightforward if it is necessary to terminate the employment of those employees, however regrettable and regretted that necessity is.

ADRIAN LYNCH Q.C.