

CWU

**North West Regional
Women's Committee**

15th April 2009

Rights of Employees With Breast Cancer

Introduction

In 2006 a survey was carried out jointly by the Chartered Institute of Personnel Development (“CIPD”), Cancer Backup and Working with Cancer which revealed that one in five of employers responding to the survey did not know that cancer was covered by the Disability Discrimination Act 1995 (“DDA”) and just 1% of organisations had, at that time, a specific policy for managing and supporting employees with cancer. A more recent survey carried out by Breast Cancer Care showed that 68% of employees responding to their survey did not know about their rights under the DDA. The need for employers to have clear policies which set out the rights and support available for employees who have breast cancer and which are made known to employees, could not be clearer.

This handout sets out in brief the range of legal rights available. However, legal rights are not a panacea for resolving problems in the workplace and generally only provide minimum rights.

Furthermore, the legislation is couched in terms as to what it is reasonable for an employer to do. Often what is reasonable is better determined through collective consultation and negotiations between the union and the employer.

So What Are the Legal Rights?

Employees with breast cancer have the following rights:

- ❖ The right not to be treated less favourably on the grounds of disability;
- ❖ The right not to be unfairly dismissed;
- ❖ The right to request flexible working to care for dependents;
- ❖ The right to take time off for urgent family reasons in cases of sickness, (often referred to as emergency leave).

Set out below is a summary of these rights.

DISABILITY DISCRIMINATION

Who is Covered?

Unlike other employment law, the DDA (and other discrimination legislation) covers not just employees and workers but also the self-employed, temporary and agency workers.

The DDA only protects people who are disabled as defined by the Act. A disabled person is a person who has a physical or mental impairment which

has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities. However, since the 5th December 2005 those who have cancer no longer have to show that the cancer has a substantial and adverse effect on their ability to carry out normal day-to-day activities. This means that women with breast cancer are now deemed disabled from the point of diagnosis.

The DDA also applies to workers who have had cancer in the past.

It also covers those who may be in remission and those who may have had an operation to treat their cancer. This means that a woman who has been successfully treated for breast cancer following a mastectomy will still be covered under the DDA.

The DDA also applies to carers. In the case of *Coleman -v- Attridge Law ET 2303745/2005* the European Court of Justice ("ECJ") held that the Framework Directive on Equal Treatment also applied to those who are associated with someone who has a disability. Following a referral back to the Employment Tribunal ("ET") the ET held that the DDA should be read in light of the Framework Directive and as such applied to Ms Coleman. Ms Coleman claimed she had been subject to discrimination on grounds of disability after her employer failed to offer her flexible working opportunities to look after her disabled son in contrast to mothers of other non-disabled children. She also brought a claim of harassment on the basis of comments which had been made to her. Although the employer has appealed this decision, it is unlikely to be successful. In particular, the Government have recently announced that they intend to extend the definition of discrimination under the proposed Single Equality Act, to include associative discrimination. As such, those who care for a dependent who has breast cancer are also likely to be covered by the DDA.

The Government has also announced that those who are subject to discrimination or harassment on the grounds of perceived disability will also be covered under the Single Equality Act.

However, the DDA does not apply to those with a genetic disposition or future risk of disability. This means that those who have an operation to prevent breast cancer in the future will not be covered.

What is Discrimination?

There are five aspects to disability discrimination:

- ❖ Direct discrimination on the grounds of a person's disability;
- ❖ Disability-related discrimination that cannot be justified;
- ❖ The duty to make reasonable adjustments;
- ❖ Harassment; and

❖ Victimisation.

Direct Discrimination

This occurs where someone is treated less favourably than someone who does not have a disability, **because of** their disability. This covers situations such as where an employer's private health insurance excludes those who have cancer or excludes those who have cancer from joining the pension scheme on the basis that they may draw on it early.

What is Disability-Related Discrimination?

The statute provides that this occurs where someone is treated less favourably **for a reason related** to their disability rather than the disability itself. However, the distinction between direct discrimination and disability-related discrimination has been fundamentally altered by a House of Lords case the *Mayor and Burgesses of the London Borough of Lewisham -v- Malcolm* [2008] UK HL 43. The effect of this decision means that a worker who is dismissed following long term sickness absence related to their cancer is less likely to be able to succeed in a claim that they have been subject to less favourable treatment for a disability-related reason. This is because the employer can now argue that they would have dismissed a non-disabled person who had been off for the same length of time. Before the House of Lords decision in *Malcolm*, it was much easier to show that the reason why the employer dismissed someone for being off sick was for a reason related to their disability on the basis that had they not had their disability then they would not have been off sick.

Since this decision the Government has announced that it proposes to introduce a definition of indirect discrimination along the same lines as applies for other discrimination legislation. This means that an employer who applies a provision, criterion or practice which puts those with a disability at a substantial disadvantage compared with those who do not have a disability would be liable to a claim of indirect discrimination. This would apply for example, where the employer applies a redundancy selection policy which takes into account sickness absence. Under the proposed indirect discrimination provisions, this may be unlawful since those with a disability who took more sickness absence because of their disability would be at a substantial disadvantage in comparison to non-disabled employees.

What is the Duty to Make Reasonable Adjustments?

As part of the duty not to discriminate against employees, there is also a duty on employers to make reasonable adjustments. This applies where a provision, criterion or practice or any physical feature of the premises occupied by the employer causes a substantial disadvantage for a disabled person in comparison with those who do not have a disability.

So for example, where a disabled employee is selected for redundancy because they have had more time off on long term sickness absence, the employer is under a duty to consider what reasonable adjustments they can make to ensure that the disabled employee is not put at a substantial disadvantage under the redundancy policy, such as by excluding sickness absence which is related to their disability.

Does the Employer Have to Know About the Disability?

It is important to point out that the duty on the employer to make a reasonable adjustment **only applies** where **the employer knows or reasonably ought to know of the disabled person's disability**.

One of the most difficult decisions a worker with cancer has to consider is if/when to inform the employer after they have been diagnosed. This decision will very much depend on the individual.

Details of an employee's medical condition amounts to sensitive personal data under the Data Protection Act 1998. This means that where a worker informs their employer then the employer should not disclose the fact that the worker has cancer to a third party without that person's consent. There are exceptions, such as where disclosure is necessary for the purposes of obtaining legal advice or to protect the interests of that person where consent cannot be given by that person.

It is important to point out that not everyone has to know that the worker has breast cancer in order for the duty to make reasonable adjustments to apply. It is therefore perfectly reasonable to ask a line manager or personnel to keep it confidential.

Employees who disclose information to occupational health because they do not want their line manager to know will still receive protection under the DDA. The Code of Practice on Employment and Occupation provides that disclosure to an employee's agent or employee means that the employer cannot escape the duty to make a reasonable adjustment. An employer's agent includes an occupational health advisor, line manager, personnel or recruitment agency. In a recent decision *Eastern and Coastal Kent PCT -v- Grey UK/EAT/0454/08*, the Employment Appeal Tribunal ("EAT") had to determine whether or not the employer had properly made reasonable adjustments when an employee went for a promotion which required her to make a presentation. In particular, the employee was dyslexic and needed special software. The employer in that case argued that it was exempt from making a reasonable adjustment because they did not know that she was disabled. Even though she had ticked that she had a disability on her application form she had not indicated that she required reasonable adjustments.

The duty to make reasonable adjustments is on the employer and is not dependant on the worker either knowing or suggesting what reasonable adjustments are necessary.

But What are Reasonable Adjustments?

The DDA gives the following examples of reasonable adjustments that an employer may have to take including:

- ❖ Altering working hours;
- ❖ Allowing time off for rehabilitation or treatment;
- ❖ Allocating some of the disabled person's duties to someone else;
- ❖ Transferring the disabled person into another vacancy or another place of work;
- ❖ Giving or arranging training for the disabled person or others;
- ❖ Providing a reader or interpreter;
- ❖ Requiring or modifying equipment or reference manuals;
- ❖ Adjusting the premises; and/or
- ❖ Providing supervision or other support.

Some examples of reasonable adjustments which have been held by case law include:

- ❖ Redeployment without the need to attend competitive interviews – *Archibald v Fife Council [2004] IRLR 651;*
- ❖ The creation of a new post – *Southampton City College –v-Randall [2006] IRLR 18;*
- ❖ Amending provisions for sitting an exam – Qualifications Body – *Project Management Institute –v- Latif [2007] IRLR 579;* and
- ❖ Being allowed to return to work on a trial or phased basis – *Smith v Stannard t/a The Blakeney Hotel ET 1500946/05.*

Other reasonable adjustments which have been held **not** to be reasonable include:

- ❖ Failure to consult, by itself;
- ❖ Failure to carry out a risk assessment, by itself;
- ❖ Extending the provisions for paid sick leave;

However, the employer cannot avoid liability for failing to make a reasonable adjustment by claiming that they were not aware of the reasonable adjustment because of a failure to consult or carry out a risk assessment.

When Will an Employer Act Reasonably?

What is a reasonable step for an employer to take in the circumstances will be determined objectively by the Tribunal. The Tribunal will take into account factors such as the effectiveness of the adjustments, the practicality of carrying it out, its cost and the financial resources and size of the employer.

Employers often argue that flexible working is not practicable. This defence is unlikely to succeed if there are examples of other non-disabled employees working flexible hours such as working from home or having different start and finish times.

In terms of costs, financial resources and the size of the employer, this is harder for the employer to rely on given that Access to Work provides employers with up to 80% of the costs of making a reasonable adjustment. The Government has recently announced that this scheme will be extended to cover work experience placements. In fact, most adjustments cost very little, certainly no where near the bonuses employers often award themselves even in the current economic climate.

In the CIPD survey, more than two thirds of employers covered by that survey (including communications companies) provided flexible working, adjustments to the work carried out by the disabled employee and return to work polices. However, less than half provided additional paid sick leave and just under a third provided unpaid sick leave.

When Does the Right not to be Discriminated Apply?

This applies to:

- ❖ Recruitment;
- ❖ Terms and conditions of employment;
- ❖ Promotion, transfer or training;
- ❖ Access to benefits such as private health insurance;
- ❖ Dismissal or any other detrimental treatment including post employment discrimination, such as the failure to provide a reference.

What is Harassment?

A person is unlawfully harassed for a reason relating to their disability if she is subject to unwanted conduct which has the purpose or the effect of violating

their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

The conduct is regarded as harassment only if in all the circumstances, including, the perceptions of the person being harassed, the conduct should reasonably be considered as having that effect. This rather technical legal definition of harassment applies to women who are subjected to comments about their appearance after having undergone treatment for breast cancer or who are ostracised by work colleagues have taken time off as a consequence of breast cancer are likely to fall within this definition. Tribunals have held that an employer's unhelpful and inconsiderate attitude towards an employees return to work and use of the word "flid" in a disabled employee's presence amounted to harassment.

What is Victimisation?

Victimisation is often used interchangeably with discrimination. However, it has an entirely separate legal definition. A person is victimised if they are treated less favourably by the employer as a consequence of:

- ❖ Submitting a grievance that they have been subject to disability discrimination;
- ❖ Made allegations that they have been subject to less favourable treatment; or
- ❖ Appeared as a witness in a grievance where another employee has alleged that they have been subject to discrimination under the DDA.

These are known as protected acts. Therefore, a person can be subject to victimisation under the DDA even if they themselves do not have a disability provided there has been a protected act.

UNFAIR DISMISSAL

As well as the right not to be subject to disability discrimination, employees also have the right not to be unfairly dismissed.

In order to qualify for this right, the employee must have one year's services and have been employed under a contract of employment. This means that workers and the self-employed do not have protection from ordinary unfair dismissal (although if their dismissal is discriminatory then they may be able to make a claim under discrimination legislation).

There are six fair reasons an employer can dismiss an employee:

1. Capability;
2. Conduct;
3. Redundancy;

4. Retirement;
5. Breach of statutory duty; and
6. Some other substantial reason.

This means that an employer can fairly dismiss an employee with a disability on the grounds of capability. However, that is not the end of it as they must act reasonably when dismissing someone on these grounds. As we have seen, under the DDA, an employer may be liable for a claim for discrimination if they fail to make reasonable adjustments before deciding to dismiss a disabled employee. Similarly an employer who fails to consult with an employee, ascertain the nature and prognosis of the condition via medical evidence and consider alternative employment may be liable to a claim of unfair dismissal if they dismiss an employee on the grounds of ill health.

Where the employer has an ill health retirement scheme an employer may be liable for a claim of unfair dismissal if it does not consider retirement on ill health grounds. In *First West Yorkshire Ltd t/a as First Leeds –v- Haigh [2008] IRLR 182*, an EAT held that an employer who forced an employee to choose between dismissal or forgo his right to claim ill health retirement, after he became incapacitated from doing his own job, without obtaining a specialist report as to whether he was permanently incapacitated, acted unfairly when it dismissed an employee on the grounds of long term sickness absence.

However, it is a common myth that an employee cannot be dismissed whilst they are off sick. Provided that the employer acts reasonably when dismissing an employee off on sickness absence then that dismissal may be fair.

Employers who dismiss an employee after the 6th April 2009 now have to follow the Acas Code of Practice which replaces the statutory dispute resolution procedures. The Code provides that employers should inform employees if they are proposing to subject them to the disciplinary proceedings. That notification should contain sufficient information including medical reports, minutes of welfare meetings and witness statements that the employer intends to rely on before the disciplinary hearing takes place. The employer should hold a meeting at which the employee has a right to be accompanied by their trade union representative. The employer should also provide the employee with a right of appeal. Where an employer fails to comply with the Acas Code of Practice and the employee wins a claim of unfair dismissal, the employer could be liable for an increase in compensation by up to 25%. An employer cannot defend a claim of unfair dismissal by arguing that even if they had followed a fair procedure they would still have dismissed an employee (although a Tribunal could take this into account when making an award of compensation).

FLEXIBLE WORKING

Employees, who have 26 weeks service and who have, or expect to have, responsibility for a child up to the age of 17 and/or who cares for a dependent adult who is in need of care have the right to request flexible working. The right to request flexible working therefore applies to an employee who has caring responsibilities for a dependent adult with breast cancer. A dependent adult can be a partner, including civil partner, relative or other adult living at the same address.

The right to request flexible working is usually a request to adjust working hours or the times when an employee is required to work. Any change to working hours or times following a request will amount to a permanent change to the employee's contract of Employment. Employees therefore, need to think this through carefully as once a change to the contract has been made, say to work part time, then unless the employer later agrees that the employee can return to work full time, the employee may end up working part time indefinitely.

The right to request flexible working is simply a right to request. The employer is under no obligation to accept a request and they can refuse it on business grounds. These are defined in the Employment Rights Act as:

- ❖ Burden of additional costs;
- ❖ Detrimental effect on ability to meet customer demands;
- ❖ Inability to reorganise work amongst existing staff;
- ❖ Inability to recruit additional staff;
- ❖ Detrimental impact on quality;
- ❖ Detrimental impact on performance;
- ❖ Insufficiency of work during the periods of which the employee proposes to work; and
- ❖ Planned/structural changes.

As can be seen from the above, there is plenty of scope for an employer to argue that a request for flexible working does not fit in with the business needs of the employer. An employee can only bring a claim before an Employment Tribunal if they can show that the employer rejected the employee's application for a reason that was not a permitted business reason or that the employer decision was based on incorrect facts. Given the scope of the business reasons set out above, it is often very difficult to challenge an employer's refusal. However, there is a strict procedure which applies to requests for flexible working (a copy is set out in the flow chart attached). It is usually more likely that an employee will succeed in a claim under these provisions because the employer has simply failed to comply with the procedure. As in the case of *Clarke –v- Telewest Communications Plc ET*

Case No. 1301034/04 where the employer failed to reply promptly to her request, set up a meeting within 28 days and failed to give written reasons for its decision. However, the amount of compensation an employee can recover for breach of the procedural requirements is limited to 8 weeks' pay set at a statutory maximum currently £350 per week.

TIME OFF FOR URGENT FAMILY REASONS

This applies to all employees who care for dependents. However, the right **does not include a right to paid time off** although many unions have negotiated paid time off to cover these circumstances. Circumstances which an employee may take time off are set out in s. 57 A of the Employment Rights Act 1996. These are where it is **necessary**:

- ❖ To provide assistance when a dependent falls ill, gives birth or is injured or assaulted;
- ❖ To make arrangements for the provision of care for a dependent who is ill or injured;
- ❖ The death of a dependent;
- ❖ Because of the unexpected disruption or termination of arrangements for the care of a dependent –two week's notice of a breakdown in childcare arrangements is unexpected see Royal Bank of Scotland –v- Harrison [2009] IRLR 28 or
- ❖ To deal with an incident involving a child of the employee which occurs unexpectedly in the period during which an educational establishment is responsible for the child.

The right is intended to cover unexpected or sudden events affecting dependents. It is most likely to be relevant in the case of breast cancer when a dependent falls ill. It can cover situations not only at the point at which a dependent is taken into hospital for example, but also for the duration of the time that the dependent may be expected to remain at hospital **provided** the hospitalisation has occurred as result of an unforeseen or unexpected emergency. It will not cover the situation where an employee has a planned attendance at hospital although it will cover the situation where an employee needs to take time off to make arrangements for the long term care of a dependent, say following hospitalisation.

If a dependent suffers from a medical condition that is likely to cause regular relapses then it is unlikely that this will amount to an unexpected or unforeseen illness falling within the definition. However, if as a result, an employee needs to make arrangements for the long term care of a dependent who has breast cancer where there are relapses then the employer should provide reasonable time off.

USING THESE RIGHTS

Ultimately, an employee who has been subject to discrimination under the DDA , unfairly dismissed, had a request for flexible working or reasonable time off for an urgent family reason refused, can lodge a claim at an Employment Tribunal. However, strict time limits apply and a claim must be lodged within 3 months less 1 day from the act of discrimination, the date of dismissal or the date of refusal. In addition, where the employee brings a claim for discrimination or refusal of flexible working or time off for an urgent family reason they should also raise a grievance with their employer. This is because employees who wish to bring a claim on these grounds have to comply with the ACAS Code of Practice which requires employees to lodge a grievance, attend a grievance hearing and appeal. A failure to follow the ACAS Code could lead to an employee having any compensation reduced by up to %25.

As previously stated an employer must also follow the ACAS Code when dismissing an employee.

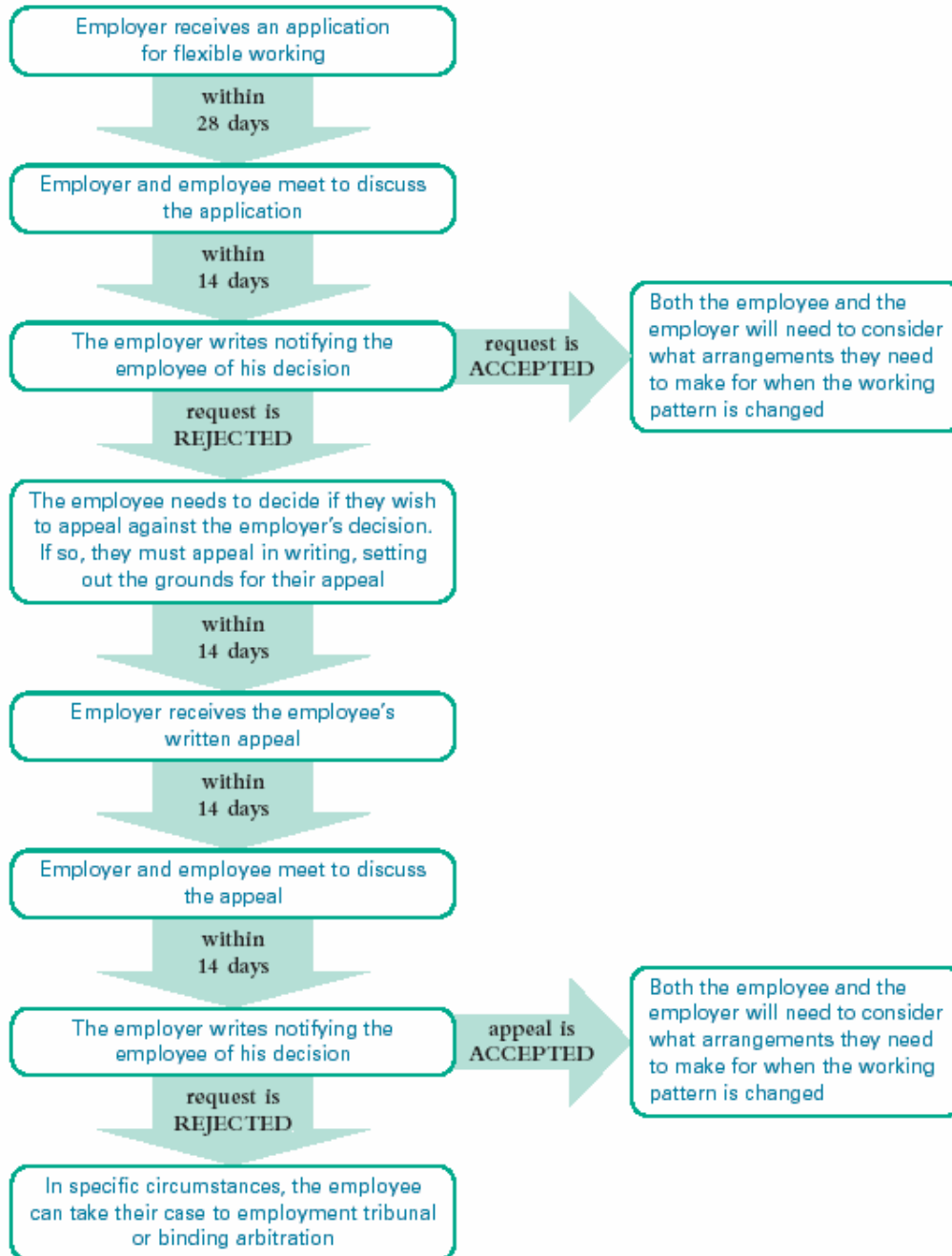
ACAS officers now have a power to conciliate before proceedings have been lodged in an Employment Tribunal.

CONCLUSION

Although many employers espouse to inform their employees of their rights, very few do. It will therefore be important for you to use the legal rights including the questionnaire procedure, codes of practice and guidance to negotiate a working environment which supports those who have breast cancer.

Note: This paper sets out a brief overview of the law and is not intended to be a comprehensive statement of the law. Specialist advice should always be sought in specific cases.

How does the process work?



Source: berr.gov.uk