

## Employment

### Is it disability discrimination to identify a redundancy situation as a result of long-term sick leave?

Many employers have to manage long-term sick leave amongst their staff. So what happens when, as a result of the absence, the employer identifies that the absent employee's position is not needed and decides to make them redundant? In this situation, the employee may attempt to raise the argument that they have suffered disability discrimination if they have been absent because of a condition which is classed as a disability.

This is what happened in the case of *Charlesworth –v- Dransfields Engineering Services Ltd* where the Employment Appeal Tribunal (EAT) upheld an Employment Tribunal's decision that the employee's disability was not an operative cause of his redundancy dismissal.



Mr Charlesworth was absent from his position as a branch manager (of one of four branches) for two months as a result of surgery for cancer. Cancer is automatically considered to be a disability under the Equality Act and from the date of diagnosis sufferers are protected from being treated less favourably because of something arising in consequence of their disability. The only time that an employer could justify treating somebody less favourably in these circumstances is by showing that it is a proportionate means of achieving a legitimate aim.

Whilst he was off, the employer identified that it could save costs by removing the branch manager role and absorbing Mr Charlesworth's responsibilities into the remaining workforce at the branch. The company had not been performing well and it had been looking at ways to reduce its costs for some time. A few months after his return from sick leave, the employer commenced a redundancy process and Mr Charlesworth was ultimately given notice of redundancy.

Mr Charlesworth brought a number of claims, including one of discrimination arising from disability. All of his claims were rejected by the Employment Tribunal. In relation to the claim of discrimination arising from disability, the Tribunal held that, although Mr Charlesworth's sick leave had given the employer the opportunity to identify its ability to manage without him, this was not the same as saying that he was dismissed because of his absence.

The EAT dismissed Mr Charlesworth's appeal, however there is a warning in the EAT's judgment. It says that it has no doubt there will be many cases with similar facts where an absence is the effective cause of a decision to dismiss (which would then be disability-related discrimination and unlawful if not justified).

This case shows that if an employer identifies during ill health absence (even if the absence results from a disability) that it can operate without that position, it is possible to potentially fairly dismiss in a non-discriminatory way if a full and fair redundancy process is followed. The key question is what is the reason for the dismissal? The EAT distinguishes between cases where absence is merely part of the context for dismissal and those where it is an effective cause. It says every case will depend on its own particular facts.

If your business is facing a potential redundancy situation or has issues with sickness absence, please contact the Employment team.

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