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HMRC DDA DUTIES

PUBLIC AUTHORITY IN BREACH

HAWORTH v CARTMEL and HMRC

HMRC is a "public authority" and has duties under the DDA in the exercise of its functions

On 4 February 2011, the High Court handed down judgment in this important case, which puts the HMRC's duties as a public authority under the Disability Discrimination Act 1995 in the spotlight.

The case is likely to be of significance for public authorities carrying out functions which may affect disabled persons, as well as for all practitioners acting for or against such public authorities.

SUMMARY

HMRC breached its DDA duties to Ms Haworth, as a public authority, as HMRC knew she was suffering from a disability at the time it pursued bankruptcy proceedings against her

The case concerned an Application made on behalf of Ms Haworth to annul or rescind the Bankruptcy Order made against her on the Petition of the HMRC.

The application was made on the basis that Ms Haworth lacked relevant capacity when the Statutory Demand and/or Petition were served and /or the Bankruptcy Order made, or that in serving the Statutory Demand and/or Petition and/or inviting the Court to make a Bankruptcy Order HMRC acted in unlawful breach of its duties to Ms Haworth under the Disability Discrimination Act 1995 ("DDA").

Ultimately the Court annulled or rescinded the Order on the basis that Ms Haworth lacked relevant capacity at material times, and held that HMRC had clearly breached its duty to make reasonable adjustments in the conduct of the bankruptcy proceedings.

THE FACTS

Ms Haworth suffered from a longstanding mixed anxiety and depressive disorder, which included a phobia or avoidance of opening letters. She bred horses as a therapeutic hobby and made minimal income from this activity.

Aware that Ms Haworth was suffering from a relevant disability, HMRC nevertheless raised a Determination and obtained a Bankruptcy Order against her

In August 2005 HMRC received an anonymous letter "informing" it that Ms Haworth was a commercial horse breeder, and projecting her annual income as £100,000 per annum.

The letter resulted in HMRC raising a Determination that Ms Haworth owed back tax in excess of £192,000. It was this sum which formed the basis of a Statutory Demand raised by HMRC, and then the Petition which led to Ms Haworth being declared bankrupt.

HMRC had been informed by various means (including Ms Haworth's mother) that Ms Haworth was not capable of managing her own affairs, did not open mail, had difficulty with forms, and that she kept horses only as a therapeutic hobby. HMRC nevertheless proceeded with enforcement action on the basis of the Determination raised.

In May 2008 the Statutory Demand was personally served on Ms Haworth who told the server that she was "under the Mental Health Act" and could not open mail (there was indeed a pile of unopened post at the door). Ms Haworth did not open the envelope containing the Statutory Demand.

In July 2008 the Petition was personally served on Ms Haworth, although she was not told what the significance of the document was.

In August 2008 the Bankruptcy Order was made in Ms Haworth's absence, and in September 2008 a Trustee in Bankruptcy, Miss Cartmel, appointed.

HMRC later conceded that Ms Haworth owed no tax at all

After the Bankruptcy Order was made Ms Haworth obtained assistance in filing tax returns, following which HMRC accepted that she in fact owed no tax. By this time significant costs had been incurred, including in relation to Ms Haworth's horses, which had been removed from her by the Trustee in Bankruptcy and stabled elsewhere.

There followed various applications, including an application to annul which did not raise Ms Haworth's capacity or DDA as an issue (permission to appeal raising capacity as an issue was refused).

On the intervention of new solicitors, a fresh application was made, putting Ms Haworth's capacity and the DDA squarely in issue.

THE APPLICATION

Advised by counsel, the Official Solicitor argued that Ms Haworth lacked capacity and that HMRC had breached its DDA duties

Ms Haworth appeared by the Official Solicitor, acting as her litigation friend. It was argued by counsel on her behalf that the Bankruptcy Order should be either annulled or rescinded under section 282(1)(a) or 375 of the Insolvency Act 1986.

There was no dispute that, subject to issues as to capacity and breach of DDA duty, HMRC was entitled to proceed as it did. Once a Determination had been raised HMRC was entitled to enforce unless and until it was set aside.

However, it was argued that in fact (1) Ms Haworth lacked capacity at all material times, and (2) Ms Haworth was a disabled person within the meaning of s1 DDA and:

- *HMRC knew or ought to have known Ms Haworth was disabled.*
- *HMRC is a public authority" within the meaning of s21B DDA and subject to a duty not to discriminate against a disabled person in carrying out its functions (s21B, 21D and 21E DDA)*
- *HMRC failed in its duties not to discriminate, including by failing to make reasonable adjustments, such as making further contact with Ms Haworth's family, considering alternatives to enforcement proceedings, and drawing information to the Court's attention before seeking a Bankruptcy Order in Ms Haworth's absence.*

HMRC'S ARGUMENTS

HMRC argued that the application should not be entertained at all

HMRC first took a procedural point: that the Court had no jurisdiction to entertain the application to annul because such an application had already been made and permission to appeal had failed.

HMRC disputed that Ms Haworth lacked relevant capacity at any material time (and detailed expert evidence was called on this issue).

On the DDA points, ultimately, HMRC conceded that HMRC knew that Ms Haworth was suffering from a disability from 2007, and also that HMRC is a "public authority" within s21B DDA.

HMRC also argued the DDA was irrelevant

However HMRC variously maintained that:

- *The DDA was irrelevant to an application to annul or rescind because the Act merely provides a remedy in damages in respect of which the County Court was given exclusive jurisdiction.*
- *There was no "practice, policy or procedure" which might give rise to a duty to make reasonable adjustments.*
- *The appropriate comparator was a person without a disability who acted in the same way as the disabled person, and in this case would have been treated in the same way as Ms Haworth.*

THE JUDGMENT

HMRC's approach was criticised by the Judge

HHJ Pelling QC rejected HMRC's argument on jurisdiction, holding that the Court had a discretion in such circumstances, and that the discretion should be exercised in Ms Haworth's favour, the issue being "of cardinal importance" to her, and the prospect of precluding the Court from considering the alleged breach by the HMRC of its public duty on procedural grounds "obviously unsustainable". The judge indeed went so far as to question, in the circumstances of the case, whether it was appropriate for a state entity such as HMRC to take the point at all.

HMRC's further attempt at a "knock out blow" – on the basis that the DDA was irrelevant to an application to annul or rescind - was similarly rejected. The courts cannot be required to give legal effect to acts proscribed as unlawful (applying Lewisham LBC v Malcolm [2008] UKHL 43 [2008] 1 AC 1399).

The Judge considered the medical evidence concerning Ms Haworth's capacity and concluded that she lacked relevant capacity at the date of service of the Statutory Demand, service of the Petition, and throughout the bankruptcy proceedings.

The Judge held that HMRC breached its duties under the DDA in failing to make reasonable adjustments

As to the DDA, the Judge held Ms Haworth was a disabled person at all material times, this was known to HMRC, and that in principle all of the points made on Ms Haworth's behalf as to the reasonable adjustments that could have been made were well made.

Significantly, the Judge considered that HMRC ought to have informed the Court at the date the Petition came on for hearing of the matters within its knowledge, and that had this information been before the Court it was likely that the Court would have sought further medical evidence before deciding what orders to make.

HMRC's position on reasonable adjustments was entirely misconceived

The Judge held that HMRC's argument that there was no practice, policy or procedure was "entirely misconceived", and the argument as to the proper comparator was not relevant to the failure to make reasonable adjustments.

In those circumstances, the Judge ordered that the Bankruptcy Order should be in principle annulled or rescinded and HMRC as petitioning creditor pay the fees of the Official Receiver and the Trustee and the expenses of the bankruptcy.

COMMENT

The outcome in this case was plainly correct. The fact that HMRC decided to proceed with bankruptcy proceedings as it did had serious consequences for Ms Haworth. It was unlawful for HMRC to act as it did and necessary for proper redress to be made by annulment of the Bankruptcy Order.

Outcome - the Bankruptcy Order was annulled or rescinded

It should be expected that HMRC will act with greater reference to its DDA duties in the future.

Other public authorities would be advised to consider their own practices and policies carefully. They should also carefully consider where reasonable adjustments may need to be made in the exercise of their public functions.

Having a policy to have a policy (in due course) is not enough. Any policy should be realistic, compliant and reasonably easy for officers and employees of the relevant public authority to follow.

Contact

Patrick Green (profile) and Kathleen Donnelly (profile) who advised on and drafted the DDA arguments for the Official Solicitor, on behalf of Ms Haworth, instructed by Bevans solicitors.

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