



Stress and Disability at work – The Employment Law Perspective

'DISABILITY' & 'STRESS'

The Meaning of 'stress'

The Health and Safety Executive define stress as:

'The adverse reaction people have to excessive pressure or other types of demand placed on them.'

The Meaning of 'disability' and 'disabled person'

Section 1 of the Disability Discrimination Act 1995 defines a disabled person as a person with:

'a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.'

'Mental Impairment' under the DDA

The Act previously required that where impairment arose from mental illness, that illness had to be clinically well-recognised in order for it to be regarded as a mental impairment for the purposes of the Act. The Disability Discrimination Act 2005 amended the original Act to remove this requirement with effect from 5 December 2005.

- **A person suffering from stress can, but will not necessarily, fall within the definition of 'disabled' within the meaning of the DDA.**
- **Whether a person is disabled for the purposes of the Act is generally determined by reference to the effect that an impairment has on that person's ability to carry out normal day-to-day activities.**
- **In order to show 'mental Impairment' there is now no need to establish a clinically well-recognised mental illness.**
- **Although claimants will no longer have to show a clinically well-recognised illness, they will still have to establish, by evidence, that they have a mental impairment.**

Certain conditions are not to be regarded as 'impairments' for the purposes of the Act. These excluded categories are:

- **Addiction to, or dependency on, alcohol, nicotine, or any other substance (other than in consequence of the substance being medically prescribed);**
- **tendency to set fires;**
- **tendency to steal;**
- **tendency to physical or sexual abuse of other persons;**
- **exhibitionism;**
- **voyeurism.**

- **Even if a person has a condition that is excluded, they may be covered by the Act if they have an additional impairment even if that impairment is caused by an excluded condition. i.e. someone with depression caused by alcoholism.**

Impact upon ability to carry out at least one of the normal day-to-day activities listed in Schedule 1, paragraph 4 (1) of the DDA

An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following—

- (a) mobility;
 - (b) manual dexterity;
 - (c) physical co-ordination;
 - (d) continence;
 - (e) ability to lift, carry or otherwise move everyday objects;
 - (f) speech, hearing or eyesight;
 - (g) memory or ability to concentrate, learn or understand; or
 - (h) perception of the risk of physical danger.
- **Stress cases are likely to comply with this provision if it can be shown that the stress complained of affects memory, the ability to concentrate, learn or understand.**

The meaning of 'substantial'

- **Includes those conditions where the effect is 'more than minor or trivial'.**

The meaning of 'long-term'

- **The effect of an impairment is a long-term effect if (a) it has lasted at least 12 months, (b) the period for which it lasts is likely to be at least 12 months; or, (c) it is likely to last for the rest of the life of the person affected.**
- **A disability can arise from impairments which can be fluctuating, recurring and/or progressive.**
- **If an impairment has had a substantial adverse effect but that effect ceases, the substantial adverse effect is treated as continuing if it is likely (in the sense of being more likely than not) that the effect will recur (DDA Schedule 1 paragraph 2(2)).**
- **An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.(Schedule 1 paragraph 6(1)). In particular, medical treatment and the use of a prosthesis or other aids (Schedule 1 paragraph 6(2)). Sight correction is excluded.**

In the case of a person with stress which is being treated by counselling, whether or not the effect is substantial should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet, or were not receiving counselling (the so-called "deduced effects").

- **It is necessary to consider the complainant's condition at the time of the alleged discrimination, not at the time of the hearing (Cruickshank v VAW Motorcast Ltd [2002] IRLR 24, EAT).**

- **Past stress is excluded.** i.e. when an employee returns to work fully recovered after a long period of absence due to stress but faces discrimination.

CAN YOU DISMISS A STRESSED EMPLOYEE FOR WORK RELATED ABSENCES?

- **The simple answer is yes, provided that:**
 - (a) The employer is not directly discriminating against the employee by dismissing him or her solely because he or she is suffering from a disability;**
 - (b) The dismissal is fair in all the circumstances (Section 98(4) of the ERA 1996);**
 - (c) The statutory dismissal procedure has been followed (Section 98A);**
 - (d) Reasonable adjustments have been made; and**
 - (e) The dismissal can be justified in all the circumstances.**

- **Where disability results in the employee's absence from work, then dismissal for that absence will be dismissal for a disability-related reason.**

- **Where dismissal is because of the absence caused by the disability rather than the disability itself, justification is a possibility.**

- **The employer needs to be aware of the condition causing the absence and that it constitutes a disability under the statutory definition (*Malcolm v Lewisham* [2008] 3 W.L.R. 194). Contrast this with the position in Direct Discrimination cases where no knowledge is needed of disability.**

Direct discrimination: The employer advertises internally for a promotion, stating that the post is not suitable for anyone with a history of mental illness, and exclude, unknowingly, a member of staff with a history of schizophrenia (Code of Practice (above) s.4.11).

Indirect discrimination: The employer dismisses an employee for poor typing when unbeknown to the employer the cause of that poor typing was the employee's dyslexia. Knowledge is required.

Also note that Malcolm reversed the decision in Novacold relating to the correct comparator –now the comparator is a person in the same circumstances save for the disability.

Was the dismissal fair in all the circumstances?

- Incapability is one of the potentially fair reasons for dismissal (The ERA 1996, Section 98(4)).
- “Capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.
- **Whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.**

‘The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?’ (*Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373, [1977] ICR 301, per Phillips J.)

- In *Spencer*, it was held that there are a variety of factors to be weighed up in considering whether the decision to dismiss is reasonable under ERA 1996 Section 98(4). These include:
 - **the nature of the illness and the job;**
 - **the needs and resources of the employer;**
 - **the effect on other employees;**
 - **the likely duration of the illness;**
 - **how the illness was caused;**
 - **the effect of sick-pay and permanent health insurance schemes; and**
 - **alternative employment.**

- **If an employee has an illness which makes him a danger to his fellow workers that will be a relevant factor** (*Harper v National Coal Board* [1980] IRLR 260).
- **The need for the employer to get a replacement will be greater where the business is small and the work cannot be readily absorbed by other employees** (*Tan v Berry Bros and Rudd Ltd* [1974] IRLR 244, [1974] ICR 586).
- **Where employees work in a team, an absence can also affect the earnings of other workers, a factor which was considered to be relevant in determining that the dismissal was fair in** *Ali v Tillotsons Containers Ltd* [1975] IRLR 272.
- **The employer will have to show that he carried out an investigation which meant that he was sufficiently informed of the medical position.**
- **'Before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.'**

(*East Lindsey District Council v Daubney* [1977] IRLR 181, [1977] ICR 566)

'While employers cannot be expected to be, nor is it desirable that they should set themselves up as, medical experts, the decision to dismiss or not to dismiss is not a medical question, but a question to be answered by the employers in the light of the available medical advice. It is important, therefore, that when seeking advice employers should do so in terms suitably adjusted to the circumstances. Merely to be told, as the employers were told, because that is the question they asked, that an employee "is unfit to carry out the duties of his post and should be retired on the grounds of permanent ill health", is verging on the inadequate, because the employer may well need more detailed information before being able to make a rational and informed

decision whether to dismiss. Nonetheless, it seems to us on the whole that the [employment] tribunal required overmuch of the employers when saying that they should have demanded a detailed medical report, and should have questioned Dr Haigh about it'.

- **Consultation with a doctor is not generally sufficient on its own to justify a fair dismissal but it will often be a necessary step for the employer to take. Sometimes the medical position can be established by consultation with the employee alone.**
- **Where an employer tries to compel an employee to undertake a medical examination where there is no express contractual power, this is likely to constitute a repudiatory breach of contract which will entitle the employee to resign and allege that he has been constructively and unfairly dismissed.** (*Bliss v South East Thames Regional Health Authority* [1985] IRLR 308, [1987] ICR 700, CA).
- **If the employee refuses medical examination the issue of fairness will be judged on the basis of the facts known to the employer at the time of the dismissal.**
- **There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair.** (*Lynock v Cereal Packaging Ltd* [1988] IRLR 510, [1988] ICR 670, the EAT (Wood J presiding)).
- **Where the employee's ill health has been caused by the employer's conduct, this does not mean that a dismissal of the employee is unfair.**
- **However, where an employee's ill health was caused by the employer, that might justify a tribunal requiring the employer to,**

'go the extra mile' and demonstrate extra concern before dismissing the employee. (*McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806, [2007] IRLR 895).

- **There is no rule that an employer cannot take into account disability related absences when operating its sickness procedure.** (*Royal Liverpool Children's NHS Trust v Dunsby* [2006] IRLR 351.) The question will be whether the employer was justified.
- **An employer will find it difficult to claim that he has acted reasonably if he takes no steps to try and fit the employee into some other suitable available job.** This is likely to be more so in an ill-health case than in an incompetence case (*Bevan Harris Ltd v Gair* [1981] IRLR 520, EAT).
- **There is no duty to create a job** (see: *Taylorplan Catering (Scotland) Ltd v McInally* [1980] IRLR 53).

The statutory procedure

- The same considerations relating to the impact of the statutory dismissal procedure and ERA 1996, Section 98A apply to capability dismissals on the basis of ill health.
- It will therefore always be necessary to consider whether there has been a breach of the statutory dismissal procedure and whether any procedural failing that is not a breach of the statutory procedure made any difference to the decision to dismiss.

The Duty to Make Reasonable Adjustments

- **The duty to make reasonable adjustments only bites when the employer knows (or reasonably should know) that the disabled person has a disability and is likely to be put at a substantial disadvantage as envisaged by s 4A(1)—see s 4A(3).**

- Section 18B of the 1995 Act gives guidance as to the type of adjustments that could be made:
 - (1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—
 - (a) **the extent to which taking the step would prevent the effect in relation to which the duty is imposed;**
 - (b) **the extent to which it is practicable for him to take the step;**
 - (c) **the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;**
 - (d) **the extent of his financial and other resources;**
 - (e) **the availability to him of financial or other assistance with respect to taking the step;**
 - (f) **the nature of his activities and the size of his undertaking;**
 - (g) **where the step would be taken in relation to a private household, the extent to which taking it would—**
 - (i) **disrupt that household, or**
 - (ii) **disturb any person residing there.**
 - (2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments—
 - (a) **making adjustments to premises;**
 - (b) **allocating some of the disabled person's duties to another person;**

- (c) transferring him to fill an existing vacancy;**
- (d) altering his hours of working or training;**
- (e) assigning him to a different place of work or training;**
- (f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;**
- (g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);**
- (h) acquiring or modifying equipment;**
- (i) modifying instructions or reference manuals;**
- (j) modifying procedures for testing or assessment;**
- (k) providing a reader or interpreter;**
- (l) providing supervision or other support.**

The recent case of *Chief Constable of Lincolnshire Police v Weaver* [2008] UKEAT/622/07, considered the issue of reasonable adjustments. In that case a police officer was placed on restricted duties when he became ill with a qualifying disability. On reaching the normal retirement age of 50, he wished to take advantage of a scheme which permitted police officers to remain in service on advantageous terms. However, in relation to those on restricted duties, this scheme was discretionary. The force took the view that it would not be in its operational interests to allow him on to the scheme, partly because of financial pressures on the force and partly because they had an unusually large number of officers on restricted duties, and his post (which was particularly appropriate) could go to one of them. The officer challenged this as disability discrimination, arguing that it was a reasonable adjustment to allow him on to the scheme.

The EAT allowed the force's appeal and held that the tribunal had erred in considering reasonable adjustment solely in relation to the claimant's own position, without taking into account the wider operational objectives of the force and the effects on other officers of allowing him on to the scheme. When assessing the question of reasonable adjustments it may be relevant to take into account both the effects on other employees and adjustments made for other disabled employees. The decision of the Court of Appeal in *O'Hanlon v CIR* [2007] IRLR 404 was referred to as

authority for taking into account questions of finance, especially where there are a significant number of disabled employees to be

Justification

- 'Justification', this is defined (s 3A(3), formerly s 5(3)) as arising 'if, but only if, the reason for..[the treatment] is both material to the circumstances of the particular case and substantial'.
- There can be no justification defence where the circumstances show that the employer is under a duty to make reasonable adjustments in relation to the disabled person but has failed to comply with that duty.
- The function of the tribunal in reviewing an employer's decision for the purposes of s 5(3) was held to be very close to the application of the test of the 'band of reasonable responses' in unfair dismissal law. If justification was within the range of reasonable responses it passed the test of s 5(3). (see: *Jones v Post Office* [2001] EWCA Civ 558, [2001] IRLR 384).
- The procedural protections built into the unfair dismissal regime are likely to mean that it will be extremely rare for a dismissal to be contrary to the DDA but not the ERA. Whereas it is clearly possible for a dismissal to be within the DDA but nevertheless unfair under ERA by reason of an employer's procedural failings.

**BEWARE OF RES JUDICATA IN DISCRIMINATION
CLAIMS INVOLVING AN ELEMENT OF PERSONAL
INJURY**

- **Where a victim of discrimination suffers stress and anxiety to the extent that psychiatric and/or physical injury results, an employment tribunal has jurisdiction to award compensation for that injury, subject to proof on causation.** In such cases, there is no need to show that the loss is reasonably foreseeable.
(Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] IRLR 481, CA.)

- **If the presence of psychiatric injury is known at the time of the tribunal hearing and no claim is made in respect of it, or the claim is settled or withdrawn without reference to it being specially excluded, the Claimant will be estopped from raising the claim in the County or High Court as a stress at work claim unless special circumstances can be established (i.e. collateral attack on previous decision or dishonesty).**
(Sheriff (ibid))

This is based upon the public policy decision in *Henderson v Henderson* (1843) 3 Hare 100, that all matters ought to be litigated at once.

- **A party will be estopped from challenging findings of fact made by one tribunal or court in further proceedings (issue estoppel).**
(Thoday v Thoday [1964] 1 All ER 341)

- **A party will be estopped from raising the same cause of action in subsequent proceedings even if the first claim is withdrawn, i.e. damages for wrongful dismissal (cause of action estoppel).**
(Sajid v Sussex Muslim Society [2001] EWCA Civ 1684 & Thomas v Devon County Council [UKEAT/0513/07/JOJ])

Sheriff v Klyne Tugs

The Claimant was employed by the Defendant when he suffered a nervous breakdown at the end of January 1995 and was certified unfit for work due to anxiety and stress. He complained of racial harassment and within one month was dismissed.

He bought a claim of unlawful racial discrimination in April 1995.

The case was settled without an admission of liability in January 1996 and the tribunal dismissed his claim.

In 1998, he issued a claim in the County Court claiming damages for personal injury in the form of PTSD, the particulars of the abusive treatment relied upon were the same as those relied upon in the employment tribunal race discrimination claim.

The employer applied to strike out the action as an abuse of process.

It was held by the CA that:

1. The employment tribunal had jurisdiction to award damages for personal injury on the same basis as the County Court.
2. Although the employee's County Court claim was based on the tort of negligence which required him to establish more than simply a causal link to establish racial discrimination, the claim arose out of his employment of which the employment tribunal had jurisdiction and was therefore precluded by the compromise agreement.
3. It was a matter of public policy that all claims that had or could have been litigated in earlier proceedings between the same parties in a tribunal should not, save in exceptional circumstances be allowed to be litigated.
4. Since the essence of the employee's psychiatric injury must have been apparent by the time he bought his claim before the employment tribunal and could have been bought before the tribunal, the claim was struck out in the absence of special circumstances.

Sajid v Sussex Muslim Society

Dr Sajid was dismissed from his employment with the Muslim Society in January 1996 and issued a claim in the employment tribunal for unfair dismissal, redundancy payment and breach of contract claiming damages of £72,053.12.

On his IT1 he stated that, "This claim is made recognising that the Industrial Tribunal has jurisdiction up to a claim of £25,000 in relation to breach of contract claims. I therefore reserve the right to reply upon the findings of the Tribunal as Respondent *judicata* in proceedings in another court to recover the balance'.

During July 1999, the claim was settled on terms and the claim was withdrawn and dismissed.

Dr Sajid thereafter issued proceedings in the County Court to recover damages in excess of the statutory cap in respect of breach of contract.

It was held that the claim was struck out as an abuse of process because Dr Sajid had raised the same cause of action in the employment proceedings (cause of action estoppel).

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