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EMPLOYMENT LAW BULLETIN

JULY 2019

Welcome to the July edition of our employment law bulletin.

As temperatures soar, we consider some of the current hot topics for employers in four complex and interesting cases in the EAT and Court of Appeal.

In ***The Chief Constable of Norfolk v Coffey***, the Court of Appeal considered when stereotypical assumptions about a health condition might be direct disability discrimination.

The EAT examined the tricky issue of whether an employer will be expected to know about a disability in ***A Ltd v Z***, particularly in the context of an employee who is secretive about the real reason for absences.

In ***Page v NHS Trust Development Authority***, the EAT considered a claim by a Christian non-executive director that he had been discriminated against on the basis of his religion for speaking out against adoption by same-sex couples.

And in our Question of the Month for July, we consider the implications of an employee making a covert recording of a workplace meeting in the light of the recent EAT case of ***Phoenix House v Stockman***.

Finally, may I remind you of our forthcoming events:

- **Employment Breakfast Briefing: Managing sickness absence**
  6th August 2019, Radisson Blu, Leeds
  For more information or to book

- **Employment Breakfast Briefing: Dealing with employee grievances**
  1st October 2019, Radisson Blu, Leeds
  For more information or to book

- **SAVE THE DATE - Wrigleys Annual Charity Governance 2019**
  10 October 2019, Hilton City, Leeds
  For more information or to book

- **SAVE THE DATE - Northern Education Conference 2019**
  27th November 2019, Principal York, York
  For more information or to book

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Wherever you see the BAILII logo simply click on it to view more detail about a case

Stereotypical assumptions about a health condition could be disability discrimination – even if the employee is not disabled

Court of Appeal confirms perceived disability discrimination claims are permissible under the Equality Act 2010

The Court of Appeal (CoA) has provided some useful guidance on technical elements of perceived discrimination claims, in the first case of its kind to reach the Court. This includes how perceived discrimination claims work where the individual does not have a 'disability' for the purposes of s.6 of the Equality Act 2010 (EqA'10) (but are thought to have one by a discriminator) and what bearing stereotypical assumptions about the perceived disability have on a claim.

The case below also mixes in the element of a perceived progressive condition. A progressive condition is where the condition has some effect but does not have a substantial adverse effect on the individual at the present time but is likely to have that effect in the future, in which case the individual is treated as disabled in the present for the purposes of the EqA'10.

Case details: *The Chief Constable of Norfolk v Coffey*

We covered the EAT's decision in this case in our January 2018 Employment Law Bulletin (at page 4), which includes an overview of the facts of the case. The decision was appealed to the CoA.

The core facts for the purposes of this article are that when Mrs Coffey applied to transfer from Wiltshire Constabulary to Norfolk Constabulary ('NC') to be a front line officer, she disclosed her hearing loss to NC and was also able to provide medical assessments showing that her condition had not deteriorated in two years. NC were advised to ask Mrs Coffey to submit to an 'at work' test in respect of her hearing, but declined to do so. NC's Acting Chief Inspector ('ACI') ultimately declined Mrs Coffey's transfer.

At tribunal, the ACI said she had some rudimentary understanding of the EqA'10 and did not consider Mrs Coffey to be 'disabled' for its purposes. The ACI said her decision had therefore been purely based on budget and operational pressures, because Mrs Coffey might not be fully operational due to her hearing condition, and the ACI needed to be mindful of NC's finite resources and how this might affect front line services.

Court of Appeal decision

The CoA upheld the EAT's decision, which had found that the ACI had perceived Mrs Coffey to have a disability on the grounds of a perceived progressive condition. The CoA agreed with the EAT's view that a discriminator need not know the detail of the legal definition of disability under the EqA'10 to discriminate against someone on the grounds of perceived disability. However, the CoA made clear that the discriminator's perception of the person discriminated against must encompass all aspects of the definition of disability, which the ACI was found to do in this case.

As part of its appeal, NC argued that Mrs Coffey's complaint was that she had been unfavourably treated because of something arising from her disability (i.e. it was a s.15 EqA'10 discrimination claim) and was not a complaint that she had been less favourably treated because of the disability itself (a direct disability claim). This was because, as NC argued, the ACI's decision

was not based on the fact of Mrs Coffey's perceived disability, but the actual things the ACI believed Mrs Coffey could not do in consequence of it. If this were true, Mrs Coffey had no claim because she was not in fact disabled (as it is likely that the person discriminated against must themselves be disabled for a s.15 claim to succeed).

However, the CoA found that the ACI's decision had been taken because of a stereotypical assumption about the effects of what was perceived to be Mrs Coffey's disability. The CoA found this view compelling because NC had refused to consider further medical information before the ACI made her decision (despite recommendations for NC to do so). The CoA held that a stereotypical assumption about the effects of a perceived disability was direct discrimination and Mrs Coffey's claim was therefore successful. However, the CoA accepted that, had the ACI made a genuine mistake about what Mrs Coffey could or could not do as a result of reviewing medical information, Mrs Coffey would only be able to bring a s.15 claim.

Comment

The CoA's decision highlights the need to obtain up-to-date medical information before making any decision in regard to an employee who has, or may have, a disability under the EqA'10. It also highlights the importance of avoiding making stereotypical assumptions about what a disabled person can and cannot do. For instance, if a medical report shows an employee to have a particular condition, employers should seek a report that clearly explains what impact that condition has on the individual in their particular circumstances and what impact it is likely to have on them in future, and not assume the impacts it has (or will) have.

The latter point is important for employers because the CoA conceded that in circumstances like Mrs Coffey's the individual would usually need to bring a s.15 claim. Mrs Coffey may not have succeeded in such a claim because she did not have a disability. What 'saved' Mrs Coffey's direct discrimination claim was that NC were found to have made stereotypical assumptions about her perceived disability; by avoiding this, employers will reduce the potential for direct discrimination claims that flow from perceived discrimination from individuals who are not 'disabled' for the purposes of the EqA'10.

Could an employee bring a disability discrimination claim after keeping her serious mental health condition secret?

Employer could not reasonably be expected to know about a disability as employee was unlikely to engage with medical enquiries

Employees may be reluctant to share details of a mental health condition with their employer. In some cases, they may attribute their sickness absence to physical ailments and fail to disclose the real reason to the employer. Could it still be possible for such employees to succeed in a disability discrimination claim?

Section 15 of the Equality Act 2010 (the Act) makes it unlawful to treat someone unfavourably because of something arising as a consequence of a disability (for example sickness absence). An employer can justify any such unfavourable treatment if it is a proportionate means of achieving a legitimate aim.

For a section 15 claim to succeed, the employer must have actual or constructive knowledge of the claimant's disability. In other words, a tribunal will consider whether the employer actually knew or could reasonably have been expected to know that the employee had a disability, i.e. a mental or physical impairment with a long term and substantial adverse impact on the employee's ability to carry out normal day to day activities. There is no need for the employer to have actual or constructive knowledge of any particular medical diagnosis. It will be enough that they should have known that the impact of the condition on the employee met the criteria

for a disability under the Act.

Where there are circumstances which suggest that the employee may have a disability, for example persistent absences, the employer should take reasonable steps to find out more about the employee's medical condition.

There is no separate requirement for the employer to know about the link between the "something arising" and the disability. It will therefore be no defence to argue that the employer did not know that the sickness absence in question was linked to a known disability.

When assessing compensation in a discrimination case, the tribunal will aim to put the claimant in the position she or he would have been in if the discrimination had not happened. Compensation can be reduced in accordance with the likelihood that the claimant would have suffered the same wrong (e.g. dismissal) for a non-discriminatory reason.

Case details: *A Ltd v Z*

In A Ltd v Z the EAT ruled that the employer did not have constructive knowledge of the claimant's disability because the claimant would not have engaged with medical enquiries if they had been made.

Z was employed for just over a year as a part-time finance co-ordinator for A Ltd. Z's stress, depression, low mood and schizophrenia qualified as a disability under the Act.

Before Z commenced her role, she was asked to explain her 30 day sickness absence with her previous employer. She gave a misleading explanation, attributing the absence to injuries arising from a car accident. Z also stated on a questionnaire, answered shortly after her employment began, that she did not have a disability. Z was absent for 85 days during her employment, with 52 of these being recorded as sick leave. The true reason for many of these absences was her severe mental ill health. However, Z attributed them to physical ailments on each occasion.

A Ltd raised concerns with Z about her absences and poor time-keeping both informally and formally in her probation and end of year reviews.

The claimant returned to work after a two-month absence. On her first day back, she was late arriving for work. The Chief Executive informed her that she could no longer depend on Z and that she was dismissed because of her sickness absence and poor time-keeping. At the time of the dismissal, the employer had seen GP's certificates stating that she was suffering from "low mood" and referring to "mental health and joint issues" and a hospital certificate showing that she was expected to spend four weeks as an in-patient.

In considering Z's claim under section 15 of the Act, the tribunal found that the employer did not have actual knowledge of the disability at the date of the dismissal. However, it concluded that the employer ought reasonably to have known about the disability at this date. It noted that employees suffering from poor mental health will often be reluctant to disclose such conditions. Given the sophisticated (although not large) nature of the employer organisation, it should not have taken the claimant's silence on her mental health as conclusive and should have made further enquiries after receiving the GP and hospital certificates. The tribunal found that the dismissal for poor attendance was unfavourable treatment because of something arising in consequence of her disability. The "intemperate and precipitate" nature of the "on the spot" dismissal led the tribunal to conclude that it could not be justified as a proportionate means of achieving a legitimate aim. The tribunal took into account that the employer did not follow the statutory Equality and Human Rights Commission (EHRC) Code of Practice, did not hold a return to work meeting and did not refer Z to occupational health or seek information from a medical expert.

The tribunal reduced the claimant's compensation by 50% because of the probability that she would have failed to engage with any medical enquiries made by the employer and that she would have been dismissed before the second anniversary of her appointment. It also reduced the compensation by 20% for the claimant's contributory fault because the claimant's poor time-keeping was a factor in her dismissal (which was unrelated to her disability).

The EAT set aside the tribunal's decision on the question of constructive knowledge and so the claim was dismissed. It held that the employer did not have constructive knowledge of the disability. The tribunal should have asked itself what the employer would have known if it had made further enquiries about Z's health. As the tribunal had found that it was likely that the claimant would not have disclosed her conditions on further enquiry, it should not have concluded that the employer should reasonably have known about the disability. The EAT noted that the EHRC Code of Practice requires that employers consider issues of dignity and privacy when making enquiries about disability. The EAT commented that it is not reasonable to expect employers to "impose themselves" by pursuing medical enquiries when an employee wishes to keep their health condition secret.

The EAT also ruled that the tribunal had not properly considered the question of whether the unfavourable treatment was justified as it had failed to take into account the business needs of the employer.

Comment

This case is a useful reminder of what will be expected of employers where an employee has frequent and/or long term sickness absences but fails to disclose a condition which could qualify as a disability.

As the EAT notes, it is not surprising that employees are reluctant to reveal serious mental ill health given the continuing stigma of such conditions inside and outside the workplace. Employers should not simply go along with the "silence" of an employee on such a condition. The EHRC Code of Practice states that employers must do all they can reasonably be expected to do to find out if a worker has a disability. If employers have sufficient evidence to put them on notice that the employee may be suffering from a condition qualifying as a disability, they should try to find out more by referring the employee to occupational health and/or seek information from the employee's consultant or GP.

However, where the employee does not or is not likely to co-operate with such enquiries, this case suggests that a tribunal will find that the employer could not reasonably have been expected to know about a disability.

The question of whether the employer might have been able to justify the on the spot dismissal in this case remained unresolved. Employers should be aware that it will be difficult for an employer to justify dismissing an employee because of something arising from a disability where it does not follow a fair dismissal process and take into account the EHRC Code of Practice.

Was a Christian NHS Trust director discriminated against for expressing his views on same-sex couple adoption?

Employers need to have a clear non-discriminatory reason for action when dealing with religious expression

The tension between religion and sexual orientation in discrimination claims has seen a number of high-profile court cases in recent years. These cases have tested the interplay of protection from discrimination in the Equality Act 2010 and the rights to manifest religion or belief in the workplace.

Case details: ***Page v NHS Trust Development Authority***

Mr Page was a non-executive director of an NHS Trust who also happened to be a magistrate. In 2014, whilst part of a panel of magistrates hearing an adoption application, he expressed his view that a child ought to be brought up by a mother and father and that it was 'not normal' to be adopted by a single parent or same-sex couple. Concerned that Mr Page was unable to fulfil his oath of office to apply the law impartially, his fellow magistrates complained and Mr Page was subject to disciplinary action.

Newspapers and radio stations became interested in the story and Mr Page gave several interviews in which he said the disciplinary action against him was 'saying I was a Christian and therefore I was prejudiced' and that as a Christian his views would naturally be brought into his decision-making.

Mr Page did not inform the Trust about the disciplinary action or about the media coverage. The Trust only found out when a complaint was received from the chair of its LGBT Staff Network, who noted that Mr Page's publicity and association with the Trust was undermining the Trust's ability to serve the local LGBT community.

The Trust warned Mr Page that publicly expressing his views could undermine the Trust's ability to deliver services. Mr Page was instructed to inform the Trust of any further media interest before he gave interviews.

However, Mr Page continued to give interviews without warning the Trust he was doing so. As a result of these interviews he was removed as a magistrate. When the Trust learned about his further media appearances and his removal from the magistracy it scheduled a meeting to discuss developments with Mr Page.

The day before the Trust and Mr Page were due to meet he again appeared on TV for an interview, during which he stated his belief that homosexuality was wrong and that he did not agree with same-sex marriage. The following day the Trust met Mr Page and told him that because he had contacted the media against instruction, he was being suspended and an investigation into the matter would be launched.

It was ultimately decided that Mr Page's tenure as non-executive director could not continue based on the events outlined above having a negative impact on the Trust's ability to serve the local LGBT community. In addition, the review panel noted that Mr Page had failed to acknowledge the impact his actions had on his credibility as a non-executive director of the Trust, and that he had failed to demonstrate 'any kind of remorse or insight' into the

consequences that his actions might have.

Mr Page brought claims of direct and indirect discrimination against the Trust on the grounds that he had been removed from office because of his religious beliefs. In addition, he claimed victimisation for alleging he had been disciplined for being a Christian and that his rights under the European Convention of Human Rights (ECHR) were breached. An employment tribunal dismissed all of his claims. Mr Page appealed.

EAT decision

The EAT dismissed all grounds of appeal. In its decision, the EAT was clear that the tribunal was entitled to find that there was no discriminatory reason for Mr Page's dismissal. The tribunal had found that the employer dismissed Mr Page because of the impact his public statements had on the Trust's ability to deliver services to a vulnerable community, not because of the views themselves. This had been exacerbated by Mr Page ignoring the Trust's warning to notify them of any further media appearances, which he failed to do.

The EAT also agreed with the tribunal that Mr Page's Article 9 (right to freedom of religion) and Article 10 (right to freedom of expression) ECHR rights were not infringed by the Trust's actions. The EAT confirmed that the Mr Page's actions in giving media interviews were not 'intimately linked' to his religion; being asked not to give media interviews without the Trust's permission did not prevent him from holding his beliefs or practising his religion.

Comment

Mr Page's case against the Trust flowed from the disciplinary action taken in respect of his magistracy. Despite warnings not to, Mr Page prioritised publicly expressing his religious views and views in regard to his magistracy over the potential impact this could have on the Trust's obligation to serve a particular community. It was relatively straightforward for the tribunal and EAT to determine that the Trust's actions were as a result of a clear non-discriminatory decision based on misconduct in office. Mr Page's attempts to bind together his right to his religious beliefs, his right to publicly express them, and his job did not convince the tribunal or EAT.

This case continues to underline to employers the importance of having good documentary evidence of warnings and the reasons for any disciplinary action taken so that an employer can clearly demonstrate non-discriminatory reasons for their actions

Question of the month: can an employee make a covert recording?

Making a covert recording could be gross misconduct in some circumstances but the recording may be admissible in the employment tribunal

It is a straight-forward matter nowadays for most people to make an unobtrusive recording of a conversation on a mobile phone. Even where an employer has clear rules in place that meetings and calls should not be recorded, there is no guarantee that an employee will not be covertly recording what is said.

We are often asked what an employer can do about this. The safest approach is perhaps to assume that a recording is being made and to try to ensure that discussions remain reasonable, fair and non-discriminatory. However, employers can take steps to make clear in policies and

rules that covert recordings are not permitted and that making one will be a disciplinary matter. This can also be restated and minuted at the outset of meetings.

A recent case has helpfully considered when a covert recording might be gross misconduct as a breach of the implied term of mutual trust and confidence. This was a key question for the tribunal in deciding whether to reduce the claimant's compensation on the basis of her contributory fault and because she would have been dismissed in any event if the employer had known about the recording.

Case details: Phoenix House v Stockman

Ms Stockman worked in the finance department of a charity, Phoenix House. As part of a restructure, Ms Stockman's role was deleted and she was appointed to a more junior role. Ms Stockman raised concerns that she had been treated differently to her colleagues in the restructure. She interrupted a meeting between colleagues about this complaint, refused to leave the room and demanded to know what had been said. Subsequently, she made a covert recording of a meeting with HR. HR made clear that her conduct in interrupting her colleagues' meeting would be a disciplinary matter. Ms Stockman went off sick and raised a grievance, including a complaint that she had been harassed and that the employer had not provided her with a safe place or system of work under health and safety legislation.

The employer attempted to resolve the situation through mediation. HR invited Ms Stockman to a further meeting. Ms Stockman made clear her wish to return to work and to put the grievance behind her. However, she was summarily dismissed at the meeting. The HR manager took the view that Ms Stockman continued to distrust senior management and on that basis it appeared that the employment relationship had irretrievably broken down.

Ms Stockman brought claims of unfair dismissal, victimisation and whistle-blowing detriment which were upheld by an employment tribunal. It found that the employer had not acted reasonably in dismissing Ms Stockman for a breakdown in relationship when she had made clear her wish to put the matter behind her and get back to work.

At the remedy hearing, the employer argued that it would in any event have dismissed Ms Stockman for gross misconduct on the basis of the covert recording if it had known about it at the time of the dismissal and that her compensation should be reduced to nil accordingly. The tribunal decided that the basic and compensatory awards should be reduced by just 10% because Ms Stockman had made a covert recording.

Covert recording was not gross misconduct in the circumstances

On appeal, the employer argued that the act of covert recording was in breach of the implied term of mutual trust and confidence because it was dishonest and calculated to put the employer at a disadvantage. The EAT disagreed and commented that making a recording these days "is the work of a moment". It does not require significant planning and need not be designed to entrap or gain a dishonest advantage. It may have been done simply to keep a record, to protect the employee from the risk of being misrepresented in a later process, or to enable the employee to obtain advice from a union or elsewhere.

The EAT made clear that a tribunal will need to consider all of the circumstances of the case when assessing whether a secret recording equated to gross misconduct. Those circumstances will include the purpose of the employee in making the recording, whether they falsely stated that they were not making a recording, and the type of meeting which is recorded – a covert recording of a highly confidential meeting about the organisation or personal information about another employee would be more likely to be gross misconduct than a covert recording

of the employee's own disciplinary meeting (which one might expect to be recorded).

Covert recording will often be misconduct

The EAT commented that it is "good employment practice for an employee or an employer to say if there is any intention to record a meeting save in the most pressing of circumstances; and it will generally amount to misconduct not to do so". However, that is not the same as saying that covert recording will always be conduct likely to destroy or damage the mutual relationship of trust and confidence between employer and employee and so good grounds for summary dismissal.

When should we allow an employee to record a meeting?

There are further circumstances, not listed by the EAT, which are likely to suggest a covert recording will not be a fundamental breach of contract. For example, employees with disabilities or whose first language is not English may have very good reason to keep a recording of what is said and not to explain to the employer that they are doing so.

It may be a reasonable adjustment to your policies or normal practices to allow a disabled employee to keep a record of a meeting. If employers have concerns about the accuracy of the employee's recording, one solution may be to make an official record of the meeting which is then made available to both parties.

Will the recording / transcripts of a covert recording be admissible in tribunal?

The general rule is that a covert recording of a disciplinary meeting where all parties are present is likely to be admissible in court or tribunal where it is relevant to the issues the tribunal must consider. A covert recording of the private discussions of the disciplinary panel is unlikely to be admissible. However, a recent case in the EAT indicates that there will be circumstances where even private discussions between the panel will be admissible, for example, if the recording reveals the discriminatory motivation of the decision-maker or that the reason for the dismissal is a sham.

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