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Review

Employment

When is depression a disability? EAT guidance on how to approach the issue

In 2009 the National Institute for Health and Clinical Excellence estimated that 13.7 million working days are lost each year in the UK because of work-related mental health conditions including stress, depression and anxiety at an annual cost to UK employers of more than £28 billion. The size of the cost mirrors the level of difficulty which employers have dealing with these cases, from between sympathy for the employee, concern for their own business, uncertainty as to the real medical position and fear of putting a foot wrong legally. Does the Disability Discrimination Act apply? If it does, what limits does it place on the employer's options?

A person has a disability for the purposes of the DDA if he has "a physical or mental impairment which has a substantial and long-term effect on his ability to carry out normal day-to-day activities" (section 1(1)). In the recent case of *J v DLA Piper UK LLP [2010]*, the Employment Appeal Tribunal gave practical guidance to Employment Tribunals on how to decide whether or not depression is a protected disability under the Disability Discrimination Act 1995.

The claimant (J) is a barrister. She had a history of depression. In a previous job she consulted her GP 12 times over a period of just over a year about symptoms of depression, and was off work for four months. She was diagnosed as having 'moderate depression' and was prescribed antidepressants. In 2008 J was offered a job with law firm DLA Piper. The job offer was subject (amongst other things) to her completing a medical questionnaire. Before completing the questionnaire, J spoke to an HR Manager at DLA about her history of depression and was told that the job was a high-pressure one. A few days later DLA told her that the job offer had been withdrawn due to a recruitment freeze caused by the credit crunch. J believed that the real reason for the withdrawal of the job offer was her telling DLA about her history of depression. She brought an Employment Tribunal claim against DLA, alleging that she had been discriminated against under the DDA.

The first issue the Tribunal therefore had to consider was whether J's depression was, at the time she applied for the job, a disability within the meaning of the DDA. DLA's position was that J was not disabled, and that as a result she had no claim which she could pursue before the Tribunal.

The Tribunal held that J was not disabled within the DDA on the basis that her symptoms did not constitute clinical depression, a recognised illness, and in addition that they did not in its view have a substantial effect on her ability to carry out her day-to-day activities. It therefore dismissed her claim.

J appealed to the EAT, arguing that the Tribunal had applied the wrong test at law in its conclusion that she was not disabled. The EAT allowed the appeal, but did not go so far as to substitute a disability judgement. The issue of whether or not J was disabled within the DDA will now be decided by another Employment Tribunal. In reaching this decision, the EAT gave practical guidance as to how employers and the Tribunals should approach cases involving claims of a 'mental impairment' such as depression or stress:

- in cases where there is a dispute as to whether a mental impairment such as depression exists, the starting point for the Tribunal should be to consider the **effect** of the condition on the employee **before** considering the medical issues of its precise description or classification. If the Tribunal finds that the effect of the condition on the employee's day-to-day activities is substantial, then it

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is likely ("as a matter of common-sense inference" as the EAT put it) that the claimant is suffering from a condition which has produced that effect, and therefore it can be concluded that the employee is disabled within the DDA. It may then be unnecessary for the Tribunal to have to deal with the potentially very complicated medical issues that can arise in mental impairment cases, particularly where there is no specific medical diagnosis. In other words, the parties should concentrate upon symptoms rather than cause.

- if a Tribunal starts by considering the adverse effect of the symptoms on the employee's ability to carry out normal day-to-day activities and finds that those activities have been substantially impaired by symptoms characteristic of depression for 12 months or more, a Tribunal would be likely to conclude that he is suffering from clinical depression (a recognised mental impairment under the DDA), rather than what it described as a reaction to "adverse life events". This might be the sort of certificated "stress/anxiety/debility" which traditionally follows something actually or prospectively going wrong at work, e.g. a redundancy or disciplinary proposal, some reversal in relation to bonus or a falling-out with a colleague. This would be more likely to be temporary or less severe, and (despite what the employee's solicitor might say) less likely to constitute a mental impairment within the DDA;
- it is still good practice for an Employment Tribunal to state its conclusions separately on the issues of first impairment and then adverse effect when considering the question of whether or not someone has a disability, although it should not proceed by "rigid consecutive stages". As explained above, considering the practical day-to-day effects of a potential mental impairment before going on to consider medical evidence (if necessary) is likely to be the better approach; and
- although the original requirement under the DDA that an employee had to prove the existence of a clinically well-recognised illness was removed in 2005, Tribunals should still look behind the often very general descriptions that are given to mental illnesses such as 'depression' or 'stress'. Specialists called to give evidence for either party will need to be as precise as possible about the actual adverse effects on **that** individual, not the possible varieties which the complaint may take or the different ways it may affect different people. Sadly for employers, disproving an impact on the usual indicators of memory or concentration may be an uphill struggle, especially where the effects no longer need to be tied to a specific clinical illness with established medical symptoms.

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The EAT also clarified the role of a GP's evidence in mental impairment cases. In J's case the Tribunal did not take into account the evidence of J's GP (which was that J was suffering from clinical depression) on the basis that the GP was not an expert or a specialist in the field of mental illness. The GP had been J's doctor throughout the relevant periods and her evidence as to J's daily state was not contradicted by either of the (more sceptical) psychiatrists' reports that the Tribunal did take into account. The EAT considered that the GP's evidence should have been taken into account as although this one was not a specialist, GPs frequently deal with individuals suffering from depression, and therefore can express an opinion on it. Moreover, there was little dispute as to how the condition, whatever it was, actually impacted on J.

So what does this case mean for employers? As ever, employers must take the issue of disability discrimination seriously including – as in J's case - at the recruitment stage. After all, there is no cap on the compensation which can be awarded for a successful claim under the DDA. With more and more employees claiming to suffer from stress and depression, employers should not be dismissive of these conditions, even though they are often more difficult to diagnose and deal with than some other forms of disability.

The practical and pragmatic approach of the EAT in stating that the day-to-day adverse effects of a potential mental impairment must be considered first highlights the importance of communication with the employee and where medical advice is appropriate or necessary, employers should bear in mind that the employee's GP may be best placed (at least at the outset) to advise before any further specialist advice is taken. Even if J does establish that she was disabled, this would not have obliged DLA to keep the offer open regardless. An employer is entitled to point out issues which may make the appointment a risky one for the employee, and one could mount a perfectly decent argument that had DLA offered the role to J in the full knowledge both of her medical history and the high-pressure nature of the role, it would have had little defence to a personal injury claim if she became ill in consequence. The appropriate way forward (irrespective of whether she was statutorily disabled, as that could not be safely assessed at that time) would have been a discussion with J about that pressure and how far she felt up to it. The question of reasonable adjustments should be seen to

be addressed, and if the tension between what the employer needs and the candidate can safely do becomes too great, **then** the offer can be withdrawn. Without that discussion, however, an employer will always be vulnerable to discrimination allegations of the sort made in this case.

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