Disability Discrimination in the Employment Tribunal: lessons for education lawyers

By Sarah Bowen and Naomi Webber

This article considers two recent appellate decisions (Khorochilova v Euro Rep Limited UKEAT/0266/19/DA and Robinson v DWP [2020] EWCA Civ 859) in respect of the provisions of the Equality Act 2010 (EqA) in relation to the protected characteristic of disability. Whilst the facts of the cases relate to the employment sector, the same definition of disability applies in the context of education. Accordingly, their principles are directly relevant and applicable to disability discrimination claims in education.

Khorochilova v Euro Rep Limited UKEAT/0266/19/DA

Facts

1. The Claimant was employed by the Respondent to manage its insect colony (a place for breeding insects such as crickets as food for animals/reptiles). Following her dismissal, she brought a number of claims against the Respondent including disability discrimination.

2. The Claimant's claim contained a very brief pleading in relation to disability. The grounds of complaint simply said that the 'disability' causes the Claimant to be "somewhat obsessive" about how she does her work and that some people interpreted it as "perfectionist behaviour".

3. At the preliminary hearing she identified her disability as a "mixed personality disorder" and relied on a report from a Consultant Psychologist which was undated but based on assessments in 2010.

4. The Tribunal firstly considered impairment and concluded that there was insufficient evidence that the Claimant suffered from a mixed personality disorder because the

Consultant Psychologist declined to diagnose her with that condition and described her as having "problematic personality traits".

5. The Tribunal also concluded, that there was no specific evidence to support that her condition had a substantial adverse effect on her ability to carry our normal day to day activities.

Issue

6. Does the question of whether a claimant had a mental impairment need to be considered before considering the effect on their day to day activities?

Legal background

7. The EAT gave guidance in ***Goodwin v Patent Office*** **1999 ICR 302**, EAT on the proper approach to adopt when applying the definition of disability under the provisions of the Disability Discrimination Act which preceded the Equality Act 2010. The guidance remains equally relevant today in interpreting the meaning of 'disability' under s6(1) EqA 2010.

8. The 'Goodwin guidelines' require the court/tribunal to look at the evidence by reference to four different questions:

   (a) Did the claimant have a mental and/or physical impairment? (the 'impairment condition');

   (b) Did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition');

   (c) Was the adverse condition substantial? (the 'substantial condition'); and

   (d) Was the adverse condition long-term? (the 'long-term condition').

9. These four questions should be posed sequentially and not together.[1]

10. This approach has been approved in subsequent cases and in ***J v DLA Piper UK LLP*** **2010 ICR 1052 EAT[2],** Mr Justice Underhill P, observed that the court/tribunal should state their conclusions separately on the questions of impairment and adverse effect, and in respect of the latter findings on substantially and long-term effect. However, expressly stated that such questions should not be applied in a rigid consecutive approach specifically in cases where there may be dispute about the existence of an impairment it will make sense to begin with making findings about whether the claimant's ability to carry

[1] *Wigginton v Cowie and ors t/a Baxter International (A Partnership)* EAT 0322/09
[2] At paras 38-40.

out normal day-to-day activities is adversely affected and to consider the question of impairment in light of those findings.[3]

Decision of the EAT

11. There was no error of law in determining the impairment before substantial adverse effect question. Quoting ***J v DLA Piper*** as authority for the fact that the tribunal should not apply a rigid sequential approach to the questions under s6 EqA, it does not mean that the Tribunal erred in dealing with the questions in the order they appear in the statutory provisions and the Tribunal did go on to consider substantial adverse effect in any event in the present case.

Comment

12. Whilst ***J v DLA Piper*** did not endorse a stringent order in which the questions should be considered there may still be an argument that the court/tribunal's decision amounts to an error of law if the approach adopted is illogical, unclear or fails to deal with any particular question adequately in the circumstances of a particular case. The EAT's decision in ***Khorochilova*** does not change that position.

13. This case also serves as another warning to those representing Claimants as to the complex nature of the issue of disability and the importance of ensuring that there is sufficient evidence to support its existence and impact in light of the four questions that the court/tribunal must apply. For those representing a Respondent/Defendant, it is a useful reminder of the avenues that may be adopted to try and prevent a finding of disability in reliance on technical arguments. As stated above, whilst the facts of this case related to the field of employment, it is a decision on the provisions of the EqA and therefore will be of equal relevance in claims of disability discrimination in the context of education.

14. Finally, in the present case there was a useful discussion about the importance of definition or label that a claimant places on the disability relied on. ***Khorochilova*** she relied on mixed personality disorder. That condition was not established on the evidence. However, the EAT endorsed that if there was evidence that the claimant had some other impairment such as "problematic personality traits", then it would be an error not to consider whether that met the definition of disability. In the present case the Tribunal did do so but

[3] At para 40.

discounted it in any event. It is not uncommon for claimants to mislabel or describe their disability or to rely on more than one condition.

***Robinson v DWP* [2020] EWCA Civ 859**

Background

15. The Claimant/Appellant had been working for the DWP as an administrator for several years when she began suffering from migraines/blurred vision, making it difficult to see her computer screen and use certain software. She attempted to use screen magnification software and was eventually moved to a paper-based role. This process caused her a considerable amount of stress and she raised two grievances, and ultimately brought a claim in the Employment Tribunal for discrimination arising from disability (s15 EqA) and failure to make reasonable adjustments (s20-21 EqA).

16. The ET dismissed the reasonable adjustments claim but upheld the claim for discrimination arising from disability; holding that the DWP had treated the Claimant unfavourably by causing her undue stress, delays in dealing with her second grievance and delays in its attempts to implement adjustments.

Issue in the Employment Appeal Tribunal and Court of Appeal

17. For a successful claim under s15 EqA, must unfavourable treatment arise **'because of'** something arising from a disability, or can it be **'but for'** something arising from a disability?

Legal background

18. The Court of Appeal considered a similar question under s13 EqA in ***Dunn v The Secretary of State for Justice & Anor* [2018] EWCA Civ 1998**. It held that in most cases of direct discrimination, the claimant must show a discriminatory motivation on the part of the alleged discriminators in order to satisfy the 'because of' test (i.e. that, for example, the claimant's disability operated on their minds so as to cause them to act, or fail to act, in the manner complained of). The only time a claimant does not need to show discriminatory motivation is if the treatment in question is inherently discriminatory, for example the application of a criterion which necessarily treats men and women differently.

EAT decision

19. The EAT in ***Robinson*** reversed the ET's decision. It held that the treatment of the Claimant could not have been motivated by the consequences of her disability. Instead, it was an attempt to deal with the consequences of the disability, which did not succeed. This meant that while it was correct to say that 'but for' her disability the treatment would not have occurred (which is not the test to be applied), it could not be said that the treatment was 'because of' something arising from her disability. Applying ***Dunn*****,** her claim under s15 EqA therefore failed.

Court of Appeal decision

20. The Court of Appeal upheld the EAT's decision. It held that in deciding whether less favourable or unfavourable treatment was because of disability or something arising in consequence of it (in s13 and s15 EqA 2010 respectively), it is necessary to consider the thought processes of the decision-maker concerned and was not a simple matter of 'but for' causation. This reflected the decision in ***Dunn***.

Comment

21. The distinction between 'because of' and 'but for' is important. In a s15 EqA claim, if an individual can only show that the alleged discrimination occurred in circumstances they would not have been in had they not been disabled, this is unlikely to be enough. To succeed, it is important to demonstrate that the 'something arising in consequence of disability' was operating in the mind the alleged discriminator when they did the acts complained of.

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Sarah Bowen

Barrister
3PB

0330 332 2633
sarah.bowen@3pb.co.uk

3pb.co.uk

Naomi Webber

Barrister
3PB

0330 332 2633
naomi.webber@3pb.co.uk

3pb.co.uk