

EAT conclude that an erroneous belief that an employee was carrying out physical work whilst signed off sick can constitute ‘something’ arising in consequence of disability

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[Pilkington v Jones \[2023\] EAT 90](#)

The Facts

1. The Respondent is a manufacturer of glass. The Claimant commenced employment with them in 1983 as an apprentice, and had been promoted to Team Leader by the time of his dismissal for gross misconduct in October 2019. The Claimant developed a chronic shoulder condition which meant that he was unable to carry out physical work. In November 2018 he was signed off work due to his level of pain. An Occupational Health report provided that his condition was “*very disabling*” but indicated that he could return to work in a non-manual role once the pain was sufficiently controlled.
2. Following a report received in March 2019 that the Claimant had been seen wearing work boots, the Respondent engaged surveillance consultants to covertly record the Claimant. One of the videos showed the Claimant in a greenhouse with a friend of his [a farmer], where he passed a hose to his friend, and another video showed the Claimant accompanying his farmer friend on a delivery, in which he was seen handling a small bag containing potatoes. This led to the Claimant’s manager considering that he may have been engaged in secondary employment.
3. A disciplinary process ensued, the conclusion being that the Claimant had undertaken physical activity whilst signed off sick. He was summarily dismissed for gross misconduct.

4. A claim was brought of discrimination arising from disability, with the 'something' arising in consequence of his disability being the Respondent's belief that the Claimant was engaged in physical activity while off sick from work, and the unfavourable treatment being his dismissal.

The ET decision

5. The ET summarised the law in respect of the 'something' in a section 15 claim:

In City of York Council v Grosset 2018 ICR 1492 the Court of Appeal held that where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to unfavourable treatment under S.15, even if the employer did not know that the disability caused the misconduct. The causal link between the 'something' and the unfavourable treatment is an objective matter that does not depend on the employer's knowledge. The Scottish EAT in Sheikholeslami v University of Edinburgh 2018 IRLR 1090 clarified the S.15 causation test. It held that an employment tribunal had erred in rejecting a S.15 claim on the basis that the reason for the Claimant's dismissal – her refusal to return to her existing role – was not 'caused by' her disability. The test is whether the reason arises 'in consequence of' the disability, which entails a looser connection than strict causation and may involve more than one link in a chain.

6. The ET concluded that the Respondent had developed an erroneous view of what the Claimant was in fact capable of ['the erroneous belief'], that this arose in consequence of disability and that the Claimant was dismissed as a result of this. They therefore upheld the section 15 claim.
7. The Respondent appealed on various grounds, including that the ET erred in its approach to the causation test, namely (a) they incorrectly stated the law as to the causation test between the "something" and the unfavourable treatment as objective, and (b) in referring to the "something arising" that they had found as connected to the disability rather than as a consequence of the disability.

The EAT decision

8. The EAT commented that the case of Grosset made it clear that in a section 15 claim, the 'something' must objectively arise out of the disability, whereas the question of that something being the causation of the unfavourable treatment must be examined on a subjective basis.

9. As regards causation, the EAT referred to Pnaiser v NHS England [2016] ICR 170, in which Simler J sets out the requirements that apply to section 15 EqA. She states that the ET must identify the unfavourable treatment and then what caused the treatment and then making clear that there may be more than one reason or cause for the treatment but that the 'something' that is one cause of the treatment must have at least a more than trivial influence on the unfavourable treatment which would amount to an effective reason for it, also making the point that motives are irrelevant. She also went on to state that there may be more than one link and a range of causal links, but that, as the causal link is a question of fact, the more links in the chain the harder it will be to show the requisite connection.
10. The Respondent argued that they considered that the video footage showed the Claimant doing acts which they considered were inconsistent with what the medical report had indicated that he could do. That was the reason for the dismissal. It was argued that when considering the judgment, the disability amounted to background context and not a causal context. It was argued that there were too many links in the chain between the Respondent's belief and the disability such that the requisite causal connection was not made out.
11. For the Claimant it was argued [inter alia] that an assumption as to what someone could or couldn't do because of their disability is inseparable from the disability itself, and it was conceptually flawed to argue that these were 'links'.
12. HHJ Beard firstly considered the concept of a "belief" constituting the something arising. It was acknowledged that at first blush that might appear surprising, given the need for an objective test to be applied to the question of whether the "something" arises in consequence of a disability, and the fact that a belief naturally was a subjective state of mind in the individual holding the belief. However, he opined that the correct question was whether there can there be an objective finding that the particular state of mind arises from the disability? He concluded that *"That state of mind could not exist without knowledge of the existence of the disability. If there is knowledge of a disability it is easy to conclude that any belief about that disability arises from that knowledge. That means that either an accurate or an erroneous belief, drawn from a knowledge of the existence of that disability, would be a "something" arising from the disability. Although that belief is subjectively held, it can be objectively recognised in the same way that a subjective intent can be objectively observed from surrounding facts. On that basis a belief could be properly categorised as something arising from disability"*.

13. In any event, it was found that the erroneous, subjective belief, which would not exist without knowledge of a disability, arises *because* of the disability. The sickness absence is the reason for the investigation and observation, equally the sickness absence is the context in which the decision to dismiss is made, relying on the erroneous belief. It was held that:

“In this case a key element of information is the Claimant’s absence due to sickness. That was caused by his disability. The fact that other pieces of information led to the erroneous belief does not stop the sickness absence being a substantial part of the reason that led to the unfavourable treatment. The Respondent’s overall conclusion resulted in one consequential response; dismissal. If that analysis is adopted, based on the ET’s factual findings, the decision to dismiss was substantially because of the Claimant’s sickness absence and erroneous beliefs about his disability”. HHJ Beard considered whether or not this conclusion would be to import a ‘but for’ test but formed the view that it would not. This was because a ‘but for’ test implies not only that there is a sequence of events which leads to a final event, but that the initiating event is no longer active at the final event. Here however the initiating event, the sickness absence, is still an active event at the end of the sequence as it is part of the information which leads to the erroneous belief, as opposed to merely being the first stage in the sequence.

14. Thus it was found that the tribunal had not erred in law in upholding the section 15 claim.

Commentary

15. This case is a useful reminder that a wide approach is to be taken in determining whether or not there is a ‘something’ which arises in consequence of disability, which can encompass matters such as beliefs held by an employer. The fact that a belief is a subjective state of mind does not mean that the existence of such a belief cannot be determined objectively, as is required by Grosset. It serves as a warning to employers to very carefully consider the dismissal of an employee in cases of potential malingering as they could unwittingly find themselves facing a successful section 15 claim.

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