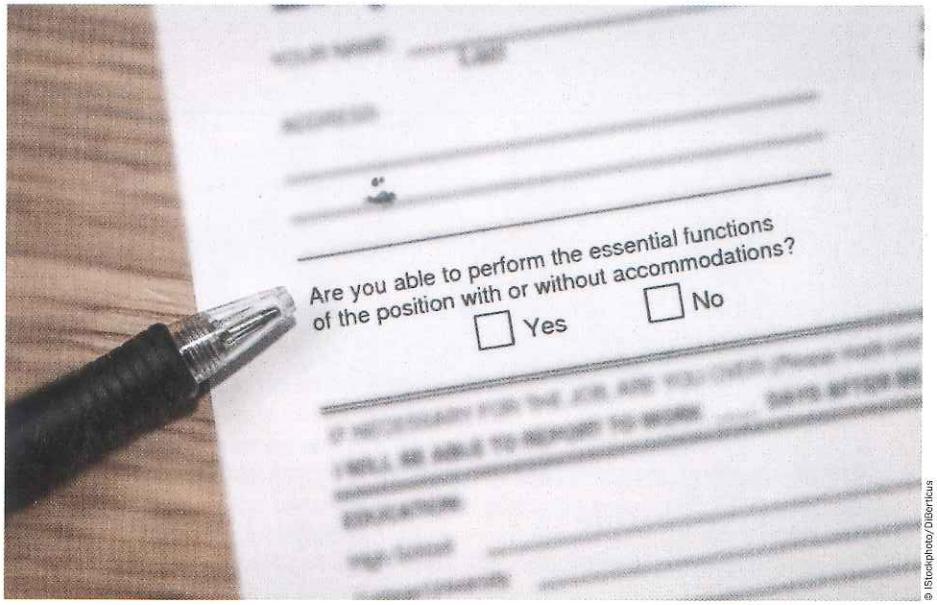
Post-*Pnaiser* protection

Karen Moss considers the evolution of discrimination arising from disability under s 15 of the Equality Act 2010



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IN BRIEF

▶ The president of the Employment Appeal Tribunal gave important guidance on how tribunals should approach discrimination arising from disability in *Pnaiser*.

The evolution of the law relating to discrimination arising from disability under s 15 of the Equality Act 2010 (EqA 2010) from the previous incarnation of 'disability-related discrimination' under the Disability Discrimination Act 1995 (DDA 1995) has considerably widened the protection given to employees. When Baroness Hale gave her judgment in *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399, [2008] All ER (D) 342 (Jun) (interpreting disability-related discrimination differently to the rest of the House of Lords) she outlined a four-stage test for disability-related discrimination and introduced an element of 'remoteness' to s 5(1) of DDA 1995 (applicable at the time).

The four stages set out by Lady Hale were: (a) what is the treatment complained of?; (b) what was the reason for that treatment?; (c) did that reason relate to the disabled person's disability?; and (d) was the treatment less favourable than the treatment of others to whom that reason did not apply? Under (c), Lady Hale stated (at [83]): 'The reason may not be the disability, but the disability may have been the cause of the reason. But that is not necessarily enough. The connection between the disability and the reason must not be too remote. It is not easy to lay down a simple test by which to judge that remoteness. The number of links in the chain may be a pointer.'

EqA 2010 removed reference to comparators and a new iteration of disability-related discrimination was termed 'discrimination arising from disability'. Section 15 of EqA 2010 states:

'(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.'

The lead-up to Pnaiser

The wording of s 15(1)(a) has had the practical consequence of weakening the causal link a claimant needs to show between the treatment complained of and the disability.

In *Houghton v Land Registry* UKEAT/0149/14/BA, [2015], [2015] All ER (D) 284 (Feb) bonuses were prohibited for employees who had any warning on their disciplinary record. The claimant was given a warning for disability-related absence. It mattered not that the person deciding to whom a bonus should be awarded did not know that the reason for the warning was disability-related absence. The respondent was still liable under s 15(1)(a) subject to justification under s 15(1)(b). P Clark J described the formulation at s 15(1)(a) as 'deliciously vague'. In *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893 [2015], All ER (D) 404 (Jul) the respondent wrongly believed that the claimant was falsely claiming to be incapacitated. The Employment Appeal Tribunal (EAT) found that the 'something' arising from disability need only amount to a 'significant influence' or 'operative cause' to be actionable, even if not the main cause for the unfavourable treatment.

In *Basildon and Thurrock NHS Foundation Trust v Weerasinghe* [2016] ICR 305, [2015] All ER (D) 397 (Jul) Langstaff J, the EAT president at the time, confirmed that the right approach was to apply the statutory two-stage tests on causation, being: (1) What is the reason for the treatment: the 'something' which the unfavourable treatment was because of; and (2) did that 'something' arise in consequence of the claimant's disability. By seeking to determine the claim simply on whether there was a link between the disability and the treatment of the claimant by the trust, the tribunal had risked failing to distinguish sufficiently the context within which the events occurred from matters which were causative and had taken too loose an approach to the construction of the section.

The next president of the EAT, Mrs Justice Simler, in *Pnaiser v NHS England* [2016] IRLR 170, [2015] All ER (D) 262 (Dec) endorsed the view that the two-stage test should be used (which is broadly the same as the tests set out by Lady Hale in *Malcolm* but without the comparison, and also without any express consideration of 'remoteness'). Identifying the 'something' involves looking into the mind of the putative discriminator and identifying an effective or operative cause of the unfavourable treatment (see *IPC v Millar* [2013] IRLR 707, [2013] All ER (D) 261 (Apr)). The second test is objective: Did the 'something' arise in consequence of the claimant's disability, regardless of whether the putative discriminator knew that it did or not?

In *Pnaiser*, pertinently to s 15, a prospective employer, NHS England (R1), had relied upon a negative reference to withdraw a job offer made to Dr Pnaiser. That negative reference from Coventry City Council (R2) was itself discriminatory under s 15 because it was negative due to the claimant's disability-related sickness absence. The tribunal accepted that R1 simply relied upon the negative reference and did not know of the link

between the disability and the negativity. Nevertheless, applying the two-stage test, the 'something' was the negative reference; that did arise in consequence of the disability because, objectively, it arose due to sickness absence which was, in turn, due to the claimant's disability and R1 was liable (subject to justification had it been pleaded).

What was the 'something' which caused the treatment?

Identifying the operative cause for the treatment has been problematic for some tribunals since *Pnaiser*. In *Secretary of State for Justice & Anor v Dunn* UKEAT/0234/16/DM Simler P reminded tribunals that where it was found as a fact that certain failures were as a result of 'incompetence' on the part of the decision-maker, it did not make sense to conclude that an operative cause of the same failures was the claimant's inability to work full time without stress. The tribunal in that case had not followed the *Pnaiser* two-stage test, and its analysis was flawed.

In *Charlesworth v Dransfields Engineering Services Ltd* UKEAT/0197/16 the claimant tried his luck in saying that his employer found the reason for his dismissal while he was on disability-related leave, therefore his disability had a sufficient influence on his dismissal to make it discrimination arising from disability. Simler P did not accept this—the causal test under s 15(1)(a) was still 'because of' and nothing less would do.

Did the 'something' arise in consequence of the disability?

In *Risby v Waltham Forest* UKEAT/0318/15, [2016] All ER (D) 219 (Mar) the EAT made clear that no 'direct linkage' between the disability and the behaviour for which the claimant was disciplined was required. The tribunal in that case erred in finding merely that there was no direct link between the behaviour for which the claimant was disciplined and the disability (my emphasis), when dismissing the claim under s 15. This claimant, who was paraplegic, was dismissed for using racially abusive language in his frustration at not being provided with an accessible training session. Although it was remitted to the employment tribunal to apply the *Pnaiser* tests correctly, the claim was withdrawn after the Court of Appeal granted permission to appeal. In my opinion, had the tribunal looked at this again, they would probably have found that the reason for the dismissal (the use of racist language) had not arisen in consequence of the disability, but his disability had merely been a background circumstance.

In *Urso v DWP* [2017] IRLR 304, [2017] All ER (D) 171 (Feb) the EAT found that the tribunal had erred by failing to consider if the reason for the unfavourable treatment (sick leave) was caused by the symptoms of the disability, as opposed to the disability itself. As the sick leave had been caused by stress/anxiety/depression, it had arisen in consequence of the disability of post-traumatic stress disorder.

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The EAT adopted a more forgiving approach towards the tribunal in *Balson v Foray Motor Group Ltd* UKEAT/0288/16/RN. Although the tribunal had failed expressly to ask itself the question of whether the reason for the claimant's negative redundancy scoring was caused by symptoms of his disability, Mr Justice Kerr found that the tribunal was simply not satisfied of the causal link. Mr Justice Kerr considered in a different case (*Pulman v Merthyr Tydfil College Ltd* UKEAT/0309/16/JOJ, at [41]), nevertheless, that in an action under s 15, the safest course is to follow the guidance of Simler P in *Pnaiser*. Although, as in *Balson*, the EAT will read a judgment as a whole, to determine whether the answer to the *Pnaiser* tests can be gleaned from the tribunal's other findings if not to be found within the reasons for the s 15 claim (as in *Birmingham City Council v Lawrence* UKEAT/0182/16/DM).

The differences between unfair dismissal & s 15

We have also been reminded, since *Pnaiser*, that it is easier for an employer to defend an unfair dismissal claim under s 94 of the Employment Rights Act 1996, than a discrimination action under s 15 of EqA 2010. In *City of York Council v Grosset* UKEAT/0015/16, [2016] All ER (D) 186 (Nov) the EAT upheld a finding of discrimination after a teacher showed an inappropriate film to his class. It was disproportionate, and therefore not justified, to dismiss, where the lapse of judgement was related to his disability (even though the school did not know that link at the time they dismissed him). A tribunal's focus in an unfair dismissal claim is on what the employer knew at the time of the decision to dismiss (after a reasonable investigation), and whether it was within the range of reasonable responses to dismiss. Mr Grosset's dismissal was found to be fair under s 94; the medical evidence which linked the disability and the misconduct did not exist at the time of the dismissal. However, when the tribunal objectively judged whether the misconduct arose in consequence of the dismissal under s 15(1) they were right to consider the subsequently sought medical advice. They were also right to consider, objectively, whether the dismissal was a proportionate means of achieving a legitimate aim in light of all that was known at the hearing; not just whether it was within the range of reasonable responses.

In *West v RBS* UKEAT/0296/16/BA the EAT found that, where a decision to reduce pay as part of a long-term disability scheme depended upon the occupational health advice, it constituted discrimination arising from disability subject to justification. Arguably, this case is an authority for the proposition that, even if misconduct is disclosed within a medical report sought due to a disability, an employer would have to establish that a dismissal is a proportionate means of achieving a legitimate aim, rather than establish that it was within the range of reasonable responses to dismiss for misconduct that had nothing to do with the disability (though *Charlesworth* could probably be used to rebut this). There is a fine line between a background circumstance which would not exist but for the disability, and something arising from a disability.

Conclusion

Section 15 is a complex and evolving area and it remains to be seen whether the Court of Appeal will take a more restrictive approach than the EAT to the causal links required to be proved between a disability and the unfavourable treatment. Perhaps Lady Hale's 'remoteness' criterion will be reintroduced in the future. For now, parties would be well advised to examine any possible link between a disability and unfavourable treatment very carefully, even if neither party was aware of any such link at the time. NLJ

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