Evidence in Disability Cases: Where are we now?

by Matthew Curtis

Introduction

1. The purpose of this note is to review some recent decisions regarding evidential issues in disability discrimination cases.

2. The cases focus on:

    a. Stress as a disability

    b. Principal's liability for acts of their agents

    c. Knowledge of disability, in particular who has to know for a claim to succeed?

    d. Indirect discrimination: the standard of evidence required

    e. Dismissing for long-term absence where there is late evidence from the employee

a. Stress as a disability

3. Stress, depression and anxiety can be particularly difficult conditions when determining whether an employee is (or was) disabled. Part of the difficulty comes from the fact that the labels can be used interchangeably on fit notes whilst all referring to the same condition.

4. Which of these conditions can constitute a disability? The guidance of Underhill P in *J v DLA Piper*[1] continues to be very useful:

> *"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or -if the jargon may be forgiven - "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would*

[1] [2010] ICR 1052

not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."

5. A summary of the principles above:

    a. There is a difference between a clinical condition such as depression, and an adverse reaction to life events. Both may produce similar symptoms but only the first is capable of being a disability

    b. Identifying which condition an employee has can be difficult.

    c. One way of making the task easier is to consider how long the impairment has lasted. If there have been depression-like symptoms which have caused been a substantial adverse effect on day to day activities for more than 12 months then in most cases the employee has a clinical condition.

6. The effect of *J v DLA Piper* is that it appears to lower the bar for Claimants in depression/anxiety cases: so long as they could show depression-type symptoms lasting 12 months then they should get home on a claim that they were clinically depressed rather than simply reacting to something badly.

7. However, symptoms lasting more than 12 months will not always get the Claimant home. The recent case of *Herry v Dudley Metropolitan Council*[2] demonstrates this.

The facts in Herry

8. The Claimant had been signed off work for a lengthy period of time:

    a. from May 2010 to April 2013 he was absent with a physical condition (fractured ankle, post-operative recovery, leg pain, leg pain and stress, ankle pain and stress)

    b. From October 2013 his fit notes referred to mental conditions only (stress, stress at work, work related stress, stress and anxiety)

9. The relevant period for the purposes of his tribunal claims were April to June 2014.

10. The EAT found that:

    a. Although reactions to adverse circumstances are not normally long-lived, there is a class of case where a reaction to circumstances perceived as adverse can become entrenched

    b. A doctor may be more likely to use the label of "stress" in this situation, instead of "anxiety" or "depression".

    c. In such circumstances, a tribunal can certainly find that there is no mental impairment.

[2] UKEAT/0100/16/LA

The lessons from Herry

11. Firstly, labels can be important: an employee is more likely to establish disability if the fit notes refer to "depression" than if they refer to "stress".

12. Secondly, whilst *J v DLA Piper* made it easier for employees with depression/anxiety to meet the definition of disability, *Herry* shows that you can still run the argument that the employee is simply suffering an adverse reaction to life events, even if that reaction has continued for a long period of time (by arguing it has become entrenched).

Costs

13. A large part of the EAT judgment also dealt with the issue of costs (Mr Herry had been ordered to pay the whole of Dudley's costs subject to detailed assessment. The costs were expected to exceed £100,000).

14. Many of the relevant principles on costs are brought together in the judgment, but there is one novel point. The ET had considered Mr Herry's potential future earning capacity when considering his means. The Respondent had served a statutory demand (a precursor to bankruptcy proceedings) shortly after the judgment on costs. The EAT has this to say at para [46]:

> *"a party who applies for costs to the ET and relies wholly or in part on an argument that the paying party's future earning capacity is to be taken into account ought to say if there is any intention in the near future to serve statutory demands and bring bankruptcy proceedings. Bankruptcy may result in the extinguishment of the debt before any future earning capacity can be brought to bear; and it may have other severe consequences for the paying party - both personal and financial."*

b. Agents and principals

15. What liability arises for an agent of the employer under the EqA?

16. The position is addressed at section 109 of the EqA, which most people will be familiar with as providing liability and the statutory defence for employers whose employees contravene the act (the "reasonable steps" defence at s.109(4)).

17. Section 109(2) provides:

> *"Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal"*

18. This is very similar wording to s.109(1), which provides for employer's liability for acts if its employees. So far so simple.

19. However, how should the tribunal deal with a case where an agent is blissfully unaware of the protected characteristic, or that the act it has been asked to carry out contravenes one of the principles of the EqA?

20. If the principal is not fixed with liability in these circumstances then arguably it opens the door for employers to engage innocent third parties to carry out acts of victimisation.

Peninsula Business Services v Baker

21. The situation arose in *Peninsula Business Services v Baker*[3]. The employer instructed a third party to carry out covert surveillance on Mr Baker, who had claimed to be disabled and to require reasonable adjustments. The third party was told that the reason for the surveillance was to check whether Mr Baker was moonlighting, Mr Baker claimed that the surveillance was an act of victimisation, having only been ordered because of his claiming to be disabled.

22. Mr Baker argued that although the agent didn't know it was doing anything wrong, if the motive of the principal was 'suspect' then that was sufficient to make the principal liable for the carrying out of the surveillance

23. The EAT found that for liability against a principal to be established under s.109, the act of the agent must be a breach of the EqA in and of itself; i.e. the agent must satisfy the appropriate causal test (the surveillance was carried out because of the protected characteristic).

24. It is only when the act of the agent is a contravention of the EqA that the principal will be fixed with liability under the EqA.

25. This would not normally allow employers to get off 'scot-free' as Mr Baker claimed in the EAT: the ordering of the surveillance can be a breach of the EqA, even if the subsequent surveillance itself isn't. Indeed it is difficult to imagine a circumstance in which an employer could engineer a situation in which it could avoid liability under the EqA by simply instructing an agent: it would require the person instructing to also be acting innocently.

The importance of knowledge/motive of the decision maker

26. The principle in *Baker* is the natural extension of the principle in *CLFIS (UK) Ltd v Reynolds*[4], a case where the Court of Appeal explained that in "tainted information" cases (cases where a decision maker dismissed someone based on a report produced by someone with a discriminatory motive) if the decision maker has an innocent motivation then his decision cannot be attacked as discriminatory, even if he relies upon information which is tainted by a discriminatory motive.

27. Again, the employee in such a situation is not left without remedy: he can make a claim based on the act of the employee with the discriminatory motive. If that act ultimately caused or contributed to a dismissal then the losses related to the dismissal can be claimed as part of the compensation, even though the dismissal is not a discriminatory act in and of itself.

28. This highlights the importance of getting the right person in the crosshairs when presenting or defending a claim. Who was the one who actually had the discriminatory motive? Has their act been pleaded as a detriment? It is all too common to see dismissal claimed as the only detriment, regardless of whether the decision maker had the discriminatory motive, or whether he was acting on tainted information.

c. Knowledge of disability

29. On a related issue, the fact that one employee of the Respondent has knowledge of the Claimant's disability is not sufficient to impute that knowledge to the whole of the Respondent.

[3] UKEAT/0241/16/RN
[4] [2015] IRLR 562

30. In *Gallop v Newport City Council (No.2)*[5] the EAT again highlighted the importance of focussing on the knowledge of the individual decision maker. At paragraph 41 the EAT said:

> *"the appellant's argument that the knowledge of one employee (or in this case of the occupational health department) must be imputed to all employees was misconceived, at least in the context of direct discrimination... the focus should be on those committing alleged discriminatory acts and on their state of knowledge and state of mind and not on those supplying the information... What has to be addressed is the mental process of the person making that decision and not that of those providing information to that person (see paragraph 20) unless it could be considered to be a joint decision."*

31. The points at paragraph 28 above bear repeating here: it is essential for Claimants to make sure that they have the right decision maker targeted (and if they are not sure who had the required knowledge then they are better off casting the net wide than missing someone out).

32. Equally, Respondents will benefit from having as few decision makers as possible and avoiding decisions being made jointly where they can.

d. Proving indirect discrimination

33. Section 19 of the Equality Act 2010:

> (1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> > (a)A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c)it puts, or would put, B at that disadvantage, and
> >
> > (d)A cannot show it to be a proportionate means of achieving a legitimate aim.

34. What level of evidence is required to prove that a PCP is indirectly discriminatory? To what extent does the Claimant have to prove the reason for the disadvantage?

35. In *Essop & ors v Home Office (Uk Border Agency)*[6] the Supreme Court had to decide exactly this: "*The principal issue of law on appeal to this court, therefore, is whether section 19(2)(b) and (c) of the 2010 Act requires that the reason for the disadvantage suffered by the group be established and that the reason why the individual has suffered from that disadvantage be the same.*"

[5] [2016] IRLR 395
[6] [2017] 1 WLR 1343

36. The court recognised that this is not a straightforward concept to grapple with. The judgment is written in a straightforward way, and may serve as a useful guide for those struggling with the concepts involved in an indirect discrimination claim.

37. The key points can be seen in the following quotes:

> *"There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage[7]."*

> *"In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law[8]."*

> *"it must be open to the respondent to show that the particular claimant was not put at a disadvantage by the requirement. There was no causal link between the PCP and the disadvantage suffered by the individual: he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not finish the task. A second answer is that a candidate who fails for reasons such as that is not in the same position as a candidate who diligently prepares for the test, turns up in the right place at the right time, and finishes the tasks he was set. In such a situation there would be a "material difference between the circumstances relating to each case", contrary to section 23(1)[9]"*

38. The judgment illustrates that:

    a. C needs to show that a PCP puts one group at a disadvantage compared with another

    b. C need not show why the PCP has that effect

    c. C needs to show that he/she suffered that disadvantage

    d. It is open to R to show that the disadvantage was caused by a reason other than the PCP (for example, a failure to pass an exam could be caused by the PCP of taking the exam, or could be caused by a failure to study, or turning up late)

39. I suspect that there will be an increased focus on justification defences from Respondents, as *Essop* makes it easier for Claimants with proper statistical evidence to bring indirect

[7] At para [24]
[8] At paragraph [33]
[9] At paragraph [32]

discrimination claims. Equally, Respondents may focus more on the reasons why the individual claimant suffered a disadvantage, to show that it was not the PCP.

e. Long-term absence dismissals – new evidence at appeal

40. Where an employee has long-term disability related absences, it can be permissible to dismiss, although the employer will often face a claim of disability-related discrimination under s.15 EqA 2010.

41. The key issue will then be whether the dismissal was a proportionate means of achieving a legitimate aim (such aims could be the efficient running of the business, the reduction of costs or the need for consistency in the workforce).

42. An important consideration is often whether the employer ought to wait longer for the employee to return. Where the medical evidence suggests a return to work is imminent then it will rarely be fair (or non-discriminatory) for the employer to dismiss. Where there is no prospect of a return at any point in the short- or medium- term then dismissal can more easily be justified.

43. What about a case where there is no prospect of any immediate return at the dismissal hearing, resulting in a dismissal, but fresh evidence comes to light before the appeal hearing. Is the employer bound to take that evidence into account?

44. The short answer is yes. If the evidence suggests the employee is able to return to work within a short period of the appeal hearing then the employer ought to take that into account and will rarely be able to justify the dismissal.

Bolton St Catherine's Academy v O'Brien

45. This situation arose in *Bolton St Catherine's Academy v O'Brien*[10]. The facts:

    a. C had been off sick from 9 December 2011 until her dismissal on 29 January 2013.

    b. There was no prospect of her returning to work at the time of her dismissal hearing.

    c. At the appeal hearing the Claimant produced a fit note from her doctor which stated she could immediately return to work.

46. The outcome was that the Respondent's dismissal in light of that new evidence was unjustifiable.

47. The Court of Appeal also made some observations regarding the evidence required for justification in cases of dismissal for long-term disability-related absence. These highlight that Respondents must not assume that the effect of the absence can be taken as read: the tribunal can expect to have proper evidence before it of how the absence has resulted in increased costs/reduction in quality of work/whatever else the legitimate aim is. As Underhill LJ said:

    "In principle the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject. What kind of evidence is

[10] [2017] EWCA Civ 145

appropriate will depend on the case. Often, no doubt, it will be so obvious that the impact is very severe that a general statement to that effect will suffice; but sometimes it will be less evident, and the employer will need to give more particularised evidence of the kinds of difficulty that the absence is causing. What kind of evidence is needed in a particular case must be primarily for the assessment of the tribunal"

f. Expert evidence for personal injury award

48. Those who attended the ELA Solent Region training day will have already been told that *Hampshire County Council v Wyatt*[11] is good authority for the proposition that it is not always necessary to serve a medical report to obtain an award for personal injury in a successful discrimination claim.

49. A note of caution on this though: the circumstances in which a claimant will get away with not providing a medical report are likely to be very limited. The EAT made particular reference to the fact that:

    a. It is unusual for a medical report not to be produced

    b. The Respondent had not argued that the injury (depression) was divisible as between lawful and non-lawful causes, nor did it contend for an apportionment or percentage reduction on that basis.

50. Claimants should still seek medical reports to prove the extent of the injury and its causation. Respondents should be alive to the fact that the court can make a personal injury award even without such evidence, and should make sure that they properly plead causation issues where there are potential non-discriminatory causes of the injury.

MATTHEW CURTIS

matthew.curtis@3pb.co.uk

01962 868884

3PB Barristers

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[11] UKEAT/0013/16/DA