All in the past? Recurrent disabilities and informal medical evidence

By Ben Amunwa
3PB Barristers

Must a claimant relying on a recurrent condition as a disability under s.6 and Sch.1 of the Equality Act 2010 ('EqA 2010') prove that the condition had a substantial adverse effect in both the previous occurrence and the current circumstances? Yes, according to HHJ Beard in *Connor v Chief Constable of South Yorkshire Police* [2024] EAT 175, in a judgment that also offers guidance on the use of informal medical evidence in disability discrimination claims under s.15 EqA 2010.

The facts

The claimant was a civilian employee with the police who was summarily dismissed for accessing pornography on the respondent's computers. He relied on his health as mitigation for the admitted misconduct. At trial, the respondent conceded that the claimant was disabled with depression but only from the date of his suspension in February 2019 and no earlier.

The law

Briefly, a person is '*disabled*' as defined in s.6 if they have a physical or mental impairment that has a long-term substantial adverse effect on their ability to do normal day-to-day activities. The Tribunal determines whether a person is disabled by looking at the evidence at the time of the alleged discrimination (see *All Answers Ltd v W and Another* [2021] I.R.L.R. 612 at §26, *per* Lewis L). Sch. 1 para 2(2) of the EqA 2010 adds that where an impairment ceases to have a substantial adverse effect, it is treated as continuing to have that effect if it is '*likely to recur*'. The statutory guidance at para. C6 clarifies that a person who suffers from a condition with debilitating episodes may have a period of remission but if the symptoms are likely to recur beyond 12 months after the earlier episode, they will be treated as continuing and will therefore satisfy the '*long-term*' requirement in s.6 and Sch.1.

The Employment Tribunal's judgment

The Employment Tribunal found that while the claimant suffered from work-related stress and anxiety between 2011 to 2019, he was not disabled with depression until his suspension in February 2019. Even if the claimant had depression prior to that, the condition did not have a substantial impact on his ability to carry out day to day activities. The Tribunal concluded that the dismissal was in any event justified by the need to maintain behaviour standards and public expectations.

The EAT's analysis

On disability, the EAT observed that the statutory requirements of '*long term*' and '*substantial adverse effect*' relate to the *effect* of the impairment, not simply the existence of the impairment. It is the adverse effect/s that must recur (§§39 & 51).[1] A claimant who only proves the past and current *existence* of an impairment may satisfy the long-term requirement but will not be able to satisfy the substantial adverse effect requirement (§52).

On s.15 EqA 2010, the EAT reiterated the guidance of Laing J, as she was, in *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, namely, that the question of whether a '*thing*' arises from a disability is an objective one for the Tribunal. The connection between the disability and the '*thing*' arising may be direct, indirect or via a series of links - the more links in the chain, the weaker the connection and the less likely the test will be satisfied.

Applying these principles, the EAT held that the Tribunal was entitled to conclude that the claimant had failed to prove a past episode of mental impairment that had a substantial adverse effect on him (§54). He was therefore unable to establish that his depression had recurred when he experienced his symptoms in February 2019.

The appeal was dismissed for that reason, however, the EAT went on to consider whether the Tribunal was entitled to conclude that the claimant's conduct in watching pornography was not '*something arising*' from his claimed disability. On this point, the EAT concluded that the Tribunal had approached a letter from the claimant's GP in too literal a manner. A medical letter indicating that there '*appeared*' to be a connection between the condition and a '*thing*' arising is usually sufficient to establish such a connection on balance of probabilities in the absence of evidence to the contrary (§§60-61, applying *Hall*). A formal experts' report was not usually necessary and Tribunals should give due regard to relevant evidence from a qualified

[1] Though not necessarily the same adverse effect/s on both occasions (§52).

medical professional or provide '*substantive reasoning*' for rejecting it. Since this error would not have made a difference to the outcome, the claimant's appeal was dismissed.

Comment

Where disability is disputed, claimants are expected to provide a disability impact statement and supporting evidence for the Tribunal to consider at either a preliminary or final hearing. Such evidence tends to focus on the claimant's symptoms and challenges at the time of the alleged discrimination. The judgment in *Connor* highlights that where claimants rely on the fact that a condition (such as depression) has recurred, the picture will be incomplete if the evidence fails to establish the *previous* occurrence of the condition and its effects. Put another way, a claimant relying on the effects of a condition that has in fact recurred must prove disability pursuant to s.6 and Sch.1 para 2 of the EqA 2010 on two separate occasions over a period of 12 months or longer.[2]

The EAT's flexible approach to informal medical evidence is a further reminder of the potentially broad scope of disability discrimination under s.15 EqA 2010. Employers, employees and their advisers have good cause to take a precautionary, wide-angled approach to (i) whether the effect/s of a person's condition may amount to a disability; and (ii) how a disability may impact on an individual or manifest itself within the workplace.

(NB. The author notes several typographical or transcription errors in the EAT's judgment. Subject to appropriate controls, it might be thought appropriate for the EAT, a superior '*court*' of record, to provide its judgments to the parties in draft prior to wider publication in order for such errors to be corrected. AI might also be a helpful drafting tool).

[2] If the effects of a condition did not *in fact* recur, a claimant might still bring themselves within the s.6 definition if they can establish that the effects are '*likely to recur*' 12 months or longer after an earlier occurrence, notwithstanding reasonable counter-measures (see statutory guidance at paras. C9-10). This usually requires medical evidence of an underlying condition giving rise to the recurring episodes.

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Ben Amunwa

Barrister
3PB Barristers

020 7583 8055
ben.amunwa@3pb.co.uk

3pb.co.uk