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Employers can't just rely on occupational health

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NIGEL JOHN GALLOP v NEWPORT CITY COUNCIL (2013)

CA (Civ Div) (Longmore LJ, Rimer LJ, Sir John Mummery) 11/12/2013

DISCRIMINATION - EMPLOYMENT - LOCAL GOVERNMENT

In this case, the Court of Appeal consider the degree to which an employer can simply rely on the opinion of its occupational health adviser when determining whether an employee is "disabled" within the meaning of the Equality Act 2010 (EqA 2010). The case was decided under the Disability Discrimination Act 1995 (DDA 1995) but is equally relevant to cases under the EqA 2010.

For an employer to be liable for discriminatory treatment of an employee on the grounds of disability, the employer must know that the employee is disabled.

The claimant had been complaining of work-related stress symptoms from 2004. He was referred to occupational health (OH) who identified that he was suffering stress-related symptoms but was not depressed and efforts were then made to adjust his workload.

In August 2005, the claimant was signed off work. Over the next three years, a pattern developed of the claimant being signed off sick for lengthy periods with occasional and short-lived resumptions of work. Throughout this period, the employer referred the claimant to OH and sought its advice concerning the management of his sick absences. On a number of occasions, OH reported to the employer that the claimant was suffering stress, anxiety and/or depression but was not covered by the DDA 1995. The OH adviser did not explain his rationale for this conclusion.

In February 2008, the claimant returned to work and was suspended in connection with historical allegations of bullying for which ultimately he was dismissed on 23 May 2008.

The employment tribunal (ET) determined that the claimant was disabled within the meaning of the DDA 1995 from July 2006 but found that the disability claim was not well founded on the grounds that the employer did not have the requisite knowledge to found liability and was entitled, in the absence of any good reasons to the contrary, to rely on the opinion of its OH adviser. The EAT upheld the ET decision.

In the Court of Appeal, it was agreed that before an employer can be answerable for disability discrimination (i) it must have actual or constructive knowledge that the employee is a disabled person and (ii) for that purpose the required knowledge is of the facts constituting the disability by reference to the statutory definition of (a) physical/mental impairment which (b) has a substantial and long-term adverse effect on (c) the employee's ability to carry out normal day-to-day activities.

In allowing the appeal and remitting the case back to the ET, the Court of Appeal stated that the OH advisers' declarations that the DDA 1995 did not apply were unsupported by reasoning and did not identify by reference to the three elements of the statutory definition why they considered that the Act did not apply. It followed that the OH advice was worthless to the employer who was personally required to form its own judgment on whether the claimant was or was not disabled.

What follows from this judgment is that whatever the advice it receives from OH, the employer must still make the factual judgment as to whether the employee is disabled and cannot simply rubber stamp the view of OH.

It is, of course, entirely reasonable and appropriate for the employer to seek external medical advice on the issue but when doing so, it must pose specific practical questions to OH directed to the particular circumstances of the putative

disability if it is to place any reliance on the advice received. If the key factual requirements are established then the employer should act on the premise that the employee is disabled ignoring any contrary opinion expressed by OH. To do otherwise is to risk a subsequent finding of discrimination.

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