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West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

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Gallop and Disability

Determining whether an employee is disabled is not always straightforward and it was way back in 1995 that the Disability Discrimination Act came into its own… since that time many cases around disability have been heard and ruled on. In this bulletin we look at the case of Gallop v Newport City Council which hinges on the legal interpretation of what a disability is (or isn't) as opposed to taking independent medical advice.

The Court of Appeal made that point back in 2013 in the case of *Gallop v Newport City Council*[1]. Mr Gallop had a history of absence caused by stress and anxiety. He was eventually dismissed when a deputation of his colleagues alleged that he was a bully. The Tribunal upheld an unfair dismissal claim but rejected claims for disability discrimination and a failure to make reasonable adjustments. The Tribunal held that the employer did not know – and could not reasonably be expected to know – that Mr Gallop was disabled because it had been given clear advice from occupation health that he was not. The Court of Appeal held that this was not good enough. What mattered was the employer's knowledge about Mr Gallop's condition – not occupational health's opinion about whether that condition met the test of disability set out in the Equality Act. The case was sent back to the Employment Tribunal to re-hear the discrimination complaint.

Normally, when that happens, it is the last we hear of it. Once the legal point has been disposed of by the Court of Appeal, the parties can work out what the eventual outcome is likely to be and settle the case accordingly. Not in this case.

The claim went back for a five-day hearing before a fresh Employment Tribunal – which also rejected Mr Gallop's discrimination claim. His case has now made its second visit to the Employment Appeal Tribunal[2].

The main issue for the EAT concerned the allegation of direct discrimination - with Mr Gallop's arguments about reasonable adjustments being dismissed because he failed to present any evidence in relation to them. So the only real question was why Mr Gallop was dismissed. If the dismissal was in some sense 'because of' his disability then his claim would succeed, and if not it would fail.

Here the issue of the employer's knowledge came to the fore again, because the Tribunal found that the manager who dismissed Mr Gallop did not know that he was disabled. The Tribunal found that the dismissal could not be 'because of' a disability that manager did not even know about.

On appeal, Mr Gallop argued that anything known by occupational health should be taken to be known also by the employer as a whole.

[1] [2013] EWCA Civ 1583

[2] Gallop v Newport City Council [2016] EAT 0118 15 0403

Occupational health may have been wrong about whether Mr Gallop's condition was a disability or not, but they certainly knew of his condition. Mr Gallop argued that the manager should therefore be deemed to have also been aware of the disability when he decided to dismiss him.

The EAT rejected this. In a direct discrimination claim the Tribunal had to concentrate on the reason for the treatment complained of. That meant the reason for the behaviour of the manager whose act was alleged to be discriminatory. The Court of Appeal had confirmed that point in the age discrimination case of CLFIS (UK) Ltd v Reynolds[3]. In this case the manager dismissed Mr Gallop in response to a complaint from colleagues and without knowing that Mr Gallop had a condition which could potentially amount to a disability. Without that knowledge it could not be said that the dismissal was 'because of' the disability.

Mr Gallop was dismissed way back in 2008 (this case really has dragged on rather) – before the Equality Act came into force. He was not therefore able to claim discrimination because of something 'arising in consequence' of his disability under s.15 of the Act. If he had been dismissed today, there is no doubt that such a claim would be his best option. He would have to show – first of all - that the behaviour for which he was dismissed was in some way a consequence of his disability. We don't know the details of the bullying allegations, but I suspect the he could plausibly argue that his condition affected the way in which he interacted with colleagues and so that part of the test could well be met. The question would then be whether the employer's actions were a 'proportionate means of achieving legitimate aim'. An employer cannot simply be expected to put up with inappropriate behavior – even if it does have its origins in the employee's disability. However, Mr Gallop succeeded in his unfair dismissal claim and so it seems that the Tribunal thought that there was something unreasonable about the way in which the employer approached the case. They may have struggled to show that their actions were proportionate.

That would leave the question about the state of the employer's knowledge. A claim under s.15 will not succeed if the employer did not know 'and could not reasonably be expected to know' that the employee had a disability[4]. In Mr Gallop's case it seems that the manager who dismissed him was completely unaware of his condition, but that the details were known to occupational health. The Equality Commission's Code of Practice[5] suggests that in such cases the employer as a whole should be taken to know of the condition so the ignorance defence under s.15 would not apply. While there has been no definitive ruling on the issue, I think that is probably right. It is the employer's knowledge that matters for these purposes rather than the whether disability was in the mind of the person who took the decision to dismiss.

It would be a mistake to take the lesson from this case as being: 'ignorance is bliss'. If an employee's behavior is causing concern, a fair employer will investigate whether there are any underlying factors that may be contributing to the problem. If that leads to the discovery that the employee might have a disability, then so be it; the employer can then make a properly informed decision about what it needs to do to address the problem. If the decision is to dismiss the employee then it will be easier to show that the decision was proportionate and reasonable if the employer can show that it was in full possession of the facts and took them properly into account.

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[3] [2015] EWCA Civ 439

[4] Equality Act 2010, s.15(2)

[5] Employment Statutory Code of Practice (paras 5.17 to 5.19)

HR HOWLERS

The world's most expensive Milkshake!

One very large retail company has recently had to cough up the princely sum of £23k in compensation after unfairly dismissing an employee, Ian Fortune, who had gulped down a milkshake (flavour not known) which would have cost him 79p if he had bought it.

Fortune (no pun intended) worked at an IKEA cafe in the Republic of Ireland. One day he was observed by his manager helping himself to the drink (we are not sure of the size of the shake either) and not scanning the item on the cafe till as per procedure.

The matter was investigated and Fortune was initially suspended and the `theft` was treated as `gross misconduct`, and he was subsequently dismissed. Fortune is reported to have not appealed against his dismissal as he didn't have any faith in IKEA's procedures.

At the tribunal Fortune claimed that taking the milkshake (it's a shame there were no biscuits involved as well) was an `honest mistake`.

The day after Fortune had been observed having his `free` shake, his manager escorted him from the premises and the other employees all gave statements ... no action appears to have been taken against anyone else it should be noted.

In reaching its conclusion, the tribunal stated, "Taken all in all and given the circumstances of the milkshakes and the conversation at the time the Tribunal is not satisfied that the matter amounts to a 'substantial ground justifying the dismissal'."

Unsurprisingly IKEA were left feeling a bit shook up and Marsha Smith, IKEA Dublin Store Manager, said, "We are disappointed with the outcome of the tribunal. "However the ruling of the tribunal has been made and we are in process of reviewing the findings."

We assume there will be a major shake-up of how management acts in the future and it remains to be seen if Fortune will use his compensation to buy 29,113 milkshakes (I guess other beverages are available) with his cash. One thing is pretty certain; I suspect future investigations will be on less shaky ground than this one.