SUMMARY

2013/23 When does an employer have “imputed knowledge” of an employee’s disability? (UK)

<p>The UK Employment Appeal Tribunal (the “EAT”) has determined that an employer can have “imputed” knowledge of an employee’s disability, even if the wrong medical diagnosis was attached to the Claimant’s condition at the time.</p>
<p>The EAT went on to hold that, despite such knowledge, it was not a reasonable adjustment in this case for the employer to exempt the employee from its absence management policy, even though the cause of the employee’s intermittent absences was his underlying disability.</p>

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Facts

The Claimant, Mr Jennings, worked for the Respondent NHS Trust (the "Trust") as an IT

support engineer, one of a team of ten people providing support services for the personal computer equipment used by other Trust employees.

Mr Jennings had held the role for nearly nine years at the time of his dismissal. Throughout his employment, he was intermittently absent due to recurrent short-term illness. Some of his absences in earlier years related to back problems, but the majority in the last two to three years of his employment were apparently caused by angina, and a stress-related psychiatric condition allegedly arising from a road traffic accident in February 2006. His condition had an initial diagnosis of post-traumatic stress disorder (PTSD), with symptoms including anxiety, panic attacks and sleep disorders. In early 2007 Mr Jennings was absent from work for forty-four days. He then returned to work but in July 2007 he was again absent, for four days with stress, followed by a further five days off in August, also due to stress.

The Trust had two procedures to be used in the event of an employee's absence for medical reasons: a short-term absence policy to address cases where the employee has an unacceptable number of short-term absences, and a long-term absence policy to address cases where the employee is off work for an extended period of time. Both policies involved a series of formal meetings.

Following Mr Jennings' absence in August 2007, the Trust commenced short-term absence proceedings, doing so in a rather rigorous way.

Mr Jennings went off sick again in September with stress and did not return to work. A series of meetings was arranged, the majority of which were postponed or conducted in Mr Jennings' absence following his failure to attend.

Following a hearing on 10 October 2007, Mr Jennings was given a first written warning under the Trust's short-term absence policy. The hearing was also used to commence the Trust's long-term absence procedure. It did this in breach of its own long-term absence policy by holding a formal meeting under that policy without prior notice to Mr Jennings informing him that the long-term absence policy was now being implemented.

In November 2007, the Trust's internal Occupational Health (OH) department recommended that Mr Jennings begin a phased return to work in four to six weeks. This was later delayed to March 2008 by a subsequent OH report. In preparation for his return, Mr Jennings was asked to complete a "stress at work" questionnaire. He never completed the questionnaire, despite a reminder to do so.

On 23 January 2008, at a final stage hearing, it was held that there was no clear evidence that Mr Jennings would in fact return to work within the proposed timeframe, and he was

dismissed under the Trust's long- term absence procedure.

Employment Tribunal ("ET") Judgment

Mr Jennings brought a claim for monetary compensation in the Employment Tribunal. The claim was based on unfair dismissal and disability discrimination on the grounds of his employer's failure to make reasonable adjustments.

The ET had a number of issues to consider:

1.Did the Trust have actual or imputed knowledge of Mr Jennings disability?

Medical evidence before the tribunal confirmed that Mr Jennings suffered from a paranoid personality disorder and major depression, amounting to a disability under the Disability Discrimination Act 1995 (DDA 1995) (as replaced on 1 October 2010 by the Equality Act 2010 (EqA 2010)).

The Trust accepted that Mr Jennings suffered from a disability, however it denied that it had known (or could reasonably be expected to have known) that he was disabled. Although the Trust knew about the diagnosis of PTSD, it argued that that diagnosis did not indicate that Mr Jennings was disabled, and that, therefore, the Trust had no duty to make reasonable adjustments.

It was held by the ET that the Trust had sufficient information to have "imputed knowledge" of Mr Jennings's disability i.e. that he had a mental impairment that had a 'substantial' and 'long-term' negative effect on his ability to perform normal daily activities.

2.Was there therefore a failure to make reasonable adjustments?

It was determined that the alleged failure to make reasonable adjustments related to the application of the Trust's sickness management policy, which would have a greater impact on disabled than non-disabled workers. The particular disadvantage to Mr Jennings was clear. The erratic and recurrent nature of his condition meant that if he returned to work and then had to be absent again, as was more likely to be the case than with a non-disabled person, he would be disciplined under the policy. In other words, the policy was 'a provision, criterion or practice' which put Mr Jennings at a substantial disadvantage in comparison to an employee who was not disabled and

therefore the duty to make reasonable adjustments arose. It would have been a reasonable adjustment, Mr Jennings argued, to have disapplied the Trust's current sickness absence procedure.

The ET disagreed. Noting that the Trust would be required to operate a new sickness absence policy that applied uniquely to Mr Jennings, and the extent of the "clear operational problems" caused to the Trust by Mr Jennings' continued absence, it was held that excusing Mr Jennings from the Trust's absence procedure did not fall within the scope of reasonable adjustments.

3. Was Mr Jennings unfairly dismissed?

In line with its reasoning above, the ET held that Mr Jennings had not been unfairly dismissed. The ET commented that Mr Jennings' attendance record was extremely poor (100 days' absence in an eight month period), and that this was therefore not a "borderline" case.

EAT Judgment

The EAT upheld the Tribunal's decision on all counts.

On the question of "imputed knowledge", the EAT commented that if a wrong label is attached to a mental impairment, a later re-labelling of the condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name. Given that, whether or not an employer knows or should have known there is a disability, is essentially a question of fact. On these grounds, there was sufficient factual material for the Tribunal to conclude that the Trust knew, or should have known, that Mr Jennings suffered from a disability (although there was a suggestion that the EAT themselves may have reached a different decision on the facts).

On the issue of reasonable adjustments, the ET provided an adequate explanation of why it did not think it was reasonable for the Trust to have to tailor its procedures to suit Mr Jennings's situation, providing no reason for the EAT to overturn this ruling or the decision on unfair dismissal.

Commentary

In the UK, it is possible for employers to take disciplinary action for absences where the absence rate presents an unacceptable level of disruption to the business or organisation, regardless of whether the employee is to blame for his absence. Action can consist of issuing written warnings, and ultimately it can mean dismissal. The procedure is somewhat like a disciplinary procedure in that it provides for a series of warnings about the possibility of dismissal. This is why it is sometimes called a "disciplinary" procedure, even though no question of misconduct arises.

Contrary to some European jurisdictions, in the UK a dismissal for being absent due to sickness is perfectly valid. However, there are two important issues for the employer to be

aware of: (i) the risk of an unfair dismissal claim and (ii) the obligation not to discriminate on the grounds of disability, which obligation includes the duty to make reasonable adjustments where appropriate. The case reported here deals with that duty.

The decision of the EAT clarifies the right of employers to take action against an employee who has excessive absences, even if these arise from the employee's disability. Nevertheless, employers must consider each case on its own facts. Mr Jennings' absences were extreme and protracted, and he himself had failed to engage in the absence procedure. This failure appears to relate to the fact that Mr Jennings did not take positive steps to explain his needs to the Trust or to discuss a meaningful phased return to work. As part of this general criticism, there was particular emphasis on his failure to complete the "stress at work" questionnaire.

Depending on the circumstances, it may still be appropriate to make some adjustment to the terms of an absence policy amongst any other reasonable adjustments that could be made.

One important lesson for UK employers is the danger of blindly relying on an employee's medical diagnosis, if the evidence before them suggests that the employee is in fact disabled under the Equality Act. If the employee's mental or physical impairment is long-lasting and has a substantial effect on day-to-day activities, relying on a medical diagnosis will not provide a defence to a claim of failure to make reasonable adjustments.

Comments from other jurisdictions

Luxembourg (Michel Molitor): Under Luxembourg law, Mr Jennings would have probably been reclassified internally or externally or declared as a handicapped employee, but the employer would not have been allowed to dismiss him.

In fact, when a Luxembourg employer is informed about the sickness of his employee, he is not allowed to dismiss him, even for serious misconduct, nor to call him for interview prior to the dismissal. Besides the automatic termination of the contract after 52 weeks of sickness on a reference period of 102 weeks, an employer is then only entitled to dismiss a sick employee after a period of 26 weeks. In the matter in question, these timescales are not relevant and even if this had been the case, the employer would have had to justify the dismissal.

As regards the regular absence of the employee due to sickness, Luxembourg case law is rigorous in assessing the right to dismiss. Absenteeism is accepted as an objective and serious ground for dismissal only if the absences seriously disrupt the functioning of the company, without any certainty of future improvement. The employer has to show the disruption of the company as the ground for dismissal giving precise explanations of the organisational problems that have been caused by the employee's absence.

However, it is not possible to dismiss the employee where a procedure of professional reclassification has been launched. This happens in general in Luxembourg after six weeks of sickness. From that moment on, where the procedure has been filed with the Commission for Reclassification, the employee cannot be dismissed until the Commission has decided not to reclassify him. Where, on the other hand, the Commission considers that the employee is not likely to return to his former position, unless there is some adaptation of his working conditions, or that there is a possibility that his employer can find another position for him, the Commission will decide to reclassify him internally. In that case, the protection against dismissal is extended until one year after the Commission's decision. Finally, if the Commission considers that the employee is unable to return in his former position, that there is no other job available with his employer, but that he could be able to find a position on the job market, the Commission will decide to reclassify externally. If the Commission considers that the employee is totally unable to return to work, it will declare him disabled.

Subject: Disability discrimination

Parties: Jennings - v - Barts and The London NHS Trust UKEAT/0056/12

Court: Employment Appeal Tribunal

Date: 5 February 2013

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