

## NeTWork

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### Disability Discrimination

*J v DLA Piper UK LLP*

In a recent case, the Employment Appeal Tribunal ("EAT") has given guidance as to whether mental illness is a disability for the purposes of the Disability Discrimination Act 1995, particularly following the removal of the requirement that the mental impairment be clinically recognised. Read more...

The Claimant was a barrister who had a history of clinical depression. She applied for a job with the Respondent firm but found that her offer of employment was withdrawn after she told them of her history of depression. She brought a claim in the employment tribunal stating that she had been unlawfully discriminated against on the grounds of her disability. The tribunal had to address the preliminary issue of whether the Claimant was "disabled" within the meaning of the Act at the time of the alleged discriminatory act. The Tribunal held she was not, as she was unable to show that her symptoms of tiredness, anxiety and low moods were due to a clinical disorder rather than a "possible medicalisation of employment problems", which would not be a disability within the meaning of the Act.

The Claimant appealed to the EAT. The EAT allowed her appeal and sent the case to a fresh Tribunal to determine the question. The EAT stated that it was still good practice to consider the four elements of the disability which is whether it is a mental or physical impairment, that has a substantial and long term adverse effect on the Claimant's ability to carry out normal day-to-day activities separately, however they do not have to be adhered to rigidly. It may make more sense to start with finding out whether the Claimant's ability to carry out normal day-to-day activities is adversely affected, and then consider the question of impairment in the light of those findings.

Mental illness can be difficult to classify under the Act but it may be easier to establish whether it is a disability or not (i.e. a clinical depressive illness as opposed to a reaction to adverse life events) if the Claimant's ability to carry out day-to-day activities is considered as a first step.

## Without prejudice discussions

*Woodward v Santander UK plc (2010) (EAT)*

The Employment Appeal Tribunal ("the EAT") upholds a tribunal's decision to prevent a victimisation Claimant from adducing evidence of without prejudice discussions she had with a previous employer in relation to the settlement of an earlier claim. The recognised exception from the without prejudice rules for communications that display "unambiguous impropriety" did not apply here in the absence of blatant discrimination and the EAT refused to extend the exception to include comments from which an inference of discrimination might be drawn. [Read more...](#)

The Claimant brought proceedings for sex discrimination following her dismissal from the company Santander in 1994. The proceedings settled in 1996 but the settlement did not require the Company to provide a reference for her. The Claimant found it difficult to get another job and believed this was because the Company had failed to provide a suitable reference and had made adverse comments about her. She brought claims for victimisation under the Sex Discrimination Act 1975, direct sex discrimination and the fact that she suffered a detriment under the whistleblowing provisions contained in the Employment Rights Act 1996.

The Claimant sought to rely on the 1996 negotiations as acts from which the Tribunal could infer discrimination but the Company sought to exclude this evidence as the negotiations were conducted 'without prejudice'. The Tribunal granted the exclusion and the Claimant appealed.

The EAT held that the without prejudice rule did apply as the negotiations took place for the purpose of settling existing litigation between the parties. The EAT also held that the exceptions, where for example the exclusion of such evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety", must be strictly adhered to.

## Constructive dismissal

*Hunter v Timber Components (UK) Ltd*

An employee may resign and claim unfair constructive dismissal because of the employer's repudiatory breach of contract, notwithstanding that the breach of contract was not targeted at that employee in particular. [Read more...](#)

The employee worked at the Respondent Company as a joiner. The owner's son, C, became a director of the company and the employee had concerns about the way C managed the workforce, in particular he was bad tempered and aggressive towards other members of staff. The Claimant raised his concerns with the Managing Director and was later involved in a verbal altercation with C after C had shouted at another

member of staff. The Claimant was thereafter signed off sick with "nervous disability" and subsequently resigned claiming unfair constructive dismissal.

The Claimant argued that C's conduct had been calculated or likely to destroy or seriously damage the implied term of trust and confidence between them and therefore he was entitled to resign and claim constructive dismissal. The Employment Tribunal held that whilst C's behaviour was unpleasant and intimidating, the Claimant had always maintained that his concern was not how C had behaved towards him, but how C had behaved towards other members of staff, also that the Claimant did not consider himself a target of C's behaviour, nor was he intimidated by it. The Tribunal therefore concluded that there had been no breach of the duty of trust and confidence and the claim failed.

On appeal to the EAT, the EAT agreed with the Tribunal and stated that although the Claimant found C very difficult to work with, as his main concern had been C's behaviour towards other members of staff it could not be said that C's conduct had amounted to behaviour likely to destroy or seriously damage the employment relationship with him. However, the EAT stated that the proposition remained that conduct not directed at the employee in question could still amount to a breach of the implied duty of trust and confidence if, when viewed objectively, it can be shown that the conduct was calculated to damage or destroy that employment relationship.

*If you would like to discuss any of these topics further please contact **Heather Cowley** (Partner & Head of Employment Law) on 01582 731161. Alternatively she can be contacted via email at [heather.cowley@taylorwalton.co.uk](mailto:heather.cowley@taylorwalton.co.uk)*