CONSTRUCTIVE KNOWLEDGE OF DISABILITY

Introduction

This bulletin examines the meaning of constructive knowledge of disability by the employer by explaining the background to a recent Employment Appeal Tribunal (EAT) judgement.

Equality Act

One category of unlawful discrimination may occur where the subject has the protected characteristic of a disability. The statutory definition requires that the individual must have a physical or mental impairment that is long lasting – meaning it has lasted for 12 months or is likely to last for that period - and has a substantial adverse effect on their ability to carry out normal day to day activities.

However, where the employer does not know, or could not reasonably be expected to know, that the worker or employee has a disability, then a claim for discrimination cannot succeed because disability discrimination occurs where the employer treats a disabled worker or employee less favourably, or unfavourably BECAUSE of, or related to, their disability.

Reluctance to declare

There are genuine reasons why someone may be reluctant to disclose their disability to their employer, such as a fear of stigma or harassment, or a wish to keep personal information private. Generally, there is no obligation on workers to do so. Having said that, failing to tell an employer may lead to a worker losing the right to bring a successful disability claim.

Constructive knowledge

Actual knowledge of disability is not usually difficult to establish. Some disabilities are visually obvious, but so called “hidden disabilities” can be more difficult to establish unless a positive declaration is made. The question then becomes whether the employer could reasonably have been expected to know the worker is disabled – which is called constructive knowledge – and it can be harder to prove, as the case explained below demonstrates.

A Ltd v Z

The claimant – Z - was employed as a part time finance coordinator for an organisation that works with contractors and trade associations in the construction industry.

It was a small company with 15 employees but the employment tribunal (ET) noted that it had significant resources.

Z had a long history of mental health conditions including severe depression and schizophrenia but chose not to tell the employer during her employment. In addition to her poor health she had domestic and family problems that included being homeless.

During her employment with A Ltd she had told her employer that her sickness absences – including a two-week period of psychiatric illness for which she was hospitalised – were caused by various physical ailments. She was employed by A Ltd for 14 months, during which time she had 85 days of unscheduled absence, 52 of which were recorded as sick leave. She was also often late for work. Eventually she was dismissed for poor attendance and timekeeping.

Two months before she was dismissed her employer had seen GP notes that referred to her “low mood” and said she expected to be an in-patient for four weeks. The notes mentioned “mental health and joint issues”.

At the tribunal

The ET found that despite having that information available, and as a result of what it found to be “an intemperate and precipitative decision”, the chief executive immediately dismissed her for being slightly late on her return to work and failing to provide a reason. Z lacked the necessary two complete years’ service needed to claim unfair dismissal and brought a claim for discrimination arising from disability – see reps bulletin EQA004 for the definition.

A Ltd said they did not know she had a disability and that dismissing Z was, in any event, objectively justified because it was a proportionate means of achieving the legitimate aim of maintaining a reliable accounting function – a statutory defence for this type of claim.

The ET upheld Z’s claim. It accepted that her dismissal was an act of discrimination since the sickness absence (but not the lateness) arose from her disability. Recognising the stigma that can discourage people from disclosing mental health problems, the ET considered her silence about her conditions did not mean her employer had no constructive knowledge of her disability.

The Employment Code of Practice issued by the Equality watchdog (EHRC) says an employer must do all it can reasonably be expected to do to find out if a worker has a disability. The ET therefore considered A Ltd should have made enquiries about Z’s mental health.

By the date of her dismissal A Ltd was in possession of medical notes that raised a question about her psychiatric health. A Ltd could not, therefore, rely on a lack of constructive knowledge as a defence to her claim.

The tribunal also rejected the justification defence (see above) saying that the drastic step of summary dismissal was

disproportionate to the lateness – it had failed to make a balanced and informed decision. A Ltd appealed the decision.

At the EAT

Overturning the ET decision, the EAT said that even after further enquiries A Ltd would not have known Z had a disability because she would have continued to hide the true facts of her conditions to it.

This meant it had no constructive knowledge of her disability and her claim could not succeed. It also rejected the ET's finding that dismissal was not justified because it did not take into account the employer's business needs in making its decision.

This left Z with no legal remedy for her dismissal. As the EAT suggested, her employer may have been less hasty in dismissing Z had she had two years qualifying service and therefore able to bring an unfair dismissal claim.

Reps action

It is concerning that workers and employees still fear disclosing hidden disabilities – and particularly mental health issues and impairments – to their employers and so risk leaving themselves in this vulnerable position. When dealing with members who are similarly reluctant to tell their managers what is really happening, reps will need to gently explain that – even if they want to keep the problem a secret – it is in their interest not to do so. The employer will be under a duty to keep the information confidential but will then be on notice that discrimination of any of the types identified in reps bulletins EQA002, 003 and 004 must not be allowed to happen.
Without disclosure members cannot make requests for reasonable adjustments to the workplace, technology or system of work that will ensure they can remain in work and able to continue to contribute to the business they work for.

Acknowledgments and further information

More information on this and other employment rights matters is available from:

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- TSSA Helpdesk – 0800 328 2673