

EMPLOYMENT EBULLETIN - 25 JUNE 2010

In this week's **resource** Employment Law Update Bulletin read about:-

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EAT judgement on mental illness and perception discrimination



In the case of *J v DLA Piper UK LLP*, the Employment Appeal Tribunal (the "EAT") has provided guidance to tribunals on what situation covers a depressive illness for the purposes of the Disability Discrimination Act 1995. The EAT warned against a formulaic approach to the issue whether an 'impairment' has been proved by an employee.

In this case an employee brought a claim to the Employment Tribunal under the Disability Discrimination Act 1995, when the Company withdrew a job offer after she disclosed her history of depression. Although the Company claimed the reason for the withdrawal of the job offer was the recruitment freeze, the Employee believed that the real reason was discrimination, arguing that, the real reason was the disclosure of her medical history. She complained of both disability related and direct discrimination arguing at the time that the job offer was frozen she was suffering from clinical depression, which met the definition of disability under the Act. The tribunal struck out the claim on the basis that the employee was not disabled, and the employee was merely suffering from a minor and trivial complaint.

The Employee then appealed to the EAT on the question of disability. As an alternative, she argued that she did not need to prove that she was disabled in any event. She argued that the Company had discriminated against her on the perceived belief that she was disabled. The second argument was not allowed by the EAT on the grounds that it was not raised at any time prior to the appeal. The EAT upheld the employees appeal holding that the tribunal had not taken in to account evidence from the employees GP, preferring the more sceptical evidence of a specialist. Although a tribunal is entitled to give more weight to specialist evidence, it should not have ignored the evidence of a GP who had treated the employee regularly. The EAT added that, when considering the question of impairment in cases of alleged depression, there is a technical difference between clinical depression and a reaction to adverse circumstances although they stated that in everyday life this distinction was of little importance, and the clinical label applied was of little relevance under the statutory test of disability.

EAT rules on 'Fresh Evidence'

The EAT has gave its decision in the case of *Adegbuji v Meteor Parking* and stated that the EAT may not have jurisdiction to hear fresh evidence appeals as no error of law has arisen where a Tribunal makes a decision on the evidence before it.

The EAT suggested that the appropriate course of action for a litigant with fresh evidence is to apply to the Employment Tribunal for a review under Rule 34 (3) (d) and that In genuine fresh evidence cases it would be proper to extend time to hear a review. The EAT went on to state that appeals would be stayed pending review applications unless important to other issues under appeal.

Disability Discrimination



In the case of *Aitken v Commissioner of Police of the Metropolis* the Employment Appeal Tribunal (the “EAT”) had to consider whether treatment on the basis of a mistaken perception that an employee is suffering from a particular disability falls within the definition of direct disability or disability related discrimination. In this case, a police officer contended that following the ECJ’s reasoning in *Attridge Law LLP v Coleman*, s 3 of the Disability Discrimination Act should be interpreted to include a situation where an employer perceives an employee to have a disability. The EAT disagreed and noted that this case was not one of perceived disability. The employer never acted on the basis that the employee had a dangerous mental illness rather the employer acted on the manner in which the employee presented himself. The EAT went on to note that the words of section 3 of the DDA are distinguishable from those used in other discrimination statutes which do not relate the relevant characteristic to the complainant. The EAT further noted that the DDA requires an actual disability albeit since the decision in *Coleman*, the actual disability of a person related to the complainant.

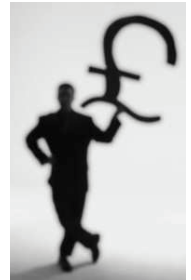
The relationship between employment consultants and legal privilege



The EAT in the case of *Scotthorne v Four Seasons*, provided authority that advice given by employment consultants on how to deal with an alleged act of gross misconduct does not have to be disclosed because it is protected by litigation privilege. The reason for following a disciplinary procedure is to avoid litigation and it made no difference that the consultants were not legally qualified.

The judgement that non-qualified advisors could attract legal privilege was said to be ‘fraught with difficulty’ but it was found that on the facts that it was not required to be disclosed in this case because it was not relevant to the claim as pleaded. Although it had been alleged that the dismissal had been concocted in response to earlier events, this was supported by no more than an assertion.

Coalition government confirms October 2010 national minimum wage increases



The government has announced the national minimum wage increases proposed by the previous Labour government in March 2010. The new rate of £5.93 will take effect from October 2010.

The government has also extended the remit of the Low Pay Commission for its 2011 report. As part of its annual role of monitoring and reviewing the impact of the national minimum wage, the Commission has been requested to pay particular attention to the competitiveness of small firms and the employment prospects of young people.

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