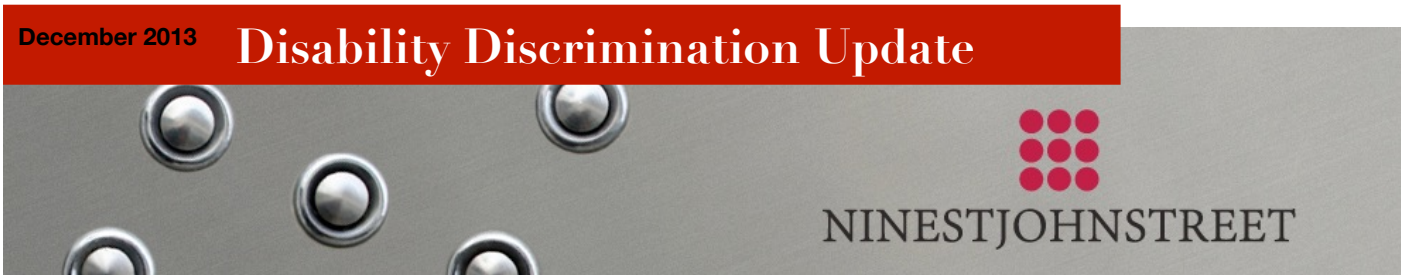

Daniel Northall

Definition of Employee

X v Mid Sussex Citizens Advice Bureau [2013] IRLR 146 (Supreme Court)

The facts

The Claimant was a volunteer adviser for the Mid Sussex Citizens Advice Bureau ("the CAB") from May 2006. At her interview it had been explained that there would be no binding legal contract between her and the CAB. She signed a volunteer agreement headed: "This agreement is binding in honour only and is not a contract of employment or legally binding". She brought proceedings alleging that she had been asked to cease her work on grounds of her disability. Her claim was dismissed by the Employment Tribunal because no legally binding contract had been entered into between the parties. She was a pure volunteer,

The Claimant appealed, submitting that the EC Equal Treatment Framework Directive 2000/78, which the Act implemented, was intended to cover volunteers and that, in those circumstances, the Act should have been read as affording her the requisite protection.

The judgment

The EC Equal Treatment Framework Directive did not extend to cover voluntary activity.

Comment

The protection of volunteers would have extended considerably the scope of the EqA in a manner which would have placed a great burden on third sector organisations in particular. The Supreme Court was clear that no such protection was intended by the Directive.

However, the judgment is not a substitute for a proper analysis of the contractual position. Only if the individual is truly a volunteer does the judgment apply.

Definition of Disability

HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab [2013] **IRLR 571** (CJEU)

The facts

Danish law allows an employer to terminate an employment contract with a reduced one month notice period if the employee has been on paid sick leave for 120 days during the previous 12 months. A Danish trade union brought actions on behalf of Ms Ring and Ms Skouboe Werge, who were dismissed under this provision, claiming that the reduced notice period under Danish law should not apply where the absence results from a disability or from a failure to make reasonable adjustments. The trade union argued that because they were suffering from a disability (Ms Ring had whiplash and Ms Skouboe a back disorder and osteoarthritis), the short notice period could therefore not apply to them; and, in addition, their employers were required to offer them a reduction in working hours. Ms Ring and Ms Skouboe Werge's employers denied that their conditions amounted to a disability.

The judgment

The CJEU noted that the EU had signed up to the UN Convention on the Rights of Persons with Disabilities (CRPD) since its last judgment on the meaning of disability (Chacón Navas) and that the Directive must therefore be read in light of the CRPD. [It should be noted that the Directive itself does not contain a definition of disability].

The CJEU, applying CRPD, stated that the concept of "disability" for the purposes of the Directive "must be understood as referring to a limitation which results in particular from a physical, mental or psychological impairment which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers."

Comment

The CJEU focussed on the effect of an impairment on an individual's professional life in light of the statement of disability contained in the CRPD. This is to be contrasted with the EqA (and its predecessor the DDA) which defined disability with reference to normal day to day activities. It has long been established that work activities may amount to normal day to day activities, but the two are not synonymous, Some work activities do not amount to normal day to day activities and vice-versa. Since the EqA must be read consistently with the Directive which in turn, so the CJEU has held, should be read consistently with the CRPD, is there now a tension between the EqA and the Directive?

The Burden of Proof

IPC Media Ltd v Millar [2013] IRLR 707 (EAT)

The Facts

Ingrid Millar was a journalist employed initially as features editor of *Chat* magazine. She developed serious osteoarthritis of the knees, and required time off for operations. The team at *Chat* was merged with that at another magazine and Ms Millar's role was placed at risk of redundancy. Following consultation she was ultimately made redundant. She complained to an Employment Tribunal that she was not notified of the vacant positions of associate editor and group associate head of features because of her previous disability related absences. She brought a claim pursuant to s.15 EqA and was successful before the Tribunal.

The judgment

As with other species of discrimination, an act or omission can occur "because of" a proscribed factor as long as that factor operates on the mind of the putative discriminator (consciously or subconsciously) to a significant extent. The starting-point in a case which depends on the thought processes, conscious or unconscious, of the putative discriminator, is to identify the individual(s) responsible for the act or omission in question. The facts did not justify an inference that the person responsible knew of the claimant's absences. The tribunal had not made an explicit finding, by inference or otherwise, about what that person knew. In fact, it did not directly address the question at all.

Comment

It is a further restatement that the first stage of the burden of proof is not so easy an obstacle to overcome as many claimants (and some Tribunals) think.

Tribunals cannot avoid undertaking some analysis of the subjective thought processes of an alleged discriminator, If they did not know of a proscribed factor, it cannot have been influential and as such there cannot have been any act of unlawful discrimination.

Provision, Criterion or Practice

Nottingham City Council v Harvey UKEAT/0032/12/JOJ (EAT)

The facts

Mr Harvey suffered from depression which qualified as a disability. He undertook a phased return to work following a period of absence. During this time he left work early on three occasions, but submitted time sheets indicating he had worked his full hours for those days. He was dismissed as a consequence.

The Tribunal found that the employer had failed to make a reasonable adjustment in that it applied a PCP (namely the disciplinary procedures) which placed Mr Harvey at a substantial disadvantage. It found that the employer could reasonably have made adjustments to the process by undertaking reasonable investigations, by considering personal mitigation and by not dismissing him.

The judgment

The EAT found that the Tribunal had erred and in so doing made some observations as to the essence of a PCP:

In this case it is common ground that there was no provision that the employer made nor criterion which the employer applied that could be called into question; the issue was the practice of the employer. Although the Act does not define "provision, criterion or practice" and the Disability Rights Commission's Code of Practice: Employment and Occupation 2004 deals with the meaning of provisions, criteria and practices by saying

not what they consist of but what they include (see para 5.8), and although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned.

(para.18)

Comment

Many poorly thought out claims for reasonable adjustments argue that the PCP complained of was a particular act vis a vis the employee and the adjustment would be not doing it. In light of this decision, such claims are likely to fail unless the act falls as part of a wider practice which was, or would be, applied to other employees.

Knowledge of Disability

Gallop v Newport City Council [2013] EWCA 1583 (Court of Appeal)

The facts

Mr Gallop was a technical officer working for Newport City Council. He had shown some signs of depression such as, stress, lack of sleep and appetite, tearfulness and difficulty in concentrating. Over the course of around 3 years, these symptoms continued and were the cause of absences from work. He was referred to Occupational Health for assessment. Each OH report concluded that Mr Gallop was not a disabled person within the meaning of the DDA (which then applied). The ET and EAT held that the employer was entitled to

rely on the reports conclusively in demonstrating that it did not have knowledge of Mr Gallop's disability even though he was later found to meet the definition.

The judgment

As to the value of the OH reports in that case:

Their opinions amounted to no more than assertions of their view that the DDA did not apply to Mr Gallop, or that he was not 'covered' by it or words to that effect. No supporting reasoning was provided. As the opinions were those of doctors, not lawyers, one might expect them to have been focussed on whether, from the medical perspective, the three elements of section 1 were or were not satisfied. Since, however, OH made no reference to such elements, neither Newport nor the ET could have had any idea whether OH considered (i) that Mr Gallop had no relevant physical or mental impairment at all; or (ii) that he did, but its adverse effect on his ability to carry out normal day-to-day duties was neither substantial nor long-term, or (iii) that he did, but it had no effect on his ability to carry out such duties. OH's opinion was, with respect, worthless. For reasons indicated, Newport had to form its own judgment on whether Mr Gallop was or was not a disabled person; and OH's views on that topic were of no assistance to them. (Para.40)

As to the employer's responsibility in such circumstances:

The problem with certain types of disability, or claimed disability, is that it is only when eventually the ET rules on the question that it is known whether the claimant was in fact a disabled person. In the meantime, however, the responsible employer has to make his own judgment as to whether the employee is or is not disabled. In making that judgment, the employer will rightly want assistance and guidance from occupational health or other medical advisers.

That assistance and guidance may be to the effect that the employee is a disabled person; and, unless the employer has good reason to disagree with the basis of such advice, he will ordinarily respect it in his dealings with the employee. In other cases, the guidance may be that the opinion of the adviser is that the employee is not a disabled person. In such cases, the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled: he cannot simply rubber stamp the adviser's opinion that he is not.

(paras.42 and 43)

The CA also gave some guidance on what OH reports should ideally address:

I add that this case illustrates the need for the employer, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability. The answers to such questions will then provide real assistance to the employer in forming his judgment as to whether the criteria for disability are satisfied.

(para.44)

Comment

Employers cannot blindly rely upon the contents of an OH report in denying it knew that an employee's impairment amounted to a disability. Much depends upon the quality of the report itself and the questions which it specifically addresses.

The judgment should be a much needed reminder to OH practitioners that they need to earn their corn. Bland statements are inadequate and nor should they sit on the fence in expressing their professional opinion, unless the circumstances are genuinely borderline. The judgment is also a reminder to employers to be specific in their referrals to OH. A practitioner should be required to answer the specific questions which lie at the heart of the definition of disability.

Reasonable Adjustments

HMRC v Whiteley UKEAT/0581/12/MC (EAT)

The facts

Mrs Whiteley suffered from asthma, which qualified as a disability. Her employer applied an attendance management policy which had a 'consideration point' of 10 days' absence in any rolling 12 month period. In 2010 the employer reviewed Mrs Whiteley's attendance on the ground that she had breached her consideration point. She had been absent from work for 15 days up to and including 15 October 2010; 1 day was due to an unrelated condition and 14 days were due to viral infections and a chest infection. The employer discounted 3 days' absence but issued her with a warning nonetheless.

Mrs Whiteley complained that her employer had failed to make reasonable adjustments as it should have discounted a greater number of her absences, which would have avoided her warning. She argued that her absences were caused or prolonged by her underlying asthma. For the purpose of the hearing her union had obtained medical evidence and, on the strength of this evidence, the Tribunal upheld her claim. HMRC appealed.

The judgment

The EAT overturned the Tribunal's decision and remitted it for reconsideration. It found that the Tribunal had misinterpreted the medical evidence before it. However, the EAT also gave useful guidance on the approach an employer may take in this situation:

There are, in principle, at least two possible approaches to making allowances for absences caused by a disability that interacts with other ordinary ailments. One is to look in detail and with care and, if necessary, with expert evidence at the periods of absence under review and to attempt to analyse with precision what was attributable to disability and what was not. The alternative approach, which we anticipate will be of

greater attraction to an employer, is to ask and answer with proper information the question: what sort of periods of absence would someone suffering from the disability reasonably be expected to have over the course of an average year due to her disability?

(para.14)

Comment

The judgment gives valuable guidance in the often vexed situation of managing absence which may or may not be related to a disability. The latter approach recommended by the EAT has the benefit of not requiring an investigation into the medical causation of each absence. Rather, the employer can apply a 'rule of thumb' provided that conclusion is based on proper evidence.

Secretary of State for Work and Pensions v Higgins UKEAT/0579/12/DM (EAT)

The facts

Mr Higgins worked as an administrative officer in a benefits delivery centre for the DWP. In June 2009 he began a long period of absence due to a heart condition. His condition qualified as a disability. In August 2010 he presented a fit note from his GP recommending a phased return to work over a 13 week period.

In accordance with the fit note, Mr Higgins' employer proposed a phased return over a 13 week period. Mr Higgins proposed a phased return over a 26 week period. He refused to return to work until his employer agreed an extension to the 13 week period. It did not and Mr Higgins was dismissed.

The Tribunal upheld Mr Higgins' complaint of disability discrimination. It found that the failure to agree an extension to the 13 week phased return period was a failure to make a reasonable adjustment.

The judgment

The Tribunal had erred in its identification of the PCP. The correct PCP should have been the requirement to work his full contractual hours. It was this requirement which caused Mr Higgins a disadvantage by virtue of his disability.

Put in this light, it was plain that the proposal of a 13 week phased return alleviated the disadvantage at that time. The Tribunal had failed to identify what further disadvantage an extension to the 13 week period would have avoided or the extent to which the disadvantage would have been avoided.

The EAT remarked that:

Employers will often be presented with "fit notes" which last a certain length of time and which request consideration of reduced hours during that time. If the employer grants the reduced hours which the employee says he is capable of working, we do not see why it will generally also be necessary for the employer to give some explicit guarantee of future review. If, at the end of the period, the employee continues to be under a substantial disadvantage, the duty to make an adjustment will still be applicable and can be judged in the circumstances at that time.

(para.56)

Comment

The decision is a further reminder to Tribunals that the duty to make reasonable adjustments must be analysed stage by stage. Further, the duty does not simply place upon an employer a requirement to act reasonably in all the circumstances.

The employer is entitled to act consistently with the medical advice before it, in the absence of evidence of some further disadvantage. If an employer offers the recommended period of phased return, it cannot be criticised for failing to offer some greater period. It may well be that a further period of rehabilitation is

required, but that can only be assessed once the original period is coming to an end.

Frustration of Contract

Warner v Armfield Retail & Leisure Ltd UKEAT/0376/12 (EAT)

The facts

Mr Warner was employed as a site manager until he suffered a severe stroke in February 2010. He began a period of prolonged sickness absence and moved away from where his workplace was based. He gave no indication of when he might be able to return to work. His employer terminated his employment by letter in January 2011 and without prior warning. Mr Warner was examined by an occupational health physician in October 2011 who confirmed that he was unable to return to work and was unlikely to return in the foreseeable future.

The Tribunal dismissed Mr Warner's claims of unfair dismissal and disability discrimination. It accepted the employer's arguments that the contract was frustrated. Mr Warner appealed.

The judgment

The EAT did not feel that the application of the doctrine of frustration to contracts of employment was 'beyond question'. Nonetheless, it felt bound by the earlier judgment of the CA to that effect in **Notcutt**.

However, grafting the requirements of disability discrimination legislation upon the common law doctrine of frustration meant that a contract of employment could not be frustrated unless and until the duty to make reasonable adjustments had been complied with. On the facts of the case before it, the EAT upheld the Tribunals earlier findings.

Comment

Employers rarely deploy frustration of contract as an argument in the Tribunal and for good reason, Although a finding of frustration has the benefit of avoiding a potential dismissal (a frustrated contract does not amount to a dismissal for the purpose of s.95 ERA) the argument is very difficult to establish. It is even more difficult in circumstances involving a disabled employee where the duty to make adjustments has arisen. Employers should be especially careful before using frustration to bring to an end the employment of individuals who have been on long term sickness absence.