



Freeneys Williams

Freeneys Williams Ltd.

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The Disability and Equality Agenda e-bulletin – September 2009

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1. Two new films to tackle mental ill health prejudice

The campaign Time to Change has launched two new films aimed at tackling the prejudice, ignorance and fear that surround mental health conditions.

‘The Movie’ - “The Movie” takes people on a journey – from a point of fear and stereotyping, all the way to realising that people with mental health problems are not in fact like the stereotypes. It also points out that it is the support of friends and family that have been the deciding factor in this man’s life.

‘Kids Party’ - This film works on a similar basis to ‘The Movie’, except this time people think they are about to see real video with the title ‘Schizophrenic man terrifies kids at party’.

Click link below to view both films:

<http://www.time-to-change.org.uk/online-films>

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2. Credit crunch impacting on employment for disabled, says new study

A new study has identified the impact of rising unemployment for disabled people in the current economic climate.

At a time when workforces are being reduced and the economy is more unpredictable than ever, a new study identifies the impact of rising unemployment for disabled people.

US and UK routes to Employment: Strategies to Improve Integrated Service Delivery to People with Disabilities, by City University London and the University of Massachusetts, highlights the current economic climate as one of the main challenges to delivering effective employment services for disabled people and helping them progress from benefits into work.

Doria Pilling, Honorary Research Fellow at the Centre for Disability and Social Inclusion, City University London, who co-authored the study, said: "Initiatives to overcome employers' misperceptions about employing disabled people are essential in this economic climate."

Funded by the IBM Center for the Business of Government, the study reviews research on the Public Employment services for disabled people in the United Kingdom and the United States and identifies 12 strategies that show some evidence of effectiveness. These include:

Proactively reaching out and marketing to disabled people to increase access to employment programs and services

- Training staff on disability and related issues to more effectively serve disabled people
- Engaging disability organisations in direct employment service delivery
- Understanding employers' needs as part of the process of finding jobs for disabled people
- Intervening early to help prevent people on long-term disability benefits from becoming disconnected from the labour market
- Helping people to understand and manage their disability so they are in a better position to obtain and keep employment
- Providing support to help disabled people do their job and stay in work

Doria continues, "Implementing these strategies can benefit not only individuals with disabilities, who will have the opportunity to realise their potential, but also the taxpayer, who will pay less for disability assistance, and society at large, which gains the productive skill of talented individuals. However, many challenges remain to be overcome for services to be really effective."

For the executive summary which includes a list of all 12 strategies please visit: <http://www.businessofgovernment.org/pdfs/BoeltzigUSUKExecSumm.pdf> (pdf)

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3. House of Lords approves the extension of disability discrimination

The House of Lords has given a judgment that makes clear that the range of individuals protected by the Disability Discrimination Act 1998 (DDA) is broader than statutory guidance suggests. The case affects people with conditions that are controlled by treatment or whose symptoms fluctuate, and also those with new conditions whose prognosis is not altogether certain.

Definition of disability

To qualify for protection, Schedule 1 DDA requires that an individual must usually show he or she has “a physical or mental impairment which has a substantial and long term adverse effect on his or her ability to carry out normal day to day activities”.

The DDA recognises that where an individual is receiving treatment the effects of their impairment may be suppressed and no longer be considered “substantial”. To ensure such individuals are protected DDA also specifically provides that any measures taken to treat or correct an impairment should be ignored if the impairment would otherwise “be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities”.

DDA also accommodates those with an impairment whose effects are not constant. Normally, the effects of an impairment have to last for at least 12 months. However, provision is made for situations where an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities. In that event, the impairment will be treated as continuing to have that effect “if the effect is likely to recur”.

Both of these provisions use the word “likely”. The question for the House of Lords was does “likely” mean probable ie “more likely than not” or does it mean simply that it is a real possibility, something which “could well” happen?

Meaning of “likely to recur”

Statutory guidance on the matters to be taken into account in determining questions relating to the definition of disability provided that an event is “likely” if it is “more likely than not” that it will happen.

Surprisingly, the House of Lords opted not to follow the approach suggested in the Guidance. Instead, it said that “likely to happen” must be interpreted as “could well happen”.

Extending the definition of disability

What this decision of the House of Lords will inevitably mean, is that it will be much easier in future for individuals to establish a disability and protection under DDA. Medical experts, who have historically struggled to address or agree upon the question of probability of recurrence of an injury or illness, are liable to find it much easier to comment on whether recurrence “could well happen”.

The House of Lords made reference to medical conditions which, through controlled medication or treatment are resolved or subject to periods of remission, such as

multiple sclerosis or epilepsy. It is also easy to see that individuals with conditions which flare up from time to time but are not continuous will be more able in future to establish themselves as disabled.

Perhaps most critically, although the facts of this case relate to the extent to which a substantial, long term impairment should be deemed continuing because of the likelihood of recurrence and to the importance of ignoring effects of medication or treatment, the word “likely” appears elsewhere in DDA. The effect of an impairment will, for example, be treated as “long term” if it is likely to last for at least 12 months or for the rest of a person’s life. Applying this new definition of “likely” will make it easier for employees to claim the benefit of the Act if they have a condition which has not yet lasted a year. If the effects “could well” last for 12 months or more then the employee will be protected by within the DDA. For example, back problems are amongst the most prevalent injuries for workers and result in the majority of absences. Depression is similarly an ever growing issue. Conditions such as these also pose a real risk of recurrence such that doctors will be almost bound to conclude that “could well happen”.

The word “likely” also crops up in relation to progressive conditions. DDA states that a progressive impairment is treated as having a substantial effect on day to day activities from the moment it has any minor effect, provided the effects are ‘likely’ to become substantial at some time in the future.

It follows from this case that employers will need to be far more aware of reasons for absence and more flexible and accommodating in their responses if they are to avoid being on the receiving end of allegations of disability discrimination.

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4. Tribute to Bob Sang

Bob Sang – long term associate of the Employers’ Forum on Disability and a Social care reformer who led the field in giving citizens a say in how services work – sadly died in June. For a tribute to him click:

<http://www.guardian.co.uk/society/2009/jul/02/bob-sang-obituary>

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5. What employers should know about the Disability Discrimination Act

Employers must make reasonable adjustments at work for disabled employees. But what if a disability has no physical or visible signs? Read more at:

<http://www.personneltoday.com/articles/2009/07/01/49865/disability-in-the-workplace-the-same-but-different.html>

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6. Police officers bring more cases

Seven times as many police officers are bringing disability discrimination cases against their forces as five years ago, according to figures released under the Freedom of Information Act. For more information click:

<http://www.disabilitynow.org.uk/latest-news2/news-focus/the-bill-gets-larger-as-disability-claims-rise>

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7. Shared surfaces

The controversy over “shared surfaces” continues as Manchester City Council is set to reject official Cobe guidance on street design by refusing to include them in its new Street Design Manual. Read more at:

<http://www.bdonline.co.uk/story.asp?storycode=3143563>

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8. Recent cases

i. Disability Ruling: Dumfries & Galloway v Adams

Mr C Adams, a probationary Police Constable, had originally won his case at the Employment Tribunal for unfair dismissal on the grounds of disability discrimination. The Chief Constable argued on appeal that the original verdict was wrong because Mr Adams was not carrying out ‘normal day to day activities’ when his impairment affected him. Mr Adams had to work shifts as part of his work, but only on the night shift between 2am and 4am did symptoms affect his work. His activities during the night shift included walking, climbing stairs, driving and undressing. Mr Adams was diagnosed with M.E. and taken off night shifts so was then able to do his work without difficulty. However in May 2006 he returned to night shifts where the symptoms returned and he was sacked in February 2007.

The tribunal agreed Adams did have an impairment – M.E. (Myalgic Encephalopathy) - and that his impairment fell under paragraph 4 of Schedule 1 to the DDA because it affected Mr Adams’ mobility. The critical question that may have important ramifications was whether walking, stair climbing, driving were normal day to day activities when carried out at 2am to 4am.

The police contended that they were not normal day to day activities but were specialised to a police officer. The appeal was rejected by claiming that night shift

work was common in the UK and could thus be covered in the day-to-day activity of section 1, especially as the activities that Mr Adams was carrying out were “very ordinary” such as walking, stair climbing and undressing. The Tribunal used the Secretary of State’s 2006 guidance notes below when making their decision:

“D4: In general, day-to-day activities are things people do on a regular daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities.”

“D5 The term ‘normal day-to-day activities’ is not intended to include activities which are normal for only a particular person or small group of people. In deciding whether an activity is a normal day-to-day activity, account should be taken of how far it is normal for a large number of people, and carried out by people on a daily or frequent and fairly regular basis. In this context, ‘normal’ should be given its ordinary, everyday meaning.”

“D6 A normal day-to-day activity is not necessarily one that is carried out by a majority of people. For example, it is possible that some activities might be carried out only, or more predominantly, by people of a particular gender, such as applying make-up or using hair curling equipment, and cannot therefore be said to be normal for *most* people. They would nevertheless be considered to be normal day-to-day activities.”

(Thanks to Michelle Valentine – Disability Forward)

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ii. Disability Discrimination and Local Government Pensions

The Court of Appeal has handed down its decision in *Booth v Oldham MBC*, an interesting case about 1) the effect of a failed DDA claim on a breach of contract action brought in relation to an employer's decision about pension entitlement and 2) the need for exhaustion of remedies provided by the 1997 Pension Regulations before resort to litigation.

Mr Booth was dismissed in August 2001 on grounds of capability, having been signed off for stress and depression. He brought an ET claim for disability discrimination. Had he been deemed permanently incapable of discharging efficiently his duties of employment because of ill-health or infirmity of mind or body then - under regulation 27 of the Pension Regulations (which govern the Local Government Pension Scheme) - he would have been entitled to additional pension benefits. However, after the ET

held that Mr Booth was not a disabled person for the purposes of the DDA 1995, the Council decided not to medically examine Mr Booth to establish if he qualified for those additional pension benefits. Whilst Mr Booth appealed the ET decision (unsuccessfully) he did not avail himself of all of the dispute resolution remedies provided by the Pension Regulations.

Mr Booth brought a breach of contract action several years later, arguing that, had they referred him for medical assessment, he would have satisfied the criteria for ill-health under regulation 27 and he would have been awarded permanent ill-health retirement.

The claim was dismissed by the High Court and, subsequently, by the Court of Appeal. The Court of Appeal held:-

a.. given the finding of the ET in relation to disability, Mr Booth could not successfully contend that the Council remained under a duty to medically assess him. Lord Justice Thomas stated that there was no need to consider whether a person who is found not to be under a disability under the DDA will always fail to establish permanent incapacity under the Pensions Regulations since there was clear evidence in this case that Mr Booth did not satisfy the latter test.

b.. as the Pension Regulations provided dispute resolution machinery by which to challenge the Council's decision, which Mr Booth had not availed himself of, he had no right to bring his claim at all.

(Thanks to Emma Price of 1 Temple Gardens for preparing this case summary and to Daniel Barnett)

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iii. Disability Discrimination: Excluded Conditions

The case of X Endowed Primary School v Mr & Mrs T is authority for the proposition that where a disabled person has a protected impairment under the DDA which manifests itself in a form falling within one of the conditions excluded by Regulation 4 of the Disability Discrimination (Meaning of Disability) Regulations 1996, the focus should be on whether any alleged discrimination relates to the excluded condition or to the protected disability or to both.

JT was excluded from the Appellant School for scratching a teacher. He suffers from ADHD (a protected disability) which causes sufferers to act aggressively in certain provocative situations. The School appealed the Special Educational Needs and Disability Tribunal's finding that it had failed to make reasonable adjustments, arguing that the only aspect of JT's ADHD in respect of which there was need to make an adjustment was his tendency to physical abuse of other persons (an excluded condition under the Regulations).

The Equality and Human Rights Commission, supporting JT's parents, argued that the Regulations only applied to free standing conditions and not to consequential symptoms of an impairment. Mr Justice Lloyd Jones rejected this and in so doing preferred Edmund Nuttall Limited v Butterfield (2005) over Murray v Newham CAB (2003), both EAT decisions. The fact that the tendency to physical abuse was a manifestation of a protected disability did not remove it from the Regulations' scope. On the facts, there was a failure to make reasonable adjustments in respect of JT's protected disability.

Claimants may wish to argue that where there is an underlying protected disability and an excluded condition, the issue is one of reasonable adjustments for the protected disability even where any failure to make adjustments causes the excluded behaviour.

(Thanks to Will Dobson of Cloisters for preparing this case summary and to Daniel Barnett)

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iv. Disability Discrimination: Malcolm continues...

The EAT has held, in *Fareham College v Walters*, that a decision to dismiss can be an unlawful act of disability discrimination by reason of being a failure to make reasonable adjustments. It therefore mitigates the effect of *Lewisham v Malcolm* .

Fareham makes it clear (paras 65 -78) that if, at the point at which the employer was considering dismissing the employee, there was a reasonable adjustment (e.g. allowing the employee to transfer to an alternative role) which would have avoided the dismissal, the dismissal itself will be an unlawful act of disability discrimination - by reason of the failure to make reasonable adjustments.

Contrary to previous dicta there is no need for claimants in such circumstances to rely on disability-related discrimination and the problems posed by *Malcolm* in these situations can thereby be avoided.

Fareham also contains a useful discussion of the comparative exercise involved in the duty to make reasonable adjustments (paras 50- 64). It is a broad-brush exercise that does not involve like for like comparisons. Moreover, it is not always necessary for a tribunal to expressly state who the comparators are because it is often obvious.

(Thanks to Caroline Musgrave of Cloisters for summarising this decision and to Daniel Barnett)]

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