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Employer Found Liable for Unknown Impact of Disability on Employee's Conduct (UK)

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Now here's a case which doesn't feel entirely fair, about an employer's liability under Section 15 Equality Act 2010.

Section 15 says that if you treat an employee unfavourably because of something arising from his disability, then you will have discriminated against him unless that treatment is justified. The example in paragraph 5.9 of the Equality and Human Rights Commission Code of Practice is of an employee who suffers great pain due to her cancer and who, as a result of that pain, is one day rude to her boss. Normally that would be a disciplinary matter but the question which the Code asks (though does not answer) is whether that action against her could be justified in the light of her disability. It is clear from the example that the employer knows about the cancer and implicit that it can reasonably extrapolate from there to the pain and hence the employee's crabbiness. To justify disciplinary action the employer will then be obliged to look first at how rude she was, how often, how personal the rudeness, her role, the impact on others of seeing it happen seemingly unchecked, etc.

City of York -v- Grossett appears to break new ground in finding that the employer can be liable under Section 15, even if it did not have any knowledge, actual or constructive ("ought to have known"), that the particular conduct was caused by a disability.

Mr Grossett was employed as a teacher. He suffered from cystic fibrosis which was fully recognised by his employer as a disability and adjustments to his workload made. His workload was increased by a new Headmaster and while suffering from that, he showed an 18-rated horror film to a class of vulnerable 15 year olds [he said, to promote "a discussion about the construction of narratives" – Halloween has a *narrative*?]. In the subsequent disciplinary proceedings, Grossett accepted he had done wrong but blamed the stress he was under. He was sacked summarily and claimed unfair dismissal and disability discrimination under Section 15.

The unfair dismissal claim was unsurprisingly rejected, but the Section 15 claim succeeded in the Employment Tribunal, Employment Appeal Tribunal and now the Court of Appeal also. The question, they all said, was purely factual – did the misconduct arise from the disability, yes or no, and if it did, the employer's ignorance of the connection between the two was no defence. The only knowledge requirement in Section 15 is that the employer knows or ought to know that the employee has the disability from which the conduct is alleged to arise.

This seems harsh. If you know or are deemed to know about a disability then it would appear that you are also deemed to have knowledge of all its possible (not even just likely) impacts on the employee's behaviours, and are then obliged to justify your disciplinary decisions under the Equality Act. In addition, it seems that the question of actual, as opposed to possible, causation was pretty much taken as read – it is not clear from the decision that there was any real scope for the employer to argue that although misjudgements of this sort could arise from Grossett's disability, in fact this particular one was just a mistake of the sort that any employee might make from time to time. That argument must be viable in theory, because if the misconduct was not caused by the disability, it did not "arise" from it, but you could expect that point to be very difficult to win in practice.

Was it not also inconsistent that a dismissal could be found both fair and discriminatory at the same time? The Court of Appeal said not – the test of reasonableness in unfair dismissal cases allows the employer significant

latitude so long as it operates “within the range of reasonable responses”, whereas the Section 15 test requires the Tribunal to reach a view of its own on the much stricter test of justification.

Lessons for Employers

- If your employee claims that a particular act of misconduct arises from a disability, take it seriously even if there is no obvious connection between the two. You could spend quite some time googling the possible connection between cystic fibrosis and the showing of Halloween to minors and not find anything, but you might get to irrational behaviours via stress on top of cystic fibrosis, and that should be enough to make you hesitate, says this case.
- Your duties under Section 15 are probably not removed even if the employee does not pray the disability in aid in the disciplinary process. He may be reluctant to rely upon it, but the Section 15 test is objective, a bit like the duty to make reasonable adjustments – whether the employee makes the point or suggests the adjustments is broadly irrelevant to your duty to make them.
- It is at least arguable that obtaining Occupational Health medical advice would not save you. If a specialist says there could be a link between the disability and the misconduct, then relying on your OH’s view that there isn’t could leave you significantly under-gunned in the Tribunal.