Stress as a Disability

Identifying when stress is a disability for the purposes of the Equality Act 2010

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S.6(1) of the Equality Act 2010 defines disability: a person (P) has a disability if (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. Para. 5 of Schedule 1 EA 2010 provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. Assistance in determining what is and is not a disability is provided by the Equality Act (Guidance on the Definition of Disability) Appointed Day Order 2011 SI 2011/1159 ("the Guidance"). This is not an authoritative statement of law but an ET must take it into account.

When looking at a stress condition one has to ask:

- Does the stress condition amount to a mental impairment?
- Does the stress condition cause (or would it cause if it was not being treated) substantial adverse effects on the individual's ability to carry out normal day to day activities?
- Are those substantial effects long term?

J v DLA Piper [2010] IRLR 936, a decision of Underhill J, provides guidance as to how the tribunal should consider the relevant questions in a mental health case. Whilst the ET should state conclusions for each question, it should not proceed in rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense... **to start by** making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long term basis) and to consider the question of impairment in light of those findings."

Mental impairment

Simply because an employee / claimant is referring to "stress" rather than a clinically recognised mental health condition does not mean that they cannot be regarded as disabled for the purposes of the EA 2010.

Para A3 of the Guidance provides that it is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. There is no requirement that a mental illness has to be a clinically well recognised illness before it can be a mental impairment. The former requirement that it was, under the Disability Discrimination Act 1995, was removed from that legislation by the Disability Discrimination Act 2005, and not re-introduced in the Equality Act 2010. The Guidance makes it clear that the mental impairment does not need to be a clinically well recognised illness.

Respondents often cite *Morgan v Staffordshire University* [2002] IRLR 191 in response to loosely framed mental health cases because in that case the EAT said "it is not the case that some loose description such as 'anxiety', 'stress' or 'depression' of itself will suffice ". However, that case is now to be viewed with substantial caution because it was primarily considering whether a clinically recognised condition had been proved, as was required at the time.

The leading case is now *J v DLA Piper*, in which the EAT said that in cases where difficulty is encountered in identifying an impairment, it will be easier to focus upon whether the claimant's ability to carry out normal day-to-day activities has been adversely affected, to what extent and for what period. If it finds that those criteria are met "it will in many or most cases follow, as a matter of common-sense inference, that the claimant is suffering from a condition which has produced that adverse effect - in other words an 'impairment'. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues.

The EAT further said that the distinction between mental illness / clinical depression and reactions to adverse life events should in principle be recognised for the purposes of the Act and that "it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use terms such as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'". However:

> *"we would not expect those difficulties often to cause a real problem...because of the long term requirement....[If the tribunal finds symptoms characteristic of depression at work for more than 12 months] "it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long-lived."*

In the context of the EA 2010, the more relaxed approach to impairment prescribed by *J* was confirmed recently in *City Facilities Management (UK) Ltd v Ling* UKEAT/0396/13/MC.

Having regard to the above, stress conditions may well be regarded as impairments where they are causing long term symptoms, such as inability to sleep, low mood, anxiety, inability to concentrate, or loss of appetite on a long term basis. Simply feeling stressed, without associated symptoms / effects, would be highly unlikely to be regarded as an impairment.

PRACTICAL TIPS:

- *The focus must be on the interference with day to day activities and the longevity of that interference, rather than whether a medical label can be attached to the condition.*
- *However, if a clear medical diagnosis has been given, this may make the issue of impairment more straightforward.*
- *In ET proceedings, ensure that the impairment/ effects thereof relied upon are clear from the outset. This should be set out clearly in the ET1. If it is not, this should be highlighted in the ET3. If a response is not forthcoming, a PH should be requested to clarify the issue. Parties cannot prepare a case without knowing this: see Morgan v Staffordshire University.*
- *Ensure medical records are obtained at an early stage.*

Substantial adverse effect on ability to carry out day to day activities

The Act does not define what is to be regarded as a 'normal day-to-day activity'. Para B1 of the Guidance reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.

Various relevant effects upon the ability to carry out day to day activities are recognised, by the Guidance and in authority, which could arise from a stress condition. For example, tiredness, loss of motivation, inability to concentrate, inability to care for one's self (e.g. eating or hygiene), needing additional time to complete an activity, completing tasks in a particular way, forgetfulness, inability to plan ahead, and avoiding activities because of loss of energy and motivation.

The case of *DWP v Conyers* UKEAT/0375/13/KN, a decision of HHJ David Richardson in the EAT, provides some assistance as to what effects will not be regarded as significant. The evidence from the claimant was that she had cried in the doctors, ate when she was unhappy, felt like things were getting on top of her, had low mood, lost interest in pleasures of life, lost motivation, and that she stopped going to opera and theatre and plays. She was not prescribed any medication. The EAT was satisfied that there was no

evidence of substantial adverse effect on day-to-day activities during that period of time.

The decision of Mr Recorder Luba QC in *Purohit v Hospira UK Limited* UKEAT/0520/13/LA suggests that if someone has time off work that in and of itself could evidence substantial interference with everyday activity.

PRACTICAL TIPS:

- *A claimant's ET1 and statement should set out clearly what interferences have occurred with their participation in day-to-day activities, being specific as to the periods to which this interference relates. If a claimant's ET1 is poorly pleaded, a request for clarification should be made.*

Where a Respondent wishes to challenge what a claimant is saying about the impact of the condition on his / her ability to undertake day to day activities the following should be explored:

- *Can witnesses of fact being identified and statements obtained from them to contradict what the Claimant is saying? e.g. colleagues?*
- *Are there documents that contradict what the Claimant is saying? Often, one will be looking for omissions, i.e. what evidence does not exist that one would expect to exist if there was a significant impact upon the ability to carry out day to day activities.*
- *The medical records also may contradict the Claimant by omission, i.e. not showing the Claimant complaining of symptoms that she now says exists.*
- *Expert medical evidence. An expert may be able to say that what the Claimant is reporting is not consistent with her condition or with the medical records.*

Effect of treatment ("deduced effects")

This is an important matter to consider in stress claims where the symptoms of stress could be being managed using treatment such as anti-depressants, drugs assisting sleep, CBT or counselling. Counselling was specifically identified as a relevant medical treatment in *Kapadia v London Borough of Lambeth* [2000] IRLR 14.

Historically, tribunals have taken a firm approach to the claimant's responsibility to prove deduced effects, see *Woodrup v London Borough of Southwark* [2002] EWCA Civ 1716 where the EAT emphasised the difficulty in proving such a case without expert evidence.

However, in *Purohit v Hospira* the EAT gave further guidance as to how ETs should deal with evidence of deduced effect. The Claimant in *Purohit* was being provided with Temazepan for her insomnia and a drug called Citalopram as an anti-depressant. The EAT said that sleeping tablets were obviously prescribed to improve sleep and anti-depressants to prevent depression. Accordingly, it was incumbent upon the Tribunal in this case, when considering “substantial adverse effect”, to consider the effect of the impairments on the Claimant absent the beneficial effects of the medication that she received.

PRACTICAL TIPS:

- *Parties seeking to prove or challenge a "deduced effects" case should if possible seek to rely on expert medical evidence. The issue of what would have been suffered but for receipt of treatment is a technical issue about which the ET may not be able to make assumptions.*
- *However, before incurring the cost of medical advice, consider the evidence with a degree of common sense. If someone suffering stress is being treated with a high dose anti-depressant, it may be unlikely that this would have been prescribed if the GP felt that the individual could participate in normal life without those drugs.*

Long term effects

The Act states at Sch1, Para 2, that, for the purpose of deciding whether a person is disabled, a long-term effect of an impairment is one: which has lasted at least 12 months; or where the total period for which it lasts, from the time of the first onset, is likely to be at least 12 months; or which is likely to last for the rest of the life of the person affected. The situation is straightforward where, at the time of the alleged unlawful act, symptoms have been in existence continually for more than 12 months. However, this is often not the case with mental health conditions.

The Guidance provides some, limited, assistance in the case of a mental health condition which "flares up" twice over a 13 month period. In *J v DLA Piper* the EAT gave the example of a person who suffered several short bouts of depression over a five years period and said "in such a case it may be appropriate, though the question is one on which medical evidence would be required, to regard her as suffering from a mental impairment throughout the period in question, ie even between episodes." It also said that a tribunal should consider whether earlier depressive episodes were likely to recur and therefore if the claimant was disabled at the material time even though not suffering at the time of the unlawful act.

DWP v Conyers UKEAT/0375/13/KN emphasises the need for ETs to look at each period of suffering separately.

PRACTICAL TIPS:

- *When considering long term effects in stress claims, the parties should identify a clear chronology showing when symptoms were being suffered and when they were not. The medical records will assist.*
- *If the claimant is suffering symptoms at the time of the alleged unlawful act, the evidence needs to focus upon whether those symptoms had already lasted for a year, whether they would be likely to last for a year, or whether they can be linked to a previous episode of symptoms so that an underlying continuing condition can be proved. Particularly in relation to the latter two considerations, medical evidence is advisable.*
- *If the claimant is not suffering symptoms at the time of the unlawful act, the medical records need to be examined to establish if there are sufficient past episodes of symptoms to justify obtaining medical evidence to explore whether those past symptoms would be likely to recur.*

Understanding and Managing Mental Health in the Workplace – Practical Steps

An employer may often ask what the difference is between “stress” and a psychiatric condition that may amount to a disability. There are also a range of psychiatric conditions that employees may suffer from, which employers have little or no understanding of. For an employer, having a basic understanding of a mental health condition that an employee has been diagnosed with may go a long way towards understanding what adjustments may be required in order to manage that condition in the workplace.

Key definitions

Stress: is not a formally recognised psychiatric medical condition but can describe a range of symptoms or feelings experienced by a person that may be caused by a range of life stressors.

Psychiatric Disorder: When a mental health professional determines there is a sufficient range and severity of symptoms and signs to satisfy diagnostic criteria for a particular disorder as defined in the psychiatric literature.

Depression: This is the most common psychiatric condition employers will come across. It can include bipolar affective disorder (manic depression). Typical symptoms include low mood, poor concentration, disturbed sleep, reduced appetite, experience of suicidal thoughts, feeling tired and guilt. Symptoms disrupt normal social and occupational functioning.

Recurrent Depressive Disorder is where two or more discrete episodes of depression have occurred in a lifetime.

Other types of psychiatric conditions include:

- **Anxiety disorders:** generalised, specific phobic, acute (panic disorder e.g. agoraphobia), social, travel, obsessive compulsive disorder (relapse or exacerbation)
- **Mixed anxiety and depression:** mixture of anxiety and depression symptoms but neither severe enough to justify individual diagnosis
- **Adjustment Disorders:** Mixture of anxiety and depression symptoms in response to a life event including trauma (e.g. falling short of PTSD)

- **Somatoform Disorders:** Physical symptoms with no identifiable physical origins e.g. chronic pain syndromes, fatigue syndromes (CFS, ME), dissociative disorders

Liability of the employer to the employee

There are a number of areas of law in which potential liability arises towards a disabled employee, not just under the Equality Act 2010. Employers and employees should be aware of these additional areas of liability to ensure that these additional duties are being complied with:

Employment Law: Disability Discrimination and harassment under the Equality Act 2010, potential unfair dismissal claims (constructive, ill-health, capability)

Tort/common law: Liability for harm where there has been a breach of duty resulting in a reasonably foreseeable risk of harm/injury to the health of the individual employee which is attributable to stress at work *(Hatton v Sutherland* [2002] ICR 613)

Breach of Contract: Breach of contractual terms as to stated duties, nature and volume of task, working hours

Breach of statutory duty under Health and Safety Regulations: The Management of Health and Safety at Work Regulations 1999, and in particular Regulation 3 is oft-cited in stress at work claims

PRACTICAL TIPS:

- *If drafting or signing a COT3 Compromise Agreement for a disability discrimination claim, be absolutely clear precisely which claims are being compromised, if there is any reference to "personal injury claims", be sure to define what this means within the agreement. If in doubt, include a list within the COT3 of all the statutory claims/causes of action that are intended to be compromised by the agreement.*

Impending signs of stress/injury to mental health

The signs displayed by employees suffering from stress or a mental health disorder can vary enormously from person to person, but there are some key indicators that employers should be alerted to that might suggest that employees are becoming stressed and therefore are at risk of that stress turning into a psychiatric condition. Such indicators may be relevant to the question of whether an employer has actual or constructive knowledge of an employee's mental health disability:

Signs to look out for in the individual employee:

- Are there any particularly stressful life/emotional events occurring in the employee's life
- Is the employee is of normal fortitude or extra sensitive to outside pressures and stressors
- Does the employee have generally high or low levels of sickness absence – are there now uncharacteristic, frequent or prolonged absences
- Has the employee had any previous stress-related illness or absence
- Has the employee made any complaints about their workload/ability to cope with their role
- Have there been any warnings by colleagues about the employee's ability to cope with their role

Sign to look out for in the workplace generally:

- Is there suddenly or progressively a higher workload than normal for that particular job
- Are there higher demands on this employee than are made on others doing the same/comparable job
- Are others who are doing the same job showing signs of stress or abnormal levels of sickness/absenteeism in the same department

Managing employees through illness and on their return to work

The way in which an employee is managed during their absence and upon their return to work is crucial – this is the area where employers can be most vulnerable to potential employment tribunal claims, and employees can be most vulnerable in respect of potential relapses or an exacerbation in their condition. There are three main actions that employers should take when managing an

employee during their absence, immediately upon their return to work and when they have settled back into the workplace:

a. The use of Occupational Health
b. The return to work meeting
c. Risk assessment

Occupational health

A referral to OH should be considered as soon as it is apparent that an employee has a possible mental health condition, may be absent for a prolonged period of time, or has a number of short-term absences related to the same condition.

The OH Referral form is important and should ask OH to address the following specific areas:

a. The nature of the employee's condition and the symptoms it causes
b. The effects on the employee's normal day-to-day activities
c. What medication the employee is taking and the effects of it
d. The triggers for the employee's condition – both inside and outside the workplace
e. Any adjustments that the employer might make to assist the employee's return to work
f. Whether the employee meets the definition of disability within the Equality Act 2010

Employers should be warned however, that blind reliance on OH's conclusion that an employee does not have a disability within the meaning of the Equality Act 2010 may not amount to a defence to any subsequent disability discrimination claim. Employers should be mindful of the following:

- **Gallop v Newport City Council** [2014] IRLR 211: **Gallop** showed that an employer could not simply leave a decision as to whether an employee was or was not disabled to the say-so of a medical advisor. An employer had to form its own judgment on such matters; and
- **Donelien v Liberata UK Limited** UKEAT/0297/14/JOJ: The EAT accepted and applied the legal principle so far as **Gallop** sets it out, that the decision as to whether or not an employee is disabled, so as to trigger the duty of reasonable adjustment, is one for the employer to make.

Employers should therefore consider whether further medical evidence is needed, such as a letter from the employee's GP and should use all of the information at its disposal, not just the OH report.

Return to work meetings

It is always good practice to undertake a return to work meeting following any significant or prolonged period of absence. Employers should write such a requirement into any Sickness Absence Management Policy or Stress Management Policy to ensure that managers undertake such a meeting upon an employee's return to work.

Such meetings should always be documented and employers should explore and try to agree the following main areas with the employee:

a. What the cause/s of their stress or mental health illness was
b. What symptoms are caused by it, whether they are still suffering from such symptoms and to what degree
c. Whether there are any triggers/stressors within the workplace and if so, to identify these
d. Agree a return to work plan and schedule – can the employee return to work on a full time basis or is a phased return to work required
e. Agree the duties the employee will be able to undertake upon their return to work
f. Agree a schedule for future meetings/supervision sessions to monitor the progress of the employee during their return to work
g. Write an outcome letter setting out the areas of agreement and the return to work plan

This allows employees to be proactive in identifying what reasonable adjustments they require within the workplace and ensuring their need are met, rather than leaving the onus solely on the employer to identify what reasonable adjustments may be required.

Risk assessments

Although the failure to do a risk assessment will not amount to a failure to make a reasonable adjustment under the Equality Act 2010, a risk assessment has real value for employers in identifying where the problem areas lie for employees i.e. what reasonable adjustments may

be needed. Risk assessments encourage employers to think about practical ways of assisting employees back into the workplace.

A failure to undertake a risk assessment could expose an employer to liability under the Management of Health and Safety at Work Regulations 1999 and in particular, Regulation 3:

> ***3 Risk Assessment***
>
> *(1)Every employer shall make a suitable and sufficient assessment of -*
>
> *(a) the risk to the health and safety of his employees to which they are exposed whilst they are at work; and*
>
> *(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking.*
>
> *For the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions*
>
> **and** note the on-going duty to review:
>
> *(3) Any assessment such as is referred to in paragraph (1) or (2) shall be reviewed by the employer or self-employed person who made it if-*
>
> *(a) There is a reason to suspect that it is no longer valid; or*
>
> *(b) there has been a significant change in the matters to which it relates;*
>
> *And where as a result of any such review changes to an assessment are required, the employer or self-employed person concerned shall make them.*

Employers should note the Management Standards Approach. This is a document designed by the HSE to provide guidance to employers to manage causes of work-related stress and risk assessments and can be found www.hse.gov.uk/stress. It is backed by ACAS and TUC.

The Management Standards Approach comprises 5 steps:

- Identify the stress risk factors
- Decide who might be harmed and how
- Evaluate the risks
- Record your findings
- Monitor and review

It also provides the following practical tips as to the type of information which is useful in completing a risk assessment:

- Involve senior and line managers, TU representatives, health and safety managers, OH and HR in the process
- Useful data includes sickness absence rates, staff turnover, exit interviews, number of OH referrals

Action points that could arise out of a risk assessment, which apply to employees generally or to a specific employee may include the following:

General action points

a. management development e.g. in interpersonal skills
b. creating or updating policies and procedures (e.g. sickness absence management policy, bullying and harassment policy)
c. reviewing job descriptions and job plans
d. training in stress awareness for managers and employees

Action points specific to an employee

- Transfer to a different position or department
- Reduced responsibilities or hours
- Demotion
- Offer of counselling services (note: this may not be sufficient of itself: *Daw v Intel Group)*
- Offering additional assistance e.g. more administrative time, employing assistants, etc.

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Rehana specialises in employment law and personal injury claims, with particular expertise in occupational stress, harassment, and discrimination claims.

"Formidable work ethic and intelligence" (Legal 500, 2014), Rehana has been recommended as a leading Junior in the Legal 500 since 2010. She co-authored "Litigating Psychiatric Injury Claims" (Bloomsbury Professional, 2012), a Practitioners' Guide, combining her expertise in both personal injury and employment law. She became an Accredited Advocacy Trainer for the Inner Temple in 2012 at the highest advocacy level (New Practitioner), teaching cross examination of expert medical witnesses and Court of Appeal advocacy to other practitioners. She was promoted to Advocacy Teacher Trainer in 2014.

Rehana is Patron of Bird & Bird's Bursary Foundation and has been a guest speaker on BBC World News and the BBC World Service on equality issues in the workplace. She was a specialist panel speaker at the BBC's 100 Women of the Century Event in October 2013 which was broadcast internationally. She won the Young Achiever award at the National Asian Women of Achievement Awards in 2009 and was a Finalist at the British Muslim Awards 2013. She has featured in the International Asian Who's Who Guide since 2012.

Reported cases include Bone v North Essex Partnership NHS Trust (Court of Appeal) [2014] All ER 964, [2014] IRLR 635, Nambalat v Tayeb and Ors (Court of Appeal) [2012] All ER (D) 62, [2012] IRLR 1004, Mohammed Najib v John Laing PLC (High Court) [2011] All ER (D) 203 and Julio v Jose and Others (EAT) 2012 [IRLR] 180, [2012] All ER (D) 100.

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Hayley McLorinan is an experienced employment law advocate who acts for both respondents and claimants. She regularly undertakes advisory and drafting work in addition to hearing work. Her lay clients include public authorities, NHS Trusts and private employers. Her experience covers unfair dismissal, including constructive unfair dismissal, redundancy, equal pay, discrimination and victimisation, wrongful dismissal and TUPE claims.

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Prior to coming to the Bar, Hayley obtained a double first class degree in Law from Gonville and Caius College, Cambridge, and a Masters degree in Law from the University of Pennsylvania, USA, where she studied under a Thouron Scholarship.

Full CVs are available at: www.2tg.co.uk