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Causation and proportionality in claims of discrimination arising from disability

Topps Tiles Plc v Mr G Hardy [2023] EAT 56; April 13, 2023

Facts

Mr Gary Hardy (GH) was employed by Topps Tiles Plc (TT) as a store manager, having joined the company on June 5, 2002. GH had suffered with depression for over 20 years. GH alleged he made TT aware of his diagnosis of depression following a discussion with an area manager in 2016, though no support was offered at the time.

During a routine meeting on October 7, 2019 with GH's line manager, Tammie O'Lone (TO'L), GH broke down in tears and they discussed his poor mental state and history of depression. TO'L sent GH home after the meeting with some information about TT's counselling service. TO'L followed this up with an email two days later regarding the Employee Assistance Programme. She then spoke to GH at a managers' meeting a few days later to ask how he was. GH responded that he was fine and was hopeful that being back at work would make him feel better.

On November 14, 2019, a customer came into the store when GH was on duty and complained of a delay with his order. The customer's behaviour became increasingly aggressive and he used a lot of foul language. GH became angry at this and gestured to the customer to leave the store, resorting to swearing himself. GH gestured with his hand at one point while holding a cup of tea and as a result some of the tea splashed onto the counter with a small amount landing on the customer's face. GH was subsequently suspended and later dismissed.

Employment Tribunal

GH brought proceedings for discrimination arising from disability under s15 of the Equality Act 2010 (EA) and for unfair dismissal.

The ET found that GH was a disabled person within the meaning of the EA and that TT had the requisite knowledge of GH's depression at all material times. The ET found that GH's depression was a more than trivial contributing factor in his response to the customer and therefore a causative link was established connecting the disability to the conduct which in turn led to his dismissal. The ET concluded that GH was treated unfavourably because of something arising in consequence of his disability - *'namely his difficulties in managing his anger in response to a trigger such as an argument with a customer'*.

The ET found that TT gave no thought at all to the possibility of a sanction other than dismissal. Whilst the ET accepted the legitimacy of the aim to ensure a positive customer experience, it rejected the submission that it could not be achieved by any other means than GH's dismissal. The ET considered that had TT issued a warning with a referral to occupational health and support from management *'there was every reason to believe that this out of character handling of the incident would not have occurred'*.

GH was therefore successful at first instance in both his claims for discrimination arising from a disability and unfair dismissal.

In advance of the remedy hearing, the ET concluded that GH had not contributed to his own dismissal, such as to merit a reduction in compensation for unfair dismissal. The ET

did not agree that a reasonable employer would treat GH's handling of the incident as an act of gross misconduct in the overall circumstances.

Employment Appeal Tribunal

In relation to the s15 EA claim, TT appealed on the basis that the ET had failed to apply the correct approach in establishing causation. The EAT relied on that set out in *Pnaiser v NHS England* 2016 IRLR 170; [2016] Briefing 778, namely the ET should first determine whether GH was treated unfavourably and by whom, and then it should determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator.

The EAT found that the ET had applied the correct test in relation to causation and that the 'something arising' from disability need not be the main or sole cause for the unfavourable treatment but must have at least a significant (or more than trivial) influence.

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TT also appealed on the ground that the correct test in assessing proportionality had not been applied, as required under s15(1)(b) EA, namely whether the treatment is a proportionate means of achieving a legitimate aim. TT considered that the ET had relied on some factors which were speculation or conjecture, in particular the potential impact that a referral to occupational health would have had on GH's dismissal.

The EAT found that the ET was entitled to take into account factors such as his depression, that he was dismissed for gross misconduct, his length of service and also the fact that he was 60 and therefore would find it difficult to get a new job. The EAT also found that the ET, as an industrial jury, is well entitled to consider, without any speculation or conjecture, that there are reasonable alternative ways of achieving the legitimate aim set out.

TT's appeals on the grounds raised in relation to the s15 EA claim were rejected by the EAT.

However, for purposes of the unfair dismissal claim, the EAT allowed an appeal on the ground that the ET had not applied the correct test in accordance with s123(6) of the Employment Rights Act 1996 (ERA) when concluding that GH did not contribute to his dismissal.

S123(6) ERA provides:

> *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

The EAT found that the ET had incorrectly focused on whether TT was justified in considering GH's behaviour as gross misconduct, rather than evaluating his actual behaviour and its impact on the dismissal. The matter was remitted back to the ET with any reduction in compensation to be dealt with as part of the remedy hearing.

Implications for practitioners

The EAT's consideration of *Pnaiser* highlights the test for discrimination arising from disability cases, that the 'something arising' just needs to have a more than trivial influence to establish causation.

This case is a reminder that reasonable adjustments need to be properly considered by employers in order to avoid incidents which lead to dismissal. Secondly, once the

incident occurs then it is important that a range of reasonable responses, other than dismissal, are considered.

In terms of contributory fault, this case highlights the important of considering the actual conduct of the individual and whether or not it contributed to the dismissal, as opposed to whether it was reasonable to treat the conduct as gross misconduct.

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