Stress and mental impairments: blurred lines

ANNABEL MACKAY, Addleshaw Goddard LLP

The requirement for a mental impairment to be clinically well recognised for disability discrimination claims was removed 11 years ago. However, it remains difficult to determine whether employees suffering from 'stress' or 'work-related stress' qualify for protection under the EqA. In Herry, the EAT provides useful guidance on where the line might be drawn.

Background

Mr Herry was a design and technology teacher who had been involved in protracted litigation with Dudley Metropolitan Council. He alleged disability discrimination from 4 April to 27 June 2014. During that period, his sickness certificates recorded that he was suffering from 'work-related stress' and 'stress'. There was no reference to depression until 25 November 2014.

The employment tribunal found that while there had been lengthy absences, Mr Herry was not disabled because he had provided 'little or no evidence that his stress had any effect on his ability to carry out normal activities, other than occasionally to exacerbate his dyslexia'. It determined that the stress was largely due to his unhappiness about his perceived unfair treatment at work and a 'reaction to life events' (para 22).

Mr Herry appealed, arguing that the tribunal had failed to take into account the fact that he was signed off work with 'stress' and unable to teach, thereby demonstrating a long-term adverse effect on normal day-to-day activities.

The EAT's decision

The EAT observed that there was 'a dearth of information in the medical documents as to the nature of the "work-related stress"' (para 51, page 17). An occupational health report dated 17 March 2015 noted that Mr Herry was fit to perform his role but 'outstanding management (non-medical) issues at the workplace' were causing stress. A certificate dated 31 March 2015 recorded: 'Patient feels the behaviour of certain individuals [is] what is stopping him from returning to work at the school and causing his stress' (para 51, page 17).

The EAT then considered whether the tribunal had correctly determined that Mr Herry was not disabled, having regard to the guidance in *DLA* on conditions described as 'depression', which had 'stood the test of time' (para 55, page 18).

This guidance distinguished between two states of affairs which produce symptoms of low mood and anxiety; the first being a mental illness or condition (referred to by clinicians as 'clinical depression') and the second being a short-term reaction to adverse circumstances. The former would qualify for protection while the latter would not, although, as the EAT stated in *DLA*, the 'borderline between the two states of affairs is … very blurred in practice' (para 42, page 31).

In such cases, while each element of the statutory test had to be considered, it was often sensible to 'start by making findings about whether a 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 the light of those findings' (para 40(2), page 29).

The EAT in *Herry* considered this guidance in the context of stress. It referred to 'a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities' (para 56, pages 18–19).

This situation will be familiar to many practitioners dealing with lengthy grievance processes or litigation involving employees on long-term sick leave. In such cases, tribunals are not bound to find that there is a mental impairment as '[u]nhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise … are not of

'the focus of the test remains on the substantial and long-term nature of the effects on normal day-to-day activities'

themselves mental impairments' (para 56, page 19).

The EAT upheld the tribunal's decision that Mr Herry was not disabled. Mr Herry had failed to establish a substantial and long-term adverse effect on normal day-to-day activities. While his reaction to adverse circumstances at work had become entrenched, that did not mean that it amounted to a mental impairment. Nor was a long period of sickness absence conclusive evidence of a mental impairment.

Impact

At first blush this decision appears helpful to employers by applying guidance that distinguished between reactions to adverse circumstances and long-term conditions to diagnoses of stress. However, as the EAT acknowledged in *DLA*, the distinction can be difficult to apply in practice, particularly as the effect rather than the cause of an impairment is what matters.

The fact that an employee improves in their home environment does not mean that they will not qualify for protection. In *Rayner*, the EAT noted that advice from a GP that an employee with anxiety and depression should refrain from work 'is capable of being a substantial effect on day-to-day activities' (para 22, pages 6–7), although, as *Herry* demonstrates, this remains a factual question for the tribunal.

A diagnosis of 'work-related stress' rather than 'stress' may prove more challenging for employees. Without further clarification from either the claimant or medical practitioners, it may imply that once a specific situation at work (such as a grievance, performance management or disciplinary process) is resolved, the employee's health will improve. In contrast, a diagnosis of stress could point to a longer-term condition (such as an anxiety disorder), which may hinder an individual's full participation in work or non-work related activities in the absence of coping strategies and/or reasonable adjustments.

Medical evidence

With such potential for uncertainty, even with the removal of the requirement for clinical recognition, it is crucial that claimants provide sufficient evidence of the substantial and long-term effects of their condition on normal day-to-day activities.

The EAT noted in *Ling* that claimants are 'best qualified' to comment on the impact of their impairment (para 39, page 14). However, they should not overlook the importance of medical evidence in respect of other aspects of the test and/or in supporting their own assessment of the effects. In *Morris*, the EAT stated that such evidence can be particularly important in connection with determining whether substantial adverse effects are likely to last for 12 months, whether effects which have ceased to be substantial will recur and the question of deduced effects.

The EAT held in *Rayner* that a GP may be in a position to give an 'authoritative view' (para 26, page 8). However, given that the burden rests with the claimant, it may still be prudent to invest in a more detailed report. In *Morris*, the claimant decided not to rely on expert evidence but the medical notes failed to resolve key questions regarding the duration of his impairment.

Conclusion

Employers may be encouraged by the decision in *Herry* but it is important to remember that the focus of the test remains on the substantial and long-term nature of the effects on normal day-to-day activities rather than the precise medical diagnosis or cause. Stress may be an inaccurate label for a longer-term condition. It may develop over time into an impairment that qualifies for protection or it may exacerbate other conditions, which have a cumulative effect on normal day-to-day activities.

As the EAT acknowledged in *Herry*, 'work-related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression' (para 55, page 18). Where an employee suffers from stress as a reaction to events at work, employers should focus on resolving the root cause of the problem. Workplace mediation and other forms of dispute resolution should be considered where positions are entrenched.

KEY:

EqA	Equality Act 2010
Herry	*Herry v Dudley Metropolitan Council* UKEAT/0100/16/LA; UKEAT/0101/16/LA
DLA	*J v DLA Piper UK* [2010] ICR 1052
Rayner	*Rayner v Turning Point* UKEAT/0397/10/ZT
Ling	*City Facilities Management (UK) Ltd v Ling* UKEAT/0396/13/MC
Morris	*RBS plc v Morris* UKEAT/0436/10/MAA