Employment news: Disability and discipline give pause for thought

13 APRIL 2010

Stephen Ross
PARTNER | UK

CATEGORY:
ARTICLE

Employers are not liable to make reasonable adjustments for disabled employees unless they know, or ought to know, that the employee is both disabled and likely to be at a substantial disadvantage. This is a complex test and creates practical diffi culties for employers. The Employment Appeal Tribunal (EAT) has now looked at it again in DWP v Alam.

Mr Alam suffered from symptoms of depression and, as a result, sometimes had severe headaches and was apt to lose concentration and his temper. He arrived late for work one day, having warned his line manager that he would be late. On his arrival at 12:30pm, he asked his line manager if he could leave early, at 4pm, to attend an interview for a supplementary job (his normal working day finished at 6pm). Mr Alam's line manager refused him permission to do so. At about 1pm, Mr Alam made the same request of a more senior manager, who also refused him permission to leave early. Mr Alam became increasingly stressed throughout the day (due, it transpired, to a concern over his fi nancial situation and a concern that he would not secure the supplementary job). At about 5pm (one hour early), Mr Alam left the offi ce, informing his line manager that he was going, but giving her no time to react. Mr Alam was given a written warning as a result of his conduct and complained to the tribunal, alleging disability discrimination. The tribunal found as a matter of fact that Mr Alam's depression meant that he was unable to control himself suffi ciently to ask for permission to leave work early and wait for an answer (though this was not apparent to the employer at the time).

On appeal, the EAT dismissed Mr Alam's claim of disability discrimination. It found that whilst his employer (DWP) ought reasonably to have been aware of his disability, it could not be expected to know that his depression affected his ability to ask permission before leaving work early. A clear distinction was drawn between behaviour that resulted from depression and which the DWP might realise resulted from depression (e.g. poor concentration), and behaviour which arose as a result of depression, but which the DWP could not reasonably be expected to link to mental ill-health (e.g. leaving work early without permission).

Points for employers

The EAT's decision is helpful to employers in that it falls short of imposing a duty on employers to consider reasonable adjustments when the evidence of disability is difficult to identify. However, it is worth remembering nother 2005 case involving the DWP (DWP v Hall) in which the EAT did find the DWP liable even though the employee had not specifically mentioned the disability. Both the tribunal and the EAT held that negative replies in a health declaration form, and Miss Hall's refusal to let her employer have access to her doctor or medical records, should have been a 'warning sign' to the DWP when seen against the background of Miss Hall's temperamental behaviour. The DWP's case was made worse by the fact that a member of the interview panel which had recruited Miss Hall knew her previously, but did not mention anything about her health or disability, and the fact that Miss Hall's manager failed to take note that she had applied for disability tax credit.

Taken together, the two cases demonstrate that employers should be alert to warning signs and be prepared to make enquiries when these signs point to a possible disability. However, this does not mean that every example
of erratic behaviour has to be treated as the effect of a potential disability.

Authors

Stephen Ross

PARTNER | LONDON

Litigation and arbitration

 +44 20 7597 6172

 stephen.ross@withersworldwide.com