Two Recent Cases of Interest

Why you must not be afraid of asking questions about a disability

Employers are often reluctant to push a claimant to provide evidence of an alleged disability. Given the low bar that exists in relation to establishing disability, an employer can often score an own goal by pushing an employee too hard on this issue in circumstances where it is obvious that a disability exists. There are clearly many situations where it might be unwise to require medical evidence from a Claimant in the course of a Tribunal claim to support their disability. The disability may be something of which the employer is already well aware and about which the claimant has already provided medical information in the course of their employment and in advance of any claim.

However, this is not always the case and we have seen a number of cases over the last 12 months where the relevant disability is something about which an employer is not, or could not have been aware. Often, information about that disability may only come out in the course of the claim. This creates real difficulties for employers. There is a requirement under the law to make reasonable adjustments for employees who suffer from a disability. If employers are not aware of that disability and how it impacts on that employee, it is difficult to understand how they can judge whether any adjustments which they could or should make will be sufficient to assist an employee in the work place.

In certain cases, it will be important to be ready to pin the employee down as to exactly what disability is being alleged, how and when that disability manifested itself, and what impact it had on the employee. The recent EAT judgment in the case of ***Morgan Stanley International v Posavec UKEAT/0209/13/BA*** shows that sometimes it is important to push a claimant quite hard as to the issue of disability.

There had been a preliminary hearing to determine whether the claimant suffered from a disability. The employer disputed that the claimant was suffering from a disability and denied that it had knowledge of the alleged disability. At this preliminary hearing, the claimant had given oral evidence which provided very different information as to disability to that which the claimant had included in her ET1 and her response to the employer's request for further information. On the basis of that oral evidence, the Employment Judge found that the claimant was disabled. That decision was appealed by the employer to the EAT arguing that the Employment Judge had failed to identify in his Judgment the physical impairment which had a substantial adverse affect on the claimant's ability to carry out her day-to-day activities.

In her evidence the claimant had relied upon several different conditions. The Employment Judge did not identify which of those conditions he was relying upon to say that the Claimant had a physical impairment which had a substantial and long term adverse effect on her ability to carry out day to day activities. It was therefore impossible to assess whether there was medical evidence to support the claimant's position. The employer argued that it was essential for the condition or conditions to be identified. Only then would it be possible to assess whether the employer knew or could have known that the claimant was disabled and was at a substantial disadvantage, and only then would the employer have been under a duty to make reasonable adjustments and been able to assess whether the adjustments which it proposed to make were reasonable. The Employment Tribunal had been provided with information about a large number of possible conditions some of which may or may not have caused the symptoms of which she complained in her ET1. However, the Employment Judge did not set out which of those conditions he relied upon.

The EAT agreed with the employer and remitted the matter back to a new tribunal to identify what the specific disability was, emphasising the importance of this essential piece of the jigsaw.

The case illustrates that, in certain situations, it will be essential to pin an employee down as to the exact nature of the disability that is being alleged, when, it first manifested itself and what impact it has on the employee. This will often include obtaining medical evidence from the claimant. Although pushing a claimant too hard can sometimes be counter-productive, there are times when it will be essential to allow the employer to defend itself properly.

TUPE: Using a percentage calculation to determine if someone is assigned to a group

Those of you who are involved in outsourcing will be familiar with the concept of using a percentage as a broad brush indicator of whether an employee may transfer over in a service provision change. However the recent case of ***Costain Ltd v Armitage*** UKEAT/0048/14/DA suggest that too much emphasis should not be attributed to this factor, and it is perfectly possible for someone spending upwards of 65% of their time on something not to transfer.

Mr Armitage's employer, ERH had two contracts with the Welsh assembly. He was a project manager and he carried on work on both contracts. One of the contracts had been lost in a re-tender exercise to Costain. The Tribunal decided that, at the time of the service provision change, Mr Armitage was probably working for 67% of his time on that contract. The tribunal laid heavy emphasis on the percentage of time Mr. Armitage spent on the contract and found that he did transfer. The EAT disagreed saying that the issue of whether or not someone is assigned to an organised grouping was a question of fact but it could not be assumed that every employee that carried out work for that particular client was assigned to that organised grouping. Whether or not a particular employee was assigned to the grouping could only be resolved on a proper examination of all the facts and circumstances. The percentage of time spent on that work or service is a relevant part of this decision but should not be the starting point. A systematic approach is more important. It is fair to say that in this case, Mr Armitage was a trouble shooter who moved from contract to contract as needs arose, so in the run up to the transfer had been heavily involved in the contract but he had not been "assigned" to it.

If you have any questions on these cases or would like to discuss matters further please contact us.

Stefan Martin
Partner, London
E: smartin@mayerbrown.com
T: +44 20 3130 3308

Ann Robson
Associate, London
E: arobson@mayerbrown.com
T: +44 20 3130 3345

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