

Legal Brief

UNILEG/14/02

THE ROLE OF MEDICAL EVIDENCE IN DISABILITY DISCRIMINATION CASES

Please read in conjunction with UNILEG 07/02

In disability claims it is for the applicant to prove that she/he is disabled. Bearing that in mind, it is imperative that the Applicant has sufficient medical evidence to substantiate the claim.

Background

Morgan v Staffordshire University [2002] IRLR 190 is an Employment Appeal Tribunal (EAT) decision. A female supervisor assaulted Mrs Morgan when she was a work. Mrs Morgan was offered alternative jobs, but none were such that the employer could guarantee that she would not encounter the supervisor again. Mrs Morgan resigned and claimed constructive dismissal. Her IT1 mentioned the stress and anxiety which the assault had caused her.

Subsequently, solicitors who took over the conduct of Mrs Morgan's case amended the IT1 and added a claim of disability discrimination, which was denied by the University. A preliminary hearing was held on the question of whether Mrs Morgan was a disabled person within s.1 of the DDA. No medical evidence was heard at the preliminary hearing, but copies of her medical notes were produced which referred to Mrs Morgan as feeling depressed and diagnosing 'anxiety'. Mrs Morgan's Counsel submitted extracts of the World Health Organisation's International Classification of Diseases' (WHOICD) relating to Mood [affective] disorders and Neurotic, stress-related disorders. Based on the doctor's notes and the WHOICD extracts, submissions were made that Ms Morgan had a mental rather than physical impairment.



In determining whether Mrs Morgan was a disabled person within s.1 of the DDA, the ET also considered whether Mrs Morgan's state fell within any specific description mentioned in the WHOICD.

The Employment Tribunal found that Mrs Morgan did not have a disability (in this case a mental impairment) within the meaning of s.1 of the DDA 1995. S.1(1) of the DDA states:

“Mental impairment includes an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognised illness.”

The EAT held that even if the words 'anxiety', 'stress' and 'depression' could be found at intervals in the medical notes put before the tribunal, it is not the case that their occasional use, even by medical persons, will, without further explanation, amount to proof of a mental impairment within the Act.

In other words it was not sufficient to merely point to occasional references in the medical notes and to the indices in the World Health Organisation's International Classification of Diseases without any informed medical evidence beyond those notes. To do so was to invite failure.

The EAT also made the following observations (these have been summarised and anyone relying on the case should read the full judgment):

- (1) The onus is on the Applicant to prove the impairment - on a balance of probabilities;
- (2) there is no good ground for expecting the tribunal or EAT members to have anything more than a layman's rudimentary familiarity with psychiatric classification. Therefore things need to be spelled out;
- (3) as the WHOICD does not use terms without qualification, it is not the case that some loose description such as 'anxiety', 'stress' or 'depression' of itself will be enough to show a 'clinically well-recognised illness', unless there is credible and informed evidence to back up the terminology;
- (4) where the WHOICD classification is relied on then, in any case where dispute is likely, the medical deponent should depose to the presence or absence of the symptoms identified in its **diagnostic guidelines**;

- (5) whilst there may not be a need for a full consultant psychiatrist's report in every case, the existence or not of a mental impairment is very much a matter for **qualified** and informed medical opinion;
- (6) if it becomes clear that the impairment is to be disputed on technical medical grounds then thought will need to be given to further expert evidence;
- (7) there are dangers of the tribunal forming a view on mental impairment from the way the claimant gives evidence on the day.

Further Cases

In the Employment Tribunal (ET) case of ***Langlands v Xerox Ltd case no. 5400631/01 (Judgment given in February 2002)*** the Tribunal was asked to determine if the applicant suffered from a clinically well recognised mental illness, and if so, whether or not it had a long term and substantial adverse effect on her ability to perform normal day to day activities.

Ms Langlands claimed that she was suffering from a mental impairment in the form of clinical depression. She relied on evidence in the form of a report prepared by her counsellor and physiotherapist. This report stated that the Applicant presented the signs of clinical depression but did not set out in any coherent way the diagnostic criteria, their application, or the identity of the type of depression.

The Respondent employer relied on a medical report compiled by a Dr Turner, a medical practitioner and the employer's medical adviser. He noted that the counsellor's report was not consistent with the GP's notes and after conducting a mental state examination he found that the Applicant showed evidence of mild anxiety but no significant depressive thought content, and therefore did not appear to fulfil the diagnostic criteria for major depressive illness.

The ET was quick to point out that the counsellor was not a registered medical practitioner unlike Dr Turner. They questioned the counsellor's ability and authority to make clinical diagnoses of medical conditions. The ET found in favour of Dr Turner's evidence and therefore concluded that the Applicant could not discharge her burden of proof; i.e. that she was disabled as defined by the Act.

Whilst the above case is an ET decision and has only influential persuasion when used at other ET hearings, it is nonetheless important as it points out the ET's view of medical evidence which is needed to support disability cases.

Implications for UNISON members

With this in mind, it is essential to know some ways in which potential applicants can increase the effectiveness of medical evidence.

- Any representative would be well advised to obtain medical evidence before the need for proceedings has arisen.
- Whilst the requirement of a report at this stage may not be essential, a letter to the employer from the consultant or GP explaining the disability and suggesting any adjustments which could be made to enable the employee to return to work, may be a good idea. This also documents the disability and informs the employer at an earlier stage.
- Medical evidence needed for an actual ET hearing needs to be more complete.
- Be careful about the choice of medical expert, as the evidence required needs to be specific to DDA claims.

In ***Abadeh v British Telecommunications [2001] IRLR 23*** the EAT pointed out that there are limits to the matters upon which a medical adviser can give useful or relevant evidence. The EAT stated that it was up to the ET to determine whether impairments has a substantial adverse impact on normal day to day activities within the meaning of the Act. The medical evidence should be directed toward prognosis, medication and observations of the applicant carrying out relevant tasks or functions.

- What is apparent from the cases mentioned is that the issue of **diagnosis** is very important especially in cases where applicants need to prove that their conditions are 'clinically well recognised illnesses'.
- Issues relating to medication and the effect on the Applicant should also be covered in the report.

These suggestions are by no means exhaustive, but are detailed to give guidance on what the ET looks for in making its decisions. A careful look at the observations in the **Morgan** case will also prove a useful aide to any medical expert called upon to give evidence in these cases.

Despite the above, the Applicant remains a very important witness as to the effect of the disability has on his/her life. This evidence together with a sound medical report will be vital to ensure the most complete case is put before the ET.

This is one in a series of briefings on legal and industrial relations issues, which we hope Branches and Regional Organising Staff will find useful. These briefs are not a full statement of law and further advice should be sought before bringing or defending proceedings. Please see UNILEG/5/00 for information on time limits.

If there are any subjects you would like covered, please contact: Christine Durance, Policy and Public Affairs, ext. 400 (at Mabledon Place)

If you have general enquiries on Employment Rights and Membership Legal Service issues, please contact: UNISONdirect on 0800 5 97 97 50