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Successful disability discrimination claim based on the menopause (Davies v Scottish Courts and Tribunal Service)

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Employment analysis: Nicholas Lakeland, employment partner at Laytons LLP, discusses this case which highlights that employers should be careful to consider the impact of symptoms of the menopause on an employee at work and that, in severe cases, these symptoms may amount to a disability.

Davies v Scottish Courts and Tribunal Service, S4104575/2017

What is the relevant background?

The employee, Ms Davies, had been employed as a Court Officer by the Scottish Courts and Tribunals Service (STCS) for 20 years with an unblemished service record. She was then dismissed allegedly by reason of gross misconduct. Ms Davies claimed unfair dismissal and that the dismissal was discrimination arising from disability under section 15 of the Equality Act 2010 (EQA 2010). She sought reinstatement into her position and compensation.

The case had some unusual facts to it. Ms Davies was going through the menopause. This resulted in particularly heavy and regular bleeding which at times necessitated her to be close to a toilet so that she could regularly change her sanitary towels. She had been prescribed a medication called Cystopurin which had to be diluted in water and turned the water pink when dissolved.

The SCTS had made adjustments for Ms Davies, including that she was allocated work in a courtroom close to the toilets when her bleeding was heavy.

The incident which led to her being dismissed for gross misconduct resulted from an altercation with two men in a courtroom prior to a hearing. Ms Davies kept her medication and sanitary towels in a large pencil case. She left the courtroom to escort the Sheriff out of the court and returned to find that her pencil case had been moved and the water jug next to it emptied.

Ms Davies was very concerned because she could not remember if she had already diluted her medication into the water. She spotted two men drinking water and asked them where they had got the water and she was informed the Court Clerk had poured it out for them out of the now empty water jug.

Ms Davies expressed her concerns that they may be drinking her medication and one of the men decided to shout at her. The second man told the man if he continued to shout he would eject him from the court and at that point in time the Court Clerk arrived in the courtroom.

The Health and Safety team was notified of the incident. They ascertained what medication had been involved and took medical advice about the medication and the potential risks of taking it.

While the claimant had initially thought the medication was in the water, it was established that the medication had not in fact been dissolved in the water. However, this was only after the men had been advised to seek medical assistance through a home visit made personally by a Health and Safety Officer.

A Health and Safety Officer prepared a report which noted there were no immediate health and safety issues surrounding the incident, but went on to make various recommendations regarding the claimant, including that she had not shown the values and behaviours held by the respondent and had

behaved inappropriately; that she had breached section 7 of the Health and Safety Act; that the incident could cause embarrassment for the respondent; and that the claimant should be considered for formal disciplinary action for her actions, which constituted gross misconduct.

The incident led to Ms Davies being disciplined and dismissed and the decision was upheld on appeal. She was, in particular, found to have knowingly misled the men (rather than been mistaken) about her medicine being in the water. As part of the disciplinary process, an occupational health report was obtained which explained that not only did Ms Davies' condition lead to heavy bleeding, but also amnesia, tiredness, light headedness and even fainting.

The battleground in the employment tribunal proceedings seems to have been drawn over the damning health and safety report which was taken into consideration, as it had made unfavourable conclusions about Ms Davies. In essence, she was dismissed because the STCS took the view she had not acted honestly and with integrity in the course of the disciplinary process leading to an irretrievable breakdown in trust and confidence as between the employee and employer.

What did the Employment Tribunal decide?

The STCS conceded that Ms Davies was disabled at the relevant time as a result of the severe symptoms she had because of the menopause.

The employment tribunal found Ms Davies to be a wholly credible witness and the health and safety report had made the disciplinary process fundamentally unfair by tainting it completely. It found that the STCS did not have reasonable grounds to find that the claimant had lied because:

- it had not properly considered her explanation that she had become confused and stressed
- it had failed to have regard to her medical condition which could cause memory loss and confusion

In spite of a finding that she had in part contributed to her own dismissal, the tribunal concluded that the dismissal was unfair and ordered the STCS to reinstate her and pay £14,009.84 in respect of arrears of (net) pay for the period between the date of termination of employment and the date of reinstatement.

In relation to the discrimination claim, the tribunal found that the dismissal was because of something arising in consequence of her disability (ie the menopause) and rejected the STCS's argument that the dismissal was objectively justified on the basis it was a legitimate aim to have honest employees with integrity because Ms Davies was found to possess both qualities. She was awarded £5,000 compensation in respect of injured feelings.

This case is a clear example of a formal process having been started in which no one seems to have stood back and applied a little bit of common sense to the decision. In particular, they failed to appreciate that a woman with Ms Davies' condition—where amnesia was a symptom—could get flustered and forget whether she had put the medication in the water. It was also unclear whether the health and safety officer had known about Ms Davies' condition when preparing his damning report.

A lot turned on the fact that Ms Davies should have realised the water was not pink and therefore no medication was in it, but that seems to be a conclusion which is reached in the cold light of day, and not one which reflects a flustered employee in a bit of a panic being shouted at by a member of the public.

What are the practical implications of this case?

EQA 2010, s6 defines disability as:

'(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

It is clear from the occupational health report prepared on behalf of the employer and from what they already knew of Ms Davies' condition, that her particular form of the menopause met the definition of disability.



The Trades Union Congress (TUC) has produced a menopause toolkit, as 50% of the population is going to suffer from the menopause. Clearly, this issue is now far more likely to be raised by female employees and the TUC is even suggesting a specific menopause policy should be drawn up by employers.

While a policy is in my view a step too far, the strong advice is for employers to make every effort to understand the degree to which any condition affects an employee's ability to carry out normal day-to-day activities, and if necessary obtain comprehensive medical reports and to not allow pre-conceived ideas to cloud their judgement.

While many women will suffer only minor symptoms as a result of the menopause, there are those who clearly will suffer far more severely. In such cases, employers will need to make all the necessary adjustments and be alert to the possibility of a disability discrimination claim being brought against them in circumstances in which they have failed to comply with their legal obligations.

Interviewed by Diana Bentley.

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