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Legal update ——— February 2018

Employment
Employer didn't have constructive knowledge of employee's disability

The Court of Appeal has held in Donelien v Liberata UK Ltd that an employer did not acquire constructive knowledge of an employee's disability when it took reasonable (but not exhaustive) steps to ascertain whether the employee was disabled. As a result it was not under a duty to make reasonable adjustments.

Miss Donelien had been employed by Liberata UK Ltd (Liberata) since 1999. From 2008 onwards she took various period of sick leave (sometimes failing to notify Liberata of her absence), attaching different explanations for her ill health (including stress, high blood pressure, breathing difficulties and viral infections) to these periods of leave. Miss Donelien was referred to occupational health (OH), and Liberata were informed that she did not have a disability. Following further absences, Liberata began to take disciplinary proceedings against Miss Donelien which culminated in her dismissal for a failure to work her contracted hours, as well as a failure to comply with the notification procedures for sickness absence. Miss Donelien subsequently brought an employment claim alleging that she was disabled and that Liberata had failed to make reasonable adjustments to accommodate her disability.

The employment judge determined at a pre-hearing review that as the substantial effects of the impairments from which Miss Donelien suffered would have lasted for 12 months it followed that she was disabled. However, when the matter went to a full hearing the employment tribunal held that Liberata had not failed to comply with its duty to make reasonable adjustments because it did not know, and could not reasonably have been expected to know, that Miss Donelien was disabled. When the Employment Appeal Tribunal (EAT) upheld the tribunal's decision, Miss Donelien appealed to the Court of Appeal, relying on the earlier decision in Gallop v Newport City Council where the Court of Appeal held that it is not enough to "rubber stamp" a medical adviser's opinion that an employee is not disabled, and that a reasonable employer must ultimately apply its own mind to the test for deciding whether an employee is disabled.

The Court of Appeal upheld the tribunal and EAT decisions. Although Liberata relied in part on the OH report, it also took other steps such as holding "return to work" meetings, engaging with Miss Donelien, and corresponding with her GP. The Court also noted that Liberata had been presented with a substantial amount of "not very clear" information, and that not all of Miss Donelien's absences reflected her being truly unable to work. Liberata had to disentangle what Miss Donelien was incapable of doing from what she would not do and this was no easy task. It could not reasonably have been expected to know that Miss Donelien satisfied the definition of disability, and could not have been expected to have done more than it did in the circumstances.

This case will be helpful for employers managing employees who are frequently absent and/or where the information provided by the employee and the relevant medical professionals is unclear or inconsistent on the question of disability. An employer managing an employee who is taking frequent periods of sick leave must take reasonable steps to establish whether a disability is the root cause of the absence. Such steps do not have to be completely exhaustive, but will usually include trying to get an up to date and relevant medical opinion. It is important to ensure that, as well as taking medical information into account, other enquiries are made and proper meetings are held when the employee returns to work to establish both the cause of the absence and whether it is an issue which is likely to recur.

Published by
Trowers & Hamlins

Trowers & Hamlins LLP
3 Bunhill Row
London
EC1Y 8YZ

t +44 (0)20 7423 8000
f +44 (0)20 7423 8001

www.trowers.com

For more information please contact

Emma Burrows
Partner
t +44 (0)20 7423 8347
e eburrows@trowers.com

Nicola Ihnatowicz
Partner
t +44 (0)20 7423 8565
e nihnatowicz@trowers.com

Rebecca McGuirk
Partner
t +44 (0)121 214 8821
e rmcguirk@trowers.com

John Turnbull
Partner
t +44 (0)1392 612370
e jturnbull@trowers.com

Helen Cookson
Senior Associate
t +44 (0)161 838 2081
e hcookson@trowers.com