
# Disability Discrimination: Something arising

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**Discrimination under s.15: when does 'something' arise in consequence of disability?**

As we know, an employee will have been discriminated against if they were unjustifiably subjected to unfavourable treatment because of something arising in consequence of their disability. We also know of the two-stage test to be adopted when determining whether or not there is a link between the disability and the treatment: (1) what was the reason for, or cause of, the treatment; (2) was that reason or cause something that arose in consequence of disability (*Pnaiser v. NHS England* [2016] IRLR 170).

It is important to note that these two stages are distinct. The first is an examination of the employer's motives and whether the unfavourable treatment occurred because of the 'something'. The second is an objective assessment of whether the 'something' is causally linked to the disability. There is no requirement that the employer must have been aware of *the link* between the 'something' and the disability – s.15 Equality Act 2010 was intended to reverse the position in which disability-related discrimination found itself following *Lewisham LBC v. Malcolm* [2008] IRLR 700 (see *City of York Council v. Grossett* [2018] IRLR 746). The employer must be aware of the existence of the disability of course, otherwise it has a defence under s.15(2).

More often than not, it will be straightforward to see how the disability caused 'something', which in turn caused unfavourable treatment. However, on some occasions it will not be. I recently looked at a sickness absence dismissal in which some absences were 'disability-related' and some were not. This will not be an uncommon case. The 'something' in these cases is the absence record, but did it arise in consequence of disability? Yes, but only in part. Was that part sufficient to amount to discrimination?

This was the type of issue that arose in *Baldeh v. Churches Housing Association of Dudley & District Ltd.* UKEAT/0290/18/JOJ. The Claimant was disabled by reason of depression. She was dismissed at the end of her six-month probation period. The reason for dismissal consisted of five issues: (1) breach of professional boundaries, (2) a complaint from a service user about the tone of a text message, (3) two incidents of breaching data protection, (4) failing to consult with senior staff relating to an instruction, (5) communication and how she related with colleagues. The final allegation was said to be something arising from the Claimant's disability.

The Tribunal found that the reasons for dismissal were not something arising from disability. Although perceived communication may have been something arising from disability, each of the other reasons would have caused the employer to have had concerns and to have considered her unsuitable to continue in their employ. That was a misapplication of the test. We know, in direct discrimination cases, that to show that treatment was 'because of' a protected characteristic, a 'but for' test is not appropriate, and that the protected characteristic need have a 'significant influence' on the decision made. So it is in the case of discrimination arising from disability. The 'something' arising from disability must have a 'significant influence' on the decision.

The EAT held that the Tribunal's reasoning was incorrect. The suggestion that, because there were four other reasons that could merit dismissal there was no discrimination, was 'clearly deficient' (although that finding could affect compensation). The 'significant influence' test is not new. What amounts to a significant influence, in a claim under s.15 has already been provided: *The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it* (*Pnaiser*) (my emphases).

Going back to the mix of disability-related and non-disability-related absences, possibly only in cases in which a small percentage of absences fall into the former category are those likely to be trivial. Arguably, it would not always be a case of pure numbers, but the timing and length of absences may render them trivial (or more than trivial). We know from the use of the word trivial in the guidance on the definition of disability, that it is not a particularly high threshold.

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