

# Abusive language, disability, dismissal, and justification: a view through the prism of disability discrimination law

Is a disabled employee's use of abusive and offensive language towards colleagues a sufficient ground to justify dismissal where there is a link between the employee's behaviour and their disability? In *Duncan v Fujitsu Services*, the Employment Appeal Tribunal (EAT) agreed with the Employment Tribunal that, in this case, the answer was "yes" and the EAT dismissed the appeal.

## What happened in this case?

The Claimant was employed by Fujitsu from September 2017 until April 2021 when he was dismissed for gross misconduct. Fujitsu had knowledge of the Claimant's two disabilities: attention deficit hyperactivity disorder (ADHD) and autistic spectrum disorder (ASD).

During employment, the Claimant raised three grievances, all of which were dismissed. As part of the third grievance, he disclosed "chat logs" which contained messages between himself and two other colleagues which had been exchanged on Fujitsu's Slack communication system. These communications contained abusive and offensive language towards other colleagues, such as: "stab, stab, stab", "imma f\*\*\*in kill you", "I just can't believe how much of a c\*\*\* he is", and "room had been full of business c\*\*\*\*s" (redactions by BDBF LLP).

In response, Fujitsu invited the Claimant to attend a disciplinary hearing on 1 March 2021. On 24 February 2021, he emailed Fujitsu stating that he did not plan to attend the disciplinary hearing, but that it should proceed in his absence. He sent a document containing his mitigating factors, which included his submission that there was a link between his disability and his use of the offensive language.

On 3 March 2021, the investigating manager emailed the Claimant with 12 questions. On the same day, he responded stating "*I would appreciate no further questions regarding my disabilities*". On 16 April 2021, the Claimant was dismissed without notice. The investigating manager found that the comments were inappropriate and offensive, and she dealt with each of the mitigation points that had been raised.

Whilst the investigating manager considered (to the extent possible on the limited information before her) the issue of a potential link between the disability and the offensive behaviour, she concluded that the behaviour was deliberate, repeated, and hateful towards other colleagues. As such, she considered that the only appropriate sanction in the circumstances was dismissal for cause.

The Claimant appealed that decision but said he would be unable to meet with the appeal manager. The appeal hearing proceeded in his absence and was, ultimately, dismissed.

The Claimant went on to bring claims of disability discrimination and unfair dismissal.

**What was decided?**

The Claimant lost his claims and raised one ground of appeal which contained two limbs in the EAT.

The first limb was that the Tribunal should have considered whether the offensive language arose *directly* from his disability. The Claimant argued that he suffered from an “*involuntary loss of control of emotion*” and that he did “*not understand social rules*”. The question for the EAT was whether the Claimant had advanced this argument before the Tribunal. The EAT found that he had not. Amongst other matters which persuaded the EAT of this, the Claimant had not led medical evidence on this point. The EAT considered that the Claimant had, instead, brought his claim based on the basis of their being an *indirect* link. As such, Mr Duncan failed on this first limb.

The second limb of appeal was that the Tribunal had insufficiently analysed whether his dismissal was a proportionate means of achieving a legitimate aim – if it was not it would amount to disability discrimination. For example, it was argued that the Tribunal did not appear to have considered whether there were options short of dismissal that would have reduced the discriminatory effect on him.

The EAT reiterated that this was an objective test. It held that certain of Fujitsu’s legitimate aims were valid, including, for example, preventing the use of threatening language about managers and colleagues, preventing harassment and other behaviour that leads to a hostile working environment and preventing threats of violence against colleagues (expressed to other colleagues but directed repeatedly and forcefully at colleagues and managers) in any work-related context.

The EAT held that the words used were very strong examples of foul and abusive language towards colleagues and there was no evidence that assured Fujitsu that the offensive remarks would not be repeated. The EAT found that the Tribunal had carried out its own assessment of proportionality and was entitled to find that the dismissal was justified. In particular, the Tribunal had considered legitimate aims and found that, on the basis of at least some these, the decision to dismiss because of the abusive communications was a proportionate response with respect to achieving Fujitsu's legitimate aims. Accordingly, the second limb of appeal also failed.

### **What does this mean for employers?**

Employer clients should be mindful of employees' disabilities when subjecting them to disciplinary sanctions. Even where there is no obvious direct link between an employee's behaviour and their disability, there may be an indirect link that proves problematic.

Where that is the case, employers should consider the justification defence and, in particular, whether a lesser sanction than dismissal is appropriate in the circumstances with respect to achieving a particular legitimate aim.

If a sanction short of dismissal would enable an employer to achieve that legitimate aim, an Employment Tribunal may conclude, once it has done its own analysis, that the decision to dismiss was not proportionate, in which case the employer would be liable for discrimination arising from disability.

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