Employee who was anxious about performing part of her role was disabled.

In the recent case of Williams v Newport City Council, the EAT concluded that an employee who was severely anxious about performing one part of her job role was disabled. Although the part of the role in question was not a normal day-to-day activity, her anxiety about it substantially and adversely affected her ability to perform her other normal day-to-day activities.

What happened in this case?

Ms Williams worked as a senior social worker in the Council's Fostering Team. The Fostering Team was responsible for assessing the suitability of a person to foster a child. These "viability assessments" were open to challenge in the Family Court. In practice, Ms Williams did not carry out viability assessments, but other members within her team did. However, in January 2015 she was asked by her manager to attend a Family Court hearing concerning a viability assessment which had been conducted by another team member. Ms Williams was unable to answer the Judge's questions which led to the Judge being deeply critical of her. Indeed, Ms Williams recorded that one of the barristers had described her as having been treated like *"a human punch bag".*

After this incident, Ms Williams carried on with her role and did not attend Court again. However, in March 2017, her

manager retired, and she was told that she would now need to carry out viability assessments and attend Court if they were challenged. Ms Williams was upset at this prospect given what had happened in 2015. She was signed off sick with stress and remained off sick for 18 months. While she was absent, several occupational health reports were obtained, all of which said she was unfit to work. By July 2018, she was feeling much better, and she submitted a Fit Note from her GP which said she would be fit to return subject to a phased return and the removal of Court work from her role. The Council refused and told her that, in the circumstances, she should obtain another Fit Note to certify her further sickness absence.

The Council then launched a capability process. At the hearing, the Council confirmed it did not consider that it was reasonable to remove the Court work from her role and that it had been unable to identify any alternative roles. The Council said that her absence could not be sustained, and it terminated her employment with effect from 24 September 2018. Ms Williams brought claims of unfair dismissal, discrimination arising from disability, indirect disability discrimination and failure to make reasonable adjustments. However, the Council did not concede that Ms Williams was disabled. The disability status question was considered by the Employment Tribunal at the outset of the hearing of her claims.

The Tribunal upheld Ms Williams' unfair dismissal claim but dismissed her disability discrimination claims on the basis that she was not disabled. The Tribunal found that she had a mental impairment (i.e. anxiety) from when she went off sick up to the dismissal decision. However, when the Tribunal came to look at the question of substantial impact on her normal day-to day-activities, it found that by the time of the

dismissal she was able to undertake the normal day-to-day activities relevant to her professional life (e.g. getting ready for work, travelling to work, moving around premises, interacting with people, dealing with paperwork, using a computer etc). The one activity that she could *not* do was attend Court hearings. However, this was a specialised activity and not a day-to-day activity (whether in connection with her particular job role or in general) and, therefore, it was out of scope.

Ms Williams appealed to the Employment Appeal Tribunal.

What was decided?

The EAT held that the Tribunal had failed to consider the implications of its own findings that Ms Williams was still off sick when she was dismissed, and this was because the Council had rejected the suggestion of removing the Court work from her role. In other words, she continued to be unable to work because of her intense anxiety about having to return to a job which required her to attend Court. All of this was supported by medical evidence, and the Council had said it did not doubt the genuineness of her absence.

Furthermore, in the successful unfair dismissal claim, the Tribunal had observed that the employer had not really engaged with the question of whether it could have removed the Court work. Essentially, that claim had succeeded because the Tribunal considered that a reasonable employer would have removed the requirement and that would have enabled Ms Williams to have returned to work. In other words, unless and until it was removed, Ms Williams remained affected by anxiety to such a degree that she was unable to return to work at

all.

Accordingly, the Tribunal should have concluded that Ms Williams' anxiety did substantially affect her normal day-to-day activities at the relevant time and that it was sufficiently long term.

Although the appeal had succeeded on this basis, the EAT went on to consider the question of whether attending Court should itself have been treated as a normal day-to-day activity. Ms Williams had argued that it was normal thing to do in a range of roles and was not specialised. The EAT accepted that attending Court was not unique to social workers but said that it did not necessarily follow that it was a "normal" activity. The EAT said the Tribunal was entitled to conclude that such a requirement was not so commonly found among a range of other work situations as to meet that test (although it is possible that another Employment Tribunal might take a different view).

The EAT also said that it was not possible to approach the question by looking at the tasks involved in attending Court in isolation (e.g. reading documents, travel, public speaking, answering questions), which, by themselves, *would* be normal day-to-day activities. The EAT rejected this approach on the basis that *"such a reductive analysis would fail to capture the distinctive nature of the task…specifically in the context of contested litigation over an inherently highly-charged subject, in person to a judge in a Court hearing."*

The case was remitted to the Employment Tribunal to hear the disability discrimination claims.

What does it mean for employers?

The temptation for an employer in this situation is to assume that if an employee cannot perform a core part of their job role then a dismissal will be justified. In many cases, this will be right. However, where an employee is disabled, employers must pause to consider reasonable adjustments before moving to dismiss.

For example, could the problematic part of the job role be removed, whether on a temporary or permanent basis? Indeed, the EHRC's Employment Statutory Code of Practice states that altering a disabled person's duties, perhaps by transferring them to another employee, might be a reasonable adjustment. In this case, Ms Williams had performed her role for around seven years and had only been asked to attend Court once, which suggests that it would have been reasonably possible to adjust the role in the way that she wanted. In another recent case – Churchman v Frazier & Deeter UK LLP – a depressed employee was dismissed after she had asked for direct client contact to be removed from her role on a temporary basis. The Employment Tribunal said the dismissal amounted to discrimination arising out of her disability, which could not be justified. Furthermore, the request was a request for a reasonable adjustment and a protected act, meaning that the dismissal was also held to be an act of victimisation.

Alternatively, it might be reasonable to redeploy a disabled employee to fill an existing vacancy, even if they are not the best candidate. Or it might be reasonable to create a new role for them altogether, although whether this is reasonable or not will be fact-specific. In one case, it was held that it would have been a reasonable adjustment where the employer

effectively had a *"blank sheet of paper"* so far as job specifications were concerned. In another case, it was held that swapping a disabled employee's role with that of a non-disabled employee was a reasonable adjustment, even where the non-disabled employee was happy doing his job.

The key take-away is not to assume that dismissal is safe in this situation. Reasonable adjustments must be considered first and may require you to go further than you might think. This will be fact-dependent, and it is always a good idea to seek legal advice in this situation. Once reasonable adjustments have been exhausted, then a fair dismissal should usually be possible, but a fair disciplinary/capability process should always be followed prior to dismissal.

Williams v Newport City Council

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.