Neurodiverse employee's aggressive and disruptive behaviour did not arise from his disabilities

In the recent case of McQueen v General Optical Council the EAT upheld a decision that an employer had not discriminated against a neurodiverse employee by disciplining him in connection with aggressive and disruptive behaviour at work.

What happened in this case?

Mr McQueen worked for the General Optical Council. He had various conditions including dyslexia, symptoms of Asperger's and left-sided hearing loss. His employer knew about these conditions and accepted that he was disabled for the purposes of the Equality Act 2010.

Medical evidence predating the employment relationship indicated that in situations of stress, anxiety or conflict, Mr McQueen had a tendency to raise his voice and adopt mannerisms suggestive of aggression, with inappropriate speech and tone. During the employment relationship, occupational health advice was obtained which said that Mr McQueen found it difficult to deal with changes to ways of working. As a result, it was agreed that such changes should be notified to him in writing before a conversation about them took place.

Problems arose with Mr McQueen's performance and conduct. In

April 2015, a manager told him to prioritise certain work. In response, Mr McQueen behaved in a rude and disrespectful manner and used aggressive gestures and inappropriate body language. In April 2016, he had a second "meltdown" after the same manager asked him to clear a backlog of work. He responded aggressively and the manager was driven to tears.

Mr McQueen became angry towards colleagues over various other issues, including a disagreement over his job description, his failure to follow instructions, his low appraisal rating and his giving out incorrect advice to a client. Mr McQueen was disciplined on more than one occasion and given a final written warning. Separately, he was verbally warned by managers about his tendency to stand up at his desk and speak loudly to colleagues, which was felt to be unnecessarily disruptive.

Mr McQueen brought a disability discrimination claim under section 15 of the Equality Act 2010, alleging that he had been subjected to unfavourable treatment for "something" (i.e. the aggressive and disruptive behaviour) which arose out of his disabilities.

The Employment Tribunal rejected the claim. Although it accepted that Mr McQueen found it difficult to deal with changes to ways of working, it did not accept that his disabilities meant he had difficulty discussing either performance or conduct related matters. Rather, his aggressive response was simply because he resented being told what to do and was short-tempered. Further, it found that his tendency to stand up and speak loudly was a habit and was not linked to his disabilities.

Mr McQueen appealed to the Employment Appeal Tribunal (**EAT**). He argued that it was enough for his disabilities to have merely played a part in triggering his problematic behaviour – they did not have to be the sole or principal cause.

What was decided?

The EAT dismissed the appeal, holding that the Tribunal's reasoning was not flawed by any error of law or principle.

The Tribunal had considered the medical evidence and made findings about Mr McQueen's disabilities and their extent and effect. It had rejected Mr McQueen's view that the effects of his disabilities went further and meant that he found it difficult to deal with the raising of performance or conduct issues and that he had a need to stand up and speak loudly. The Tribunal was not bound by Mr McQueen's self-assessment and it had drawn a legitimate conclusion that his disabilities played no part in his conduct.

However, it is worth noting that the EAT observed that the Tribunal's decision was confusing in places and it suggested that the following structure be adopted in decisions in cases such as this:

- What are the disabilities?
- What are their effects?
- What unfavourable treatment is alleged (and in time and

proved)?

- Was that unfavourable treatment because of an effect of the disability?

What are the learning points for employers?

This case underlines the need to get over two separate hurdles in a discrimination arising from disability case:

- firstly, the claimant must show that the "something" (here, the aggressive and disruptive behaviour) **arose out of** the disability. The disability need not be the sole or principal cause of the something – it is enough for it to be a contributing factor (provided that it is more than minor or trivial); and

- secondly, the claimant must show that the unfavourable treatment by the employer was **because of** that something.

This decision makes it clear that Tribunals will not take a broad-brush approach to the first question. Although there was some evidence that the employee could respond aggressively in situations of stress or conflict, this was not enough. The specific medical evidence obtained during the employment relationship suggested that the difficulties were confined to changes to ways of working. Here, the problematic behaviour was not linked to changes in the way of working and it could not be said that they arose out of the disabilities.

However, employers should be aware that this case does not mean that a neurodiverse employee will never be able to get over the first hurdle in a similar scenario. It will be fact-specific, and may be dependent upon medical evidence specifying the particular effects of the employee's particular disability or disabilities.

Even where an employee is able to show that they received unfavourable treatment because of aggressive or disruptive behaviour which did arise out of their disability, this does not necessarily mean they would succeed in a disability discrimination claim. It is open to employers to objectively justify the treatment – this means showing that there was a legitimate aim behind the treatment and that it was proportionate. Where an employee's aggressive behaviour at work is causing distress to other staff the employer may be able to point to legitimate aims such as protecting the health and safety of other staff and maintaining harmony within the workforce. The key question would then be whether the treatment was proportionate. To get over this hurdle the employer will need to show that they had considered less discriminatory alternatives (for example, behavioural coaching and mentoring or moving the employee to a different role).

McQueen v General Optical Council

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. 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.