

UPDATE

Disability discrimination in absence management

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The Jersey Employment and Discrimination Tribunal has recently considered two disability discrimination claims in which the Claimants alleged unfavourable treatment because of something arising as a consequence of their disability. In both cases, the Tribunal ruled that the employer's actions in respect of the management of sickness absence could not be justified as a 'proportionate means of achieving a legitimate aim' as required by the Discrimination (Jersey) Law 2013 (DJL).

Dinah Dias v Verite Trust Company Limited [2024] TRE 239

In the Dias case, the Claimant had a history of fibromyalgia and intractable migraines. Having commenced employment in August 2023, a series of sickness absences led to the employer, a trust company business, issuing notice to terminate her employment on 31 July 2024.

The Claimant issued a direct disability discrimination claim under Article 6(12) DJL. This required the Tribunal to consider whether, objectively, the Claimant's dismissal amounted to unfavourable treatment because of 'something arising' as a consequence of disability.

The employer accepted at the Tribunal hearing that the Claimant has the protected characteristic of disability. The Tribunal also found that the employee could have been expected to know that the Claimant was disabled prior to the decision that her employment should be terminated.

The Tribunal also found that the Claimant's absence work was 'something arising' from her recurring migraines, and that her migraine-related absences were the effective cause of her dismissal.

When it came to decide whether the dismissal was a proportionate means of achieving a legitimate aim, the Tribunal decided that the employer's rationale of business continuity (which, in this context, entailed the Claimant's work in maintaining an accurate client database) was an essential business need and a key part of the Claimant's role, and there was no one else available to do that role. The Tribunal therefore agreed that the employer could satisfy the legitimate aim requirement.

However, the Tribunal went on to find that the dismissal was not a proportionate means of achieving the legitimate aim, stating:

To demonstrate proportionate means an employer must show that it has considered whether some lesser alternative would suffice. An employer must not move too quickly to dismissal but must consider alternatives and if there are reasonable adjustments that need to be made.

The Tribunal was also critical of the employer's failure to follow any process before dismissing the Claimant, despite having an absence management process in the staff handbook.

The Claimant's dismissal was therefore found to be discriminatory, and as such 'automatically unfair'. Recognising that, even if a proper process had been followed, the Claimant's employment would have been terminated and in a non-discriminatory way within several months anyway, the Tribunal made a limited compensation award of £3,600.

Jacqueline Murphy v States Employment Board [2024] TRE 94

In Murphy, the Claimant was employed by Revenue Jersey in a Team Leader/Higher Office role. After a continuous period of absence which started in September 2023, her employment was given notice of termination on 29 February 2024.

As in Dias, the Tribunal was required to decide whether the Claimant's dismissal was directly discriminatory for the purposes of Article 6(12) DJL, but here the Claimant alleged that her sickness absence arose as consequence of stress amounting to a disability. The Tribunal accepted that proposition and concluded that the Claimant's stress did indeed constitute a disability in the context of this case. In particular, the Tribunal found that:

- the Claimant's stress was 'long-term' in that it was expected to extend beyond a six month period, as required by the DJL;
- stress 'can' adversely affect a person's ability to engage in relevant activities, and according to the DJL that requires an assessment of whether the condition in question has a potential adverse effect on a person, not an actual adverse effect on the Claimant; and
- the Claimant's stress constituted a 'mental impairment' - the Tribunal considered this in detail, and emphasised that stress may not amount to a mental impairment in every case, but found that in this case the evidence supported that conclusion.

Turning to whether there was a proportionate means of achieving a legitimate aim, the Tribunal upheld the employer's position that the application of its managing attendance policy met this requirement. The policy objective is quoted in the judgment as follows:

...ensuring equality and consistency relating to managing an employee's health and attendance in the workplace and supporting a culture where regular attendance is the norm.

Despite this legitimate aim, the Tribunal concluded ultimately that the employer's failure to explore the possibility of redeployment outside of Revenue Jersey prior to the Claimant's dismissal meant that the termination of her employment could not be said to have been reasonably necessary and, therefore, a proportionate means of achieving the legitimate aim.

Key Themes

Taking these two cases together, the key themes are:

1. The good management of sickness absence and its effects (including business continuity and service delivery) will usually meet the legitimate aim requirement in 'something arising' disability discrimination claims.
2. To also show that the legitimate aim has been pursued proportionately, the process leading to an ill-health capability termination will be critical to justifying the decision to dismiss. At each step, consideration should be given to the balancing of business needs against the proper weight to be given to the effects of the employee's underlying health condition.
3. Before taking the decision to dismiss, employers should assess whether any potential alternatives have been adequately considered, including the possibility of redeployment and the scope of any redeployment search.
4. Finally, and whilst it is likely that the *Murphy* decision may be appealed to the Royal Court, the Tribunal's finding that stress amounted to a disability in this case is a reminder that the DJL does not operate a high bar for claimants to overcome.

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