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Focus on Disability and Mental Health

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Paul Shevlin looks at the legal definition of disability under the Equality Act 2010 and considers when and in what circumstances it applies to workers suffering from mental health-related issues

What is mental impairment?

ACCORDING TO the Equality Act, a person has the "protected characteristic" of disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

"Substantial" means something more than "minor" or "trivial". For instance, if it takes a person much longer than it usually would to complete a daily task like getting dressed. "Long-term" means a condition that has lasted or is likely to last for 12 months or more.

"The fact that only some groups of people work at night does not prevent night working from being designated a normal day-to-day activity"

Mental impairment

There are many different types of mental health condition that can satisfy this definition including: dementia, depression, bipolar disorder, obsessive compulsive disorder and schizophrenia.

Certain specific conditions are, however, excluded from the definition. These include a tendency to set fires and addiction to alcohol, nicotine or any other substance. Although these conditions are excluded from the protection of the Act, impairments caused by any of these conditions might amount to a protected disability. For example, depression caused by substance abuse.

Invisible disabilities

Often, people with mental health conditions are not what has been described as "visibly disabled". For instance, in the Employment Appeal Tribunal (EAT) case of **Vicary -v- British Telecommunications plc**, the court warned that, when considering whether someone suffers from a disability, they should not have in their minds a stereotypical image of a person in a wheelchair or someone who can only move around with considerable difficulty.

Also, under the precursor to the Equality Act (the Disability Discrimination Act 1995), a mental impairment could only be deemed to be a disability if it was clinically well-recognised. That is no longer the case under the Act where the focus is on the effect the condition has on the person, as opposed to trying to find a name for it.

Deemed disabilities

Some conditions are expressly deemed to be disabilities under the Act, so there is no need to prove someone has a disability. Deemed disabilities include: blindness, severe sight impairment, sight impairment and partial sightedness; severe disfigurements, except unremoved tattoos and piercings; cancer, HIV infection and multiple sclerosis.

Normal day-to-day activities

Part of the test is to consider the effect the impairment has on the person's normal day-to-day activities. The guidance to the Equality Act states that day-to-day activities are things that people do on a regular or daily basis, such as shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities.

The guidance also states that normal day-to-day activities do not include specialised tasks such as: "playing a musical instrument..., activities where very specific skills or levels of ability are required; or playing a particular sport to a high level of ability."

However, in **Ekpe -v- Commissioner of Police of the Metropolis**, the EAT said that: "What is normal cannot sensibly depend on whether the majority of people do it. The antithesis... is between that which is 'normal' and that which is 'abnormal' or 'unusual' as a regular activity, judged by an objective population standard." In that case, the EAT held that the tribunal was wrong to decide that applying make-up and using rollers were not normal day-to-day activities, because they were carried out predominantly by women.

Recent case law indicates that, when looking at day-to-day activities, tribunals should also look at the effect on activities which only arise at work, thereby including mental impairments that hinder the participation required for work.

For example, people with mental health conditions may have difficulty with night work. In the case of **Chief Constable of Dumfries & Galloway Constabulary -v- Adams**, which looked at whether night work is a day-to-day activity, the EAT held that the fact that only some groups of people work at night does not prevent night working from being designated a normal day-to-day activity.

Whether or not stress constitutes a disability within the meaning of the Equality

Act is often difficult to determine. In another recent case – **Herry -v- Dudley Metropolitan Council and Governing Body of Hillcrest School** (weekly LELR 507) – the EAT provided useful guidance on when workplace stress will and will not be a disability.

In previous cases, the EAT distinguished between stress that was caused by a mental condition such as clinical depression and stress caused by adverse life events such as problems at work.

The EAT considered whether the employee's work situation was the cause of their stress. The problem, however, as ➲

➲ the EAT pointed out, is that it can be difficult to ascertain whether stress at work has an impact on day-to-day activities.

For instance, in some cases an employee may not compromise over an issue at work, and refuse to return, yet suffers little or no apparent adverse effect on normal day-to-day activities.

In Mr Herry's case, the EAT held that unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise, were not of themselves mental impairments as they may simply reflect a person's character or personality. In any event, tribunals are not required by law to find that a person is suffering from a disability if the doctor has diagnosed the condition as stress rather than as anxiety or depression.

Substantial adverse effect

Deciding if an impairment has an adverse effect will usually be fairly simple. The more complicated issue will be deciding whether the adverse effect is "substantial". Substantial is a relatively low standard and means more than minor or trivial, in order to reflect the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people.

"If a person can reasonably be expected to change their behaviour to reduce the effects of an impairment on their day-to-day activities, they may be deemed not to be disabled"

When deciding how substantial an adverse effect is, tribunals look at what someone cannot do, rather than what they can do. In the case of **Leonard -v- Southern Derbyshire Chamber of Commerce**, for instance, the employee was able to carry out most day-to-day activities but could not sustain them over a reasonable period of time because they were tired and found domestic tasks difficult to sustain in a normal time as a result of depression. The employee was found to be disabled as the effect was substantial.

Some disabilities can be progressive. In those cases the effect will be substantial if the impairment has or has had at least some effect on the ability of the person to carry out day-to-day activities and the condition is also likely to result in the impairment having a substantial effect on them.

An impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if measures are being taken to treat it or correct it and, but for the measures, the impairment would be likely to have that effect. In other words, the test is to look at the effect on day-to-day activities if the treatment was stopped.

For example, in cases of depression, the test would be to consider the adverse effect without anti-depressants and counselling.

If a person can reasonably be expected to change their behaviour to reduce the effects of an impairment on their day-to-day activities, they may be deemed not to be disabled. The focus here has to be on what is reasonable.

For example, if a person suffering from panic attacks can reduce the risk of occurrence by, say, avoiding rush hour travel, a tribunal will consider whether it is reasonable to expect that person to put that restriction in place. Equally, it will consider whether it is reasonable for the employer to change their working hours to make that possible.

Long-term

To qualify as a disability the substantial adverse effect on normal day-to-day activities must be long-term. A mental health impairment will be long-term if it has lasted at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

When looking at whether a condition is likely to last for at least 12 months, the test is whether it is more probable than not that it will happen. This may be difficult in the case of mental health conditions as prognoses are often hard to make.

As Kate Lea explains in her article (opposite), once a person has been deemed to have a disability under the Equality Act, their employer may then have to make a reasonable adjustment for them at work.

Kate Lea looks at the duty on employers to make reasonable adjustments and some of the ways in which the courts have interpreted that duty, with a specific emphasis on mental health

Making adjustments

ACCORDING TO the Office for National Statistics, one in six adults will experience a mental health condition at some time. Perhaps not surprisingly, therefore, stress, depression and anxiety are the leading causes of sickness absence at work.

In addition, not only do people with mental health problems often experience discrimination at work, they also find it difficult to secure and then remain in employment.

This is despite the fact that the Equality Act 2010 aims to ensure that people with a disability are not substantially disadvantaged (in other words, are not disadvantaged in a way that is more than minor or trivial) in the workplace when compared with non-disabled people.

Relevant law

Broadly speaking, the duty on employers to make reasonable adjustments arises when a provision, criterion or practice (PCP), or physical features of the employer's premises, put a disabled person at a substantial disadvantage, in comparison with people who are not disabled.

The duty arises not only during the course of employment but also at every stage of employment including recruitment, induction, training, development and return to work. A failure to comply with the duty to make reasonable adjustments is unlawful under section 22 of the Act.

In the case of **The Environment Agency -v- Rowan** the Employment Appeal Tribunal (EAT) held that, to determine whether the duty had arisen, tribunals have to consider:

- The PCP applied by or on behalf of the employer
- The physical features of premises occupied by the employer
- The identity of the non-disabled comparators (where appropriate) and
- The nature and extent of the substantial disadvantage suffered by the claimant.

Consequently, the starting point in a reasonable adjustment claim is often to identify the relevant PCP, which should be interpreted broadly, according to the decision in **Carreras -v- United First Partners Research** (weekly LELR 474). Once a comparative difference in treatment has been found the threshold for showing a substantial disadvantage is not high.

"not only do people with mental health problems often experience discrimination at work, they also find it difficult to secure and then remain in employment"

Finally, if substantial disadvantage is found, the employer has to take reasonable steps in terms of the overall circumstances of the case to avoid it.

These need to be aimed at alleviating the disadvantage and should focus on the features causing it, rather than on any decisions, acts or omissions that led up to identifying the adjustments, such as a referral or non-referral to Occupational Health (OH).

However, the duty is dependent on the employee or job applicant disclosing their health condition to the employer (or prospective employer) in the first place. If they don't, the employer can rely on ➲

Reasonable adjustments

➲ their lack of knowledge of the disability as a defence against any subsequent claim. This requirement is problematic as disabled people with mental health issues are often reluctant to talk about their condition with their employer.

"The Code of Practice lists factors that a tribunal might take into account when deciding whether an adjustment is reasonable"

"Reasonable" adjustments

The term "reasonable" is not defined in the Act but in practical terms, a reasonable adjustment is simply one that is effective for the employee without being too disruptive, costly or impractical for the employer to provide and which will enable the employee to continue in their work, according to **Archibald -v- Fife Council** and **Smith -v- Churchills Stairlift plc**.

Factors to take into account

Paragraph 6.28 of the Code of Practice lists factors that a tribunal might take into account when deciding whether an adjustment is reasonable, such as:

- Whether taking any particular step would be effective in preventing the substantial disadvantage
- The practicability of taking the step
- The financial and other costs of making the adjustment and the extent of any disruption caused
- The type and size of the employer
- The employer's financial and other resources
- The availability to the employer of financial or other assistance to make the adjustment.

Possible adjustments

Paragraph 6.33 of the Code of Practice provides a list of suggested "reasonable adjustments", such as:

- Allowing a person, who finds the stress of a formal interview exacerbates their mental health condition, to undertake a trial period of work to assess their suitability for the job
- Adjusting starting and finishing times to accommodate any anxiety that might be associated with commuting to work during rush hour or to allow medication to take effect
- Offering redeployment to an alternative, less stressful role – perhaps with the benefit of pay protection, as in **G4S Cash Solutions (UK) Ltd -v- Powell** (weekly LELR 491)
- Adjusting duties, for example by removing the more stressful aspects of a role such as time-critical duties or tasks that might be a source of increased anxiety, such as front-facing duties
- Appointing a buddy or mentor, ideally on a similar grade or role, usually outside of the management structure, who understands the role and can provide support and assistance
- Allowing paid time off work to attend medical appointments

- Allowing the person to take additional breaks if they become particularly anxious
- Paying for private psychiatric services or counselling, as in **Croft Vets Ltd and ors -v- Butcher** (weekly LELR 347)
- Providing additional time and resources to enable the individual to more effectively manage their work
- Offering a phased return to work following periods of sickness absence and/or the possibility of a reduced workload for a specific period of time
- Discounting periods of disability-related sickness absence, as in **Griffiths -v- The Secretary of State for Work and Pensions** (weekly LELR 456)
- Adjusting shift patterns and allowing part-time working, home working and job sharing
- Adjusting the work environment to include a quieter area in which to work, and/or offering reserved car parking
- Offering mediation and staff training to increase awareness of mental health issues and reduce the stigma often associated with them as well as the discrimination that can arise as a result
- Adjusting redundancy selection criteria.

The aim of introducing an adjustment is to get an individual back to work. The courts have generally tended to take the approach that the duty to make reasonable adjustments should focus on the practical steps that an employer can take to help keep a disabled employee at the workplace, for instance by providing equipment or changing duties. ➲

➲ The trend has been against requiring employers to make significant adjustments to financial arrangements. That being so, excluding disabled people from accessing financial benefits, such as ill health retirement, could still engage the duty to make reasonable adjustments. Further, the EAT held in **G4S Cash Solutions Ltd -v- Powell** that offering pay protection to a disabled worker could amount to a reasonable adjustment where the worker was incapable of performing previous duties.

Practical considerations

Providing a disabled individual with support is key to finding the right adjustment. It is important to recognise that this may take time and may require further changes and adjustments along the way.

It is also important to remember that everyone's experience of mental ill health is different. So, two people diagnosed with depression may require very different adjustments. Although employers are best placed to focus on what the individual can do, the disabled person is best placed to focus on the aspects of the job that cause them difficulty and therefore need to be modified or altered.

While this might initially appear a complex process, speaking with the individual concerned is crucial to understanding and meeting their specific needs, although it is, sadly, often forgotten.

"Providing a disabled individual with support is key to finding the right adjustment"

Useful sources of information

The TUC provides guidance for trade union reps on disability and mental health at: tuc.org.uk/equality-issues/disability-issues/mental-health-and-employment

The site for "mindful" employers (mindfulemployer.net) is a useful source

NICE offers public health guidance on nice.org.uk

ACAS has helpful guidance on the interaction between health and wellbeing at work (acas.org.uk)

MIND produce useful guides on supporting employees to stay in the work place (mind.org.uk).

Role of union reps

Union representatives play an important role when providing advice, support and assistance to members with mental health conditions who are often reluctant or unable to address issues with their employer without support and guidance.

When considering adjustments, reps should be flexible but realistic. For instance, they should:

- Remind the employer of the benefits of making adjustments to the business. Not only will this help to reduce sickness absence but will result in greater staff engagement and productivity. It may also help to reduced staff turnover and associated costs, not least because the cost of making an adjustment is often far less expensive than having to recruit and train a new employee.
- Keep an accurate record of what adjustments have been agreed.
- Ensure regular reviews of the adjustment/s to ensure they are effective.
- Ensure, with the permission of the individual concerned, that any agreed adjustments are communicated to the team in which they work.
- Encourage the employer to seek input from Human Resources, external bodies and health care professionals. To this end, GPs and OH play a crucial role in ensuring that the most helpful changes are made to working practices.

Access to Work

Access to Work is a valuable and often underused resource. The scheme, run by the Department for Work and Pensions, is designed to financially assist employers with costs over and above those involved in a reasonable adjustment. In addition to financial grants they can provide advice and sometimes an assessment of the individual's capabilities.

According to the Equality & Human Rights Commission, Top Tips for Small Employers: A guide to employing disabled people, the average cost of making an adjustment is just £75.

Jo Seery explores the circumstances in which legal protection against discrimination arising from disability applies to workers with mental health-related issues

Mental health, disability and the law

ALTHOUGH THE Equality Act 2010 provides protection for workers with a mental health-related disability, many still face discrimination. This is usually due to poor management because of ignorance or stereotypical views of what mental health disability is.

As Kate Lea explains in her article (p5), it may be hard in those circumstances to identify the provision, criterion or practice necessary to establish an employer's failure to make a reasonable adjustment. Hence the need for trade union reps to be aware of the protection offered under other provisions, such as section 15 of the Act.

Section 15

Section 15 provides specific protection for workers with a disability by making it unlawful for employers to treat them unfavourably because of something arising in consequence of their disability without justification.

It is worth noting that the focus of this section is not so much on the disability itself as on the unfavourable treatment to which the worker has been subjected because of the consequences of their disability.

By shifting the focus away from the disability, the law can provide protection for a broader category of people with a disability. This can be particularly beneficial for those with a mental health-related disability. For example, it could provide protection for a person who has dyspraxia (a form of developmental coordination disorder) and who is disciplined (unfavourable treatment) for misfiling work (something arising in consequence of their disability).

Unlike direct discrimination, which focuses on treating a worker with a disability less favourably, section 15 provides protection where an employer's policy puts that worker at a disadvantage. For example, if an employer has a bonus policy that states that it will not be paid to an employee who has been given a warning for absence, a worker with, say bi-polar disorder, who has received a warning because of absence relating to their condition (and who is subsequently denied a bonus) is likely to be able to bring a claim for discrimination.

Application of the legal test

The worker still has to show that they have a disability (see Paul Shevlin's article (p2) which explains when mental health amounts to a disability). The worker would then need to prove to a tribunal that they have been treated unfavourably in order to benefit from protection under section 15. ➲

> *"Although unfavourable treatment is not defined in the Equality Act, the Equality and Human Rights Commission has said that it means putting a worker with a disability at a disadvantage"*

➲ This means that they are not required to compare their treatment to a non-disabled person. All they have to show is that they have been treated unfavourably.

So, for example, where a worker with depression is dismissed for disability-related sickness absence it is irrelevant that a worker who does not have depression would also have been dismissed in the same circumstances. Instead, the question that tribunals have to ask is this – "but for" the worker's absence due to depression would the worker have been dismissed? If the answer to that is "no" then it is unfavourable treatment.

Unfavourable treatment

Although unfavourable treatment is not defined in the Equality Act, the Equality and Human Rights Commission has said that it means putting a worker with a disability at a disadvantage. That disadvantage may be obvious – such as not being appointed for promotion or being dismissed – but unfavourable treatment can also arise from more subtle barriers such as a requirement to work, say, early morning shifts. Although this applies to everyone, a person suffering from stress may have more difficulty complying with it.

Unfavourable treatment can also occur where an employer does something they think is in the best interests of a worker. For example, where someone who has Asperger's syndrome is moved to an office of their own. If that results in the worker being isolated from their colleagues, this is also likely to amount to unfavourable treatment.

Less advantageous treatment is, however, not the same as unfavourable treatment. So, if an employer agrees to reduce the hours of an employee with, say, Tourette's syndrome and obsessive compulsive disorder, as a reasonable adjustment and then agrees to ill health retirement, that employee cannot complain of unfavourable treatment despite the fact that their pension is lower because it was calculated on their part-time or reduced hours.

The unfavourable treatment must also be because of something arising in consequence of a worker's mental health-related disability. This often results where the employer has dismissed the worker because of absence due to their disability.

In that case, it can be argued that the unfavourable treatment (the dismissal) is because of poor attendance, which is in consequence of their disability. However, the employer could still defend the claim on the basis that dismissal in these circumstances was objectively justified (see below).

Knowledge of the disability

An employer can defend a claim if they can show that they did not know or could not reasonably be expected to know that the worker has a disability. This is particularly an issue for those with mental health-related issues.

Despite the high profile given to mental health during the last general election campaign, there is still a huge stigma associated with it. Many who have a mental health-related disability do not wish to disclose it. Other workers can struggle for years at work with a condition they did not know they had or which has only recently been diagnosed.

Having said this, it will not generally be a defence for an employer to simply claim that they did not know that a worker had a mental health-related disability. The Equality and Human Rights Commission's Employment Code makes clear that an employer "must do all they can reasonably be expected to do to find out if a worker has a disability". So even if the worker has not disclosed that they have a disability, employers are still expected to pick up on the signs (see box right).

Employers should, however, be careful when making health-related enquiries of an individual to whom they intend to offer a job. The Equality Act includes a provision that an employer must not ask about an applicant's health or disability, before offering them a job, or including them in a pool of employees who may be offered work in the future.

Before speaking to their line manager about their disability we would always recommend a worker with a mental health-related disability seeks the advice of their union representative.

Justification

Employers can defend a claim for discrimination arising from disability by showing that the unfavourable treatment in question is "a proportionate means of achieving a legitimate aim".

Usually it is easier to show a legitimate aim than it is to show that the treatment is proportionate. So, for example, where a worker with a mental health-related disability is dismissed under an employer's attendance policy, the employer is likely to be able to establish a legitimate aim of needing to ensure that their organisation is properly staffed.

The main issue would be whether or not dismissal is a proportionate response. The courts have made clear that, where an employer fails to make a reasonable adjustment, they are unlikely to succeed with a justification defence. Similarly, if there was a less discriminatory means of achieving the legitimate aim, such as reduced hours or a suitable alternative job was available, dismissal is unlikely to be justified.

Employers can also rely on business reasons as a defence, but they should provide evidence when they claim there would be an adverse impact on the business.

Employers are expected to pick up on signs of mental disability

The Equality and Human Rights Commission's Employment Code gives the following example.

A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability.

Conclusion

The Conservative Party's 2017 manifesto promised to ensure those with "mental illnesses" are treated fairly and that it would reform outdated laws so that employers fulfil their responsibilities.

If they are true to their word, they will need to reform the Equality Act 2010 so that a worker with a mental health-related disability is properly protected from being discriminated against.

We would recommend that the law should be simplified so that workers need only show that the less favourable treatment was in consequence of the disability without the need to enquire into the employer's motive or knowledge. It is only then that a level playing field can begin to be created for those with a mental health-related disability.

Richard Arthur summarises the implications of Brexit for employment rights and considers the government's principal legislative mechanism for implementing withdrawal

Brexit: autumn 2017

THERESA MAY'S gamble and her failure in June 2017's general election to secure the mandate she sought for her version of hard Brexit opened up the debate as to what shape the process of leaving the EU will take.

Now, with the introduction of the European Union (Withdrawal) Bill in parliament, we are able to consider the most important legislative mechanism for the delivery of Brexit.

> *EU laws relating to discrimination in particular have set required minimum standards in the UK which could not be undercut by governments bent on deregulation*

At its simplest, the EU (Withdrawal) Bill will repeal the European Communities Act 1972 (ECA) and preserve and convert all EU law into UK law, while allowing it to be modified and continue to operate effectively after Brexit.

The approach of importing EU law into domestic law, and providing for it to be amended so as to continue to operate efficiently, as well as making provision for the implementation of any withdrawal agreement, is probably sensible. It is a mammoth task to disentangle 40 years' worth of EU law from the UK legal system

The Bill has been criticised due to its reliance on "Henry VIII" powers, which allow acts of parliament to be changed by ministerial order, without the approval of parliament itself.

The Bill has been strongly opposed by devolved administrations, being described by the First Ministers of Scotland and Wales as "a naked power grab".

The Bill must not be used by the government as a vehicle to push though substantive policy changes

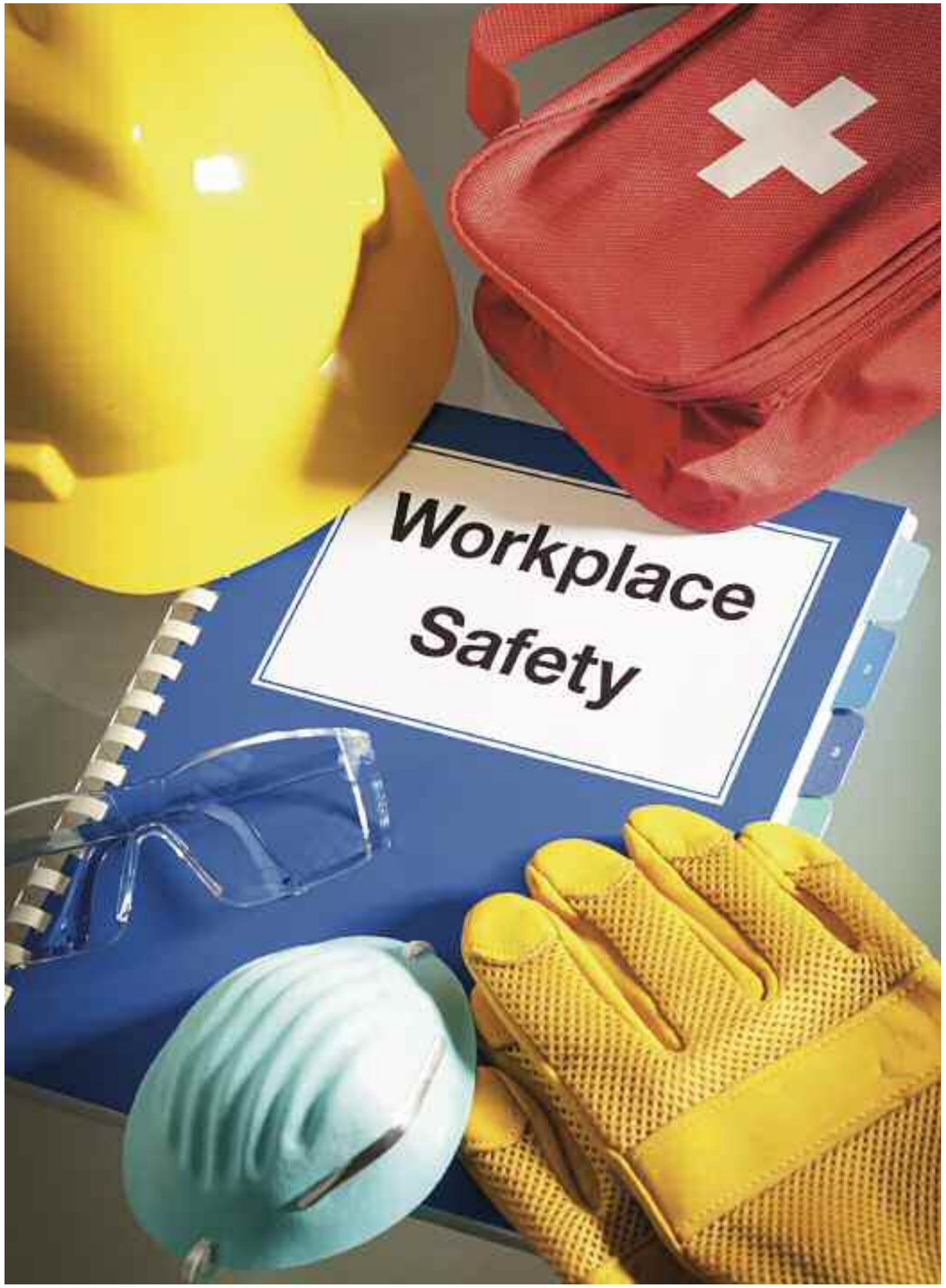
Employment and health and safety rights

Many UK employment rights have their origins in EU law. Examples include: protections for agency, young, fixed-term and part-time workers; rights in the event of business transfers and collective redundancies, in relation to working time and holiday pay, posted workers, parental leave and more.

EU laws relating to discrimination in particular – whether that's on the grounds of religion or belief, age or sexual orientation – have set required minimum standards in the UK which could not be undercut by governments bent on deregulation.

It was the European Framework Directive on Safety and Health at Work that led to the UK's introduction of the "six-pack" of health and safety regulations.

These regulations have gone on to provide the foundations for work-related personal injury claims. Many cases would have been lost by the workers involved had these regulations not imposed stricter duties on employers. As primary legislation, these laws would not be immediately affected by Brexit. However, they would ➲



“As can be seen from its decision in UNISON’s magnificent ET fees victory, the Supreme Court is ready to invalidate the unprincipled use of ministerial powers”

➲ no longer have the foundation of EU law and would therefore be more vulnerable to being changed.

There is a further category of EU law that finds its way into UK law. These “general principles” do not depend for their existence on a Directive or another regulation and include principles like proportionality, equivalence, effectiveness and equal treatment. These principles have been important to the protection of employment rights in the UK (particularly in the field of discrimination), and they should be maintained post-Brexit.

Consistent with its equivalent status to other EU Treaty Articles, the EU Charter of Fundamental Rights should also be incorporated into UK law.

The European Union (Withdrawal) Bill

Introduced on 13 July 2017, the Bill will seek to repeal the ECA, import, retain or preserve EU law in UK law, and enable the modification of retained EU law so that it can operate effectively.

After Brexit, retained EU law will continue to be supreme over pre-exit UK law, but not over new, post-exit legislation. According to the Bill, the principle of the supremacy of EU law will not be prevented from applying to new post-exit legislation provided that its application is consistent with the intention of any modification to retained UK law. It is unclear how this will be applied.

The supremacy of EU law is to be curtailed as far as general principles are concerned. The EU Charter will not form part of UK law. General principles will only be preserved where they have been recognised by the European Court of Justice before exit day. They will not be capable of being used as grounds for dis-applying UK law after exit day.

The Supreme Court will not be bound by pre-exit day case law of the European Court of Justice. In deciding whether to depart from any pre-exit day case law of the European Court, the Supreme Court will apply the same test it usually applies now.

Ministers will have exceptionally wide powers to repeal, amend or substitute retained EU law so as to “prevent, remedy or mitigate” “any failure of retained EU law to operate effectively, or any other deficiency arising from the withdrawal of the United Kingdom from the EU”. Ministers are also to be given further powers, including “Henry VIII powers”, which allow acts of parliament to be changed by ministerial order, without the approval of parliament itself.

The powers to be given to ministers are particularly wide-ranging in light of a further provision that a “minister may by regulations make such provision as the minister considers appropriate in consequence of this Act”. This provision seems impossibly widely drawn.

Supervision of powers will come in two varieties: the standard “negative resolution procedure”, where the order will become law when “made”, but is subject to annulment by resolution of either house of parliament; and the more intrusive “draft affirmative resolution procedure”, where the order does not become law unless a draft has been laid before, and approved by, both houses of parliament.

These supervision procedures are very seriously inadequate, for several reasons.

First, as per the recommendations of the House of Lords Select Committee on the Constitution, the Bill should “set out a list of certain actions that cannot be undertaken by the delegated powers contained in the Act”.

Second, the circumstances in which the affirmative resolution procedure (the higher level of scrutiny) is to apply are relatively narrow.

Third, there is no facility to make available the more enhanced scrutiny procedures available, including requirements to consult such organisations as appear to be affected by the proposals, and, in the case of the so-called “super-affirmative resolution procedure”, to have regard to representations.

Fourth, there is no opportunity for consideration by any parliamentary committee as to the appropriate form of supervision in any particular case.

Danger, deficiency and uncertainty

The Bill in its current form is riddled with dangers, deficiencies and uncertainty. The government chose not to support an alternative Bill, provided by Labour MP Melanie Onn, which included clear and precise preservation of the requirement to interpret domestic legislation in accordance with workers’ rights derived from EU law and prohibited workers’ rights derived from EU law being downgraded by secondary legislation.

However, as can be seen from its decision in UNISON’s magnificent ET fees victory, the Supreme Court is ready to invalidate the unprincipled use of ministerial powers.

As the EU (Withdrawal) Bill proceeds through parliament, it is essential that every opportunity is taken to prevent the government dismantling over 40 years’ worth of EU employment and health and safety laws, and to ensure decisions are subject to proper supervision.

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LELR aims to give news and views on employment law developments as they affect trade unions and their members. This publication is not intended as legal advice on particular cases.

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