



From alcoholism to exhibitionism - When the law says a condition is not a disability

By **Lisa Rix** - 31 January 2019

Although many HR professionals dealing with disability discrimination issues are all-too familiar with the legal definition of a “disability” in the Equality Act 2010, many are unaware of the various exclusions to that definition.

What exclusions?

The Equality Act (Disability) Regulations 2010 (the “Regulations”) expressly state that the following conditions are not ‘impairments’ for the purposes of the definition of a ‘disability’ (and hence cannot amount to a disability):

- Addiction to/dependency on alcohol, nicotine or any other substance (other than medically prescribed drugs or other medical treatment).
- Tendency to set fires.
- Tendency to steal.
- Tendency to physically or sexually abuse other people.
- Exhibitionism.
- Voyeurism.
- Tattoos and body piercings.
- Seasonal allergic rhinitis (usually known as hayfever) - but hayfever can be taken into account where it aggravates the effect of any other condition.

What about where the excluded condition arises from a disability?

A case concerning this question was recently explored by the Employment Appeal Tribunal.

Mr Wood worked for the council as a Behavioural Officer. He was caught shoplifting outside of work. This record of shoplifting prevented Mr Wood from obtaining the Non Police Personnel Vetting (NPPV) clearance he needed in order to do his job. This led to a

disciplinary process during which Mr Wood claimed that he was not aware that he had shoplifted due to his underlying conditions of depression, post-traumatic stress disorder (PTSD) and associated amnesia. Despite this, the Council dismissed Mr Wood.

As a result, Mr Wood issued claims for unfair dismissal and disability discrimination on the grounds that his PTSD and associative amnesia had caused him to shoplift. The Council accepted that Mr Wood had PTSD capable of amounting to a disability. However, it argued that Mr Wood could not bring a disability discrimination claim because he had been dismissed for a “tendency to steal”, one of the excluded conditions in the Regulations which could not amount to a disability (see above list).

The ET and the EAT both found that Mr Wood was dismissed by the Council because of the shoplifting incident and, therefore, for a tendency to steal. Mr Wood was not dismissed because of any disability. The fact that Mr Wood’s tendency to steal was probably caused by his impairment of PTSD was irrelevant. As the excluded condition had been the cause of the claimant’s dismissal (which was the act of discrimination complained of), the claimant was prevented from bringing his disability discrimination claims.

(Interestingly, there seems to be no guidance on what “tendency” means in the above excluded conditions. Somewhat strangely in Mr Wood’s case, the court concluded that he had a tendency to steal where Mr Wood had only shoplifted once).

What about where the disability arises from an excluded condition?

In contrast to the above position, a disability which is caused by one of the excluded conditions can amount to a disability, for example, where a person has depression, even if this has been caused by the excluded condition of addiction to alcohol. The involvement of the addiction to alcohol at an earlier stage does not negate the disability.

Key take-aways

As you can see from the recent case of Mr Wood, excluded conditions can make or break an employee’s discrimination claim, so it is important to be aware of them and understand them.

HR professionals should also make sure to document clearly the exact reasons why certain disciplinary actions are taken, particularly in relation to disability issues which are connected with one of the above conditions. When courts are looking in minute detail at what the reasons were behind certain decisions it is evidentially far better to be able to point to something contemporary.

Case

[Wood v Durham County Council UKEAT/0099/18 \(3 September 2018\).](#)