Definition of Disability under Equality Act 2010 Includes Pre-Cancerous Lesion

April 9, 2018

Authors
Nic Hart, Katya Gevargiz

Overview
Cancer is a ‘deemed’ disability under the Equality Act 2010 (the Act). If a claimant has a deemed disability, they are automatically considered to be disabled for the purposes of the Act. However, it has not necessarily been clear the extent to which a pre-cancerous lesion will be considered to be cancer. This update provides a short overview of the Employment Appeal Tribunal’s decision in the case of Lofty v Hamis.

Facts
The claimant suffered from a pre-cancerous lesion, which could have resulted in skin cancer. A series of surgeries to remove the pre-cancerous cells was successful, but the claimant required time off work to attend the surgeries. She also suffered from anxiety. As a result, she was signed off work.

The claimant’s employer undertook a review of her absence and, due to difficulties in arranging the meetings, ultimately dismissed her. The claimant brought claims for unfair dismissal and disability discrimination. She contended that she had a deemed disability – cancer – and was therefore protected under the Act.

Employment Tribunal Decision
The claimant’s complaint of unfair dismissal was upheld, due to procedural unfairness in dismissing her.

However, the employment tribunal (having regard to evidence from the claimant’s consultant that she was being treated for a “pre-cancerous” condition) did not consider that she had a deemed disability. Further, the employment tribunal did not consider that she met the definition of disability set out in the Act. This definition must be satisfied where a claimant does not have a deemed disability.

The claimant appealed the employment tribunal’s decision.

Employment Appeal Tribunal (EAT) Decision
The EAT found that the employment tribunal had not adequately considered the evidence from the claimant’s GP or engaged fully with the relevant medical evidence. It was too focused on the evidence regarding the claimant’s treatment, rather than evidence relating to her pre-treatment diagnosis.

In addition, the EAT considered that Parliament had not gone down the route of distinguishing between different types of cancer. It considered that there was no justification for distinguishing between different types of cancer, or disregarding certain conditions, because they had not reached a particular stage. The EAT concluded that, if the employment tribunal had engaged with the evidence before it, it would have concluded that the claimant had cancer and therefore a deemed disability under the Act.

Comment
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Comment
When considering whether or not an employee is disabled for the purposes of the Act, employers should not forget that the following conditions are deemed disabilities:

- Blindness, severe sight impairment, sight impairment and partial sightedness (certified by a consultant ophthalmologist);
- Severe disfigurements, with the exception of unremoved tattoos and piercings;
- Cancer, HIV infection and multiple sclerosis.

Following the EAT’s decision in *Lofty v Hamis*, a pre-cancerous lesion is likely to be considered to be a deemed disability. Whilst the EAT noted that “pre-cancer” might mean something different depending upon where the cells are located, employers should avoid working on the basis that a pre-cancerous condition is not cancer.

Whilst tribunals are not medical experts, they must have regard to all of the available evidence regarding an employee’s condition. In Mrs. Lofty’s case, the tribunal had not engaged fully with the evidence before it and was too focused on her post-treatment diagnosis.

For more information, please contact Nic Hart on +44 (0) 7584 290605.