

## Employees with pre-existing illnesses

The Employment Appeal Tribunal has recently decided a case which will impact upon the compensation payable to an unfairly dismissed employee with a pre-existing illness.

In Drewett v Seafield Holdings Ltd the employee had a long standing underlying medical condition which was caused by matrimonial and domestic difficulties. Her employer accepted, at appeal, that this condition had been exacerbated by its' treatment of her. The Employment Tribunal had held that the employer's treatment had culminated in the claimant being constructively dismissed.

In deciding what payment was due to the claimant the Employment Tribunal had applied a "but for" test to both her past losses and her future losses. In other words, the Tribunal held that, on the balance of probabilities, had it not been for her employer's treatment of her, the claimant would have been able to work. As a result the employer was ordered to pay both her past and future losses.

The employer appealed on two grounds. The second related purely to the circumstances of the case and was unsuccessful. The first ground related to the way in which the Tribunal calculated the employer's liability for the employee's losses. The employer argued that the Tribunal had incorrectly assessed damages for future loss by failing to assess the percentage chance that extrinsic factors (i.e. those for which the employer was not responsible), might have caused the claimant's inability to work. It was accepted that, in assessing past losses i.e. the losses occurring between the date of dismissal and the hearing, a "but for" test was appropriate. However, it was argued that the employer's liability for future losses should be assessed by reference to the uncertainties of what might have happened in any event.

The EAT considered that the approach argued for by the employer was correct. The case has been remitted back to the original Tribunal for the employer's liability, in terms of future losses, to be recalculated. The EAT also confirmed that, in its view, the Tribunal was correct to apply the "but for" test to past losses. It follows that the employee must show, on the balance of probabilities, that "but for" the employer's actions these past losses would not have occurred.

### Conclusion

Where an employee who was unfairly dismissed had a pre-existing illness, which was not the direct fault of their employer, an Employment Tribunal will consider the losses in two parts:

- Past losses i.e. those losses occurring between the date of dismissal and the date of the hearing. The Tribunal will apply a "but for" test
- Future losses i.e. those occurring after the date of the hearing. The Tribunal will estimate, with reference to the evidence before it, the percentage chance of those future losses occurring had the employer not acted as they did. The employer will only be liable for the extent to which it is said that they contributed to the chance of these losses occurring.



**Note:**

This case may be beneficial for employers in that, where there is an underlying condition for which they are not responsible, damages payable for future losses will take account of the chance of the employee having become incapable of work in any event. The amount due will be reduced to take account of that chance. However, it should be noted that where, on the balance of probabilities, the future losses would have occurred in any event, the employers will still be liable for a proportion of these losses. The future losses for which they are liable will reflect the increase in the chance of these losses occurring following their treatment of the claimant.

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