When is an employer deemed to have knowledge of a disability for the purpose of s.15 EqA 2010?

By Karen Moss

3PB Barristers

A. Ltd v Z. UKEAT/0273/18/RA

1. The EAT has upheld an appeal against a finding of constructive knowledge in a claim of discrimination arising from disability where an employee was reticent to share any detail of her mental disabilities.

Factual summary

2. The claimant, Z, was disabled by way of mental and psychiatric impairments. At the beginning of her employment as a Financial Coordinator with the respondent, A. Ltd, she had been asked about the reason for her absence from her previous work and she had misled A. by attributing that absence to various physical impairments. She also answered in the negative two questions about (a) whether she had a disability which would require adjustments; and (b) whether she had a physical or mental impairment which had a long term and substantial adverse effect on her ability to undertake normal day-to-day activities.

3. During her 14 months of employment with A., Z. had 85 days of unscheduled absence of which 52 were recorded as sick leave, but she routinely attributed her sickness absences to physical ailments and, in her dealings with the Respondent, deliberately suppressed any mention of her mental health conditions. When she explained the reasons for her absences to A., although she referred to problems with her son causing her to feel "*incredibly depressed*", she did not refer to any clinical mental health condition, choosing instead to list various physical maladies, from which she said she was suffering. Moreover, although the Claimant was hospitalised for psychiatric care for over two weeks, she again did not inform the Respondent of that fact. She continued to provide

information about various physical impairments but made no reference to any mental health problem.

4. The Tribunal found, however, that by the date of dismissal, the Respondent had had sight of a GP certificate referring to the Claimant's *"low mood"*, a hospital certificate which stated that she was expected to be an in-patient for four weeks, and a further GP certificate citing "*mental health and joint issues*". Both GP certificates declared her to be unfit for work for three weeks. On Z's final day at work, she arrived slightly late and failed to provide evidence to corroborate what she said was the reason for that. A's Chief Executive met with Z. explaining that because she felt unable to depend on her - due to her poor attendance and timekeeping – she was dismissed.

The reasoning of the ET in finding constructive knowledge

5. The Tribunal accepted that A did not have actual knowledge of Z's disability, but criticised the fact that they did not hold a return to work meeting or otherwise enquire into Z's current health or her recent problems. They did not propose or moot the possibility of making a referral to OH or involving any other medical expert. The Tribunal found that, given the material A had at the time, it had:

> "*clear evidence that, over a period of more than two months up to the dismissal, during the entirety of which she was away from work, the Claimant experienced a significant deterioration in her mental state and there was a real question about her psychiatric health… The Claimant's silence on her mental health could not be taken as conclusive. It is notorious that mental health problems very often carry a stigma which discourages people from disclosing such matters, even to family or close friends. In the circumstances, we conclude that, by the time of the dismissal, it was incumbent upon the Respondents to enquire into the Claimant's mental well-being and that their failure to do so precludes them from denying that they ought to have known that she had the disability."*

The EAT judgment on constructive knowledge

6. HHJ Eady QC found that the Tribunal was wrong to attribute knowledge to the Respondent in these circumstances. At paragraph 23 of the EAT judgment there is a useful summary of the legal principles in relation to constructive knowledge, with reference to the leading cases of ***York City Council v Grosset*** [2018) ICR 1492 CA,

Donelien v Liberata UK Ltd UKEAT/0297/14, ***Pnaiser v NHS England & Anor*** [2016] IRLR 170 EAT, ***Herry v Dudley Metropolitan Council*** [2017] ICR 610 and ***SoS for Work and Pensions v Alam*** [2010] ICR 665. HHJ Eady stated that:

> "*reasonableness, for the purposes of* ***section 15(2)****, must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code*."

7. The ET had found as a fact (when considering the likelihood of a fair dismissal in any event for the purposes of determining compensation, in accordance with ***Abbey National v Chagger*** [2009] ICR 624 EAT) that, *had* the Respondent made the enquiries of Z suggested by the ET, by asking more questions of her regarding the reasons for her absence, and referring her to Occupational Health, Z would not have revealed her mental health difficulties. The EAT therefore upheld the arguments of the appellant that:

> "*If a proposed enquiry would not have yielded the requisite knowledge, it cannot have been reasonable to have had to make it*… (and) *it could not be the function of section 15(2) to impose significant obligations and burdens on employers. Nor should an employer be required to impose itself upon an employee's concerted wish to suppress exposure of a health condition (in particular, a mental health condition). To determine otherwise would run counter to the requirement in the Code that investigations are conducted in accordance with dignity and privacy.*"

8. HHJ Eady found that the ET failed to apply the correct test, asking itself only what more might have been required of the Respondent in terms of process without asking what it might then reasonably have been expected to know. Given that the ET had found that the employer would not have obtained knowledge of the disability, even if it had asked the right questions of her, the Respondent did not have constructive knowledge of the disability at the relevant time.

Implications in relation to constructive knowledge

9. All employment lawyers will be aware of the Code of Practice from the ECHR about constructive knowledge. This is oft-cited by claimants where such matters are in issue and states that "*an employer must do all they can reasonably be expected in do to find out if a worker has a disability. What is reasonable will depend on the circumstances.*

This is an objective assessment" (paragraph 5.15 of the Equality and Human Rights Commission Code of Practice on Employment 2011 ("the Code")). As a result of this judgment those words no longer, perhaps, pack the same punch.

10. It is often the case that employees, particularly those with mental health difficulties, are reluctant to tell their employer about them. Many do not understand at the time that such conditions constitute statutory disabilities and there is still considerable stigma attached to such impairments. It would be easy for employers to hide behind a lack of actual knowledge in many cases. Parliament has recognised this and for this reason, constructive knowledge is sufficient for liability under **s.15**, and the burden is placed on the employer to show that it was unreasonable for it to be expected to know that the employee was disabled.

11. In order to have requisite knowledge under **s.15(2)** the employer does not need to know of a particular diagnosis but to escape a finding of constructive knowledge it must show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect. One can understand why the EAT has in the past attached importance to the representations of the employee to her employer (as in ***Herry v Dudley)***. There has to be a limit as to how far an employer is expected to pry into an area of an employee's life which is usually reasonably expected to remain private. If an employee has been misleading an employer as to the real reason for her absence, for example, it is not incumbent on an employer to look behind that in every case. Employees with certain medical histories might prefer to face dismissal than have to endure a persistent employer questioning them about such matters. Having said that, this most recent EAT judgment would not encourage employers to foster open, caring and supportive environments which engender trust in them from employees and create circumstances more conducive to employees feeling sufficiently comfortable to tell the truth about their health.

12. Employers should be aware that it would be risky not to follow the letter of the Code about doing all that is reasonable to find out whether an employee is disabled, particularly in a case of long-term absence. What is reasonable obviously depends on all the circumstances and every case will depend on the facts found by each tribunal. It is worth bearing in mind that, even where an employee is reticent throughout their employment to divulge any detail about their health, they might feel more able to do so after their employment is terminated, during an appeal against their dismissal, for

example. In ***Baldeh v CHADD*** UKEAT/0290/18/JOJ, 11th March 2019, the EAT found that constructive knowledge at that stage could be sufficient in deciding whether the decision to uphold a dismissal was discrimination arising from disability under **s.15**.

Additional points about justification

13. The ET in ***A Ltd v Z*** went on to consider whether the employer could nonetheless justify its dismissal of the claimant. The ET accepted that the Respondent had established a legitimate aim - i.e. to ensure that it maintained a reliable accounting function - the question was whether the dismissal amounted to a proportionate means of achieving that aim. The ET held that:

> "*Ms Nichol took an intemperate and precipitate decision simply to sack the Claimant on the spot. That was anything but a proportionate thing to do and her action denied her the chance to make a balanced and informed decision. The Claimant's minimal lateness on 18 April 2017 and Ms Nichol's consequential irritation explain but do not begin to justify the drastic step of summary dismissal. There was no need whatsoever for her to act with such haste. Dismissal was plainly not a necessary measure in order to safeguard the legitimate aim which we have identified. Quite the contrary. In the circumstances, the s15 claim succeeds.*"

14. HHJ Eady in the EAT held that this was also the wrong approach and it was apparent that the ET had failed to engage with the fundamental balancing exercise between the impact upon the Claimant on the one hand as against the business needs of this employer on the other. The question for the ET was whether terminating the Claimant's employment was a proportionate means of achieving the reliable accounting function the Respondent sought.

15. The focus of the ET instead was on the unfair process of this summary dismissal, but of course, the employer does not need to demonstrate that it had in its mind at the time of a hasty dismissal a justification argument. The complaint was not limited to the fact that the dismissal had been without notice, but that the dismissal had happened at all, and so the ET had to decide whether the decision to dismiss in a more general sense could be justified.

16. Employment lawyers would be well advised to read this case, if they deal with claims of discrimination arising from disability where there is a question about knowledge, or indeed any claims where justification is being considered. HHJ Eady provides a useful and clear summary of the law in those areas. It demonstrates that there are limits to what is required of employers who have employees intent on keeping details about their health from them.

Karen Moss
Barrister
3PB Barrister
020 7583 8055
karen.moss@3pb.co.uk