How pro-active should an employer be in making enquiries of a job applicant who indicates that they are disabled?

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AECOM Limited v Mallon **[2023] EAT 104**

An employer is *not* subject to a duty to make reasonable adjustments if it does not know, *and could not reasonably be expected to know*, that the complainant has a disability *and* that he or she is likely to be placed at the substantial disadvantage in question - Part 3 of Schedule 8 of the Equality Act 2010, paragraph 20. So, how pro-active should an employer be in making enquiries of a job applicant who indicates that they are disabled? This judgment of the Employment Appeal Tribunal provides a useful review of the authorities on an employer's 'constructive' knowledge in this regard.

The claimant had worked for the respondent in 2017 but was dismissed because of performance; nevertheless, he applied for another job vacancy with the respondent the next year. To apply for this role, candidates had to input their email address username and provide a password in order to complete a relatively short online application form. In a series of emails between the claimant and the respondent's HR department, the claimant indicated that he wished to apply for the role, attached his CV which included the information that he had dyspraxia and information about how dyspraxia affects people generally, and asked, in bold capitals: *"*BECAUSE OF MY DISABILITY*"* if he could do *"*AN ORAL APPLICATION*"* as *"*A 5 TO 10 MIN PHONECALL TO TALK ABOUT MY EXPERIENCE*"*. He asked if this could be arranged by email and said that if the respondent emailed him, he would supply a telephone number. During subsequent email correspondence between the claimant and the respondent's senior HR manager, the claimant continued to state that he was happy to do the online form over the phone and would prefer to make an oral application, while the manager repeated that he needed to complete the online form, but that he should let the respondent know if he was struggling with any aspect of the form. The claimant never answered the manager's questions about what aspect of the form he was struggling with and never told her that he could not even create a username and password and log on to the online form.

However, the manager did not call the claimant. The manager accepted in evidence that the respondent would have been able to provide whatever assistance the claimant required in completing the online form; however, the respondent's position was that *"essentially it did not know the nature and extent of the claimant's difficulties at the time, because the claimant was not being clear about the extent of those difficulties"*.

The Employment Appeal Tribunal observed, at [25], that what is necessary is not that the employer knows that the complainant is generally disadvantaged by their disability, but that it knows that they are "likely" to be placed at "a substantial disadvantage in relation to a relevant matter". An important theme in the case law on this issue - *Ridout v T C Group* [1998] IRLR 628, *Secretary of State for Work and Pensions v Alam* [2010] ICR 665 and *Newham Sixth Form College v Saunders* [2014] EWCA Civ 734 at [12]-[14] - is that consideration of whether an employer reasonably ought to have known whether the claimant was disabled and at the relevant substantial disadvantage requires the employer to make *reasonable enquiries* of the employee. An employer cannot 'turn a blind eye'- a point made clear in the EHRC Employment Statutory Code of Practice 2011 ("the Code of Practice") which states at paragraph 6.19 that an employer must *"do all they can reasonably be expected to do to find out whether"* an applicant/employee has a disability and is, or is likely to be, placed at a substantial disadvantage. In *Ridout* the EAT recognised that the duty is only to make such enquiries as are *reasonable*, and what is reasonable will depend on all the circumstances. From *A Ltd v Z* [2020] ICR 199, where the EAT (HHJ Eady QC, as she then was) summarised at [23] the principles applicable to consideration of knowledge for the purposes of a section 15 claim, the EAT in *AECOM* took the following additional points: "it is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so" and, "Reasonableness ... must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee, as recognised by the code". In *AECOM*, the claimant also referred to *BT Plc v Meier* [2019] NICA 43, a decision of the Northern Ireland Court of Appeal, principally because of the reference to the need for 'proactivity' by an employer in the Court of Appeal's summary of the tribunal's judgment at [16]. However, the EAT observed in *AECOM* at [33], there is no separate duty of 'proactivity' beyond the legal principles it had already identified. The Code of Practice makes clear (especially at paragraphs 16.39 and 16.49) that the duty to make reasonable adjustments only arises in the context of employment (in contrast to some other areas of life covered by the EA 2010) once there is a specific disabled person who, to the employer's knowledge, requires an adjustment - *"an employer is not required to make changes in anticipation of applications from disabled people in general – although it would be good practice to do so".*

In *AECOM* the Tribunal found that the respondent ought to have known the claimant was at a substantial disadvantage because if the respondent wanted further clarification of the reasons why he found it difficult to complete the online application form, it should have telephoned him. The Tribunal held: *"Given [the claimant's] difficulties with written communication, it was not reasonable to expect [him] to explain these matters in an email"*. The respondent submitted before the EAT that this conclusion was perverse as there was no evidence before the Tribunal that the claimant had suggested to the respondent that he could not explain his difficulties by email and/or that he required a telephone call to explain his difficulties. Noting, however, that perversity is a high threshold, the EAT decided that the Tribunal's conclusion on this issue was well within the range of judgments open to them: the Tribunal would at this point have had in mind the totality of the evidence, which was to the effect that the respondent had repeatedly asked the claimant to explain his difficulties by email and not received an answer to that. There could only really be two explanations for that: either he was being deliberately obstructive in order to 'engineer' a disability discrimination claim because he was not a genuine applicant, or he was having difficulty with written communication. The Tribunal had rejected the former explanation and, given its finding that the claimant was a genuine applicant (albeit the EAT found it made a separate error of law in reaching that conclusion), then the only explanation for his failure to respond to the respondent's question was that he was having difficulties with written communication. It was well within the range of judgments open to the Tribunal to conclude on the evidence that an employer acting reasonably, when faced with an individual with a dyspraxia diagnosis asking for an adjustment to avoid filling in an online form but failing to respond in writing to a reasonable question, would have picked up the phone to speak to that individual in order to understand their situation.

Arguably this judgment provides nothing further by way of guidance to employers who are trying to get the balance right between making sufficient inquiries and avoiding overly intrusive questioning of an applicant. However, looking at paragraphs [50] and [57] of the EAT's decision in *AECOM*, it appears that the Tribunal's finding that the respondent's senior HR manager "accepted ... with hindsight she should have telephoned the Claimant..." was significant.

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