Known unknowns: an employer's need to make enquiries about a disability *Cunningham v BBC* [2026]

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Cunningham v BBC [2026] EAT 92

1. This case provides useful analysis of when an employer should be taken to have constructive knowledge of an employee's disability. Within the context of diabetes and fatigue, the case looks at issues including the circumstances in which an employer should ask follow up questions of OH and what factual knowledge is needed to give legal knowledge of a disability.

2. This article considers the salient points and refers to the relevant paragraphs in square brackets. A hyperlink to the judgment is above.

Summary of Facts

3. Ms Cunningham was employed as a TV announcer/director for BBC Scotland, controlling and organising programmes and trailers as well as making announcements between programmes [2].

4. On 10 March 2023 Ms Cunningham emailed a manager informing her of her diagnosis of type 2 diabetes and fatigue [3]. On 4 April 2023 Ms Cunningham requested an accommodation while she was adjusting to the "diagnosis of Type 2 diabetes which is, I'm sure you are aware, classed as a disability?" [4]. The adjustment sought related to the "late shift", which as it sounds, finished in the early hours of the morning [5].

5. On 7 June 2023, Ms Cunningham made an error by being 45 seconds late starting a live news broadcast. That error led to a formal disciplinary process but after a disciplinary investigation the BBC decided that no formal action should be taken [6].

6. Ms Cunningham brought her ET claim as discrimination arising in consequence of a disability (s.15 EA 2010) in relation to the disciplinary process and a failure to make reasonable adjustments (ss. 20 and 21 EA 2010) in relation to the late shift [7]. For both claims, knowledge of disability is needed but actual or constructive knowledge was denied by the BBC.

7. The disability of diabetes and fatigue was found by the ET at a preliminary hearing to constitute a disability as from June 2023 [3].

8. At trial, both claims were dismissed, including on the basis that "the BBC was not and could not reasonably have been aware of Ms Cunningham's disability at the relevant time (which was held to be June to November 2023, as Ms Cunningham submitted)." [11].

9. The principal ground of appeal was that the ET erred in its approach to the question of assessing the BBC's knowledge of Ms Cunningham's disability [15]. This ground succeeded, analysed below followed by an explanation of further useful points including any arising from the further two grounds of appeal.

Knowledge of Disability

10. Ms Cunningham appealed on the basis that the ET "erred in its approach to assessing the BBC's knowledge of Ms Cunningham's disability by failing to ask itself the necessary questions described in *Donelien v Liberata UK* [2018] IRLR 535 and *A v Z* [2020] ICR 199" [15].

11. In analysing this position, the EAT highlighted well-established dicta:

    a. "the employer must show it had no actual or constructive knowledge as to the disability itself (*A v Z* [2020] ICR 199)" [21]. Readers will note the burden thus placed upon an employer to show the absence of knowledge rather than, as may be expected, the burden on the employee to demonstrate knowledge. This reflects A v Z at §23(2) and (5).

    b. "The Court of Appeal held in *Gallop v Newport City Council* [2014] IRLR 211 that the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in the definition (in s.6 EqA)" [21] and "If the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person'" [22].

c. “The question of whether it is reasonable for an employer to make enquiries about an employee’s disability is one of fact and evaluation (*Donelien v Liberata UK* [2018] IRLR 535 at para 27)” [26].

d. “Normal day-to-day activities include those which are normal for a person to engage in at home and also at work as long as they are normal across a range of employment situations (*Chief Constable of Dumfries and Galloway Constabulary v Adams* [2009] ICR 1034)” [23].

12. Applied here and in finding that the ET had erred, the EAT held:

a. “The ET’s assessment should have included what the BBC actually knew and what it would have discovered had it made reasonable enquiries about her type 2 diabetes” [32].

b. “It would have been reasonable for the BBC to ask OH about any aspects of Ms Cunningham’s disability which were unclear from the reports” [32].

c. “The ET found that the BBC did not know that the effects of Ms Cunningham’s diabetes were likely to last for at least 12 months. However this is obvious from the fact that diabetes is known to be a long-term and not a temporary condition. It was also indicated by the BBC’s OH report dated 30 May 2023 (at para 35)” That reported the diabetes was “under regular monitoring by her treating clinicians” and “can often take a number of months to evaluate the effects...” with a “possibility that medication may be required at some point in the future” [35].

d. “If the BBC was not clear that diabetes was a long-term condition with long-term adverse effects, it was reasonable for the BBC to have asked OH about this part of the definition of disability. Had the BBC done so, the OH report would inevitably have reported that she had a long-term condition” [35].

    i. This latter point applies the reasoning of *A v Z*. *A v Z* highlighted the need for an ET to not just consider what it would have been reasonable for an employer to do but actually what knowledge it would have gained had it carried out further enquiries. In *A v Z* the employee was hiding her mental health difficulties and it was held that even if further enquiries were made of her she would have kept her disability hidden and therefore the employer would not have gained knowledge in any event.

13. Of particular relevance to other cases is the significance of OH referring to "reasonable adjustments" even if OH do not specifically state 'the employee has a disability':

    a. OH had stated, "would also need to have regular meal and rest breaks as reasonable adjustments to ensure symptoms associated with her condition do not worsen." [37]

    b. The EAT held, "the reference to "reasonable adjustments" would put any employer on enquiry whether OH was using that phrase as they were treating the person who was the subject of the reports as disabled" [37].

    c. Practitioners would have seen many cases in which the phrase 'reasonable adjustments' is freely used, sometimes with no bearing to a disability at all but sometimes, as here, with an implication that the person concerned is disabled within the statutory meaning even if that fact is not explicitly mentioned. The clear statement from the EAT is that when this phrase is used by OH, that should put an employer on notice that they need to at least ask OH to clarify disability status, if not already be treating the employee as if they are disabled.

    d. Whether an employee or other non-medical person using the phrase 'reasonable adjustment' would put the employer on the same notice is arguable and likely more fact dependent. As analysed in the next paragraph, in this case the EAT did consider that Ms Cunningham's own references to 'a disability' carried much weight and therefore lending support to the notion that an employee's own references to reasonable adjustments should similarly put an employer on notice.

14. Referring to Ms Cunningham's own references about her disability as well as the EAT's perception of the ET's findings, the EAT held, "The ET made findings that the BBC had actual knowledge of type 2 diabetes, the fatigue/exhaustion, the need for appropriate treatment and management. The BBC knew that Ms Cunningham was seeking an "accommodation" because type 2 diabetes was "I'm sure you are aware, classed as a disability?" (see Judgment, para 28). These factors put the BBC on notice that Ms Cunningham was probably disabled and it would have been reasonable for the BBC to make enquiries about whether the known impairment had long-term and substantial adverse effects which met the definition of disability" [38].

15. The EAT concluded at [45] that the ET had erred by misapplying its own findings about knowledge, both regarding the basic facts of Ms Cunningham having the condition as well as regarding the substantial effects on Ms Cunningham at work and in her personal life.

16. Two further well-established points regarding the assessment of knowledge were made in concluding [46]:

    a. "In para 77 the ET finds a lack of actual or constructive knowledge saying that "there was no indication from Ms Cunningham's GP or occupational health that Ms Cunningham's diabetes could not be brought under control and indeed the reports suggested that the symptoms were improving". However whether an impairment can be brought under control is not the test, particularly as that may involve consideration of medication, treatment or measures which may need to be discounted"

    b. "The ET also note that the BBC was aware that Ms Cunningham sang in a band at weekends, was also suffering stress and appeared well at work. These matters are potentially irrelevant as an employer must focus on what an employee cannot do when assessing a substantial adverse effect on normal activities rather than balance what they are able to achieve".

Other useful points of discussion

17. Diabetes as a disability:

    a. The BBC did not concede that Ms Cunningham's diabetes was a disability within the meaning of the EqA 2010, hence the determination at a PH.

    b. In analysing this position, the EAT highlighted the dicta of *Metroline Travel v Stoute* [2015] IRLR 465 that explains that diabetes will not always satisfy the statutory definition. "type 2 diabetes which can be managed by simple dietary measures is not per se a disability" [8].

18. The burden of proof of what was 'reasonable' [52]:

    a. "a claimant must identify the adjustments that they contend ought to have been made in order for a respondent to know the case it must meet and the ET to know the case it must decide (*Project Management Institute v Latif* [2007] IRLR 579 at para 53).

    b. The burden of proof reverses where a claimant presents evidence of a potentially reasonable adjustment that would mitigate or prevent the substantial disadvantage caused by the operation of the PCP".

19. Strategy for appeals:

    a. The final ground of appeal related to the s.15 claim and was made on a perversity basis. This ground was dismissed largely on the trite position that such grounds must pass a very high threshold to succeed [79].

    b. This ground was also dismissed though on the basis that it would have been "academic" even if it did succeed, "as Ms Cunningham has not appealed the ET's conclusion that the BBC's actions were a proportionate means of achieving a legitimate aim. Therefore the section 15 claim cannot succeed in any event" [80]. This highlights an important point when considering the merits of an appeal in that the whole picture will need to be considered – the merits of the individual error as well as the full spectrum of issues that arise from the claims and any consequential issues that flow from a successful appeal.

Conclusion

20. This case usefully highlights the need for employers to seek clarification when being put on notice of a potential disability.

21. Any ambiguity in OH reports should be followed up or risk a finding of constructive knowledge and any reference to terms such as 'reasonable adjustments' ought to ring alarm bells for employers that further enquiries may be needed. References by OH will carry significant weight but those made by employees are likely to similarly need careful consideration.

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