Appeal No. UKEATS/0025/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16 October 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MR IAN McCUBBIN — APPELLANT

PERTH & KINROSS COUNCIL — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MS S SHIELS (Solicitor) Balfour & Manson LLP 54-66 Frederick Street Edinburgh EH2 1LS
For the Respondent	MS M McLAREN (Solicitor) Perth & Kinross Council 2 High Street Perth PH1 5PH

SUMMARY

DISABILITY DISCRIMINATION – Disability

The Claimant claimed that he had been discriminated against in respect of disablement. A Pre-Hearing Review was held to decide if he was disabled, and if the Respondent was aware of his disability. The Employment Tribunal held that the Claimant was disabled from 13 July 2010 to 25 September 2012, the latter being the date from which the Respondent conceded that the Claimant is disabled. It held that the Respondent knew actively or constructively from 25 September 2012 that the Claimant is disabled. The Claimant argued that the ET had applied the wrong test in respect of constructive knowledge. **Held** that the ET had erred in law in applying the wrong test. The question of the knowledge of the Respondent is to be determined at the full hearing.

THE HONOURABLE LADY STACEY

1. This case is about disability discrimination. I will refer to the parties as the Claimant and the Respondent.

2. This is an appeal by the Claimant against the judgment of the Employment Tribunal (ET), Employment Judge Bell sitting alone at Dundee on 14 and 15 January 2013 in which the judgment with the reasons was sent on 13 February 2013. The Claimant was represented at the hearing by Ms Shiels and the Respondent by Ms McLaren.

3. The decision against which an appeal is taken was a pre-hearing review (PHR). At page 90 in the core bundle there is a note of a CMD held in the case which set out the matters to be considered at the PHR as follows:

(a) The Claimant's disabled status and

(b) Whether the Respondents were aware of the Claimant's alleged disability.

Background

4. The Claimant is a school teacher who started work with the Respondent in 1976. He is still employed by the Respondent and has since the PHR been re-deployed to a different school. He lodged a claim by ET1 submitted on 13 August 2012. His claim was in respect of discrimination on grounds of disability and age, together with a claim in respect of bullying, harassment and victimisation in respect of his trade union activities.

5. The ET decided that:-

> **"The Claimant was a disabled person for the purposes of the Disability Discrimination Act 1995 and the Equality Act 2010 (as applicable) with effect from 13 July 2010 to**

25 September 2012 (being the date from when the Respondent concedes the Claimant is a disabled person) and that the Respondent knew or constructively knew from 25 September 2012 that the Claimant was disabled. The question of whether the Respondent knew or constructively knew the Claimant was likely to be placed at a substantial disadvantage because of that disability is a matter to be determined by the ET at a hearing."

I understood from parties that the Respondent had conceded, prior to the PHR, that the Claimant was a disabled person, as defined by the Acts of Parliament referred to, from 25 September 2012. Therefore, the period in dispute, in respect of which a decision was required from the ET was the period prior to that date. The ET found at para 3.4 that the relevant period during which it was contended that the Claimant was subject to discrimination on the grounds of disability was the period from 2009 to 2012.

6. In the findings in fact, the ET found that the Claimant was the principal teacher of guidance at Perth Academy. He also taught physics. He was a member of a trade union and had been the local secretary of it since 1992. He had 36 years' service in teaching, all with the Respondent. From 2009 his duties were between 60% and 70% teaching as opposed to guidance duties. In 2009 he was elected President of the Trade Union, which meant that he acquired more duties in that connection. As a result, the Claimant sought to negotiate with the Education Authority to have time off each week in order to fulfil his trade union duties. He had, at one stage, one day each week and he sought to have three days. This was known as 'facility time'.

7. Under the heading "Disability Status" the ET found that the Claimant had had two periods at the age of 20 and 23 when he felt "down". He was first diagnosed with clinical depression in July 2010. At paragraph 4.5 the ET made a finding in fact that during episodes when the Claimant was feeling "down" or when he had been suffering from depression, or in advance of an episode of depression, he suffered a set of symptoms which is listed as follows:

"(1) His level of anger rises.

(2) He undertakes riskier behaviour, because he has a reduced regard for his own welfare.

(3) He can suffer from irritable bowel syndrome.

(4) He can become confused and have a reduced ability to concentrate well especially when carrying out tasks.

(5) His normal sleeping pattern will reduce from around 6 hours to 3-4 hours.

(6) His skin flares up.

(7) He does not take full and proper care of himself such as failing to shave.

(8) He will cease participating in household chores.

(9) He will exclude himself from his family.

(10) He will fail to follow up a normal system of administration such as not proactively paying for items.

(11) His ability to concentrate is reduced so that he has difficulty reading or completing tasks for a period of in excess of 20 minutes whereas normally he would be able to concentrate for an hour or more.

(12) He can become forgetful such as forgetting to participate in the rotas for completing household tasks."

8. At paragraph 4.6 the ET found that in respect of the period between August 2010 and June 2011 the Claimant is unable to recall much detail of family activities or what he did within the household. He has a similar difficulty with the period between May 2012 and October 2012. At paragraph 4.7 the ET found that in 1996 the Claimant was on beta-blockers. On one occasion there was a Sunday school event in Crieff which he was requested to attend with his wife. He did not want to go and whilst at the event found it difficult to relate to others. At paragraph 4.8 the ET found that the Claimant felt suicidal in July 2010 and in June 2011.

9. The ET made various findings concerning medical records which began with the finding that in May 2005 the Claimant attended at his doctor with symptoms of anxiety for which he was described diazepam. The rest of the findings relate to a period beginning 9 April 2010 when the Claimant attended at his doctor with symptoms and problems with his skin, and reported having been under stress. On 13 July 2010 he attended his doctor reporting he was seeing a counsellor. He was in a confused state at that time. He was diagnosed with clinical

depression and was prescribed citalopram. He attended his doctor again on 22 July 2010 and continued to take citalopram. On meeting his doctor on 24 September 2010, he said he was taking herbal therapies and working through a self-help book. He reported occasional stomach cramps since starting on citalopram and the dosage of it was reduced. On 15 October 2010 he attended the doctor again, stating that he was starting to feel better and the prescription was further reduced. At paragraph 4.16 the ET make the following findings:

> **"The Claimant attended at his GP on 31 May 2012 and it was reported that he had good insight into his past depression. The Claimant completed a questionnaire and subsequently established that for the period 28 May to 5 June 2012 he was in "severe depression" and for the period after 25 September (for 7 days) he was in the "middle zone for depression."**

At paragraph 4.17 the ET found that the Claimant had attended a counsellor over the period of a year in 2011/2012 and had also been attending regularly at a herbalist for herbal treatments for his skin and for the effects of stress/anxiety.

10. The ET then turned to the question of knowledge. Between paragraphs 4.18 and 4.36 the ET made findings in fact. It found that in 1992 a number of complaints were made against the Claimant which he did not consider to be valid. He was referred by his GP to a clinical psychologist who identified him as having suffered from a severe panic attack during a meeting with the rector and deputy rector to discuss the complaints. The clinical psychologist reported in due course to the Claimant's GP, noting that:

> **"Attendance as an outpatient has already signalled to the school that he has difficulties and prompted a more sympathetic attitude towards him."**

11. At paragraph 4.20 the ET found that in November 2009 the Claimant was the subject of an allegation made by a parent. A meeting took place between him and Ms Angus, deputy rector, to discuss the allegation. Ms Angus had worked with the Claimant for a period of about 10 years. She had been on a secondment away from Perth Academy for part of that time.

12. At paragraph 4.21 the ET found that the Claimant met Mr Tom Ross, deputy head teacher at Perth Academy, on 22 March 2010, to discuss a parental complaint. During the course of that meeting the Claimant told Mr Ross that he had been under stress by reason of having to undertake two jobs, by which he meant his teaching and guidance role and his trade union role. He told Mr Ross that he was attending a herbalist and taking a course of calming medication and was awaiting an appointment with a counsellor.

13. At paragraph 4.22 the ET found that the Claimant met with Ms Angus again on 24 March 2010. He told her that he was struggling with balancing his teaching and guidance role and his trade union duties and that he was negotiating with the Director of Education for more time. He told Ms Angus that the stress of attempting to balance these two roles was affecting his skin, that he was attending a herbalist and that he was going to be attending a counsellor. The ET found as follows:

> **"The key issue which the Claimant raised with Ms Angus was that he needed more time off to carry out his trade union role. Ms Angus and the Claimant discussed referring the Claimant to Occupational Health with a view to attempting to secure additional time off for the Claimant."**

14. At paragraph 4.23 the ET found that Ms Angus completed an Occupational Health Referral Form dated 30 March 2010. She wrote the following:

> **"Ian is feeling the strain of coping with the demands of effectively two jobs with the added responsibility of his union duties…this session he has only one day facility time and he has found it hard to manage at times and the union duties often impinge on his school work. In May he will become President and is going to ask John Fyffe for 3 days a week facility time next session in order to cope with this increased workload…his skin has flared up again and he has been to see a herbalist which has helped. He is also seeing a transpersonal councillor at the moment, through his union, which he pays for."**

At the section of the form which asks for the specific issues which are to be addressed by the referral, Ms Angus wrote:

"Agreement of the facility time allocated to allow Mr McCubbin to carry out his duties and not feel stressed."

15. The ET found, at paragraphs 4.26 and 4.27 that the Claimant first brought to Ms Angus' attention that he was suffering from work related stress on 24 March 2010. At that meeting he did not seek any assistance except that she complete the Occupational Health Referral Form. Ms Angus did not have concerns about the Claimant's medical condition because she regarded him as being no more stressed than certain other teachers that she was dealing with at that time. She did not tell the head teacher that the Claimant was suffering from depression or taking medication.

16. At paragraph 4.30 the ET found that Mr Ross was not aware that the Claimant was any more stressed than any other teacher that he dealt with, in 2010. Mr Ross regarded the Claimant as being "frequently up or down". He thought that he had a tendency to be volatile and that that was very much part of his personality. He had known him since 1987. He thought that in 2010 he was perhaps a little more volatile than usual. Mr Ross did not think that the Claimant had any serious issues, was not told that the Claimant was suffering from depression and did not tell anyone else that the Claimant was suffering from depression.

17. At paragraph 4.31 the ET found that on 30 March 2010 the Claimant met with the head teacher to request permission for absence from school in order to attend a private counselling session. The head teacher failed to revert to the Claimant after saying he would check the position with Human Resources.

18. At paragraph 4.32 the ET found that the Claimant's absence records in respect of the period 2005 to 2012 showed him as absent by reason of stress/depression on 6 September 2005

and thereafter from 29 May 2012 to 26 June 2012 and from the period starting from 10 August 2012 onwards.

19. An Occupational Health Consultation Request Form was completed in respect of the Claimant on behalf of the head teacher on 25 June 2012 and an initial report was produced by a nurse on 13 July 2012. She was unable at that stage to express an opinion as to whether the Claimant might be suffering from a disability and stated that a review appointment would take place once his medical records had been made available. That review took place and a report was issued by Dr Fenwick, Occupational Health Physician, dated 25 September 2012. He stated that the Claimant was likely to have a condition falling within the definition of disability under the **Equality Act 2010**.

20. At paragraph 4.36 the ET found that the Claimant had been attending counselling since December 2010 on average once per month, which frequency increased to once per week in the period between July and October 2012.

21. Section 5 of the ET judgment is headed "Explanation of Findings of Fact". In it, the ET explains that while there was evidence from the Claimant that he had spoken to Ms Angus in November 2009 that evidence was not accepted. The judgment gives reasons for that. It was accepted, from evidence given by Ms Angus and by examination of documents, that there was a meeting between Ms Angus and the Claimant in March 2010. At paragraph 5.1 the Employment Judge states that she believed the evidence of Ms Angus, to the effect that the Claimant was looking for support in his negotiations with John Fyffe, the Director of Education, and was feeling stressed by having to balance the two significant roles that he required to fulfil.

22. The Employment Judge explains at paragraph 5.2 that the Claimant contended that Ms Angus knew about his medical condition. Ms Angus' evidence was that she knew that the Claimant was stressed, though no more than two other teachers she was dealing with at that time. Her impression was that the stress was caused by the Claimant having to balance two roles. So far as Mr Ross' knowledge was concerned, the Employment Judge found that while the Claimant told Mr Ross that he was attending a herbalist and awaiting an appointment with a counsellor, and was taking a course of calming medication, he did not emphasis these matters to Mr Ross nor draw his attention to them in a way which was intended to seek some kind of support from Mr Ross. In paragraph 5.5 the Employment Judge states that she did not believe that the Claimant told Mr Ross or Ms Angus that he was suffering from depression or gave them any information which would provide them with an understanding that he had been diagnosed with clinical depression in July 2010.

23. The ET noted the submissions on behalf of the Claimant to the effect that two questions had to be determined, namely, was the Claimant a disabled person, and did the Respondent have knowledge, or ought they to have had knowledge that the Claimant was a disabled person so that that gave rise to a duty to make reasonable adjustments? The ET noted that the Claimant's primary position was that the employer did know, and his alternative position was that they ought to have known. The Claimant's solicitor submitted that the referral to the GP, and from him to the clinical psychologist, in 1992 "would have been" within the Claimant's personnel file. The Claimant had been absent for 10 days following the incident and "there must have been a certificate" for that absence. When she turned to the evidence given by Ms Angus, the Claimant's solicitor criticised Ms Angus as unreliable. She relied however on Ms Angus' admission that she knew that stress could lead to serious mental health problems. Ms Angus had said in evidence that she was aware of the implications of the **Equality Act 2010**. From that, the Claimant's solicitor submitted that Ms Angus ought to have known

about the Claimant's condition and the duty of care to which it gives rise. It was submitted "it is not in the spirit of the Equality Act 2010 only to apply its terms to those employees who are off sick". The submission is summed up at the end of paragraph 6.7 as follows:

> **"The employer must do all it can reasonably be expected to do to find out if a person is a disabled person. The Claimant was having panic attacks, was undergoing counselling, was repeatedly saying he was not coping, was taking calming medication – that is sufficient knowledge for the Respondent."**

24. The Respondent's submissions are noted in paragraph 6.8 as being "the second question is whether the Respondent is likely to have had knowledge of the Claimant's disability".

25. On the question of knowledge, reference was made to the case of **Secretary of State for Works & Pensions v Alam** [2010] IRLR 283, which had also been the subject of submissions by the solicitor for the Claimant. The solicitor for the Respondent submitted that the incident in 1992, which had not been held to be proved to have been brought to the attention of the Respondent, was in any event irrelevant as it was 17 years before anything else. The solicitor for the Respondent relied upon Ms Angus' evidence to the effect that counselling was available for employees; she had had no undue concerns about the Claimant, or at least no more concerns than she had in relation to other employees; at the meeting in 2010 she had listened to the Claimant describing his personal problems and specifically an issue he had regarding facility time. Ms Angus had made a referral to Occupational Health in support of the Claimant's claim for increased facility time. While it was not explained anywhere why that was an issue for Occupational Health, the solicitor for the Respondent made the submission that that was the reason for the referral and that was clear from the evidence. It appears that that referral did not produce any action. It was submitted that Ms Angus' evidence was that she passed it to the Head Teacher but there was no evidence about what happened thereafter. That was relied on by the solicitor for the Respondent who submitted that the Claimant was "not shy about addressing

matters" and it was therefore strange that he did not chase up the referral. She relied on that as an indication that the matter had been resolved.

26. The solicitor for the Respondent submitted that Mr Ross' evidence was that he was not aware that the Claimant was suffering from depression and that he did not regard him as any more stressed than other people with whom he had to deal. She then submitted that the Claimant had been absent since 29 May 2012 and that the first Occupational Health report obtained from a nurse was not clear whether there was a disability in terms of the Act or not. It was not until the report from Dr Fenwick, received 25 September 2012 was produced, that the Respondent was aware that the Claimant had a disability. It was submitted that if the Claimant was attending work regularly and was producing no medical evidence, then it was not reasonable to expect the Respondent to consider that he had a disability pursuant to the **Equality Act 2010**.

The decision of the ET

27. The ET directed itself correctly that the relevant law is to be found in section 6(1) of the **Equality Act 2010** which sets out the definition of a disability. The EJ noted that she also had to have regard to the **Equality Act 2010 (Disability) Regulations 2010** and that she should also consider the guidance produced by the Government. She referred herself to the case of **Goodwin v Patent Office** [1999] ICR 302 and accepted that tribunals should refer to any relevant parts of the guidance they have taken into account and that it would be an error in law for them not to do so. From paragraph 7.4 onwards the EJ made extensive reference to the guidance on the meaning of impairment. In paragraph 7.4 she noted the guidance as stating:

> **"It is important to remember that not all impairments are readily identifiable. Whilst some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious."**

The EJ noted a number of definitions, apparently in the context of her considering whether or not the Claimant had shown that he is a disabled person. In so doing, she noted examples given, for instance an example, noted at paragraph 7.9 of the judgment relating to depression. In paragraph 7.14 she noted the advice given in the guidance about fluctuating symptoms and in 7.15 noted the advice given about "normal day to day activities". At paragraphs 7.25 and 7.26, the Employment Judge directed herself on the cases of **Ministry of Defence v Hay** [2008] ICR 1247 and **J v DLA Piper UK LLP** [2010] ICR 1052. She directed herself on the case of **Leonard v Southern Derbyshire Chamber of Commerce** [2001] IRLR 19.

28. Thereafter the ET at paragraphs 7.32, 7.33 and 7.34 proceeded to make the finding that the Claimant was disabled from 13 July 2010 to [and beyond] September 2012.

29. The ET then turned to the question of actual or imputed knowledge. She referred to the case of **Alam**, referred to above and noted the cases of **Eastern and Costal Kent Primary Care Trust v Grey** [2009] IRLR 429 and **Wilcox v Birmingham CAB Services Limited** EAT 0293/10. From these cases she directed herself that the test is correctly set out in **Alam** as explained in the case of **Wilcox**, and found that there are two questions to consider before the exemption from the obligation to make reasonable adjustment applies. They are:

> **"(1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out? If the answer to that question is "no" then there is a second question; namely**
>
> **(2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out?"**

30. At paragraph 7.36 the ET turned its attention to the findings in fact. It is noted that the ET had already found that the Claimant did not tell either Mr Ross or Ms Angus that he was suffering from depression or that he was in receipt of medication for depression in

August 2010. The ET also found that Ms Angus thought in March 2010 that any stress suffered by the Claimant arose from having insufficient facility time and was no greater than one or two other teachers she was dealing with at that time, and did not cause her any concern. In the case of Mr Ross, he did not appreciate that the Claimant was any more stressed than usual or than other teachers might have been. The ET then stated:

> **"It follows that they did not know or ought they to have known in August 2010 that the Claimant was disabled."**

31. The ET then found that it was at the stage of receiving the medical report, dated 25 September 2012 that the Respondent knew "actively or constructively" that the Claimant was disabled. It noted that the ET could not find that the second component is satisfied, namely that the Respondent knew that the Claimant was likely to be placed at a substantial disadvantage in relation to the three requirements set out in section 20 of the **Equality Act 2010**. That was a matter held over for determination by the ET conducting a hearing on the merits of the case.

The appeal to the EAT

32. Ms Shiels submitted that the legislation with which this claim is concerned while it straddled the **Disability Discrimination Act 1995** and the **Equality Act 2010** could be taken from the **Equality Act 2010** as it was in the same terms as the earlier legislation. She made reference to Schedule 8, paragraph 20, which is in the following terms:

> **"Lack of knowledge of disability, etc**
>
> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –**
>
> **(a) In the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**
>
> **(b) [In any case referred to in part 2 of this schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

She submitted that even if the Respondent did not know that the Claimant was a disabled person, it was for the Respondent to show that he "could not reasonably be expected to know" that the Claimant was disabled. Ms Shiels argued that the Claimant had told the Respondent enough to put them on notice. She made reference to the EHRC code, in particular section 6.19 that is in the following terms:-

> **"For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.**
>
> **Sch. 8 para 20(1)(b)**
>
> **Example: a worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."**

Ms Shiels argued that an employer has a duty to do something to find out if an employee has a disability, in certain circumstances. She emphasised that it was not for the employee to tell the employer what reasonable adjustments they required and also that it was not necessary that there be "a label" of a particular illness.

33. While she did not address me specifically on the example in the code, Ms Shiels did argue that a cornerstone of the **Equality Act 2010** and its predecessor is the idea of making adjustments to enable disabled people to have full access to employment.

34. She submitted that there are not many decided cases, if any, which give any assistance on the question of constructive knowledge. She did however submit that the idea of constructive knowledge is well recognised in the law and she made reference to the area of personal injury

claims. She referred to the case of **Adams v Bracknell Forest Borough Council** [2004] 3 All ER 897. That case is concerned with the legislation relating to limitation. Ms Shiels referred to Lord Hoffman's speech at paragraphs 33, 35 and 39. She submitted that the question of limitation in personal injuries has had a long and colourful career in the statute book. Ms Shiels reminded me that in Scotland there is also legislation about time bar. I did not find the history of limitation legislation to be particularly helpful in considering the question before me. As Ms Shiels appreciated, limitation and time bar legislation is concerned with the knowledge or lack of it in the mind of a person who has been injured. The legislation with which this appeal is concerned relates to what another person, often an employer, can reasonably be expected to do to discover whether his employee is a disabled person. It does not seem to me that the two situations are such as to be usefully compared.

35. Ms Shiels went on to submit that the ET had conflated the two issues, that is whether the Claimant was disabled, to the knowledge of the Respondent, and whether the Respondent did all that they could reasonably be expected to do to find out about disablement. She argued that the ET had failed to ask itself the second question, that is whether the employer had what she called "constructive knowledge". Ms Shiels made reference to the findings in fact about the medical records and the discussions which the Claimant had with Ms Angus and Mr Ross. She submitted that as Ms Angus knew that the Claimant needed to get more time off because he was feeling stressed, that she should have done more to find out whether or not he was disabled. She also knew that his skin had flared up and that he was seeing a counsellor. Mr Ross found that he was a little more volatile than usual and that he was intending to go to a counsellor. She made reference to the EJ's judgment at 7.36 where she says:

> **"It follows that they did not know, nor ought they to have known in August 2010 that the Claimant was disabled."**

Ms Shiels argued that that showed that the EJ had not considered separately the second point which is whether the Respondent could reasonably be expected to know that the Claimant had a disability.

36. Ms Shiels addressed the grounds of appeal and argued that the error of law which the ET had made was to state in effect "the Respondents did not know, so they not ought to have known". She referred to the case of **Ahmed v Metroline Travel Limited** UKEAT/0400/10 in anticipation that Ms McLaren would argue that it is not an error in law to fail to refer to a particular code of practice in certain circumstances. Ms Shiels argued that the case of **Lock v Cardiff Railway Company Limited** [1998] IRLR 358 was relevant. Her submission was that the ET had not asked itself, nor answered, the correct question.

37. Separately, Ms Shiels argued that the judgment of the ET did not comply with the case of **Meek v The City of Birmingham DC** [1987] IRLR 250 because the Claimant was left not knowing why he had lost the case. She argued that the reasons given by the ET were inadequate as they failed to explain why the ET decided that the Respondent could not reasonably be expected to know of the Claimant's disability.

38. Ms Shiels also argued that there was perversity in this case in that the ET had made findings that the Claimant told Ms Angus and Mr Ross a number of things concerning his health but the ET then found that they had no knowledge of this.

39. As regards disposal, Ms Shiels submitted that the correct disposal would be to allow the appeal and to order that the question of constructive knowledge be considered by the tribunal that will hear the whole of the evidence in the case. She made reference to the case of **CSA Packaging Limited v Boyle** [2009] IRLR 746. Lord Hope of Craighead said at paragraph 9:-

> **"The essential criterion for deciding whether or not to hold a pre hearing is whether, as it was put by Lindsay J in *CJ O'Shea Construction Ltd v Bassi* [1998] ICR 1130, 1140, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute."**

His Lordship also quoted Lord Scarman who described preliminary points of law as being 'too often treacherous short cuts.'

Ms Shiels said that in the present case the question of constructive knowledge was not a "knockout point" and it was unfortunate that it had been dealt with at a pre-hearing review. It would be in accordance with the overriding objective if the matter was dealt with by the tribunal which would require to hear all of the evidence to enable it to decide whether the Respondent was aware that the Claimant was at a substantial disadvantage.

40. Ms McLaren produced a written submission. She submitted that it was not challenged by the Claimant that he was disabled only from 13 July 2010. She argued that anything that he might have said before then was therefore irrelevant. She agreed with Ms Shiels that the question was whether or not the Respondent had constructive knowledge. She argued that there were no findings in fact to support any question of constructive knowledge. According to Ms McLaren's submission, the crux of the matter was that the ET found that the Respondent's witnesses' evidence to be more credible than that of the Claimant. She referred to the finding at paragraph 5.5 to the effect that the Claimant did not give them (Mr Ross or Ms Angus), any information that would provide them with an understanding that he had been diagnosed with clinical depression in July 2010. She referred to the clear finding made at paragraph 7.36 to the effect that "it follows that they (the Respondent) did not know nor ought they to have known in August 2010 that the Claimant was disabled." She referred to the statement by the ET at

paragraph 7.36 to the effect that it was only at the stage of receiving the second report dated 25 September 2012 that the Respondent knew actively or constructively that the Claimant was disabled. Ms McLaren argued that it could be inferred from that that the ET understood well that it was seeking to decide if there was any information given by the Claimant which it could be said meant that the Respondent could reasonably have known that the Claimant was disabled. Ms McLaren submitted that the ET had referred to the appropriate cases and had directed itself properly in law. She argued that they carried out an analysis of the facts and did not conflate two questions. Ms McLaren pointed out that the terms of the Equality Act 2010 Code of Practice were incorrectly quoted in the grounds of appeal where it was stated that paragraph 6.19 "requires an employer to do all they can reasonably be expected to do to find out whether a worker has a disability by conducting an objective assessment." What is actually stated in the code is that the employer is required to "do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment." Ms McLaren relied on the case of **Ahmed** to argue that it is not an error of law for the ET not to refer specifically to a provision of the code. It was clear she argued that the ET had taken the code into account. She also argued that the code imposed no additional requirements on the Respondent and that there was no need for the ET to refer to the code given that it was apparent that the code had been applied.

41. Ms McLaren argued that the judgment of the ET did comply with the case of **Meek** as the reasoning was clear. She submitted that the EAT should not interfere with the decision of the ET unless it was satisfied that there was no evidence whatsoever which had enabled it to reach the decision complained of. She made reference to the case of **Piggot Brothers & Co Ltd v Jackson** [1991] IRLR 309.

42. Ms McLaren argued that the test of perversity had not been met. She made reference to the case of **Neale v County Council of Hereford and Worcester** [1986] IRLR and the case of **Yeboah v Crofton** [2002] IRLR 635, together with the case of **Sneddon v Carr-Gomm Scotland** [2012] IRLR 820. Ms McLaren argued that the decision could not be said to be obviously wrong.

43. Ms McLaren argued that the Claimant had not led any evidence to show that the Respondent was aware of events in 1992. The evidence about the meetings he had with Ms Angus and Mr Ross in 2010 showed only that he was concerned about time to carry out his trade union duties. Mr Ross found that the Claimant was slightly more volatile that usual but that, Ms McLaren argued, was not enough to put Mr Ross on notice that he should be making further enquiries.

44. As regards disposal, Ms McLaren argued that I should refuse the appeal. However if not minded to do so, then I should remit the case to the original tribunal.

Discussion and decision

45. The matter which is before me is whether or not the ET erred in law in considering the terms of the **Equality Act 2010** Schedule 8 paragraph 20(1)(b). It is plain that the ET appreciated that it had two decisions to make, and clearly set that out from the minute of the CMD produced at page 90. The second question was "whether the Respondents were aware of the Claimant's alleged disability." Contained within that question however is another question, in terms of the legislation, which is whether the Respondent "could reasonably be expected to know" that the Claimant was disabled.

46. I am not persuaded that the ET has shown that it did consider that second question. The ET spent time carefully considering the evidence and making findings in fact. Part 7 of the judgment contains careful consideration of the law in so far as it relates to the existence of disablement. In 7.36 of the judgment it is stated:

> **"It follows that they did not know nor ought they to have known in August 2010 that the Claimant was disabled."**

The beginning of that paragraph deals with the information given by the Claimant to the Respondent in 2010. The ET finds that Mr Ross and Ms Angus were not told that the Claimant had depression. However there is no discussion of what, if anything, the Respondent could reasonably be expected to know from the information the teachers were given.

47. In the rest of the paragraph the ET deals with events after July 2010. The ET had already found that the Claimant went off sick in May 2012 with certificates giving the reason for absence as 'work related stress.' The ET finds that a report from Dr Fenwick dated 25 September 2012 was to the effect that in the doctor's opinion it was likely that the Claimant would be found to have a health condition to which disability provisions apply. The ET found that 'the Respondent knew actively or constructively that the Claimant was disabled' from that date. There is no consideration of whether the Respondent could reasonably be expected to know from an earlier date.

48. I have come to the view that the ET did not apply the test correctly. The question of what the Respondent could reasonably know as opposed to what it did know has not been dealt with separately.

49. I have some sympathy with the submission made by Ms Shiels that this matter should be considered by the tribunal which is going to hear the full hearing. It does not seem to me that there is any advantage in having this matter determined as a separate and preliminary matter.

50. I will therefore allow this appeal. In order that the question of what the Respondent could reasonably be expected to know is determined efficiently I will order that it is held over to the full hearing of the claim.