Appeal No. UKEAT/0162/13/SM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 8 August 2013
Judgment handed down on 28 October 2013

Before

HIS HONOUR JUDGE BIRTLES

BARONESS DRAKE OF SHENE

MR T STANWORTH

MR I COX — APPELLANT

ESSEX COUNTY FIRE AND RESCUE SERVICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DANIEL HOBBS (of Counsel) Instructed by: Backhouse Solicitors Carlton House 101 New London Road Chelmsford Essex CM2 0PP
For the Respondent	MR ALASTAIR HODGE (of Counsel) Instructed by: Essex Legal Services New Bridge House 60-68 New London Road Chelmsford Essex CM2 0PD

SUMMARY

DISABILITY DISCRIMINATION – Disability

Employment Tribunal entitled on the evidence to find that the employer had neither actual nor constructive knowledge that the Appellant was disabled. **Wilcox v Birmingham Citizens Advice Bureau Services Ltd** (2011) UKEAT/0293/10 (unreported) applied.

Neither was the decision perverse.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the reserved judgment and reasons of an Employment Tribunal sitting at the East London hearing centre in October and November 2012. The Employment Tribunal consisted of Employment Judge John Warren and lay members Mr Richard Boyd OBE and Mr Peter King.

2. The Employment Tribunal dismissed claims by Mr Cox for disability discrimination, unfair dismissal and wrongful dismissal. The Appellant appeals against the finding that the Respondent was unaware that he was disabled within the meaning of section 1(1) of the **Disability Discrimination Act 1995** (DDA) at the relevant time. He therefore appeals the consequential finding that his claims under the 1995 Act and for unfair dismissal must fail.

3. The Appellant is represented by Mr Daniel Hobbs of counsel. The Respondent is represented by Mr Alastair Hodge of counsel. We are grateful to both counsel for their written and oral submissions. We heard the appeal on 8 August 2013. At the conclusion of the hearing we reserved judgment.

The factual background

4. The Employment Tribunal made extensive findings of fact in paragraphs 6-74 of its reasons. What follows is necessarily a summary of those findings of fact.

5. The Claimant was employed by the Respondent as deputy finance director. His employment began on 19 March 2007. He was answerable to a Mr Clayton.

6. On 3 September 2008 the Claimant suffered an accident at work, slipping on water at the top of first-floor steps and falling down at least 12 hard steps. He was kept in hospital overnight and remained off work for a short period. He returned to work on 29 September 2008. He subsequently commenced legal proceedings against the Respondent seeking compensation for personal injury.

7. The Claimant completed a pre-employment medical questionnaire when applying for his post. He indicated he had suffered from mild depression due to redundancies and at the date of completing the questionnaire (6 March 2007) he was taking anti-depressants. In answer to the question, "Do you have any health condition or disability which affects your ability to carry out normal day-to-day duties?" the Claimant answered, "No".

8. The Employment Tribunal found that the position was a senior position, requiring a high level of numerate skills, presentation skills, risk management, change management, leadership, problem-solving skills, high-level verbal reasoning and required the post-holder to be a confident and effective communicator.

9. By April 2009 Mr Clayton was concerned about the Claimant's capabilities to do his job. He had not completed various targeted assignments. From May 2009 he had not been involved effectively in senior management meetings. He wrote to the Claimant. By letter dated 17 June 2009 the Claimant replied reminding Mr Clayton of his accident in September 2008, pointing out that he had suffered severe concussion and that he had seen a senior external cognitive behaviour therapy counsellor since early May 2009 and that this had helped him. The Tribunal found that the Claimant was raising his concerns but it appeared that Mr Clayton was

not taking into account the fact that his performance was likely to be affected as a consequence of his injuries.

10. The Claimant met with Mr Wilson, head of HR operations, on 17 June 2009, when, according to Mr Wilson, the Claimant became upset and emotional and shouted; and again on 29 June 2009, when the Claimant told Mr Wilson that he had "severe depression" and "I had an accident at work".

11. There followed a period of time in late August 2009 when there was a site reorganisation and cuts in the Fire Service. The Employment Tribunal found that there were meetings dealing with these matters at which the Claimant behaved in an inappropriate way to colleagues, including becoming increasingly aggressive. As a result of this there was an increase in tension between members of the senior management team. The cause of that tension was the Claimant's behaviour in dealing with sensitive matters.

12. The Respondent referred the Claimant to Occupational Health, and he was seen on 4 August 2009. Mr Clayton asked whether or not the Claimant's behaviour in the workplace was likely to be affected by the fact that he was on anti-depressants. The Occupational Health report is dated 4 August 2009 and is at appeal bundle pages 107-108. Dr A M Murphy did not consider that the Claimant had a disability that was likely to be considered to fall within the scope of the 1995 Act. It is recorded that he was under the care of a specialist and talked about his physical problems resulting from his accident. He was regarded as fit to work in his current role, and Dr Murphy recorded this:

> **"4. Mr Cox believes he is undertaking his duties successfully, and in that instance sees no need for management support. He acknowledged some performance matters where raised in June, that he feels occurred as a consequence of then persisting symptoms of his fall, these**

symptoms are resolved and he feels no more performance concerns are active. He recognises that he may be more aggressive than usual in his attitude in the work-place, but not inappropriately so. If performance or conduct issues are thought to be present at the moment, my advice is that they are best dealt with via appropriate management procedures."

13. On the same day, 4 August 2009, Dr Murphy wrote to the Claimant's GP requesting an extract from his medical records and sent the Claimant's consent that he had signed on the same day, subject to the requirement that he review any report from his GP before it was supplied to Dr Murphy. The GP did not reply, despite at least one reminder. Further chasing on 2 February 2010 records the GP informing Dr Murphy that the Claimant had declined to give consent for any report to be released to Occupational Health.

14. On 12 August 2009 Mr Clayton held a meeting with the Claimant about the Claimant's alleged behaviour and communications with colleagues. There are two different sets of minutes of the meeting. The Tribunal set out some of the discussion in paragraphs 30-37 of its reasons. Mr Cox did not raise his accident of 3 September 2008 as the cause of his behaviour towards colleagues and indeed rejected the suggestion that his behaviour was anything other than entirely acceptable. He did not wish for assistance or guidance.

15. On 8 September 2009 the Claimant was suspended from work. The reason for the suspension was to allow full investigation into the following allegation:

"That you have exhibited aggressive, threatening and intimidatory attitudes and behaviours towards other employees of Essex County Fire and Rescue Service tantamount to bullying and which would (if found proven) constitute gross misconduct in accordance with ECFRS disciplinary procedures."

16. The Claimant's response was to raise two grievances in letters of 9 September 2009 complaining of no support and that others had displayed unprofessional conduct towards him,

and in a third letter of the same date seeking details of the allegations against him. In the penultimate paragraph of one letter to Mr Clayton he states:

> **"As indicated yesterday, I will inform you of my current additional medical problem, when it is officially confirmed."**

17. He raised a third grievance on 10 September 2009.

18. On 18 September 2009 the Claimant sent an email to Mr Clayton that states this:

> **"Since early July 2009 I have been suffering from a Bi-Polar disorder or its more common name of manic depression.**
>
> **I have attached a file that explains this condition and have highlighted the normal symptoms and the specific symptoms that I have suffered from since early July.**
>
> **The psychiatrist I saw at Highwood Hospital on Wednesday, Dr A Bhiman, said that usually this condition affects sufferers in their early 20's [sic], but in my case it has been brought on via depression resulting from my accident at work in September 2008."**

19. At paragraph 9 of the same email the Claimant says this:

> **"9. On Weds 16.9.09 I was told that I had been suffering from a Bi Polar condition since early July 09."**

20. There is a link to a bipolar website. The Claimant then goes on to give his own assessment of his condition (Supplementary Bundle, page 20):

> **"7. Eventually my mental problems led to severe depression and at work I was just a very quiet shell of a person, avoiding work, not managing or making decision and always missing work deadlines. […]**
>
> **11. Early July, with hindsight, I started to display manic behaviour – spending large amounts of money, drinking more, started gambling, my persona became aggressive and argumentative, impatient with others especially if they disagreed with me, sleeping less, having unlimited energy – hyperactive (I thought my wife and work colleagues could'nt [sic] keep up with me), talking a lot without stopping once started and felt invincible."**

21. The report of the meeting with Dr Bhiman in September 2009 is recorded in a letter dated 16 September 2009 from Dr Vinnakota, who is staff grade to Dr Bhiman, who is a consultant psychiatrist. The relevant part reads as follows (Supplementary Bundle, pages 109-110):

> **"Diagnosis: ? Bipolar Affective Disorder". […]**
>
> **The picture described by Mr Cox and his wife does seem to suggest that he might have experienced a ?Hypomanic Episode which seems to be gradually settling down."**

22. Mr Clayton again referred the Claimant to Occupational Health. A copy of the referral is at Supplementary Bundle pages 111-113. The Employment Tribunal specifically noted the following passages:

> **"Ian has informed us that he has been diagnosed as having Bi-Polar disorder. I attach the detailed summary that Ian has provided to this referral. Ian is stating that his condition commenced in July 2009 and that his condition was triggered by an accident at work that occurred on 3rd September 2008 (accident report also attached)."**

23. The questions asked of Occupational Health were as follows:

> **"Is the employee fit to undertake their current role?**
>
> **Would adjusted duties or temporary redeployment apply and please suggest a possible time frame?**
>
> **Is the performance significantly affected by ill health and how long is this likely to continue?**
>
> **Is the ill health work related? […]**
>
> **Is the employee likely to render reliable service and attendance in the future?**
>
> **Is it likely that an employment tribunal would consider that this case falls within the scope of the Disability Discrimination Act and if so what adjustments should be considered? […]**
>
> **Other – please detail below"**

24. There then follows a summary of the matters known to Mr Clayton at that date. He also asks Occupational Health to "advise on any further support that the Service can provide to support Ian at this time".

25. Part of that summary says this:

> **"In the light of the new information Ian has provided, can you please ascertain the exact diagnosis and nature of Ian's condition from his treating psychiatrist Dr Bhiman and advise on prognosis for the short, medium and longer-term.**
>
> **Ian's role is at a senior level within the organisation, is both public facing and liaises with colleagues at all levels of the organisation and its partners. His position holds high levels of responsibility for the Service financial resources requiring sound judgement. Please advise on the implications that Ian's diagnosis may have on his ability to carry out his role and whether there are any reasonable adjustments that can be made to assist him in carrying out his role effectively. If the effects of Ian's condition will render future service unreliable in relation to effective performance within his role, please advise on the types of duties/activities he would be able to undertake.**
>
> **Ian has stated that his psychiatrist Dr Bhiman has attributed the onset of his condition to depresssion [sic] that he suffered as a result of his accident on 3rd September 2008. Please can you ascertain from Dr Bhiman the rationale for this diagnosis and that the sole causal effect is in fact Ian's workplace accident so that we may determine whether this new condition is a service-related injury or not? […] To supplement the information provided by Ian's treating psychiatrist, can you also please obtain Ian's medical records from his GP to determine whether there is any medical history of depression/health condition and advise accordingly, so that the Service can take all relevant information into consideration in determining whether the workplace accident is the sole causal factor for his new condition, or whether outside of pre-existing factors may also have contributed to his condition?"**

26. There is a further medical report from Dr Vinnakota to Occupational Health on 21 October 2009. He writes that the Claimant "has been trying to make an effort to monitor his behaviour and keep his aggression in check and denied any impulsive behaviour".

27. On 21 October 2009 Dr Murphy wrote a further report (Supplementary Bundle, pages 115-116). He says this:

> **"Mention is made by Mr Cox that he has been diagnosed with bipolar disorder. It is not clear to me that this is in fact an active diagnosis, but I am writing with his consent to both his GP and specialist asking for a report. You ask whether it is the case as Mr Cox contends that his 'bipolar disorder' can be attributed to the workplace incident as he has asserted. On receipt of the above-mentioned reports I will give my further opinion, but at this stage my opinion would be that there is unlikely to be a clear causal link demonstrable. However, like the other key matters in dispute here, I am of the opinion that this will ultimately only be decided by other processes in some other environment.**
>
> **Given the strength of feeling Mr Cox displays with regard to these various matters, I am of the opinion that there is little or indeed no prospect of him ever returning to your employee (quite apart from any underlying medical conditions that may or may not be present). This though should not of course prevent continuing efforts to resolve his grievances and the disciplinary matters."**

28. There is a further report from Dr Vinnakota on 24 November 2009 (Supplementary Bundle, pages 117-118). The diagnosis is "?Bipolar Affective Disorder Type 3". That report records that some of the symptoms, such as being very active, full of energy and aggressive were now absent, while less severe symptoms were still present.

29. There is a further report from Dr Bhiman that is undated but attached to a letter dated 8 February 2010 from him to Mr Murphy. It says this:

> **"Ian has been under care of the Brentwood CMHT since 2007 when he was diagnosed as suffering from Depression. Earlier this year, in view of his mood upswing and excessive spending a diagnosis of Bipolar Affective Disorder (F-31 ICD-10) is also under consideration. Ian is currently on anti-depressant medication (Cap Venlafaxine XL 75mg once daily) and a mood stabiliser (Seroquel XL 50mg nocte). The prognosis for recovery of a particular episode is good with medication. Long term prognosis is good provided treatment plan is adhered to."**

30. Dr Bhiman records that there is no history of previous psychiatric illness given to him.

31. In due course the Claimant's grievances were dismissed. On 30 October 2009 the Claimant emailed Mr Clayton. He says this:

> **"This is to update you on my accident at work injuries: […]**
>
> **2. Bi Polar medicine – the 2nd type of medication has also had very severe side affects [sic] and I am consulting my doctor on this."**

32. There was a disciplinary meeting on 3 December 2009 with further hearings on 4 February 2010 and 5 February 2010. The Claimant was dismissed by a letter dated 9 February 2010, which confirms that the various allegations have been found to have been substantiated on the balance of probabilities. The Claimant was summarily dismissed with effect from 9 February 2010. The subsequent appeal was heard on 9 March 2010, and the Claimant was dismissed in a letter dated 17 March 2010. The ground for dismissal was gross misconduct.

33. Finally, the Employment Tribunal noted that the last report that the Respondent would have had prior to the dismissal in February 2010 was the referral dated 21 January 2010. There appears to be no report in response to that, but there is a report dated 8 February 2010 sent to Occupational Health, which would have been received by either 9 or 10 February. However, the Tribunal found that as the dismissal deliberations were on 8 February 2010 and communicated on 9 February it was highly unlikely that the Respondent would have had knowledge of that report at the time the decision to dismiss was made.

The Employment Tribunal conclusion

34. The Employment Tribunal's conclusions were as follows:

> **78. We deal first with the Disability Discrimination claim. It is now accepted by the Respondents that the Claimant was, at the relevant time, disabled by reason of a mental impairment; namely he suffered from bipolar. That concession was made in the course of the proceedings following reference to a report on Pages 1248-1286 in the bundle, a report made on 5 February 2012 following an assessment on 3 January 2012.**
>
> **79. The first question for the Tribunal is to decide whether or not a duty to make reasonable adjustments arose.**
>
> **80. The applicability of the duty to make reasonable adjustments is limited by the knowledge of the employer. An employer is not subject to the duty if he does not know and could not reasonably be expected to know that an employee has a disability and is likely to be placed at a disadvantage by the employer's PCP.**
>
> **81. The Tribunal notes the words: 'could not reasonably be expected to know'.**
>
> **82. Employers must do all they can reasonably be expected to do to find out whether a Claimant has a disability. This appears to indicate that reasonable enquiries should be made.**
>
> **83. In this particular case, it became clear to the Respondents that the Claimant's behaviour had changed in or around June/July 2009. The Claimant, previously mild mannered, had become more aggressive. After a series of incidents where the Claimant reacted in an aggressive manner, and following a weekend away with his family, the Claimant opined to his employers that his daughter (a fourth year medical student) had suggested that the Claimant's conduct appeared to be displaying symptoms similar to someone suffering from bipolar. The Claimant brought this to the attention of the Respondents in particular in an e-mail in September 2009 to Mr Clayton, and supporting his e-mail he attached a link to a 'bipolar information website' and also attached an actual extract from that page which set out symptoms which could indicate that an individual is suffering from bipolar. The Claimant was then referred by the Respondents to Occupational Health in September 2009.**
>
> **84. The first Occupational Health appointment was 4 August 2009 so by the time that the Claimant had written to his employers in September the Claimant had already been referred to Occupational Health: firstly in July 2009 when the Claimant alleged that he had been suffering from depression, then there was a further referral on 4 August at Page 1186 when the Claimant refused to release any GP or specialist's report to his employer. There was an**

Occupational Health report dated 4 August 2009, at Page 1187 and 1188, where the advice from Occupational Health to management was: 'Mr Cox believes he is undertaking his duties successfully and in that instance sees no need for management support. He acknowledged some performance matters were raised in June but he feels occurred as a consequence of then persisting symptoms of his fall. These symptoms are resolved and he feels no more performance concerns are active. He recognises he may be more aggressive than usual in his attitude in the work place but not inappropriately so. If performance or conduct issues are thought to be present at the moment my advice is they are best dealt with via performance management procedures.' So, that was the advice to managers as of 4 August 2009.

85. The report of 16 September 2009 to the Claimant's GP, which was not shown to the employer, dated 16 September 2009, questions whether or not the Claimant suffered from bipolar affective disorder.

86. There was then a further referral of 24 September, Page 1191, where the Claimant was recorded as having informed the Respondents that he had been diagnosed as having bipolar disorder. The report back, dated 21 October, Page 1197, reads: 'Mention is made by Mr Cox that he has been diagnosed with bipolar disorder. It is not clear to me that this in fact is an active diagnosis but I am writing with his consent to both his GP and specialist asking for a report. You ask whether it is the case as Mr Cox contends that his bipolar disorder can be attributed to the work place incident as he has asserted.' The report then goes on to discuss whether there was a causal link with the accident on 3 September 2008. Indeed, in the referral on 24 September, the Respondents wrote: 'The Claimant has stated that his psychiatrist Dr Bhiman has attributed the onset of his condition to depression that he suffered as a result of the accident.'

87. Again, as indeed there is throughout the exchanges between the Claimant and the employer, and exchanges between the Claimant and Occupational Health and his advisors, there is the question constantly raised by the Claimant attempting to establish some causal link between the Claimant's depression and/or self-diagnosed bipolar with his work place accident.

88. The Occupational Health advisors had written to the Claimant's GP and to the specialist but where there were no responses because the Claimant confirmed that he had forbidden the consultant and his GP to respond to the request for disclosure of his medical condition, apparently on the advice of his personal injury lawyer.

89. What the Tribunal has to do is look at the Respondents' positions at the time and not with hindsight.

90. So the question for the Tribunal is: Did the Respondents know that the Claimant was disabled or should they have known that the Claimant was disabled at any time? Well, what information did they have? They had the Claimant's own assertion initially that his conduct was because of his depression and then subsequently a suggestion that perhaps he suffered from bipolar as some of the conduct he was displaying was typical of symptoms of some who suffered from bipolar. That was the Claimant's own self-diagnosis. The only medical evidence was the reports from Dr Vinnakota dated 21 October 2009 and 24 November 2009, if they were actually seen by the Respondents, who, for diagnosis, puts '?bipolar affective disorder'.

91. So in September 2009 the Respondents asked all the right questions. They enquired was the Claimant likely to be covered by the Disability Discrimination Act and they asked Occupational Health to ascertain and obtain a definitive medical opinion from a psychiatrist and, as we know, that opinion was not forthcoming prior to the dismissal because the Claimant had, on advice, instructed no reports to be released. Even the report which was sent with a letter of 8 February 2010 by Dr Bhiman to the Respondents' Occupational Health physician, so would have been obtained after the decision to dismiss to had been made [sic], records that: 'earlier this year in view of his mood upswing and excessive spending a diagnosis of bipolar affective disorder is also under consideration.' Even then there is no definitive diagnosis of the Claimant being bipolar.

92. Therefore, having concluded that the Respondents did not know and could not reasonably have expected to have known that the Claimant was disabled within the meaning of the Disability Discrimination Act 1995, there was no obligation to make reasonable adjustments to accommodate the Claimant. Therefore his claim of disability discrimination – failure to make reasonable adjustments cannot succeed and is therefore dismissed."

The grounds of appeal

35. Mr Hobbs' primary submission is that the Respondent was fixed with actual knowledge of the Claimant's disability, namely a form of bipolar disorder, at the date of dismissal and the Tribunal made an error of law and/or a perverse decision in failing to so find. Mr Hobbs' alternative submission is that the Tribunal should have found that the Respondent had constructive knowledge of the disability and it was in error of law and/or a perverse decision not to so find.

The law

36. Section 1(1) of the **Disability Discrimination Act 1995** as amended provides as follows:

> **"Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act [Part III of the 2005 Order] if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."**

37. This claim was a claim for disability discrimination by reason of a failure to make reasonable adjustments. That is provided for by section 3A(2) of the 1995 Act. The Claimant also relies upon section 4(2)(d) and says that it is an act of direct discrimination to dismiss him.

38. The duty to make reasonable adjustments is set out in section 4A(1) of the 1995 Act. The central issue in this case revolves around section 4A(3)(b), which provides as follows:

> **"(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know—**
>
> **[…] (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1)."**

39. Schedule 1 of the 1995 Act sets out provisions supplementing the definition of disability. We have been specifically referred to Schedule 1 paragraphs 2 and 4.

40. Mr Hobbs submits that the Employment Tribunal may well have been influenced by the legislation that existed prior to 5 December 2005, when paragraph 1(1) of Schedule 1 of the 1995 Act was repealed. That provision had required a Claimant to prove that he was suffering from a "clinically well-recognised illness" in order for there to be a mental impairment capable of amounting to a disability. Mr Hobbs refers us to **Morgan v Staffordshire University** [2002] IRLR 190, which held that "Vague references to stress, anxiety and depression are unlikely to be sufficient" in establishing an impairment. We reject that submission. There is no reference to either the repealed paragraph 1(1) of Schedule 1 or to **Morgan** in the Employment Tribunal's reserved judgment and reasons. This case was heard in October and November 2012, and judgment was sent to the parties on 27 December 2012. That is seven years after the amendment referred to by Mr Hobbs.

41. Mr Hobbs relies on **J v DLA Piper UK LLP** [2010] IRLR 396 as explaining the effect of the change made by the repeal of paragraph 1(1) of Schedule 1 of the 1995 Act. We obviously accept as correct the judgment of Underhill P, as he then was, especially at paragraphs 40-45. However, that case is concerned with the meaning of disability and in particular the correct basis on which an Employment Tribunal should approach the issue of whether or not there has been mental impairment. That was not directly in issue in this case, because by the date of the Employment Tribunal hearing the Respondent accepted that, at the relevant time, the Claimant was disabled by reason of a mental impairment, namely that he suffered from bipolar disorder. That concession was made in the course of proceedings following a reference to a report dated 5 February 2012 following an assessment of the Claimant on 3 January 2012.

42. Mr Hobbs' fundamental submission is that on an analysis of the evidence set out in the Notice of Appeal and more particularly his skeleton argument there was more than adequate material known to the Respondent to fix it with actual knowledge of the Claimant's disability from mental impairment caused by bipolar disorder. He summarises his analysis of the evidence in paragraph 29 of his skeleton argument by concluding that the Employment Tribunal had plenty of evidence that the Respondent was aware of the Claimant's changed and erratic behaviour. He says it was also obvious that his normal day-to-day activities were being adversely affected and the Respondent was also aware of long-standing underlying depression and the Claimant's use of anti-depressant medication, and it was therefore fixed with actual and/or constructive knowledge.

43. By contrast, Mr Hodge refers us to **Eastern & Coastal Kent Primary Care Trust v Grey** [2009] IRLR 429; **Secretary of State for Work & Pensions v Alam** [2010] IRLR 283 and **Wilcox v Birmingham Citizens Advice Bureau Services Ltd** UKEAT/0293/10 (unreported). The latter judgment was handed down on 23 June 2011 and is a decision of a panel of the Employment Appeal Tribunal presided over by Underhill P, as he then was. Mr Hodge relies on a passage at paragraph 34 where Underhill P says this:

> **"However, the essence of the Tribunal's reasoning, as it appears at para 7.9, is that it would be wrong to find actual or constructive knowledge on the part of the Respondent before such time as it should reasonably have obtained authoritative medical advice. In the end we have concluded that that was a legitimate approach in the circumstances of this particular case. It is important not to lose sight of the fact that, while (as we have said above) the statute does not require that the employer should know (actually or constructively) the precise diagnosis of a putative disability, it does require that he should know (actually or constructively) that the employee is suffering from a mental impairment whose adverse effects are both substantial and long-term. The Appellant's condition was on any view an unusual one; and, without in any way impugning her good faith, it was not easy to disentangle the effects of any mental health condition from the effects of unhappiness about her working conditions more generally. We can see why the Tribunal thought it reasonable for the Respondent not to be treated as 'knowing' the requisite matters until it had obtained a medical opinion. Unfortunately, but through no fault of the Respondent, the obtaining of an occupational health opinion took some time; and when first the opinion of City Doc and then that of Sandwell were obtained they did not confirm the existence of a disability within the meaning of the Act. The question thus becomes simply whether a definitive psychiatric opinion should have been sought sooner. The**

Tribunal thought that the admission to do so was reasonable in the light of the Appellant's own reluctance to acknowledge a psychiatric problem. Even if we might have taken a different view on this last point, or indeed had thought that the Respondent might reasonably have appreciated the Appellant's condition earlier, we must recognise that the question of what the Respondent knew or should reasonably have expected to know is one for the factual assessment of the Tribunal. It carried out that assessment conscientiously, and we cannot say that its conclusion was perverse."

44. In our judgment, the Employment Tribunal properly directed itself to the statutory test contained in section 4A(3) of the 1995 Act: reasons, paragraphs 80-81. Second, the Employment Tribunal's reasoning and conclusions were legitimate reasoning and conclusions for it to take; reasons, paragraphs 89-92.

45. As the Employment Tribunal pointed out, what the employers had was the Claimant's own assertion that he was displaying conduct typical of the symptoms of some persons who suffered from bipolar disorder and his own self-analysis. The only medical evidence was the reports from Dr Vinnakota dated 21 September 2009 and 24 November 2009 who for diagnosis puts "?Bipolar Affective Disorder". The Tribunal were justified, as the judges of fact, to find that the Respondent had asked all the right questions: reasons, paragraph 91. Even if one takes account of the letter of 8 February 2010 from Dr Bhiman to Occupational Health (and assuming it was received on 9 or 10 February 2010), that only records that:

"Earlier this year in view of his mood upswing and excessive spending a diagnosis of bipolar affective disorder is also under consideration."

46. Although Mr Hobbs criticises the Tribunal for saying that there was "no definitive diagnosis of the Claimant being bipolar", that is a correct statement of the factual position. Essentially, Mr Hobbs' analysis of the evidence comes down to a question of weight. The evaluation of the weight of the evidence is quintessentially a matter for the Employment Tribunal, as Underhill P recognised in the **Wilcox** case.

47. In reality, Mr Hobbs' submission in this case is that the Employment Tribunal acted perversely. The test for perversity is a well-known one: **Yeboah v Crofton** [2002] IRLR 634 at paragraphs 92-95 per Mummery LJ. This was a careful and fully reasoned decision by the Employment Tribunal based upon careful findings of fact. In our judgment, it was not perverse, and there was no error of law in the Employment Tribunal finding that the Respondent had neither actual nor constructive knowledge of the Claimant's disability and therefore there was no need for the Respondent to consider reasonable adjustments: **Wilcox** at paragraph 37 per Underhill P.

Conclusion

48. For these reasons, the appeal is dismissed.