Appeal No. UKEAT/0154/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 February 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS M ALI — APPELLANT

NEW COLLEGE MANCHESTER LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MOHAMMAD M ALI (Lay Representative)
For the Respondent	MR JACK MITCHELL (of Counsel) Instructed by: Messrs Nash & Co Solicitors LLP Beaumont House Beaumont Park Plymouth PL4 9BD

SUMMARY

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Reasonable adjustments

DISABILITY DISCRIMINATION - Direct disability discrimination

HARASSMENT

Disability discrimination - knowledge (actual/imputed) of the Claimant's disability; identification of the correct PCP for the purposes of a claim under section 21 ***Equality Act 2010*** *(reasonable adjustments); the correct test for harassment "related to" disability; the approach to the "reason why" question for the purposes of a claim of direct discrimination*

The Claimant made various complaints of disability discrimination (direct and failure to make reasonable adjustments) and harassment, arising during her employment and in respect of her dismissal, which were rejected by the Employment Tribunal. The Claimant appealed, arguing that: (1) the ET had erred in its approach to the Respondent's (imputed) knowledge of her disability and had inadequately explained its findings in this regard; (2) that the ET had adopted too narrow an interpretation of the PCP relevant to her reasonable adjustments complaint; (3) it had further erred in its approach to the Claimant's harassment claim, taking too narrow a view of the words *related to* and failing to focus to any significant extent on the perception of the Claimant; (4) further, as regards the claim of direct discrimination, the ET had erred by confusing motives and objectives with the "reason why" question.

Held: *dismissing the appeal*

In approaching the question of the Respondent's knowledge - actual or imputed - of the Claimant's disability, the ET did not lose sight of the twofold nature of the test (**McCubbin v Perth & Kinross Council** UKEATS/0025/13 applied); specifically it made findings not just as to what the Respondent was aware that it knew but also as to whether it might reasonably have been expected to know more (not just having regard to the label to be attached to the Claimant's

condition but also to the facts on the ground, the impact on the Claimant and how that might have caused the Respondent to be aware of any disability).

As for the identification of the PCP relevant to the reasonable adjustments claim, this was derived from the Claimant's Further Particulars. Allowing that it should not take too narrow or technical an approach to the definition of a PCP, the ET had not erred in its approach to the Claimant's case; rather, she was seeking to reframe her case to avoid the ET's adverse finding.

Equally the ET had not erred in its approach to the harassment claim. It referred to the knowledge of the alleged harasser as relevant to the question of purpose, but had also considered the question of effect. In so doing, the ET kept in mind both the Claimant's perspective - to which it had detailed regard when making its primary findings of fact - and the overall environment created by the various interactions of which complaint was being made. It was entitled to test the effect of the conduct complained of by what was reasonable in the circumstances (relevantly having regard to the context and overall environment); doing so the ET was in almost all cases clear that it would simply have been unreasonable for the matters in question to have the effect complained of. As for those cases where the ET found relevant effect, it further asked itself whether the conduct in question was *related to* the Claimant's protected characteristic; disability. It was not confusing this with a test of causation nor did it fall into the trap of applying too narrow a test. The ET's conclusion that the conduct was not related to disability was derived from its very clear findings as to the context; specifically, the Claimant was, as the ET found, behaving unreasonably, shouting and being rude and threatening to resign; it was that to which the conduct in question related, not her disability.

As for the approach to the direct discrimination claim, whilst there was a reference to legitimate objectives, the entirety of the reasoning made clear that the ET kept firmly in mind the correct test it had to apply; the objectives to which it referred to were part of the relevant background. This was not a case where the treatment in question was inherently discriminatory and the ET

made clear findings as to the causative reason for the Claimant's treatment, which was entirely unrelated to her disability.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. I am today concerned with the Claimant's appeal against a Judgment of the Manchester Employment Tribunal (Employment Judge Ryan sitting with members, Mrs Garcia and Dr Salim, over some two weeks during December 2015 with a further two days in chambers in January 2016; "the ET"), sent out on 19 January 2016. Representation before the ET was as it has been before me.

2. By its Judgment, the ET dismissed the Claimant's complaints of automatic unfair dismissal by reason of a protected disclosure and of disability discrimination and harassment. The Claimant appeals on the following grounds (as identified and clarified by HHJ David Richardson after an Appellant-only Preliminary Hearing):

> (1) The ET erred in its approach to the Respondent's actual or constructive knowledge of the Claimant's disability and/or inadequately explained its findings in this regard. This was relevant to the ET's approach to the claims of direct discrimination, reasonable adjustments and harassment.
>
> (2) In respect of the ET's approach to the provision, criterion or practice ("PCP") in relation to the Claimant's reasonable adjustments complaint, the ET erred by adopting too narrow an interpretation of the PCP; both parties had made submissions on a broader basis, which the ET failed to address.
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> (3) As for the ET's consideration of the legal elements of harassment, it had erred by taking too narrow a view of the words "related to" and had failed to focus to any significant extent on the perception of the Claimant.

(4) More generally - in particular as regards the claim of direct discrimination - the ET erred by confusing motives and objectives with the "reason why" question.

The Relevant Background and the ET's Decision and Reasoning

3. The Respondent is a college providing courses in English language for students for whom English is not their first language. It was founded in 2010 by a Mr Basha.

4. The Claimant commenced her employment with the Respondent on 28 May 2012, starting as a Finance Assistant but being promoted to Finance Manager in December 2012. The Claimant considered she had a close relationship with Mr Basha, and she was seen as a good and skilled worker, popular with her colleagues.

5. The Respondent's business had grown during the period 2010-2013, and a backlog of work had developed during 2012 and 2013. A new Administrative Manager, Mr Gurdaat Singh, was appointed in early June 2013, and a little later an external consultant, Mr Shameem Ali, was also brought in. This, coupled with the amount of work that had to be undertaken, put pressure on the Claimant and her team, and the situation seems also to have been exacerbated by the departure of the Sales and Marketing Manager, known as "TV", in February 2013. TV had also had a close working relationship with Mr Basha, which had given rise to some resentment on the Claimant's part and she was unhappy when TV returned to the workplace on her return to the UK during June and July 2013. That incident (TV's return) formed the more immediate background to what the Claimant relied on as a protected disclosure before the ET when, on or about 11 or 12 July 2013, she said TV had returned to work illegally. As the ET recorded, either the Claimant was being mischievous in making that statement, or she was simply mistaken. In any event, the way in which she made her allegations upset Mr Basha,

leading him to shout that she should not tell him what to do and he would throw her out, albeit that he and the Claimant then managed to patch things up and, although she had originally offered to resign, she then continued in her employment with an improved salary.

6. At around this time the Claimant was experiencing symptoms of stress and an ET had previously found (at a Preliminary Hearing in May 2015) that, from July 2013, she met the definition of a disabled person for the purposes of section 6 of the **Equality Act 2010** ("EqA") by virtue of the fact that she was suffering fibromyalgia aggravated by stress. In September 2013 her condition was further aggravated by her perception of pain and again, in 2014, by clinical depression. Although that much had been the subject of the earlier determination, when considering what the Respondent was aware of at the relevant time the ET concluded:

> **"2.13. On 4 July 2013 the claimant attended her local hospital owing to stress symptoms and she informed Mr Basha of this at that time. June, July and August of each year was the most stressful time for all of the respondent's staff because of the recruitment and registration of students in readiness for the following academic year. Mr Basha was aware that people were working in a stressful situation and that it was a case of "all hands on deck". The claimant did not inform Mr Basha that she had fibromyalgia. The claimant, amongst others, was evidencing some symptoms of stress in her mood and manner but she continued to attend work and to work as she had been prior to July 2013, giving away nothing to her colleagues, including Mr Basha, to suggest that she was disabled, that is, that she suffered a substantial adverse effect on her day-to-day activities as a result of fibromyalgia aggravated by stress. The respondent was not aware that the claimant was disabled. He [sic] was given no reason to consider that she might have been until the claimant specifically referred to disability in later written grievances."**

7. Returning to the narrative, on 16 July 2013 the Claimant attended an informal meeting with Mr Basha and Mr Ali. The ET described her conduct at this meeting as follows:

> **"2.16. … [It was] challenging of Mr Basha and she ignored SA [Mr Ali]. She shouted at Mr Basha, who instructed her that she should concentrate on her accounts function as opposed to continuing to be involved with administration and other matters that were not related directly to finance. She was encouraged to undergo Sage training. Her conduct was insubordinate. She was hostile to SA's presence. She challenged and undermined Mr Basha in the presence of SA."**

8. Although conscious at this time that the Claimant was suffering stress, the ET observed that there was no evidence that her aggressive, obstructive and challenging behaviour at this

meeting was a symptom of, or caused or contributed to by, her illness and disability; rather, she had felt slighted by Mr Basha bringing in Mr Ali.

9. A further meeting took place between the Claimant, Mr Basha and Mr Ali on 22 July, at which the Claimant was again instructed to concentrate on the finance function. She was again defensive, ignoring Mr Ali and shouting at Mr Basha. Although Mr Ali had advised that no additional staff were required, Mr Basha recruited a Mr Goddard to assist the Claimant, with Mr Goddard starting in early September.

10. Going into September 2013, Mr Basha had requested management accounts from the Claimant, but she had been unable to provide them and again had been rude and challenging to Mr Basha and Mr Ali over this. Although she subsequently produced data, Mr Basha found a number of fundamental errors with it and he was dissatisfied and frustrated by her response. During a heated exchange with the Claimant - during which she again said she would leave her employment - he said words to the effect that if she wanted to go she could.

11. Determining that the Claimant should focus on the financial side and less on other aspects of the Respondent's work such as administration, Mr Basha arranged to speak to the Claimant in the presence of an HR Consultant used by the Respondent, Ms Bottomley. Her reaction was, however, similar to the previous meeting with Mr Ali; as the ET found:

> **"2.23. … Following Mr Basha's request and explanation to the claimant she started to raise her voice and challenge him. We accept Ms Bottomley's description of the atmosphere as being "toxic". The claimant continued in the same vein as on previous occasions in that she would not accept explanations or instructions from Ms Basha, but she openly and volubly challenged him and argued with him in the presence of a third party. Ms Bottomley was very surprised and was unused to hearing a manager speak like this to a managing director."**

12. Although Ms Bottomley advised that Mr Basha could dismiss the Claimant if he wished (she had less than two years' service), he did not want to take that course and sought to make

other proposals to placate her, as set out in a letter of 18 October 2013, but which the Claimant rejected. One of his proposals was to use the Respondent's external accountant and auditor, Mr Benbow, as a further consultant in an attempt to defuse the Claimant's apparently difficult relationship with Mr Ali. That, however, caused the Claimant to express her disappointment that a third party had become involved, a view she continued to hold notwithstanding Mr Basha's attempt to reassure her of his intentions by email of 25 October 2013.

13. On 31 October Mr Benbow made a number of recommendations for the Finance Department, which he considered had not been functioning properly, had a lack of management and a certain lack of knowledge of software. His recommendations were designed to address those issues, and Mr Basha was receptive to them, forwarding them on to the Claimant. The Claimant, however, refused to read Mr Benbow's recommendations, questioning why outside consultants had been brought in. She further questioned his proposals regarding the Sage software, which in turn made Mr Benbow feel insulted and caused Mr Basha embarrassment, not least as the Claimant's attitude and approach was now impacting upon the Respondent's relationship with its long-term external accountant and auditor.

14. From 20 to 29 November 2013 the Claimant was absent on sick leave. Mr Basha messaged her to express his concern for her health and proposed that she focus on the front end of finance, suggesting that he should allow Mr Benbow and Mr Ali to work and to support putting right the Finance Department for six months, so that once everything was sorted he could discuss with the Claimant what she wanted. Referring back to various occasions when the Claimant had said that she would resign, Mr Basha expressed the view that he did not think their previous arguments were good for work or personal life and concluded by saying:

> **"I hope you understand and cooperate. If you still think we cannot work in this capacity then we both have a choice. Have a good day and have some rest."**

A The Claimant was, however, upset by that message, having unreasonably misread it.

15. In any event, thereafter the Claimant and Mr Basha exchanged a number of entirely courteous messages and the Claimant returned to work on 29 November, pursuant to a fit note signed by her GP, which stated that she might be fit for work but equally observed:

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> **"Stress from colleagues causing impact on anxiety and detrimental to work. May be well to work after some time off."**

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16. Having been advised by Ms Bottomley to see how the Claimant was during the day, on her return, Mr Basha sought a further meeting with her and Mr Ali, to seek to reassure the Claimant of the latter's involvement. That, however, again resulted in the Claimant's becoming angry and confrontational towards Mr Basha, and Ms Bottomley advised he should provide her with a letter inviting her to a disciplinary hearing about her conduct. The Claimant refused to meet with Mr Basha until 4.00pm that day and then refused to accept the letter. On being advised by Mr Basha that - given the confused medical certificate - she should go home, the Claimant also refused to do that, instead shouting at him in front of other colleagues and students before returning to her desk. Deciding she should go home both for her health and given her unacceptable conduct, Mr Basha again tried to deliver the letter to the Claimant but was unsuccessful. Eventually the Claimant went to see him at 6.45pm, apparently having understood that she had been suspended at 4.00pm and thus having disobeyed what she had understood to be a clear instruction.

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17. A first attempt to hold a disciplinary hearing on 4 December had to be rescheduled, and a revised letter was sent to the Claimant, which included an additional allegation relating to her conduct on 29 November. In the event, the hearing had to be put off again, as the Claimant was not well enough to attend. Meanwhile, on 9 December the Claimant presented a grievance,

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which the Respondent determined should be addressed as part of the disciplinary process given that matters were so interlinked. As the Claimant was still unwell, advice was sought from Occupational Health, and a consultant reported on 10 February 2014 advising that the Claimant was not disabled but the resolution of work issues would be in her interest as her problems were seen to be work-related. She was deemed to be fit to attend work-related meetings. A report was forwarded to the Claimant, along with a further disciplinary hearing letter on 17 February 2014. Although there was no specific reference to the Claimant's grievance, the letter made clear all issues would be discussed, and the ET found that Mr Basha was open to exploring the Claimant's grievance in the context of the disciplinary hearing; it rejected the Claimant's contention that the letter of 17 February could be considered an act of harassment.

18. In the event, on 24 February 2014 the Claimant submitted a further, ten-page, grievance which specifically complained of disability discrimination. Considering that it should now address the two grievances prior to the disciplinary hearing, the Respondent invited the Claimant to a grievance meeting on 28 February, but the Claimant then said she was not fit to attend meetings without what she said would be reasonable adjustments. Whilst the contentions in this regard were supported by her GP, the ET was concerned to note the Claimant had been misleading or disingenuous in suggesting to the Respondent that her doctor was concerned she might self-harm - that had not been her doctor's view - and also that she had required her GP to add that she could not attend work-related meetings under threat of making formal complaint.

19. Seeking to break through the apparent impasse and mindful of the Respondent's own Occupational Health advice, Mr Basha again wrote to the Claimant with various options as to how to move forward; all options being rejected by the Claimant by letter of 7 March 2014. Receiving further advice from its Occupational Health adviser, who observed that the question

of disability would ultimately be a legal question if there was any litigation, the Respondent determined to bring matters to a head by seeking to go forward with a disciplinary and grievance hearing. As the ET found, that was not because of the Claimant's disability or because of any views about difficulties this might cause at work, but simply because the Respondent wanted to engage with the Claimant and believed it could best do so by addressing her perceived problems alongside its perception of her behaviour and performance.

20. A grievance investigation was therefore undertaken, which rejected the Claimant's complaints, not least as Mr Basha had denied knowing of the Claimant's disability at least until the time she had raised it in her correspondence. Again, the ET found that the conclusion was reached given the evidence available, not because of the Claimant's disability. The Claimant appealed that finding, and attempts were made to put forward various proposals for hearing the appeal. On 3 April 2014, however, the Claimant's doctor wrote to the Respondent saying they would be grateful if the Respondent did not contact the Claimant. The Claimant provided a written submission in support of her grievance appeal, and that was considered at a hearing on 15 April, with her grievance appeal then being rejected.

21. Given that outcome, the Respondent then sought to move forward with the disciplinary hearing, adding to the earlier allegations the more general charge that there had been a fundamental breakdown in trust and confidence. Again, various options were offered for this hearing, the Claimant, for her part, submitting a statement of 1 May 2014 in which she made the following allegations:

> **"2.58. … inconsistent and contradictory evidence was produced during the grievance proceedings and in respect of the disciplinary matters, serious concerns of fabrication of evidence with collusion from HR Dept, a "smokescreen to cover up disability discrimination", and numerous matters regarding all of the history, challenging the allegation that she was difficult, obstructive and resistant to change, answering the allegation that she insisted on being accompanied at operational meetings, making submissions regarding criticism of her performance, and allegations of insubordination. In conclusion the claimant referred to the ACAS early conciliation process in the light of potential litigation."**

22. The Claimant's allegations were again investigated but rejected, with the disciplinary manager, Mrs Hulme, concluding that her conduct was such that:

> **"2.59. … "any reasonable employer would regard [them] as completely unacceptable and serious disregard of management instruction". …"**

23. Mrs Hulme concluded the relationship of trust of confidence had irretrievably broken down and recommended the Claimant be dismissed. The ET rejected the suggestion that the conduct of this hearing was influenced by the Claimant's disability; on the contrary, it was:

> **"2.59. … conscientious, diligent and that she arrived at a genuine outcome and one in which she believed following her professional analysis of the evidence and issues. …"**

The Claimant appealed but was unsuccessful.

24. Having thus made its primary findings of fact, the ET turned to the specific claims being made by the Claimant. It rejected the claim of automatic unfair dismissal, finding the reason for the Claimant's dismissal to have been as follows:

> **"4.1. … The claimant was dismissed in the circumstances and for the reasons described and set out in a letter dated 2 May 2014 and sent to her, addressed to her by Janet Hulme of HR Dept on behalf of the respondent, confirming Mr Basha's decision … in short, for reasons relating to conduct, performance and a fundamental breach of trust and confidence causing an irretrievable breakdown in working relationships as described in that letter. …"**

25. As for the claim of direct disability discrimination under section 13 **EqA**, the ET concluded the Claimant had not shifted the primary burden of proof, but, even if she had, the Respondent had proved that there was a non-discriminatory reason for each of its actions:

> **"4.2. … the causative reason for her treatment was a genuine attempt to resolve a crisis in the department managed by the claimant, to assist the claimant in contributing to the resolution of that problem, and to better support the claimant in her role as Finance Manager in an effective department for the greater good of the respondent company."**

26. The ET found, moreover, that these were legitimate objectives for the Respondent and were legitimately addressed by engaging Mr Ali and then Mr Benbow; the Claimant had not

been denied training, and the Respondent had only failed to give her a revised job description because of the problem in getting her to engage with the consultant's recommendations; moreover, the Claimant had not been demoted, and she was not suspended on 29 November due to her disability but because of her unacceptable personal conduct towards Mr Basha; furthermore, Mr Basha had not threatened the Claimant: she had offered her resignation on a number of occasions, such that it was not less favourable treatment for him to remind her that option remained open to her. Given Occupational Heath advice, arranging the disciplinary hearing for 17 February was not unfavourable treatment and the Respondent did not ignore medical advice relating to workplace meetings. As already related, the ET did not find the conduct or outcome of the grievance and disciplinary processes to be because of the Claimant's disability and it was satisfied the reason for the termination of her employment was because the Respondent reasonably concluded that she was guilty of gross misconduct and had breached the relationship of trust and confidence. Subsequently, the Respondent provided responses to the Claimant's grievance and to her **EqA** questionnaire that were neither evasive nor inadequate.

27. As for the reasonable adjustments claim, relevantly, the ET was satisfied that there was no PCP that the Claimant returned to work to perform all of the functions of her job (see paragraph 4.22). As the Claimant herself accepted - and, indeed, was part of her complaint - elements of her job were removed, and she was allowed to recruit additional staff (Mr Goddard) to take on functions previously carried out by her.

28. The ET also rejected the Claimant's claims of harassment. First, although Mr Basha had made a comment on or about 11 July 2013 that could reasonably have had the relevant effect, it was not related to the Claimant's disability:

> **"4.23. … at this time Mr Basha did not know that the claimant was disabled, but did know that she had suffered some stress symptoms. Despite that, however, the purpose of Mr Basha's shouted comment was to quieten the claimant so that he could explain himself to her**

and to give her the opportunity to listen and understand in circumstances where she refused to do either. The comment "I will throw you out" was a reference to dismissal in the event of the claimant continuing with her aggressive confrontational challenge of Mr Basha's authority and her wilful refusal to listen to his reasonable explanations. The unwanted words and conduct related solely to the claimant's obstructive and challenging conduct and not to the protected characteristic of disability. The claimant's conduct was due to her exaggerated sense of her importance to Mr Basha and her resentment at his questioning her and relying on others. The claimant has failed to prove facts from which the Tribunal could conclude that her conduct was related to her disability."

29. Otherwise, the ET found that other allegations made by the Claimant as to Mr Basha's conduct towards her in July 2013 were simply not established; he had not acted as she had alleged - at most, he had engaged in constructive comment and criticism of the Finance Department - and had done nothing that had the relevant purpose or could reasonably have had the relevant effect and nothing that was related to the Claimant's disability. The ET made similar findings in respect of alleged comments and conduct during August 2013.

30. Going into September 2013, the ET accepted Mr Basha had at times left the choice as to whether to resign or continue in employment to the Claimant but found that was in the context of her repeated offers of resignation and threats that she would resign. In those circumstances, Mr Basha's comments could not reasonably have had the required effect. Similarly, the ET was satisfied Mr Basha's question in October 2013, whether the Claimant wanted to "carry on", could not - seen in context - reasonably have had the relevant effect and furthermore was not related to her disability but to her conduct. The ET made similar findings in respect of the exchanges between Mr Basha and the Claimant in November 2013, the ET rejecting the Claimant's allegation that Mr Basha had said he did not care whether she was stressed, finding (on the contrary) that he was genuinely concerned for her; whilst he did not know she was disabled, he was aware she was suffering stress and his comments expressed his genuinely held concern about her health. To the extent that they related to her disability - though Mr Basha may not have appreciated that was the case - they could not reasonably have been taken to have had the requisite effect.

31. The ET, further, rejected the Claimant's complaints about her suspension, finding she had not made out the specific allegations. Further - going into December 2013 and the disciplinary process - the ET rejected various allegations made by the Claimant and found that the disciplinary proceedings were unrelated to her disability but were instead related to her conduct and performance: the purpose of the proceedings was to engage the Claimant in the disciplinary process; if she felt any harassing effect, it was unreasonable for her to do so. Thereafter the ET again rejected specific allegations of a failure by the Respondent to have regard to her GP's advice or her letters or to make reasonable adjustments. More generally and as set out above, the ET was satisfied that the Respondent's actions related to its reasonable wish to pursue its procedures and not to the Claimant's disability and that those actions, whether in respect of the grievance or the disciplinary process, had neither the requisite purpose nor, allowing for the Claimant's perspective but applying a test of reasonableness, effect.

The Relevant Legal Principles

32. The Claimant was, relevantly, pursuing complaints of direct disability discrimination, of disability discrimination by failure to make reasonable adjustments, and of harassment.

33. So far as the direct discrimination complaint is concerned, section 13 **EqA** provides:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

34. The obligation to make reasonable adjustments is provided by section 20 **EqA**, relevantly, as follows:

> **"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
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> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison**

with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

35. Section 21 then provides:

"(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person."

36. By paragraph 20 of Part 3 of Schedule 8 of the **EqA** it is further, relevantly, provided:

"(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 -

…

(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage …"

37. As for harassment, section 26 **EqA** provides the following definition:

"(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are -

… disability; …"

38. A previous ET had already determined that, as a matter of fact, the Claimant was a disabled person for the purposes of the **EqA**. The question at the Full Merits Hearing relevant

to the determination of the substantive claims required, however, consideration of what the Respondent had known at the time; not solely of its actual knowledge of the specific label to be attached to the Claimant's condition but what it might reasonably have been expected to have been aware of at the time. As it was put by Rimer LJ, giving the lead judgment of the Court of Appeal in **Gallop v Newport City Council** [2013] EWCA Civ 1583:

> **"41. … the task for the ET was to ascertain whether, at the material times, Newport had actual or constructive knowledge of the s.1/Schedule 1 facts constituting Mr Gallop's disability. The ET did not engage in that inquiry. It considered that Newport was entitled to deny relevant knowledge by relying simply on its unquestioning adoption of OH's unreasoned opinions that Mr Gallop was not a disabled person. In that respect the ET was in error; and the EAT was wrong to agree with the ET.**
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> **42. This may perhaps seem a hard result, but I consider it follows from the terms of the legislation. The problem with certain types of disability, or claimed disability, is that it is only when eventually the ET rules on the question that it is known whether the claimant was in fact a disabled person. In the meantime, however, the responsible employer has to make his own judgment as to whether the employee is or is not disabled. In making that judgment, the employer will rightly want assistance and guidance from occupational health or other medical advisers.**
>
> **43. That assistance and guidance may be to the effect that the employee is a disabled person; and, unless the employer has good reason to disagree with the basis of such advice, he will ordinarily respect it in his dealings with the employee. In other cases, the guidance may be that the opinion of the adviser is that the employee is not a disabled person. In such cases, the employer must not forget that it is still he, the employer, who has to make the factual judgment as to whether the employee is or is not disabled: he cannot simply rubber stamp the adviser's opinion that he is not."**

39. In **McCubbin v Perth & Kinross Council** UKEATS/0025/13, Lady Stacey presiding, it was further emphasised that the ET cannot simply stop at the stage of considering whether the Respondent was aware of the Claimant's disability but needs to separately consider what the Respondent could reasonably have been expected to know; a failure to carry out that further exercise giving rise to an error of law. That said, in **Jennings v Barts & The London NHS Trust** UKEAT/0056/12, HHJ Hand QC presiding, it was held that whether or not an employer knows, or should have known, there was a disability is essentially a question of fact for the ET. Moreover, as the EAT observed when **Gallop** returned for further consideration on a second appeal (**Gallop v Newport City Council (No.2)** [2016] IRLR 395 EAT) - the ET having again rejected Mr Gallop's complaint of disability discrimination at the remitted hearing after his appeal had been upheld by the Court of Appeal - when required to look into the particular

reasons playing on the mind of a specific decision maker, imputed knowledge will have no application (see paragraph 59 of HHJ Hand QC's judgment in **Gallop (No. 2)**).

40. As for the reasonable adjustments claim, the appeal relates to the correct identification of the PCP. In **Carreras v United First Partners Research** UKEAT/0266/15, I sought to offer guidance on this issue (by reference to the case-law) as follows:

> **"31. The identification of the PCP was an important aspect of the ET's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see *Environment Agency v Rowan* [2008] IRLR 20 EAT, paragraph 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, paragraph 18 of [*Nottingham City Transport Ltd v*] *Harvey* [UKEAT/0032/12]); that is consistent with the Code, which states (paragraph 6.10) that the phrase "provision, criterion or practice" is to be widely construed.**
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> **32. It is important to be clear, however, as to how the PCP is to be described in any particular case (and I note the observations of Lewison LJ and Underhill LJ on this issue in *FirstGroup plc v*] *Paulley* [[2014] EWCA Civ 1573]). And there has to be a causative link between the PCP and the disadvantage; it is this that will inform the determination of what adjustments a Respondent was obliged to make."**

41. Whilst the burden of proof was not identified as giving rise to a specific ground of appeal by HHJ David Richardson, it is a matter that the Claimant has relied upon in support of her submissions, in particular in respect of her claim of direct discrimination; I bear in mind section 136(2) **EqA**, which provides:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."**

42. Furthermore, when addressing the claim of direct discrimination, the Claimant relies on the Supreme Court's judgment in **R (E) v Governing Body of JFS** [2009] UKSC 15, in support of her contention that the motive of the putative discriminator is irrelevant. That is so, but I bear in mind that which was acknowledged in **JFS**, namely, that direct discrimination may take different forms: there will be cases where the reason for the treatment complained of is inherent in the act itself (as was the case in **JFS**) and others where the act complained of is not

in itself discriminatory but is rendered so by the discriminatory mental processes, conscious or unconscious, that led the putative discriminator to do the act (albeit, even then, the subject of the enquiry is the reason for the putative discriminator's action, not their motive or intention; see **Amnesty International v Ahmed** [2009] ICR 1450 EAT).

43. As for the approach to a complaint of harassment under section 26 **EqA**, there is no requirement for a comparator, although the conduct must be *related to* a relevant protected characteristic. That stands in contrast to the use of "because of" elsewhere in the **Act**, which is deliberate: the introduction of "related to" expressly marked a change from the earlier language of "on grounds of" the prohibited ground (successfully challenged in **R (Equal Opportunities Commission) v Secretary of State for Trade and Industry** [2007] ICR 1234 QBD as importing a requirement of a causative link, whereas EU law simply required a connection or association with the prohibited ground). Whether an employer's conduct *relates to* the protected characteristic imports a broad test: the employer's knowledge or perception of the characteristic is not conclusive, nor is the employer's perception whether the conduct relates to a protected characteristic (see **Hartley v Foreign & Commonwealth Office Services** UKEAT/ 0033/15 at paragraphs 23 and 24). That said, context alone will not be sufficient: regard needs to be given to the conduct of those against whom the complaint has been made, asking whether their conduct is associated with the protected characteristic (see per the EAT, HHJ David Richardson, in **Unite the Union v Nailard** [2016] IRLR 906).

Submissions

The Claimant's Case

44. The Claimant first contends that the ET erred in law in focusing on irrelevant factors to determine the Respondent's knowledge of disability - such as the name and legal status of her

disability - instead of applying the correct legal test relating to the actual and constructive knowledge of the elements of disability: that is, knowledge of impairment, substantial effect on daily activities and whether long-term. Specifically, whilst referring to **Gallop** (see the ET at paragraph 3.2.4.6), the ET at no place referenced the correct test - actual or constructive knowledge - notwithstanding this had been raised in the Claimant's submissions and was supported by the earlier ET Judgment on disability and by the Respondent's own ET3. When addressing the question of knowledge, the ET did so from a purely subjective perspective (see paragraph 4.12) and failed to apply an objective test and to make separate findings of fact relevant to the question of actual or constructive knowledge.

45. Turning to the second basis of challenge, the Claimant contends the ET erred in taking a narrow rather than broad approach to the PCP she had relied on - that of requiring her to perform her essential or full duties - which triggered the duty of reasonable adjustments. The broader approach was consistent with the guidance provided by **Carreras** and was how the Claimant's case had been put below: her opening skeleton argument having identified that reasonable adjustments had been requested from January and July 2013, the PCP identified being the Respondent's insistence that she perform all or the essential functions of her job.

46. Third, the Claimant contends the ET misconstrued section 26 **EqA** by applying a narrow or causative test for the harassment claim, failing to apply the broad test required by the phrase "related to"; it wrongly focused on how the Respondent perceived the conduct rather than considering the Claimant's perspective and failed to consider the overall environment created.

47. Lastly, on the claim of direct discrimination, the ET had erred by departing from causation principles and focusing instead on the Respondent's subjective motive as the reason

A why the Claimant was treated as she was and failing to consider unconscious discrimination. It had, further, used the term "unfavourable" rather than "less favourable", which suggested the ET was confused as to the relevant legal test and failed to have regard to the question of comparison on which the direct discrimination claim was based; properly speaking, it should have appreciated that at least on certain aspects of the Claimant's complaint the discrimination was inherent in the matters complained of.

The Respondent's Case

48. The Respondent observes that the ET determined some 56 separate allegations over a lengthy Full Merits Hearing. The Claimant's complaint was originally based on a purported disability of depression. It was subsequently held that the disability was fibromyalgia, although this was first mentioned in correspondence after the claim had been lodged, and the ET found that the Claimant did not inform Mr Basha of this condition (see paragraph 2.13). More specifically, the actual finding of the ET at the Preliminary Hearing stage had only been that the Claimant suffered from fibromyalgia aggravated by stress; there was no finding that stress *per se* amounted to a disability. Further, the ET had expressly found the Claimant had continued to attend work, "*giving away nothing to her colleagues*", and that Mr Basha:

> **"2.13. … was given no reason to consider that she might have been [disabled] until the claimant specifically referred to disability in later written grievances."**

49. The question for the ET was: what was in the Respondent's mind at the relevant time? (**Gallop (No. 2)** at paragraph 59). In this case, it had been entitled to conclude that Mr Basha had no knowledge of the Claimant's disability, a finding of fact (**Jennings** at paragraph 49). In any event, to the extent the ET erred in this regard, the question of knowledge might have been relevant to 14 allegations of direct discrimination, each of which was individually considered by the ET and in each case it had found that the Claimant had failed to establish a *prima facie*

A case. It might also have been relevant to five allegations of reasonable adjustments, but the ET had found there was no PCP for three of these, that there was no PCP to put a disabled person at a substantial disadvantage for one and that the last was not proven. To the extent relevant to the harassment complaint, there were 37 separate allegations, each, again, being considered separately by the ET, which found that 8 incidents had occurred but did not amount to harassment, 2 allegations were considered in the alternative, and 29 were simply not made out.

C 50. Turning to the second ground, this related to the PCP addressed by the ET as follows:

> **"4.22. The practice of the respondent insisting that the claimant "returns to work to perform all functions of her job" …"**

D 51. The Respondent did not accept that this incorrectly set out the PCP relied on and addressed by the parties: the PCP had been taken from the Claimant's Further Particulars, some of which had not been pursued (see the reference in the ET's Judgment at paragraph 2.1(1)); the E ET did not deal with the PCP of requiring the Claimant to deal with all of her essential duties because it had not been raised as an issue before it.

F 52. The third ground related to the harassment complaint. There were at most only 8 matters out of 37 allegations made where the factual inquiry turned on the perception of the Claimant. It was, however, apparent that the ET was fully cognisant of the Claimant's perspective but was equally entitled to subject that to a test of reasonableness when assessing G the effect of the treatment complained of. Moreover, the conduct had to be related to the relevant protected characteristic; here the ET had found the matters of which the Claimant complained were not related to her disability but to her unacceptable conduct and performance.

H

53. Lastly, by the fourth ground the Claimant complained of a confusion of motives and objectives in the ET's determination of her complaint of direct discrimination. Accepting that the ET referred to the Respondent's objective at paragraph 4.3, that was the only reference; otherwise, the focus was firmly on the reason for the Respondent's conduct. This was not a case where discrimination was inherent in the treatment complained of, and the ET had been entitled to find the Claimant had not discharged the burden of proof upon her; in any event, it had focused on the Respondent's reason for the treatment in question and was satisfied it was for a non-discriminatory reason: it related to her conduct and performance, not her disability.

Discussion and Conclusions

54. The first question raised by the appeal asks whether the ET erred in its consideration of the state of the Respondent's knowledge. It was common ground that this was at least potentially relevant to particular aspects of the direct discrimination, reasonable adjustments, and harassment claims (in respect of the reasonable adjustments claim, the point is expressly raised by paragraph 20, Part 3 of Schedule 8 of the **EqA**, but Mr Mitchell has accepted it could also be relevant to a number of other complaints made under other headings). There is no dispute that the ET made findings as to the Respondent's actual knowledge, but the Claimant says there was sufficient arising from what the Respondent accepted it had known to provide the foundation for constructive knowledge. She contends that the ET failed to identify this because it failed to address this separate objective question and thereby erred in law; further, it focused on the label to be attached to her disability rather than the constituent elements.

55. I can see that the ET's reasoning on this point is expressed shortly and some criticism could be made of the failure to specifically set out the two stages identified in cases such as **McCubbin**, although I suspect that it is a criticism rather easier to make at appellate level when

so many of the issues have fallen away and the questions of law more precisely identified. In any event, having regard to the entirety of the reasoning, I am satisfied that this experienced ET did not lose sight of the twofold nature of the test it had to apply. Paragraph 2.13 sets out the relevant findings of fact, which go both to the ET's assessment of what the Respondent was aware that it knew and the question whether it might reasonably have been expected to know more (and, in saying that, I do not accept that the ET solely had regard to the label to be attached to the condition affecting the Claimant; rather, it had regard to the facts on the ground, the impact on the Claimant and how that might have caused the Respondent to be aware of any disability or - as the ET found - not). In any event, I do not read the ET's Judgment on any of the Claimant's complaints of discrimination as dependent upon a finding that the Respondent did not know of her disability. That was seen as part of the relevant background in some instances - for example, in determining Mr Basha's purpose when considering the harassment complaint, albeit that the ET went on to consider the effect of the action in question in any event - but the ET did not reject any of the complaints made because the Respondent lacked the requisite knowledge; it went on in each instance to consider the merits of each complaint made.

56. Considering then the separate points raised, because it most obviously follows on from the knowledge issue, I turn first to the reasonable adjustments claim and the Claimant's contention that the ET adopted too narrow an approach to the PCP of which she was complaining. Mr Mitchell has explained how the PCPs relied on had been identified: these were the PCPs at paragraphs 7.3 to 7.6 and 7.10 of the Claimant's Further Particulars of her case (see the ET's record at sub-paragraph (1) of paragraph 2.1 of its Reasons). The Claimant complains that the ET failed to recognise the PCP that she returned to work to perform all of the functions of her role was a complaint that she was being required to carry out the essential functions of her role. She says that this - the PCP that she return to work to perform all or all of

A the essential functions of her role - was comprehended by her complaint at paragraph 7.2 of her Further Particulars (i.e. that she had to return to work to "*perform all functions of her job*").

B 57. Recognising, as I did in **Carreras**, that an ET should be careful not to take too narrow or technical an approach to the definition of a PCP - allowing for a real world construction of the complaint being made by the employee rather than subjecting it to an approach such as would be appropriate in construing a statutory provision - I cannot see that the ET here erred. It

C is important to be clear as to the PCP complained of - that will impact upon the rest of the elements of a reasonable adjustment complaint. The ET was here entitled to take the PCP from the Claimant's Further Particulars, and its reading of the way in which this complaint had been

D put entirely accords with common sense. Although the specific paragraph rejecting that PCP is expressed shortly, I read it (as I am bound to do) against the background of the ET's earlier detailed findings of fact and in the context of its earlier conclusions. Doing so, it is apparent

E that the ET was clear that no PCP had been placed on the Claimant requiring her to perform the entirety of her role; indeed, far from it: the Respondent, on the ET's findings, had made reasonable adjustments by reducing her work and the requirements made of her, which was precisely part of her complaint in other respects. For completeness I note that the ET's finding

F in respect of knowledge - constructive or otherwise - would not impact upon this conclusion: the ET tested the PCP without relieving the Respondent from liability due to absence of requisite knowledge. Returning to the point raised by the appeal, however, this is not a case on

G all fours with **Carreras**. Rather, it seems to me that, having lost on the PCP she advanced below, the Claimant now seeks to reframe her case to avoid the ET's finding adverse to her. That is not a permissible basis of challenge, and I dismiss that ground of appeal.

H

58. I turn next to the challenge relating to the ET's rejection of the harassment case. Again, I bear in mind the strictures upon me to take the ET's findings as a whole, not to adopt an overly pernickety approach to its conclusions and not to take one paragraph or sentence out of context but to see all in the round, stepping back to appreciate the entirety of the picture painted by the full Judgment. Doing so, I allow that the ET had regard in places to Mr Basha's knowledge, but, as I have observed, that was relevant to its finding as to his purpose. The ET did not, however, stop there but went on to consider the question of effect and, in so doing, it kept in mind both the Claimant's perspective - to which it had detailed regard when making its primary findings of fact - and the overall environment created by the various interactions of which complaint was being made. The ET was, however, entitled to test the effect of the conduct complained of by what was reasonable in the circumstances. Doing so - and, again, for the reasons explained more fully in its detailed findings of fact - the ET was in almost all cases clear that it would simply have been unreasonable for the matters in question to have the effect complained of. In reaching that conclusion, the ET was entitled to have regard to the context in which these matters took place. Far from failing to have regard to the overall environment, I am satisfied it was that which assisted the ET in its conclusion as to what was reasonable. It reached permissible conclusions in this regard that are not susceptible to challenge on appeal.

59. As for those cases where the ET found relevant effect, I am satisfied that it further asked itself whether the conduct in question was *related to* the Claimant's protected characteristic; disability. Whilst the reasoning follows on from the ET's consideration of purpose, I do not read its conclusion on whether the conduct was related to disability as confusing this with a test of causation (see for example how it expresses it at paragraph 4.23). The ET did not fall into the trap of applying too narrow a test. Its conclusion that the conduct was not related to disability was derived from its very clear findings as to the context to which Mr Basha was

responding and of which he and the Claimant were plainly aware. The Claimant was, as the ET found, behaving unreasonably, shouting and being rude to Mr Basha and others and threatening to resign; it was that to which the conduct in question related, not her disability.

60. Finally, I turn to the complaint about the ET's approach to the direct discrimination claim. Whilst there was a reference to legitimate objectives within the ET's reasoning, again it would be wrong for me to pick on this as indicative of an erroneous approach when the entirety of the reasoning makes clear the ET kept firmly in mind the correct test it had to apply. The objectives it referred to were part of the relevant background. Although the Claimant argues that in certain instances the treatment to which she was objecting was inherently discriminatory (per **JFS**) I do not accept that was so. Specifically, her suspension was, on the ET's finding, because of her challenging conduct; it was not inherently due to her disability. More broadly, the ET was clear as to the causative reason for the Claimant's treatment, which was entirely unrelated to her disability (see for example how it puts it at paragraph 4.2). Although at places the ET used the language of "unfavourable" treatment rather than "less favourable", that could only have been in the Claimant's favour: it caused the ET to go straight to the question of explanation, as if the burden of proof had shifted, rather than getting hung up on questions of comparison. In any event, the ET certainly did not fail to appreciate the comparative exercise required of it. Again, taking the reasoning for the conclusions along with the ET's primary findings of fact, I am satisfied that no error of law arises, and this ground is also dismissed.

61. For all those reasons, I dismiss the appeal.