Appeal No. UKEAT/0074/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 September 2017

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MR T WIECLAWSKI — APPELLANT

LONDON UNDERGROUND LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHARLES DAVEY (of Counsel) Clerksroom Equity House Blackbrook Park Avenue Taunton TA1 2PX
For the Respondent	MISS REBECCA THOMAS (of Counsel) Instructed by: Eversheds LLP Kett House Station Road Cambridge CB1 2JY

SUMMARY

DISABILITY DISCRIMINATION

DISABILITY DISCRIMINATION - Reasonable adjustments

The Claimant was a train operative employed by the Respondent. He was summarily dismissed following three serious safety breaches occurring on the same day. He had been suffering from severe symptoms of grief following two bereavements. An internal appeal succeeded to the extent that the sanction imposed was reduced to summary dismissal suspended for 52 weeks. The Claimant appealed and contended that the Tribunal had erred (1) in finding that the Respondent did not have actual or constructive knowledge of the Claimant's disability and (2) in its treatment of the Claimant's alternative argument on failure to make reasonable adjustments that the internal appeal should have been adjourned for an Occupational Health opinion. It was accepted that both arguments would be required to succeed before the appeal could be allowed.

Held:

(1) The question of actual or constructive knowledge of disability was one of fact for the Tribunal. The evidence before the Tribunal on this issue did not all point in the same direction. The finding made was accordingly open to the Tribunal and it could not be said that no reasonable Tribunal could reach the same conclusion. In any event,

(2) The alternative case on reasonable adjustment of adjourning the internal appeal had not been given prominence before the Tribunal. Insofar as it had been raised it had been addressed. An adjournment would have served no purpose as the Claimant's medical condition was taken into account as mitigation leading to reduction of the penalty. The Tribunal was entitled to conclude that an adjustment of imposing no immediate sanction was not reasonable.

Appeal dismissed.

UKEAT/0074/17/LA

THE HONOURABLE LADY WISE

1. The Claimant has been employed as a train operative with the Respondent since May 1998. He was dismissed following incidents on 15 July 2014 in which he exceeded the speed limit twice and left his train in an incorrect berthing position at a station, which obstructed the footway and so prevented the train being prepared for the next day's service. He failed to report any of this.

2. An internal appeal against his summary dismissal succeeded in relation to the sanction imposed which was reduced to summary dismissal suspended for 52 weeks. A referral to Occupational Health was also made. The Claimant contended before the Tribunal that he had been subjected to direct disability discrimination, discrimination arising from disability and that the Respondent had failed to make reasonable adjustments.

3. Following a hearing held between 25 and 29 April 2016, the Employment Tribunal at London (Central) - chaired by Employment Judge A M Lewzey ("the ET") - dismissed all of the claims in a unanimous Decision. A written Judgment followed, dated 27 July 2016 and sent to the parties in August. The Claimant appeals against that Decision. For convenience I will refer to parties as "the Claimant" and "the Respondent" as they were in the Tribunal below. The Claimant was represented both at the Tribunal and on appeal by Mr Davey of counsel. The Respondent was represented at both hearings by Miss Thomas of counsel.

The Tribunal's Judgment

4. There was little dispute surrounding the circumstances of the incident on 15 July 2014, although there had been a number of relevant events prior to that date which the Tribunal records as follows:

> **"6. … In June 2013, Mr Wieclawski heard that a very close friend, Ray, in the United States, had been diagnosed with terminal pancreatic cancer. In October 2013, with the consent of Mr Odell, Mr Wieclawski's annual leave was adjusted in order that he could visit Ray. Mr Wieclawski was grateful for the support as reflected by his letter of 25 October (69).**
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> **7. In January 2014, Ray informed Mr Wieclawski that another close friend, Carlos had committed suicide. The news of his two friends deeply affected Mr Wieclawski and he told us that he could not get the matter off his mind and focus on his work. Mr Odell's evidence was that he saw no noticeable change in Mr Wieclawski prior to 15 July 2014.**
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> **8. On 20 January 2014 (69A-B), there was an incident at Great Portland Street, involving a group of schoolchildren playing on the platform, resulting in Mr Wieclawski applying the emergency brake in order to stop. This is not mentioned in his witness statement and we have no evidence from him on the matter. The evidence was concentrated on the Respondent's witnesses and following this incident, Mr Wieclawski took a day off.**
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> **9. On 13 January 2014 (76 and 76A), there was an incident at Finchley Road, just after the train doors had been opened when an emergency alarm was activated and a passenger told Mr Wieclawski that another passenger had fallen into the gap between the train and the platform. A safety trainer reset the passenger emergency alarms and Mr Wieclawski spoke to line control. There have been previous incidents in relation to the gap on Platform 1 at Finchley Road. Mr Wieclawski was taken off the train and sent home by the DTSM at Harrow when he arrived there. He had two rest days booked following this incident.**
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> **…**
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> **11. On 6 February 2014, Mr Wieclawski says that he had an outburst in front of two managers. Mr Odell said that this was close to a strike day when passions were high.**
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> **12. On 4 May 2014, John Stockwell, the DTSM at Harrow, was concerned about Mr Wieclawski, who had broken down on his train, and substituted a relief driver.**
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> **13. Ray died on 26 June 2014. Mr Odell met Mr Wieclawski to discuss the bereavement on more than one occasion and offered him the occupational health counselling service. Mr Wieclawski did not take that up at that time.**
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> **…**
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> **16. On 18 July 2014, a factfinding interview took place between Dave Otite, the Duty Reliability Manager, and Mr Wieclawski. The notes (115-117) record:**
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> > **"DO Why didn't you inform the controller?"**
> >
> > **"TW I am a bit stressed at work and put a letter in to the TOM the night before and was worried about things in my personal life. I did not consciously make a decision not to call the controller. However, because it was out of service, I just carried on without thinking to carry out the correct procedure."**
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> **Mr Wieclawski accepted his responsibility and told the Tribunal that no such incident had taken place involving him since he started as a train driver in 1998.**
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> **17. On 19 July 2014, Mr Wieclawski sent a memo to Mr Otite (118). In this memo, he says:**
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> > **"Concerning the stress I have been under recently, it has been considerable. I am not as quoted a bit stressed at work. It is much more significant to me than that.**
> >
> > **……**

> **As I also said in the interview, I have recently lost a very close friend to a terminal illness. He and his family are very dear to me and his loss is a painful blow to his family and friends. I made a hasty visit to their home in the USA several months ago and my TOM and managers were very helpful and accommodating in this. My TOM is well aware of the pain it has caused me and has offered me counselling on several occasions which is something you yourself kindly suggested yesterday.""**

5. The issues of contention at the hearing related to the Claimant's position that he had been suffering from a disability (depression) at the time of the incident on 15 July 2014, and that the Respondent had actual or constructive knowledge of that, at least by the time of the internal appeal hearing on 16 January 2015. It was not conceded for the Claimant at this appeal that the Respondent did not have knowledge of the Claimant's disability prior to the appeal in January 2015 but the focus of the argument was with particular reference to that appeal hearing stage when medical information was available.

6. The material findings and conclusion of the Tribunal on that first issue are expressed in the following terms:

> **"45. In relation to the appeal in 2015, Ms Bancroft had two additional medical letters: the letter from Dr Broughton at page 192 which is written in the past tense; and the letter from the GP at page 193 which refers to ongoing issues, ongoing difficulties and immense psychological impact.**
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> **46. Ms Bancroft's witness statement at paragraph 11.7 states:**
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> > **"In light of the additional medical evidence, I took the view that Mr Wieclawski's actions were likely to be linked to his state of mind at the time of the incident."**
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> **47. Whilst Dr Broughton's opinion was that Mr Wieclawski would have been capable of carrying out familiar tasks such as driving his train, the overall emphasis from these letters is that Mr Wieclawski may not have been in the right state of mind to seek appropriate professional support to help him dealt with his bereavements.**
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> **48. Ms Bancroft confirmed in cross-examination that she did not consider Mr Wieclawski to be disabled. As a result of the new medical evidence of Dr Broughton and of Mr Wieclawski's GP, Ms Bancroft wanted to give Mr Wieclawski another chance. For that reason, she commuted the penalty and sent Mr Wieclawski to occupational health to get a medical opinion on whether he was fit to drive.**
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> **49. The Tribunal notes from the evidence in Dr Broughton's letter that Mr Wieclawski could function normally and therefore even if he did have a disability, it did not affect his normal day-to-day activities and so it would be difficult to see that it could be a disability. Having taken these matters into account, we are unanimous that the Respondent has shown they had no actual or constructive knowledge that Mr Wieclawski was disabled at the time of either detriment and therefore those claims fail."**

7. The Tribunal went on to consider the substantive claims so that, in the event that the decision on knowledge was wrong, there was a determination on all issues. For the purposes of this appeal only the issue of what reasonable adjustments could have been made is relevant, although there was other material pertinent to the Tribunal's conclusion. Again, the relevant findings and conclusion are expressed as follows:

> **"51. Mr Davey says that we should look at the comparator cases. However, by section 23 of the Equality Act, a comparator must be in materially the same circumstances. We only have redacted details and no information in relation to appeals and we cannot therefore say that the comparator cases are in the same circumstances. Mr Davey has argued that the matter of the disciplinary should have been postponed and Mr Wieclawski should have been referred to occupational health.**
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> **52. In questioning by the Tribunal, Mr Wieclawski said:**
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> > **"I would have loved them to stand me down and send me to see a doctor. They should have adjourned and sent me to occupational health."**
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> **53. In submissions, Mr Davey has suggested in response to questions that were put to him by the Tribunal that the only non-discriminatory action would have been not to discipline Mr Wieclawski. He went on to deal with the lesser penalties which was inconsistent with that answer. The argument is fallacious; it is equivalent to saying that if someone commits a serious offence and is disabled, they should face no sanction because the Equality Act protects them. That is clearly not the case.**
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> **54. In relation to the dismissal, even if the Claimant shows that the burden [of proof] passes, there is nothing from which the Tribunal can infer that the action of dismissing following the CDI was because of the disability. The reason for the dismissal was because Mr Wieclawski had breached safety procedures by speeding, tripping and failing to notify, and then doing the same matter again.**
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> **55. As far as the appeal decision was concerned, this was a commutation of the dismissal to a suspended dismissal which allowed Mr Wieclawski to retain his job and required a referral to occupational health. It was a benefit compared with a dismissal. Ms Bancroft only reduced the penalty because of the medical evidence relating to Mr Wieclawski's state of mind. A hypothetical comparator who was not disabled would not have been afforded that concession.**
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> …
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> **60. The final claim is the claim of failure to make reasonable adjustments. The Respondent accepts that they applied a PCP of applying disciplinary proceedings for offences such as those committed by Mr Wieclawski.**
>
> **61. Mr Davey submits that it is more likely that Mr Wieclawski would commit these offences because of his disability or difficulty in concentrating. The adjustments contended for are not imposing a maximum sanction of dismissal and the penultimate sanction of suspended dismissal. What has been put forward is that no sanction should have been applied and that that would have been a reasonable adjustment. The Tribunal is not satisfied that to apply no sanction in a safety critical environment would have been an adjustment that was reasonable. The adjustment would not make it less likely that Mr Wieclawski would commit the offence and removing the sanction entirely would not be reasonable.**
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> **62. For these reasons, the Tribunal is unanimous that the claim of failure to make reasonable adjustments would fail."**

The Arguments on Appeal

8. The Claimant's appeal is restricted to two grounds. It is accepted that these are related in the sense that both must succeed before the Tribunal's Decision could be overturned. In presenting the argument on the first challenge, namely to paragraph 49 of the Judgment, Mr Davey relied on the chronology of events which he submitted illustrated that the Respondent had knowledge of the Claimant's disability by January 2015 at the very latest and that "red lights" should have been flashing on the issue before that. In particular he relied on the report of Dr Broughton dated 29 December 2014 which was before Ms Bancroft on appeal. Dr Broughton advised that the Claimant "*has been very seriously depressed over the past few months although until his recent dismissal from work his overall condition had improved slightly*". Further, the report of the Claimant's GP, Dr Ali dated 31 December 2014 who advised that the Claimant was suffering from "*immense psychological impact*". As indicated, both reports had been before Ms Bancroft at the time of the internal appeal. Further Ms Bancroft's witness statement made clear that having reviewed the medical evidence on the Claimant's state of mind she thought that his actions were likely to be linked to that state of mind at the time of the incident.

9. Mr Davey placed reliance on paragraphs 5.14 and 5.15 of the EHRC Employment Statutory Code of Practice which, amongst other things, state that an employer must do all they can reasonably be expected to do to find out if the worker has a disability.

10. The Claimant has reported being stressed as recorded at paragraph 16 and 17 of the ET Judgment and he had been off sick with severe stress and anxiety. While it was acknowledged that a letter from his GP did not refer to any mental illness being suffered prior to the incident, the medical reports before Ms Bancroft could only be read as putting her on notice that he was

suffering from a mental disability. Mr Davey submitted that the finding of no actual or constructive knowledge on the part of the Respondent of the Claimant's disability could not stand. No reasonable ET could have concluded that there was no knowledge (constructive knowledge at least) of the disability.

11. The second ground of appeal relates to the Tribunal's treatment of the claim of failure to make reasonable adjustments. Mr Davey contended that he had raised at the hearing an alternative argument against the suspended dismissal sanction imposed after appeal, namely that Ms Bancroft should have adjourned the appeal until the Respondent had obtained an opinion from its Occupational Health department. He accepted that the issues recorded by the Tribunal following a case management hearing for determination at the Full Hearing included only that the Claimant asserted the adjustments reasonably required to be not to impose the maximum sanction of dismissal and not to impose the penultimate sanction of suspended dismissal with no reference to a secondary position of adjourning the internal appeal.

12. However, Mr Davey stated that he had cross-examined Ms Bancroft about adjourning the appeal hearing before making her decision, that he had made a submission to that effect and had raised the issue with the Tribunal after the oral Judgment was given, after which he was given an assurance that it would be covered in the written Judgment. In any event, an adjournment of the appeal hearing was a reasonable adjustment that could and should have been raised by the Tribunal itself. That was the course suggested by the Employment Appeal Tribunal in **Project Management Institute v Latif** [2007] IRLR 579 at paragraph 57 where the proposed adjustment had not been identified at an earlier stage.

13. The Tribunal in this case had failed to address the alternative case and reasonable adjustments. Mr Davey submitted that the Claimant's case for an adjournment of the internal appeal was glaringly obvious, could have been determined by the Tribunal and so could be determined at this stage. It was too legalistic to say that an adjournment should not have been in the mind of the Tribunal. Mr Davey relied on three main aspects of Ms Bancroft's decision and subsequent evidence. First, she had found on the basis of the medical evidence that the Claimant had not been in a fit state to be working on 15 July 2014 and that his behaviour on that date could have been due to his not being in a fit state of mind due to his grief and bereavements. She found also that he had not been in a fit state to accept help prior to the incidents. Secondly, Ms Bancroft had referred the Claimant for an Occupational Health review at the same time as making her decision. Thirdly, her decision made clear that the Claimant's actions on 15 July 2014 were likely to be linked to his state of mind at the time of the incidents. In light of those conclusions and the decision to refer to Occupational Health, the Respondent should have made the reasonable adjustment of adjourning its decision until after the outcome of that referral. No reasonable Employment Tribunal would have determined otherwise.

14. A joint psychiatric report on disability had been instructed by the parties and was before the Tribunal. That report from a Professor Palazidou concludes that the Claimant's impaired concentration and pre-occupation with various worries may have been responsible for his failure to drive the train in a proper manner. Further, the report from Occupational Health, obtained subsequent to the appeal hearing, clearly indicates that the Claimant was not fit for work in any capacity. Whilst the Respondent had not conceded before the Tribunal that it was more likely that the Claimant would commit further wrongful acts because of his disability, the expert report would inevitably lead to that conclusion. If the factors referred to above were present at the time of the incident they would be highly determinative in relation to penalty. A

reasonable adjustment would therefore be one that enables full details of the Claimant's illness and its consequences to be ascertained.

15. The Respondent's answer to the first ground of appeal about knowledge on the part of the Respondent is that the issue was one of fact for the Tribunal. The Tribunal had made detailed factual findings on the matter at paragraphs 45 to 48 inclusive. In particular, express consideration had been given to the additional material available to Ms Bancroft at the appeal stage and to her evidence that in her view the Claimant was not disabled. Miss Thomas submitted that the Tribunal had been entitled to make an assessment of all the material available to Ms Bancroft and to her evidence in relation to the conclusion she had reached in determining the issue of whether the Respondent had knowledge of the Claimant's disability.

16. The issue of mental illness was a difficult and contentious issue and, following extensive cross-examination of Ms Bancroft on that, the Tribunal had accepted her evidence that the information before her about the Claimant did not amount to proof of disability. In any event, Ms Bancroft had proceeded on the basis that the medical situation had played a part in what had happened, there had been no attempt to ignore its significance.

17. In relation to the second ground of appeal, Miss Thomas submitted that there were three matters to consider. First was the Claimant's alternative position on reasonable adjustments, namely that the appeal hearing should have been adjourned pending the referral to Occupational Health - properly before the Tribunal at all and if so not dealt with? Secondly, would the alternative position amount to a reasonable adjustment? Thirdly, could any error of law be identified in the Tribunal's decision on the issue of reasonable adjustment or was the decision otherwise perverse?

18. On the first question, it was apparent from correspondence that narrated the available notes from the hearing that a question had been asked of Ms Bancroft in cross-examination about the possibility of adjourning the appeal but only in the context of challenging her knowledge of the Claimant's disability. The whole focus of the Claimant's case on this point had been that the penalty of suspended dismissal should not have been imposed by Ms Bancroft. The Claimant's written submission to the Tribunal had made no mention of adjourning the appeal and referring to Occupational Health as a reasonable adjustment. Having regard to the agreed issues before the Tribunal and the way in which the Claimant's case had been presented, the alternative position on reasonable adjustment was not properly before the Tribunal. In any event the Tribunal had referred to it at paragraphs 51 and 52 and so could not be said to have ignored the point raised orally by Mr Davey.

19. On the question of whether allowing time for an Occupational Health referral would amount to a reasonable adjustment, Miss Thomas submitted that the Claimant's argument was little more than his contention to the Tribunal that a reasonable adjustment would have been to impose the sanction of dismissal or suspended dismissal. In other words, an adjournment to refer to Occupational Health would be meaningful only if the Claimant anticipated it would result in a different decision on penalty. It was not in fact a free-standing reasonable adjustment claim. As Ms Bancroft had been in receipt of medical evidence that had been influential in her decision to reduce the penalty, it would have served no purpose to adjourn the hearing. There was no gap in the Respondent's knowledge such as to require an adjournment.

20. The purpose of adjustment is to remove the disadvantage suffered by, in this case, the disabled person. It is not a reasonable adjustment to obtain a medical report when one is

already available. This was not an issue of whether the employer should consult, such as that which arose in **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664.

21. The third issue related to whether the Tribunal could be said to have erred in law in its conclusion on failure to make reasonable adjustments. The Tribunal had made a number of findings relevant to this issue (paragraphs 51 to 55 and 60, with the conclusion at paragraph 61), and had properly directed itself to the **Equality Act 2010**, sections 20 and 21. In the context of the Claimant having committed serious acts of safety related misconduct which would justify summary dismissal coupled with concerns that he did not even, at the appeal stage, accept the seriousness of what had occurred, the Tribunal's decision that an adjustment of imposing no sanction would not have been reasonable was plainly correct. The Respondent's medical condition had led to him being treated more favourably in relation to sanction than a non-disabled person would have been.

Discussion

22. The legislative provisions on reasonable adjustments relevant to this appeal are in the following terms:

> **"20. *Duty to make adjustments***
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> **(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.**
>
> **(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.**
>
> **(4) The second requirement is a requirement, where a physical feature 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.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.**

A

…

21. ***Failure to comply with duty***

(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.

B

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

…

C

Schedule 8. Work: Reasonable adjustments

…

20. ***Lack of knowledge of disability, etc***

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know -

D

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

E

23. The evidence before the Tribunal in this case illustrated that by the time the incidents of 15 July 2014 took place, the Claimant had conveyed something of his distress at suffering two bereavements to the Respondent and had been offered counselling which he had declined. However, there was nothing to draw to the Respondent's attention that he was suffering from a

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disability partly because, as subsequently understood, he had not been in the right state of mind to accept help. In contrast, by the date of Ms Bancroft's decision in January 2015 following the appeal there was medical evidence drawing attention to the Claimant's mental health issues.

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24. The sharp question raised by the first ground of appeal is whether, having regard to that material and the evidence, the Tribunal was entitled to reach the conclusion that it did on the

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state of the Respondent's knowledge of the Claimant's disability.

25. I accept, as the EAT did in **Jennings v Barts and the London NHS Trust** UKEAT/0056/12 (at paragraph 89), that whether an employer knew or could reasonably be expected to know of a person's disability is a question of fact. It is not for an appellate Tribunal to reach its own conclusion on such a question of fact. Only if the Tribunal could not reasonably have reached the decision it did on the facts found would there be a basis to interfere. The Claimant's argument on this ground has some intuitive attraction. The terms "depression" and "immense psychological impact" do appear in the medical evidence that was before Ms Bancroft at the appeal stage. Her own conclusion was that the Claimant had not been in a fit state to be working at the material time. However, the evidence did not quite all point in the same direction on the issue of disability. Dr Broughton's opinion was that the Claimant would have been capable of carrying out familiar tasks such as driving his train and could function normally. Ms Bancroft noted in her decision letter (at page 4) that she had seen during the appeal how affected the Claimant was about the bereavements of his close friends albeit that he had reported fit for duty and did not look sick.

26. It seems clear that Ms Bancroft drew a distinction between the grief symptoms from which the Claimant was clearly suffering and the existence of a disability. The context of her consideration of the medical evidence was in determining whether the mitigating circumstances it evidenced was sufficient to reduce the penalty previously imposed. Whilst there is undoubtedly a duty on the part of the employer to find out whether an employee has a disability and that is a continuing duty, it cannot be said in this case that the Respondent did not do enough to try and ascertain the position. Particularly at the internal appeal stage, real consideration was given to the question of whether the Claimant had a disability and a view was reached.

27. There was certainly sufficient material before the Tribunal that would have supported a different conclusion on actual or constructive knowledge of the Claimant's disability on the part of the Respondent, but it does not fall from that that the Tribunal was not entitled on the evidence before it to reach the conclusion that it did. I feel bound to record that I would almost certainly have reached a different conclusion to that reached by the Tribunal in this case on the issue of knowledge of the Respondent's disability by January 2015. However, I consider that there was just enough in the evidence for the Tribunal to reach the view that it did by relying (at paragraph 49) on Dr Broughton's view that the Claimant's day-to-day activities were not affected. Accordingly I cannot go so far as to conclude that no reasonable Tribunal would have determined that the Respondent did not have knowledge of the Claimant's disability.

28. In any event, for the reasons I now give this appeal would not have succeeded even if paragraph 49 of the Judgment could not stand. If the Claimant had succeeded in persuading me that the finding on lack of knowledge was not one that the Tribunal was entitled to make at all I would still have concluded that the rejection of the Claimant's case on reasonable adjustments was well-founded and was not illustrative of any error.

29. On the first issue of the extent to which the alternative case on adjustment was before the Tribunal there is no doubt that the Claimant's case as recorded at the case management hearing included only the reasonable adjustment of not imposing the sanction of dismissal or suspended dismissal. Whilst an alternative possibility appears to have been raised both in evidence and in oral (but not written) submissions, it would be unfair to criticise the Tribunal for not addressing it in any detail. However, the Tribunal did not ignore the issue. Albeit in the context of direct discrimination, the Tribunal records Mr Davey's submission on postponement for a referral to Occupational Health at paragraph 51 of the Judgment and at paragraph 52 the

Claimant's evidence that he felt the disciplinary hearing should have been adjourned so he could be sent to Occupational Health is recorded. On the specific issue of reasonable adjustments, the Tribunal records at paragraph 61 that Mr Davey's contention was that no sanction should have been applied. Adjourning a hearing for a referral to Occupational Health is on one view tantamount to not opposing a sanction at all, albeit that the door would not be closed to that outcome at a later date. It seems to me that the primary focus of the Claimant on the issue of reasonable adjustments was to contend that no sanction should have been imposed. Any fall-back or alternative position was either peripheral or subsumed within the primary argument otherwise it would have been included either in the list of issues, which failing in the Claimant's written submissions.

30. In any event, on the second issue of whether allowing time for an Occupational Health referral would amount to a reasonable adjustment, I agree with the submission made by Miss Thomas that such an adjustment would be meaningful only if it would result in a different decision on penalty. As indicated above, an adjournment with a referral involves imposing no sanction at all at that time. The medical evidence available to Ms Bancroft persuaded her that there were significant mitigating circumstances and that the Claimant should be given another chance. That is why she commuted the penalty to a suspended dismissal. The Claimant's argument on this ignores that the first stage of Ms Bancroft's decision was to uphold the dismissal due to the serious nature of the Claimant's actions, something that merited a severe penalty. Had the medical evidence not been before the Respondent at the appeal hearing it is clear that the finding of summary dismissal would have been upheld.

31. The issue then becomes what different disposal was reasonable because of the Claimant's disability. The Tribunal addressed this and reached a firm conclusion at paragraph

61 that it was not satisfied that to apply no sanction in a safety-critical environment would have been an adjustment that was reasonable. That was a conclusion that the Tribunal was entitled to reach and so the argument about adjournment becomes rather circular. Adjournment with an Occupational Health referral would have to result ultimately in imposing a sanction or not. Having concluded that, even allowing for the Claimant's disability, a sanction had to be imposed, there was simply no purpose in any proposed adjustment that did not involve that.

32. Having properly directed itself to the legal test, the Tribunal applied the facts and found that the adjustment proposed by the Claimant, which I might express generally at this stage as being to impose no immediate sanction, was not reasonable. His medical condition had been taken into account by Ms Bancroft and had resulted in an outcome that gave him another opportunity to keep his job and ensure he did not attend for work unless fully fit.

33. The psychiatric report referred to in argument, insofar as material against a background of disability being conceded does not go so far as to say that the Claimant's disability was responsible for what occurred. The Respondent's appeal decision achieved a balance between marking the seriousness of the incidents on 15 July 2014 on the one hand and the Claimant's lack of acknowledgement of the severity of those on the other and also took full account of the mitigating circumstances surrounding those incidents. No reasonable purpose would have been served by an adjustment that disrupted that balance and the Tribunal made no error of law in rejecting the Claimant's position on reasonable adjustments.

34. For the forgoing reasons the appeal is dismissed.