Appeal No. UKEAT/0042/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 November 2018

Before

MRS JUSTICE SIMLER DBE

PRESIDENT

SITTING WITH MEMBERS

MR D BLEIMAN

AND

MR M WORTHINGTON

JOANNE LAMB — APPELLANT

THE GARRARD ACADEMY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr David Massarella (of counsel) Instructed by Plumstead Community Law Centre, 36 Wellington Street, London SE18 6PF
For the Respondent	Mr Rhys Johns (of counsel) Instructed by DWF LLP 1 Scott Place 2 Hardman Street Manchester M3 3AA

SUMMARY

Reasonable Adjustments

1. The Employment Tribunal erred in law in concluding that the Respondent had neither actual nor constructive knowledge of the Claimant's disability prior to November 2012. On the Employment Tribunal's findings:

    (a) there was actual knowledge of PTSD with effect from 18 July 2012; and

    (b) constructive knowledge from July 2012.

2. That being so, the duty to make reasonable adjustments arose in this case.

3. The Employment Tribunal erred in concluding that none of the three adjustments contended for by the Claimant were reasonable. On the Employment Tribunal's own findings:

    (a) it was reasonable for the Respondent to use the Haylett report as a prompt; and

    (b) this could have been done in July by Mrs Elms rather than waiting until September.

4. Substituted findings were made in exercise of the Employment Appeal Tribunal's powers under s.35 ETA 1996.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. Ms Joanne Lamb, the Claimant below and referred to as such for ease of reference, brings proceedings for unlawful disability discrimination against her former employer, the Respondent. The proceedings have had a chequered history and this is the second time she has appealed decisions that are adverse to her, to the Employment Appeal Tribunal. On the last occasion the appeal proceeded on a single ground that the Employment Tribunal erred in law in relation to the claim that there was a failure to make reasonable adjustments for her, by requiring the Claimant to return to work in September 2012 without a proper and fair investigation of her grievance. The grievance was raised in March 2012 and she waited some 15 months before it was concluded. It was her case that had a prompt investigation and a prompt outcome been delivered in July 2012, she would have returned to work at that stage. That did not occur and although the Claimant did not contend that she was physically forced to return to work in September 2012 or in the period that followed, it was her case that she felt pressure to return then but without any resolution of the grievance, was unable to do so, and did not in fact return. I sat with members and on that occasion, the Employment Appeal Tribunal allowed the appeal: the Employment Tribunal impermissibly recast the Claimant's PCP in addressing that claim, and that vitiated the adverse conclusion it reached. The case was remitted to a fresh Employment Tribunal to rehear this claim.

2. A remitted hearing took place in February 2017 before Employment Judge Baron sitting with lay members, Dr Chacko and Mr Sparham. By the time of the remitted hearing, there was no longer any issue as to whether the Claimant was a disabled person at all material times: it was accepted that she was by virtue of post-traumatic stress disorder following child abuse triggered by alleged bullying at work and reactive depression. However knowledge was expressly in issue, together with the remaining elements of the reasonable adjustment claim. The PCP was particularised by the Claimant and broken down into seven broad elements.

3. By a judgment promulgated on 21 September 2017 ("the Judgment") the Employment Tribunal held that the claim succeeded to a limited extent in respect of the period from 21 November 2012. In particular, the Employment Tribunal held:

> (i) the Respondent did not know and could not have known of the Claimant's disabilities before 21 November 2012. This conclusion is challenged on this appeal.
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> (ii) Further, although certain elements of the PCP were made out, the finding on knowledge meant that the Employment Tribunal found no duty (in relation to PCPs 4.1.2 and 4.1.3) arose before 21 November 2012. This conclusion is challenged on this appeal.
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> (iii) The Employment Tribunal concluded that, in relation to one element of the PCP established by the Claimant subject to knowledge (namely, the setting aside of Ms Haylett's report and the commissioning of a fresh investigation from Mr Atkinson, PCP 4.1.2) it would not have been a reasonable adjustment to minimise or avoid the effects of the PCP, for the Respondent to take certain steps relied on by her. This conclusion is also challenged as perverse and an error of law.

The outline facts

4. The appeal has a narrow compass, and it is unnecessary to summarise the detailed facts relating to the Claimant's employment or its termination in those circumstances. It is sufficient to provide the following outline, by reference to the Employment Tribunal's findings and matters that are not controversial between the parties.

5. The grievance raised by the Claimant in March 2012 complained of two central incidents, both of which related to the Respondent's Deputy Head, Ms Michalski. They are accurately summarised in the Tribunal's judgment at paragraphs 17 and 18 [8] as follows.

6. In the first incident Ms Michalski informed the Claimant that she was responsible for causing an unnamed boy to feel suicidal as a result of her treatment of him; and refused to name the boy. The Claimant believed that she was seeing this boy every day in her class. This caused her intense anxiety. Four months later Ms Michalski told her that it had been a case of 'mistaken identity' and that the child was not in fact in the Claimant's class. It is not in dispute that the Respondent's Chief Executive, Samantha Elms, accepted in cross-examination, that this was a child protection issue which should have been dealt with very urgently; and Ms Michalski's failure to escalate it would have merited an informal warning to Ms Michalski at the very least.

7. In the second incident the Claimant passed on to Ms Michalski written complaints by some of her pupils that a particular pupil had used racist language. Ms Michalski put them in the bin without looking at them. Again, it is not in dispute that in cross-examination Mrs Elms said that 'Ms Michalski either should have looked at them or escalated them to Child Protection'.

8. The Claimant's grievance was investigated by the School's head of HR, Maureen Haylett. It was the Respondent's pleaded case that Ms Haylett 'failed to interview any alleged perpetrators or any other appropriate witnesses'. It is not in dispute that in cross-examination, Mrs Elms agreed this was wrong. Amongst the many interviews Ms Haylett did conduct was one with Ms Michalski, in which Ms Michalski admitted that she had done what the Claimant described in each of the two incidents. In fact, Ms Haylett upheld the Claimant's grievance, but her report presented to Mrs Elms in July 2012 was regarded as inadequate, and set aside. None of the supporting material provided by Ms Haylett (including manuscript notes of the Michalski interview) was looked at by Mrs Elms. Ms Haylett left the Respondent's employment (for unconnected reasons) at or about the same time.

9. Mrs Elms told the Claimant at the meeting of 18 July 2012 that she would deal with the two central complaints herself. It is common ground that she accepted in cross-examination that she then changed her mind. Her letter of 17 August 2012 confirms both her original intention and her change of mind. Mrs Elms agreed that this change of mind must have been 'very disturbing' for the Claimant.

10. Mrs Elms commissioned a fresh investigation from Ms Haylett's replacement, Mr Atkinson. He did not commence employment until the autumn term in September 2012. He started the grievance investigation from scratch. His report was submitted in January 2013, and rejected the grievance.

11. It is accepted by the Respondent for the purposes of this appeal that, in the course of cross-examination, Mrs Elms agreed (amongst other things) that anyone looking at the supporting material Ms Haylett had supplied would have been able to make the connections between her

conclusions and the supporting evidence; the grievance 'was not complicated'; if Mrs Elms had done so herself, she would have upheld the grievance; all the information was available to the Respondent by July 2012; and if the grievance had been upheld, it would have given the Claimant great comfort and reassured her that she was valued and taken seriously by the Respondent.

12. We shall return below when dealing with the grounds of appeal, to the Employment Tribunal's findings and conclusions in a little more detail.

The legal framework

13. Sections 20 and 21 of the Equality Act 2010 set out the framework for the duty to make reasonable adjustments. So far as relevant, they provide as follows:

> "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.
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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.
>
> …
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> 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.
>
> (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."

14. The duty applies as between employer and employee by virtue of s.39(5) Equality Act 2010 and Schedule 8 contains further provisions applicable to that duty (see paragraphs 1, 2, 5 and 20). In particular, there is no duty on an employer to make reasonable adjustments if he does not know or could not reasonably be expected to know that the employee has a disability and is likely to be placed at the relevant substantial disadvantage:

"Paragraph 20

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

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

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

15. Knowledge of disability, whether actual or constructive, must be knowledge of the following three matters:

(i) the impairment (whether mental or physical);

(ii) that it is of sufficient long-standing or likely to last 12 months at least;

(iii) that it sufficiently interfered with the individual's normal day-to-day activities to amount to a disability.

However, there is no need for the employer to be aware of the specific diagnosis of the condition that creates the impairment: Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM at paragraph 88.

16. The EHRC Employment Code ("the Code") gives guidance on knowledge of disability as follows:

"What if the employer does not know the worker is disabled?

6.19

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

…..

When can an employer be assumed to know about disability?

A

6.21

If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability and that they therefore have no obligation to make a reasonable adjustment. Employers therefore need to ensure that where information about disabled people may come through different channels, there is a means – suitably confidential and subject to the disabled person's consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act."

B

17. The relevant steps in determining a claim of failure to make reasonable adjustments are set out in Environment Agency v Rowan [2008] ICR 218 (at paragraph 27). The first step is to identify the relevant 'provision, criterion or practice; (PCP), which places the employee at a substantial disadvantage. As the Code explains, a PCP should be construed widely so as to include "any formal or informal policy, rules, practices, arrangements, conditions, prerequisites, qualifications or provisions" (paragraphs 4.5 and 6.10).

C

18. The second step is to identify the 'substantial disadvantage' to which the employee was subjected in comparison with persons who are not disabled. Substantial is defined in s.212(1) Equality Act 2010 as meaning "more than minor or trivial".

D

19. The Code (at paragraph 6.16) emphasises that the purpose of the comparison is to determine whether the disadvantage arises in consequence of the disability and that, unlike direct or indirect discrimination, there is "no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same" as those of the disabled person.

E

20. In Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, the Court of Appeal made clear the importance of identifying the relevant PCP and the precise nature of the disadvantage it creates in relation to a disabled individual by comparison with its effect on non-disabled people. The nature of the comparison required in a given case will depend on the disadvantage caused by the relevant arrangements. Where the disadvantage is the risk of dismissal for lack of capability, the comparator is likely to be an able-bodied person not at risk of dismissal because capable of performing the job (as for example in Archibald v Fife Council [2004] UKHL 32). In a case where the complaint concerns the requirement to maintain a certain level of attendance at work to avoid disciplinary sanction and possibly dismissal, although both able-bodied and disabled employees will suffer stress and anxiety when ill and unable to attend work, the risk of this is likely to be greater for disabled employees whose disability results in more frequent or longer absences, making it harder for them to comply with the requirement to attend work on a regular basis.

F

G

21. The third step is to consider the reasonableness of the proposed adjustment. This is an objective test. It is not necessary for there to be a 'real prospect' of an adjustment removing a disadvantage to be reasonable. It is sufficient that there would have been a 'a prospect' of it being alleviated: see for example, Noor v Foreign and Commonwealth Office [2011] ICR 695 where the Employment Appeal Tribunal (HHJ Richardson) held that "although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective". Observations to this effect were endorsed in Griffiths.

H

The appeal

Against that background we turn to address the grounds of appeal, taking each in turn.

Ground 1: The Tribunal erred in finding that the Respondent did not have knowledge of the Claimant's disability before the 21 November 2012

22. The Employment Tribunal set out its approach to, and conclusions on, the issue of the Respondent's knowledge of disability at paragraphs 78 to 86. The two impairments relied on by the Claimant (and conceded to be disabilities) were depression and PTSD. The concession was that the Claimant was a disabled person by reference to these two impairments throughout the whole of the period covered by her claims, as recorded at paragraph 79. At paragraphs 81 - 86 the Employment Tribunal held:

> "81. Mr Massarella reminded the Tribunal of the evidence given by the Claimant about matters which occurred in her childhood and the impact of the death of her aunt upon her. He also mentioned the Assessment Summary by Oxleas NHS Foundation Trust dated 2 November 2011 which referred to severe depression and anxiety and the Claimant's resensitisation to childhood memories.
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> 82. Mr Williams submitted that the first date of the Respondent's knowledge of any disability was on receipt of the Occupational Health report of 21 November 2012.
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> 83. As we have mentioned, the Respondent did not have a copy of the medical report of 2 November 2011. We do not accept that the comments made by the Claimant to Ms Michalski in December 2011 and in the email of 10 February 2012 were sufficient for the Respondent to have reasonably known that the Claimant was a disabled person, or indeed had an impairment which was above and beyond the normal vicissitudes of life. There was nothing in the December 2011 discussions to indicate that the personal issues facing the Claimant were anything other than temporary and had been triggered by the death of her aunt. The email of 10 February 2012 related to the behaviour of certain pupils and cannot in our judgment be read to be referring to the Claimant's health in general. The Claimant is recorded as having said on 19 March 2012 that grieving was a normal process.
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> 84. We find that on receipt of the first form Med3 dated 29 February 2012 the Respondent became aware for the first time that the Claimant was suffering from reactive depression. However, of course, for an impairment to be a disability it must have lasted, or be likely to last, for a least 12 months. That form Med3 covered a period of only two weeks. The successive forms Med3 which were issued also covered relatively short periods of time. The Occupational Health report of 21 November 2012 stated that the Claimant's symptoms had probably begun in September 2011. That does not mean that as at September 2011 the Respondent ought reasonably to have been aware that any symptoms which the Claimant had at that time were likely to last until November 2012, particularly taking into account the short periods covered by the forms Med3.
>
> 85. The other impairment in issue is PTSD. That goes back to some of the Claimant's experiences as a child. It is difficult, or impossible, to disentangle this from reactive depression and treat it as an entirely separate impairment. It is not mentioned

> specifically in either of the Occupational Health reports. The first time it was specifically mentioned by the Claimant was on 18 July 2012. The Respondent has accepted that was an impairment forming a disability. We find that it was from 18 July 2012 that the Respondent was actually aware of the fact of the impairment, and that before that date it was not reasonable for the Respondent to have been aware of it. We do not accept that such references as there were by the Claimant to memories of childhood were sufficient to create deemed knowledge of the impairment of PTSD as separate from reactive depression. We do not accede to Mr Massarella's submission that an earlier Occupational Health referral would have disclosed the condition. The form Med3 dated 15 November 2012 was the first such form which referred to PTSD. The Occupational Health reports that we do have did not identify it separately.
>
> 86. It is of course speculation what the outcome of any Occupational Health referral would have been if the appointment had been in, say, March, July or September 2012. We note that the report of 21 November 2012 stated that the prognosis for full recovery was good subject to the Claimant's work issues being resolved, and we see no reason to conclude that the prognosis would have been any different if the Claimant had been referred for an Occupational Health assessment at an earlier date. By the date of the 21 November 2012 report one year had expired after the symptoms had first appeared, and therefore the 'long term' element of the definition of disability had been satisfied. We therefore conclude that it was only on receipt of the report that the Respondent became aware, or ought reasonably to have become aware, of the Claimant's disability".

23. There are four separate aspects to this ground of challenge. The first (ground 1(a)) challenges the constructive knowledge finding from 21 November 2012 onwards, on the basis that it is inconsistent and irreconcilable with the Employment Tribunal's own earlier finding that the Respondent had actual knowledge of the Claimant's PTSD from 18 July 2012.

24. At paragraph 85, as appears above, the Employment Tribunal held that the first time PTSD was specifically mentioned by the Claimant to the Respondent was on 18 July 2012. It continued "The Respondent has accepted that was an impairment forming a disability. We find that it was from 18 July 2012 that the Respondent was actually aware of the fact of the impairment ….". In other words, this was a finding of actual knowledge of the Claimant's PTSD from that date. Nonetheless, at paragraph 86, the Employment Tribunal held that the Respondent did not know that the Claimant was a disabled person until 21 November 2012 because it was only then, after one year had expired from symptoms first appearing, that the "long-term" element of the definition of disability was satisfied.

25. Although in writing Mr Johns contended that the Tribunal appeared to rely on PTSD not being long-term and the fact that no medical practitioner was able to find that "the condition was likely to last longer than 12 months in any earlier Occupational Health referral", we do not regard this submission as realistic in the context of this particular condition. We consider that a finding of actual knowledge of PTSD "that goes back to some of the Claimant's experiences as a child" carries with it, implicitly a finding that the impairment was known to be of sufficient long-standing. When put to him in the course of the hearing, Mr Johns agreed.

26. He maintained however, that the Tribunal plainly drew a distinction between knowledge of the impairment and knowledge of disability, and made no finding that there was actual knowledge of disability. We have some sympathy with that submission but can find nothing in this section or anywhere else in the judgment to reflect a finding that there was no actual

knowledge, nor any constructive knowledge that the PTSD impairment sufficiently interfered with the Claimant's normal day-to-day activities. Had that been the Employment Tribunal's conclusion, we would have expected it to be expressed, at least somewhere in the findings or conclusions. The Employment Tribunal made no reference to that aspect of the knowledge requirement at all and its focus at paragraph 86 appears to have been on the long-term element, and nothing more.

27. In our judgment, the finding of actual knowledge of PTSD, a condition that was known to be long-term and in this case to go back to the Claimant's experiences as a child, coupled with the absence of any finding that the impairment was not known to interfere sufficiently with the Claimant's day-to-day activities, and the concession that this impairment amounted to a disability at all material times, is irreconcilable with the finding of constructive knowledge from 21 November 2012 only. Those conclusions are inconsistent with one another and the latter cannot stand in light of the former.

28. Mr Johns accepted that if that was our conclusion, the date of knowledge of 18 July 2012 should be substituted for the date of deemed knowledge of 21 November 2012.

29. The second way in which the knowledge finding is challenged (ground 1(b)) is by reference to the concessions made by the Respondent that the Claimant was at all material times a disabled person.

30. Mr Massarella submitted that the Tribunal impermissibly went behind the Respondent's concession of disability. He argued that when a respondent concedes, or a tribunal finds, that a claimant is a disabled person at a particular time, the question of whether the impairment satisfies the elements of the statutory test for disability in Part 2, Schedule 1 Equality Act 2010 no longer arises. One of those elements is that the impairment must be 'long-term'. Since the period covered by the Claimant's claims started in March 2012, and the Respondent conceded disability for 'the whole of the period covered by the Claimant's claims', by definition, it was conceded that the long-term effects requirement was satisfied at that date. Once that concession was made, there was no onus on the Claimant to lead evidence on the point. So far we agree with his reasoning.

31. However, Mr Massarella contended that in consequence, it was impermissible in light of that concession, for the Employment Tribunal to ask the question whether the Claimant met the long-term requirement in March 2012 in the context of determining the Respondent's date of knowledge.

32. We do not accept that further submission. As the Employment Tribunal made clear, knowledge, whether actual or constructive, was in issue throughout the proceedings. Knowledge encompasses the three elements to which we have already referred, including the question whether the impairment is known to be of sufficient long-standing or likely to last 12 months. It was known to the Claimant that knowledge was in issue and to the extent that she wished to lead evidence on the issue, she was free to do so. That the Respondent conceded disability at all material times with the hindsight and all the knowledge it had gained by the time of the hearing (in 2016 or 2017) does not involve any necessary admission that the Respondent had the requisite knowledge at an earlier date once it put the question of knowledge in issue. This aspect of ground 1 accordingly fails.

33. The third and fourth ways in which the date of knowledge is challenged (ground 1(c) and (d)) overlap to an extent. First, it is argued that the Employment Tribunal failed to apply the correct test in assessing what the Respondent ought reasonably to have known if the Claimant was referred to Occupational Health at some point in March 2012 or afterwards (as was accepted with hindsight, should have been done). Secondly, the Employment Tribunal's conclusions are challenged as perverse.

34. On the Employment Tribunal's findings, by the end of March 2012, the Claimant had been off sick since 29 February 2012 and had provided the Respondent with a form Med3 which advised she was not fit for work for two weeks, expiring on 14 March 2012. The reason given was reactive depression and bullying. Another form Med3 covering a period of three weeks from 14 March 2012 was subsequently provided by the Claimant, stating she was not fit for work, again because of reactive depression and bullying at work (see findings at paragraph 14 of the Judgment). Accordingly, on the Employment Tribunal's findings, Mr Massarella submits there was actual knowledge of reactive depression keeping the Claimant off work in about March 2012 and the question for the Employment Tribunal was when the Respondent ought reasonably to have known that the condition was 'likely to last 12 months.'

35. There is no dispute that the correct approach to this question involves treating the word 'likely' as meaning simply 'could well happen' (SCA Packaging Ltd v Boyle [2009] IRLR 746 at para 42). It is a low threshold.

36. Mr Massarella criticised the Employment Tribunal's failure at paragraph 86 of the Judgment to ask itself whether, if the Respondent had referred the Claimant to Occupational Health in March 2012, a competent Occupational Health practitioner would have advised that the impairments 'could well' last another six months; or another two months if consulted in July 2012. Similarly, it failed to have regard to the fact that an Occupational Health practitioner instructed in September 2012 would have stated that the impairment had already lasted 12 months.

37. Mr Massarella is correct that the approach of the Employment Tribunal to this question proceeded by reference to the Occupational Health report of 21 November 2012 actually obtained by the Respondent. So far as that report is concerned, the Employment Tribunal made findings about it at paragraphs 50 and 51, as follows:

> "50. For the purposes of maintaining a proper chronology we record that an Occupational Health report was prepared dated 21 November 2012 following an assessment of the Claimant on 14 November 2012. It recorded that the symptoms of reactive depression 'probably began in September 2011.' The report referred to her then recent bereavement, health problems, and 'an interview with the Head Teacher following an alleged parental complaint.' That reference was presumably to the meeting on 17 April 2012 followed up by the warning on 25 April 2012. The report did not specifically make any mention of disability within the 2010 Act. The diagnosis and prognosis were as follows:
>
> My diagnosis is that Ms Lamb is suffering from resolving reactive depression and given her previous medical history, her prognosis for full recovery should be good.
>
> 51. Recommendations were made. The first recommendation is as follows:

> Ms Lamb needs to resolve the outstanding issues relating to her complaint which was raised in March 2012. She thought this had been resolved and she has been quite upset by the thought of further pending investigation which is required as this will be necessary to achieve a conclusion to this episode".

On that basis, the Employment Tribunal saw no reason to conclude that the prognosis would have been any different if the Claimant had been referred for an Occupational Health assessment at an earlier date.

38. The first difficulty with that conclusion is that it seems to us to proceed from an incomplete and somewhat inaccurate characterisation of the Occupational Health report of November 2012. In fact that report makes clear that the Claimant was at that date continuing to experience symptoms of depression and would "need to continue with medication and counselling for some time to come." In relation to the diagnosis of resolving reactive depression, the occupational health physician referred to her "previous medical history" which suggests that this was a recurring condition. Although the prognosis was for full recovery, the report makes clear that this was contingent on a resolution of the March 2012 grievance. Furthermore, a recommendation was made that the Claimant should "continue with her medication and counselling and remain under the care of her GP…". The physician declined to address a return to work plan as this was not regarded as appropriate until the procedural aspects of the case had been dealt with. None of these matters are referred to at paragraph 86 of the Judgment.

39. The second difficulty is that paragraph 86 does not reflect any analysis of what an Occupational Health practitioner could well have concluded several months earlier. It ignores the fact that, if recovery was dependent on the resolution of the Claimant's work issues, then there was no prospect of recovery by mid July 2012 because there was no prospect of the work issues being resolved: in mid July 2012 Mrs Elms set aside Ms Haylett's report. Further there was actual knowledge of PTSD by then. Yet further, in September 2012 Mr Atkinson was only just beginning an entirely new investigation. Paragraph 86 also ignores that fact that, by September 2012, the Claimant's impairment had already lasted 12 months from the start date of September 2011 given in the November 2012, as Mr Johns conceded.

40. We do however accept, as Mr Johns submitted, that as of March 2012, although the Claimant was off work with reactive depression the trigger appeared to be a workplace issue and there was no knowledge of or reference to the earlier report of November 2011. Further, the Med3 certificates were for short periods as the Employment Tribunal found. An investigation into the grievance had commenced, and it could then have been reasonable to expect the workplace issue to be resolved fairly quickly. In light of the Employment Tribunal's findings and the possible variables at that stage, we consider that the Employment Tribunal's rejection of this date was a permissible option in all the circumstances.

41. The position was different by July 2012. By then, the Claimant had been off work with depression for four months. The grievance was ongoing. No resolution was imminent. In our judgment, had the Tribunal asked itself the correct question (namely what would Occupational Health have reasonably concluded if a referral was made then), in the light of these matters and the findings it made, the overwhelming likelihood is that Occupational Health would have concluded that the Claimant's impairment 'could well' last until September 2012, a further period of no more than three months (taking September 2011 as the date of onset of symptoms).

42. Again, Mr Johns helpfully accepted that if that was our conclusion, a finding of constructive knowledge by early July 2012 should be substituted. That would have been the inevitable conclusion had the issue been properly addressed.

43. It is unnecessary in the circumstances to address separately, the pure perversity challenge in ground 1(d). It is dealt with to the extent necessary in our reasoning above.

Ground 2: conceded if ground 1 succeeds to any extent

44. Ground 2 is correctly conceded if the appeal on ground 1 succeeds to any extent. The Tribunal's findings (at paragraphs 97 and 109) that because the Respondent lacked the requisite knowledge of disability, no duty to make reasonable adjustments arose in respect of two PCPs, cannot stand if the Respondent had the requisite knowledge at a date earlier than 21 November 2012. The two PCPs are, first, the setting aside of Ms Haylett's report and the commissioning of a fresh investigation; and secondly, the PCP relating to delay from 10 July 2012 until 11 January 2013, insofar as it relates to the period before 21 November 2012. The findings at paragraphs 97 and 109 are therefore set aside, and findings that the duty arose in each respect are substituted.

Ground 3 – Failure to make reasonable adjustments: in rejecting the Claimant's asserted reasonable adjustments by reference to the PCP at paragraph 4.1.2 of the list of issues (the setting aside of Ms Haylett's report and the commissioning of a fresh investigation from Mr Atkinson), the Tribunal reached conclusions which were perverse, disregarded relevant considerations and misapprehended submissions made on the Claimant's behalf

45. The Employment Tribunal made clear findings that:

(i) the Haylett report was not fit for purpose so a fresh investigation would inevitably have to be undertaken (see paragraph 98);

(ii) the Claimant was put at a substantial disadvantage in consequence, by comparison with a non-disabled person (see paragraph 99).

However, the Employment Tribunal concluded that the adjustments contended for by the Claimant were not reasonable adjustments that ought to have been made. Three particular adjustments were identified. First, reading Ms Haylett's report and its supporting documentation with a reasonable degree of care. Secondly, a member of the executive team should have built on the Haylett report and completed it before the end of the summer term. Thirdly, the Claimant argued that the Haylett report should have been disclosed to her in any event.

46. The Employment Tribunal's rejection of each of those adjustments is challenged by this ground. We take them in turn.

47. In relation to the first adjustment contended for (that the Respondent should have acted promptly on the Haylett report in the ways identified above), this was rejected by the Employment Tribunal as not reasonable because the Haylett report was "simply not an appropriate document and… it was also not possible for Mrs Elms or Mr Atkinson safely to rely on the manuscript notes made by Ms Haylett of her investigatory interviews." In coming to that conclusion the Employment Tribunal expressly observed that it had noted that when her attention was drawn to certain words in the notes, Mrs Elms accepted that they supported the Claimant's complaints.

A The Employment Tribunal concluded that was a different matter from being able safely to come to any conclusion from reading the documents.

48. Mr Massarella contends that the starting point for this ground is that, when Mrs Elms set aside Ms Haylett's report, she also set aside all the supporting material, including the contemporaneous interviews which Ms Haylett had conducted. She did not even read that material.

B

49. There is no dispute that the most significant interview conducted was with Ms Michalski. It is also common ground that in that interview Ms Michalski agreed that the facts relating to the two central complaints made in the Claimant's grievance did occur. In particular, she agreed that she told the Claimant that a child was feeling suicidal because of her; and, when handed complaints from children about a racist incident by the Claimant, she threw them in the bin without looking at them.

C

50. Mrs Elms was cross-examined about the Haylett report and the Michalski interview notes at the hearing. The parties have agreed notes of her evidence by way of a summary contained in the grounds of appeal. These so far as relevant are as follows:

> "23. Mrs Elms accepted in cross-examination that she did not [read the report and supporting material] even though Ms Haylett had provided her with all the supporting material. She accepted that she did not even read the typed notes of the March 2012 grievance meeting itself until around the time of the C's dismissal.
>
> 24. She also accepted that, had she done so, she would have upheld C's grievance on the two central issues which Ms Haylett had upheld: the 'suicidal boy' and 'racist notes' issues.
>
> 26. With regard to the incident of the 'suicidal boy', Mrs Elms agreed that, had she examined Ms Haylett's supporting evidence with care, it is likely she would have concluded that:
>
> 26.1 Ms Haylett was right to make a finding of fact that Ms Michalski told C that a child was feeling suicidal because of her… Ms Haylett was right that C was obsessed with this incident';
>
> 26.2 'Ms Haylett was right to criticise Michalski for not escalating this matter as it was a child protection matter…it was probably a disciplinary matter. It should have been dealt with urgently. At the very least it would have merited an informal warning to Ms Michalski'
>
> 26.3 'Ms Haylett was right to find that Michalski had subsequently told C that the incident was "a case of mistaken identity"…it was very disturbing that Ms Michalski admitted she had not told C that the boy was no longer in her class or that she only had the parent's word for it';
>
> 26.4 'the fact that C thought she was seeing the boy every day in her class without knowing who it was must have caused her additional distress';

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26.5 'if Ms Haylett had drawn this information into the report when she made it, the likelihood is I would have upheld this grievance'.

27. With regard to the children's notes about racist remarks made by the pupil [referred to as X] Mrs Elms accepted that, had she examined Ms Haylett's supporting evidence with care:

27.1 'I would have seen that Ms Michalski accepted that C had given the notes to her, that she had put them in the bin and that she took no action';

27.2 'I would have seen that Ms Michalski told Ms Haylett that the children's notes complained of racist remarks';

27.3 'Ms Michalski either should have looked at them or escalated them to Child Protection';

27.4 'if I had had my attention drawn to this evidence by Ms Haylett the likelihood is I would have upheld this grievance'.

28. She further agreed that:

28.1 'anyone looking at the material would have been able to make the connections between Ms Haylett's findings and the supporting evidence';

28.3 'if I had gone through the material I would have made those connections';

28.4 'Mr Atkinson should have made those connections'

28.5 'his recommendation ought to have been that C's grievance should be upheld';

28.6 'all that information was available to R before July 2012';

28.7 'it was not complicated, I probably could have done it myself';

28.8 'if these grievances had been upheld it would have given C great comfort. It would have reassured her that she was valued and taken seriously'.

51. In other words, Mr Massarella submitted that Mrs Elms accepted that had she read the interview notes, she would have realised that, whatever the faults in her report, Ms Haylett had come to the right conclusions on the two central issues; that the faults in the Haylett report were technical only; and that the Respondent had all the information it needed to uphold the grievance in July 2012 and should have done so.

52. Mr Massarella recognises that the Tribunal felt able to disregard the concessions made by Mrs Elms on the basis that there was a distinction to be drawn between relying on the report and its supporting documentation to reach safe conclusions on the grievance, and reading the report (and supporting material) to use it as a basis for building upon. Mr Massarella however, challenges the distinction drawn by the Employment Tribunal as perverse. He submits that the notes are clear and legible on the central points; and Mrs Elms herself agreed in cross-examination that 'anyone looking at the material would have been able to make the connections

between Ms Haylett's findings and the supporting evidence'. He submits that the perversity is compounded by the fact that the Tribunal found later in its judgment (paragraph 108) that the same notes should have been relied on by Mr Atkinson as a 'prompt' as they were 'more than sufficient to have enabled Mr Atkinson to ask Ms Michalski to repeat what she had told Ms Haylett'.

53. Against that, Mr Johns contends that reasonableness has two sides and the Respondent was put in the invidious position of having to make a choice in difficult circumstances with potentially difficult consequences. The Respondent had two options: the first was to perfect an imperfect report which could lead to injustice; alternatively, it could instruct a fresh report. The option it chose was a reasonable one in circumstances where the Employment Tribunal expressly accepted that the Haylett report was judged inadequate as a basis for disciplinary action against Ms Michalski or any criticism of her. He submits that the report was scant and the exercise would inevitably have to be repeated. To fudge an imperfect report, half written and investigated by somebody who did not do a thorough job, leading to the production of a hybrid report based on potentially unreliable evidence, might have led to injustice for the Claimant and others. Accordingly the Tribunal was correct to reject this as a reasonable adjustment.

54. We do not accept the submissions made by Mr Johns. Although the Employment Tribunal rejected any suggestion that the Haylett report and supporting material could be relied on by itself to come to a conclusion on the grievance, the Tribunal made the following finding at paragraph 108:

> "108 We see absolutely no reason why Mr Atkinson could not have utilised the documentation supplied to him in the first half of September. The two issues raised by the Claimant at the meeting on 19 March 2012 and recorded in the notes of that meeting principally involved Ms Michalksi. Mr Atkinson could have interviewed her without delay based upon those meeting notes, and also the manuscript notes made by Ms Haylett of her meetings with Ms Michalski on 22 and 23 March 2012. We have stated that those notes were insufficient to be relied upon for the purposes of coming to any conclusion on the grievance, but they are more than sufficient to have enabled Mr Atkinson to ask Ms Michalski to repeat what she had told Ms Haylett. He could have used them as a prompt."

55. If it was reasonable for Mr Atkinson to rely on the notes (the Tribunal having found that he "should" have done so) in September, using them as a "prompt" because they were "more than sufficient to have enabled Mr Atkinson to ask Ms Michalski to repeat what she had told Ms Haylett", we can see no basis in the Employment Tribunal's findings, or the evidence, for concluding that was not a reasonable step to take in July. Indeed, the evidence given by Mrs Elms is entirely consistent with and supports this conclusion.

56. Mr Johns accepted that he could not go behind the finding at paragraph 108 that the Haylett report and supporting material could have been used as a base for additional investigation. What is more, nowhere was there evidence that Mr Johns could point us to, (notwithstanding our repeated questioning of him in the course of this hearing) to support a conclusion that Mrs Elms did not feel able to read the report carefully, make the connection between the Claimant's grievance and what Ms Michalski accepted had occurred, use that information in order to reach a conclusion, do it quickly and reach a conclusion on whether the grievance would or would not be upheld.

57. To the contrary, Mrs Elms made the series of concessions in the course of cross-examination to which we have referred above, when asked about the notes made by Ms Haylett. Those concessions are accepted as unchallenged evidence given by Mrs Elms.

58. It seems to us, in the absence of any evidence from the Respondent that the material available, had it been read and built on, could not have enabled the Respondent to come to a conclusion about whether the grievance should be upheld; and in the face of positive evidence that flatly contradicted that position, there was simply no material to support the Tribunal's conclusion that the adjustments contended for in terms of reading the report carefully and using the report as a platform for reaching a conclusion before the end of July, were not reasonable adjustments that should and could have been made.

59. The Respondent had a third option advocated by the Employment Tribunal itself. The only difference was timing, and the person involved. If this could and "should" have been done by Mr Atkinson in September, there is no reason why Mrs Elms could not have done it in July. The adjustment was undoubtedly reasonable and the contrary is unarguable. The Employment Tribunal's conclusion to the contrary must accordingly be set aside.

60. The Employment Tribunal rejected the second adjustment relied on by the Claimant (that a member of the executive team should have built on the Haylett report and completed it before the end of the summer term) at paragraph 100 as follows:

> "199 The other point made by Mr Massarella was, as we understand it, that Mrs Elms had accepted in cross-examination that another method of dealing with the Claimant's grievance would have been for her and Mrs Moon to hold a grievance hearing, and to require all those involved to come to that hearing and give evidence. That could have been done within a short time after the beginning of the autumn term. We fail to see the material difference between Mr Atkinson seeking to ascertain the necessary information by interviewing the relevant individuals on the one hand, and that task being undertaken by Mrs Moon and Mrs Elms at one or more hearings on the other hand. We do not understand Mr Massarella to be complaining, on behalf of the Claimant, of the arrangement made of having enquiries made by a HR officer rather than a member of the management team".

61. Mr Massarella submits that this was simply wrong: it was expressly submitted in written closing on the Claimant's behalf that Mrs Elms, or another member of the executive team, should have built on the Haylett report, cured its defects and completed the process by the end of the summer term 2012. We have read and considered the relevant paragraphs of the written closing and accept this submission. The significance of Mrs Elms undertaking this exercise herself is that it would not then have been necessary to wait for a new HR manager (Mr Atkinson) to take up his post, recommence the investigation and deliver his report, a process that took many months and was not completed until January 2013.

62. Beyond repeating the points made earlier about the difficult position the Respondent was in, Mr Johns did not have any satisfactory answer to this point because the Respondent expressly agreed a number of relevant concessions made by Mrs Elms in this regard. In particular the Respondent has agreed that:

(i) it was expressly put to Mrs Elms in cross-examination, and she accepted, that she could have asked questions of both the Claimant and Ms Michalski at a hearing (before the beginning of the autumn term) and remedied any gaps in the Haylett report.

(ii) Mrs Elms accepted, at the meeting on 18 July 2012, she told the Claimant that she would personally deal with the Claimant's allegations against Ms Michalski.

(iii) Mrs Elms accepted that she could have dealt separately with the two core issues, which were both against Ms Michalski.

(iv) Mrs Elms accepted that when she informed the Claimant in her letter of 17 August 2012 that she no longer intended to do so, that must have been "very disturbing" for the Claimant because "she thought there was going to be closure" and this would have had "a greater impact" on the Claimant because of her mental health difficulties.

63. In light of the evidence given by Mrs Elms and the significance of this point which was plainly misunderstood by the Employment Tribunal, we are quite satisfied that the Employment Tribunal's finding at paragraph 100 cannot stand and must be set aside.

64. The third adjustment contended for (disclosing the Haylett report) is not strictly necessary in light of our conclusions above. We deal with it briefly. Although Mr Massarella may have some justification for the criticism he advances in respect of the Employment Tribunal's reasoning in relation to this adjustment, it seems to us that the conclusion itself is not plainly wrong. As Mr Johns submitted, disclosing a report which had been set aside and was not to be relied on, would have been liable to cause confusion and create difficulty. This was particularly so in circumstances where the whole matter was to be reinvestigated in this scenario. We cannot see how this would have helped the Claimant and we do not see any basis for challenging the Employment Tribunal's conclusion (notwithstanding some dissatisfaction with its reasoning) that this was not a reasonable step to take.

Ground 4 – The effect of the delay: the Tribunal failed to determine the issue of what would have happened had there been no discrimination; alternatively, it reached a conclusion which was perverse.

65. In assessing compensation for unlawful discrimination, tribunals must consider what would have occurred had there been no unlawful discrimination: Chagger v Abbey National plc [2010] IRLR 47 at paragraphs 57-62.

66. In the Employment Appeal Tribunal's judgment on the Claimant's earlier appeal, remitting the reasonable adjustments claims to a fresh tribunal in Croydon Employment Tribunal, we made the following observation (at [28]):

> 'Although after May 2013 she was still pursuing information that would enable her to come to terms with what had happened in the internal investigation, by May 2013 the Claimant had waited some 15 months and we consider that by then it may have been too late. Had a prompt investigation and a prompt outcome have been delivered by July 2012, on the Tribunal's findings there is strong evidence that she would have returned to work at that stage.'

67. That evidence was rehearsed at the remitted hearing, and the Claimant gave evidence (again this is agreed) in summary, that by July 2012, she had a successful 'clear the air meeting' with Ms Michalski and was preparing to return to work in September, even before she knew the outcome of the grievance.

68. Although at the start of the hearing the Employment Tribunal hived off the issue of remedy, it indicated that, if it found that the Claimant had been subjected to unlawful discrimination, it would determine the Chagger issue. However, the only finding in the Judgment which might be taken as addressing the Chagger issue is at paragraph 121, as follows:

> 'Finally, in the light of the clear statement by the Claimant that she did not feel able to return to work with the Respondent, or indeed in education at all, we cannot see that there was any alternative to dismissal. The reason(s) for the Claimant's absence resulting in her dismissal clearly relate to the allegations which had been made against her, rather than any delays which had occurred.'

69. We do not read that paragraph as purporting to find that, although there were delays which resulted from the failures to make reasonable adjustments already found by the Employment Tribunal, these made no practical difference because the Claimant would have left anyway. Mr Johns agreed, and accepts that the Chagger issue was not addressed by the Employment Tribunal and will have to be addressed at a remedy hearing.

70. In these circumstances, it is unnecessary to deal with the Claimant's challenge to that finding. We do not consider that this is a question on which we can substitute our conclusion. This issue will have to be addressed in light of the substituted findings we have made above, at the remedy hearing to be listed in this case.

Conclusion and disposal

71. For the reasons given above, we are unanimously of the view that this appeal must be allowed in relation to the Employment Tribunal's conclusions on date of knowledge; whether the Respondent was under a duty to make reasonable adjustments; and whether proposed adjustments were in fact reasonable. The relevant conclusions cannot stand and are set aside.

72. The Respondent accepted that the Employment Appeal Tribunal could make substituted findings in relation to those issues, and we make findings in exercise of our powers under s.35 ETA 1996 as follows:

> (i) The Respondent ought reasonably to have known that the Claimant was a disabled person by July 2012; and had actual knowledge of her disability by 18 July 2012;
>
> (ii) the setting aside of Ms Haylett's report put the Claimant at a substantial disadvantage;
>
> (iii) the Respondent should have sought to remove that disadvantage by way of the first two adjustments contended for by the Claimant (namely, reading the Haylett report with care, and building on it to complete the grievance investigation before the end of the summer term), both of which were reasonable.

73. The question that arises by reference to ground 4, whether had the Respondent done so, the Claimant would have continued in the Respondent's employment, has not been addressed and falls to be addressed in light of this judgment, at the remedy hearing.

74. We are grateful to both counsel for the constructive approach they took to this appeal, and for the assistance they gave us in dealing with it.