EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122942/2018

Held in Aberdeen on 17 & 18 June 2019

Employment Judge N M Hosie
Tribunal Member A W Bruce
Tribunal Member V Lockhart

Miss M Brander	**Claimant** **Represented by** **Mrs H Brander – Mother**
Bachlaw Ltd t/a Lillies Kindergarten	**Respondent** **Represented by** **Mr D M Burnside - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The majority Judgment of the Tribunal (one Member dissenting) is that the claim is dismissed.

REASONS

Introduction

1. Miss Brander brought a claim of disability discrimination, comprising complaints of direct discrimination, harassment and a failure to make reasonable adjustments. The claim was denied in its entirety by the respondent. Initially, the respondent disputed that the claimant was disabled in terms of the Equality Act 2010 ("the 2010 Act"). However, at a preliminary hearing, on 27 March 2019, Employment Judge Hendry decided that the claimant was disabled in terms of the 2010 Act and that the case should proceed to a merits hearing before a full tribunal.

The Evidence

2. We heard evidence from a number of witnesses and a joint bundle of documentary productions was submitted ("P").

3. We heard evidence first from the claimant.

4. We then heard evidence on behalf of the respondent from: -

- Sarah Davis, Kindergarten Manager and Director of the respondent Company.
- Donna Ironside, Administrative Assistant.
- Stephanie Legge, Lead Practitioner and the claimant's Team Leader.
- Pearl Whitelaw, Trainee Practitioner.
- Jill Campbell, Training and Development Social Worker with the respondent Company.

The Facts

5. Having heard the evidence and considered the documentary productions, the Tribunal was able to make the following material findings in fact.

6. The claimant commenced her employment with the respondent Company on 5 March 2018. She was employed as a "Practitioner" at Lillies Kindergarten. The Person Specification (P63) and Job Description for the Practitioner post (P64-66) were produced. Her contract of employment was also produced (P87-93).

7. There were some 10 employees at the Kindergarten, along with ancillary staff.

Claimant's job application

8. The claimant's job application was produced (P67-73) along with an "Equality and Diversity Monitoring" Form (P74), which she completed at the same time. In that Form, she intimated that she did not have a disability. While the claimant suffered from depression, she accepted in evidence that she did not reveal this to the respondent as she did not think that it would affect her ability to do the job.

Interview

9. The claimant was interviewed by Sarah Davis, Stephanie Legge and James McLeary on 2 February 2018. Their interview notes were produced (P75-80). She presented well and there was no indication of any ill-health on her part. Nor did she mention the car accident in which she had been involved.

References

10. Prior to her appointment, the respondent obtained references (P81-86). . There was no indication in these references that the claimant might be disabled. As the references were satisfactory, the claimant was offered employment which she accepted. She started to work at the Kindergarten on 5 March.

Supervision

11. Notes of the Supervision Meetings which were conducted by her Team Leader, Stephanie Legge, on 14 March, 11 May, 18 May, 29 June were produced (P94-106). Ms Legge gave evidence at the Tribunal Hearing in a measured, consistent and convincing manner. She presented as entirely credible and reliable. She recorded in her Notes that the Claimant had settled in, *"reasonably well".* She received a "Manual Handling Certificate" in May (P151). Ms Legge said she was a *"good employee"* and that she was, *"very impressed with her work".*

12. At the supervision meeting on 11 May, the claimant expressed concern about the way in which one of her colleagues, Pearl Whitelaw, had spoken to her (P98). This was when the claimant was going to put urinated water down the sink in the kitchen. Ms Whitelaw was so shocked when she saw this that she called out immediately to the claimant to stop what she was doing and told her to put it down the toilet. At the supervision meeting on 11 May, Ms Legge told the claimant that Ms Whitelaw can be, *"blunt and abrupt but there is no malice intended"* (P98). Subsequently, Ms Legge spoke to Ms Whitelaw about the claimant's concern and asked her to speak to the claimant which she did. Ms Whitelaw explained why she had spoken to her that way and told her that she, *"didn't want her to be offended".*

Claimant's sickness absences

13. The claimant was signed off work due to ill health for the period from 2 July 2018 until 5 August 2018. She provided the respondent with "Fit Notes" in respect of these absences (P129-131). The reason given for her absences was a *"stress related problem".*

Meetings at the Kindergarten

14. The claimant and her mother arrived at the Kindergarten on 2 and 10 July to hand in the claimant's Fit Notes. On each occasion they met Sarah Davis and Donna Ironside. The meetings had not been pre-arranged. Minutes of these meetings were produced (P112-114). We were satisfied that they were reasonably accurate. The following are excerpts:-

"*Melissa arrived at the Brighter Horizons Centre on 02.07.18 accompanied by her mother. She had a sick line from the doctor which said she had been signed off for two weeks with stress. Melissa said that she was struggling with a number of issues in her life and that she had reached breaking point when her drink was spiked whilst out socializing. This was not a planned meeting but Sarah Davis made space to speak to Melissa and she was clearly distressed. Melissa was encouraged to seek support to address the underlying issues. It was agreed that she would get back in touch with Steph Legge after she went back to see the doctor again on 13.07.18 to confirm if she was returning to work when her sick note ended on 16.07.18.*

Melissa turned up at the Brighter Horizons Centre, again in the company of her mother on 10.07.18. She stated that she was not any better, that she was not sleeping and that she had been signed off for a further period until 23.07.18. Melissa mentioned that she may need a phased return to work. Again, this was not a planned meeting. Sarah Davis did not have time to discuss the situation."

"Keeping in touch meeting" on 11 July 2018

15. As Ms Davis did not have time to discuss matters fully with the claimant on 10 July and as she was about to go on annual leave, she arranged to meet the claimant the following day by way of a "keeping in touch meeting". Minutes of that meeting were also prepared (P113/114). We were satisfied that they were reasonably accurate. The following are excerpts:-

"*I did explain that the purpose of the meeting was to clarify arrangements for managing Melissa's absence/return to work whilst Sarah was on annual leave and not to look to pressure Melissa to return to work before she is ready. Sarah stressed that her view was that Melissa needed to use her time off to seek appropriate support to manage her health issues and that she should not return until she was confident that she was ready to take on her work duties again.*

Sarah addressed the topic of a phased return as Melissa had mentioned it the previous day. Sarah explained that phased returns were considered following periods of prolonged absences in specific circumstances. Melissa will have been signed off for three weeks at the point her current sick note ends. This would not be considered prolonged absence. Sarah also explained that the safety and well-being of the children must be the highest priority. Each team member's role is import and it is vital that each person is able to fulfill their role and be emotionally available to the children. She stressed that Melissa must be completely confident that she was fully fit before returning to work.

Sarah explained that Lillies Kindergarten do not offer part-time contracts. Sarah was clear that her wish would be that Melissa recovered and was able to return to her full-time role."

16. The Minutes then went on to record six "Actions agreed" (P113). It was hoped that the claimant would be fit to return to work on 23 July, but if not Ms Davis would contact her to arrange a further "keeping in touch meeting" at the beginning of August.

"Keeping in touch/welfare meeting" on 1 August 2018

17. As it transpired, the claimant was not fit to return on 23 July. She was signed off again with a "stress related problem" until 5 August (P131). However, as it was hoped that the claimant would be fit to return on or before the expiry of the Fit Note, Ms Davis arranged to meet her on 1 August 2018 to discuss a possible return.

18. We were faced with a conflict in the evidence which we heard about what transpired at that meeting. In short, the claimant maintained that she had been forced to resign but this was denied by Ms Davis and Ms Ironside who maintained that the claimant had resigned voluntarily.

19. The respondent produced Minutes of the meeting (P115-117). The first part was not disputed. It was in the following terms:-

"*Present: Sarah Davis, Melissa Brander, Donna Ironside (minute)*

Melissa was advised that this was a welfare meeting – arranged to look at her return to work. She has been off for four weeks. Her doctor has said stress-related problems. When Melissa first came in to say she had been signed off, she said that she was struggling with a number of issues in her personal/family life and that things came to a head when she had her drink spiked at the Portsoy boat festival.

Sarah explained that as her employer she needed to be clear on the reasons for her absence. Having taken legal guidance, there were a number of questions she needed to work through to assess risk and look at what needs to be in place for a return to work.

- *Can you please tell me why you have been signed off with stress-related problems?*

- *I was depressed – the doctor didn't write that on the sick note but said I could tell you when time was right. Work was getting a bit on top of me along with everything else. I thought I was doing well and was ready to come back but I am getting emotional talking about it. It is hard getting negative comments and feedback. It made me feel down and feel I couldn't do my job.*

- *Have you been diagnosed with depression by G.P.? There is a difference between a diagnosis of depression and feeling low.*

- *No. I have not been diagnosed with depression.*

- *Have you been given any other mental health diagnosis?*

- *No.*

- *Are you taking any form of medication or having counselling?*

- *No. Not on medication. Not attending counselling.*

- *Have you been signed off with stress-related problems before?*

- *No.*

- *Can you tell me about the underlying issues?*

- *I don't really know. I just get upset all the time – I knew I just wasn't right. I had supervisions, Steph was saying you did this, you didn't do that – I didn't feel like I was doing anything right……*

20. The claimant was asked for her consent to the respondent contacting her GP which she gave but she denied replying "Ok. Whatever" as the Minutes recorded (P117). The claimant produced a witness statement setting out her position as to what transpired at the meeting (P118/119). The following are excerpts:-

"*She (S. Davis) asked about any underlying issues?*

I replied at meetings with S. Legge proved I was achieving the needs of the children but S. Davis said I wasn't and was being negative. I said I don't know if you remember I was in a car accident and I told you I was having difficulty moving furniture and S. Davis replied I had to get on with it.

S. Davis asked me for permission for a medical report?

I replied yes (not whatever).

I was very upset by this point and S. Davis instructed D. Ironside to stop writing as this was off the record. S. Davis gave me two options either resign or be sacked with a black mark on my CV and a bad reference.

D. Ironside moved away to her desk and S. Davis asked me what I was thinking? I asked to go home and think things over.

S. Davis said I wasn't allowed to leave the building until I had made a decision. I replied that I didn't want that to happen and I wanted to stay employed at Lillies. S. Davis replied that If I didn't make the decision she would start the procedure of sacking me.

I was very upset and S. Davis asked if I wanted a cup of tea?

I replied I would go to the toilet and come back. When I came back Sarah asked my decision and I said I would just leave. Sarah asked D. Ironside to sit with me until Sarah typed up the Minutes and Donna and I both signed them (2 pages not 3).

Donna went back to her desk and S. Davis said you better write your resignation now and Donna will help you. I sat down with Donna and she was comforting me. I asked Donna if she knew what was going to happen today. She replied no.

I signed resignation and before I left I asked for copy of Minutes.

Donna asked Sarah and she said no."

21. The claimant also maintained that the respondent's Minutes had been fabricated. She claimed that they only comprised two pages and that her signature had been falsely transposed to a third and final page (P117). She also maintained that the following paragraphs in the Minutes had been added:-

- On P116, the paragraph starting with the words "I did not intend to talk about work performance or practice issues today….
- On P116, the paragraph starting with the words: "The practitioner role was explained to you….
- On P117, the para starting with the words "You are clearly still very emotional".

22. The respondent's witnesses, Ms Davis and Ms Ironside gave a different account. They maintained that the Minutes were accurate and denied the allegation that the Minutes only comprised two pages and that they had transposed the claimant's signature onto a third page.

23. Prior to the meeting, Ms Davis had taken advice by telephone on the conduct of the meeting and the questions which she should ask. She denied that she had given the claimant two options of either resigning or being dismissed "with a black mark on her CV". Her evidence was that she gave the claimant the options of either returning to work if she felt able to do so or of remaining off work and continuing to be signed off work by her G.P.

24. Both Ms Davis and Ms Ironside maintained that the claimant had resigned voluntarily.

25. The following are excerpts from their Minutes (P117):

"*You are clearly still very emotional. I would have concerns about you being ready to return to work. My priority needs to be the welfare of the children first but I am also concerned for you. You are clearly not happy and that is not a good position for anyone to be in. You have said to colleagues that you are not happy and that you don't want to be at work.*

No I'm not happy.

What are you thinking about. What we have discussed?

I'm not sure. Can I think about?

I will get Donna to type up the minutes so we're all clear in what is being said and I will check on how the children are downstairs. I will then come back to speak to you. Would you like a cup of tea or anything whilst you are waiting?

No. I will just go to the toilet.

After approximately 30 mins Sarah returned and asked Melissa what she was thinking. Melissa said that she would "just resign". Sarah advised that if Melissa was resigning that she would not ask her to complete the medical consent paperwork as it would no longer be necessary."

26. As the claimant had advised Ms Davis that she wished to resign while Ms Ironside was typing up the Minutes, Ms Ironside asked Ms Davis to type the final paragraph of the Minutes which she did.

27. Ms Ironside then typed a letter of resignation which the claimant signed (P124). She also read through the Minutes and signed them (P117). The claimant was given a copy of the Minutes before she left.

Majority view

28. On the evidence, the majority of the Tribunal was of the view that the respondent's evidence was to be preferred. While surprised that the claimant decided to resign when that option had not been raised before, she had told Ms Davis that she wasn't happy and given the impression she didn't want to work at the Kindergarten. The majority was of the view that the respondent's evidence was consistent, corroborative, credible and reliable. The Tribunal was satisfied that the Minutes were reasonably accurate.

29. Prior to that meeting, Ms Davis had been supportive and sensitive in endeavouring to facilitate the claimant's return to work, as evidenced, for example, by the sentiments expressed at the "Keeping in Touch/Welfare Meeting" on 11 July and the "Actions agreed" (P112-114). There was no

evidence of the claimant being pressured into returning or into resigning at any time and she attended the meeting on 1 August voluntarily. The manner in which Ms Davis had engaged with the claimant from the time she was signed off was completely at odds with the claimant's contention that Ms Davis forced her to resign. There was no reason why Ms Davis would do so. There was no evidence that resignation was an option Ms Davis ever had in mind.

30. The allegation by the claimant that the Minutes were fabricated and that her signature had been transposed was an extremely serious one. But apart from the claimant's own assertion, there was no other evidence to even suggest that might have occurred. On the other hand, we had denials, under oath, from two credible and reliable witnesses, Minutes and a resignation letter both signed by the claimant and no attempt by the claimant after the meeting to withdraw her resignation. Further, as the respondent's solicitor drew to our attention, it made no sense for the respondent to add to the Minutes the paragraphs the claimant alleged as they were not prejudicial to her. Nor were we persuaded that the claimant was physically prevented from leaving as she alleged. Again, apart from her own evidence, there was no other evidence, from any source, to suggest that was so.

31. The claimant was a "good employee" who had "settled in", and she had only been off work due to a "stress related problem", a perfectly valid reason, for a short time. The purpose of the meeting on 1 August was to consider her return to work. That was why Ms Davis took advice. She did not force the claimant to resign. There was no reason why she would want to do so and lose a valued employee. The claimant's resignation was voluntary.

Minority view

32. The dissenting Member was of the view that both the respondent's witnesses and the claimant gave evidence about the "Keeping in touch/welfare meeting" on 1 August which appeared sincere and truthful. The dissenting Member felt that the claimant seemed genuinely to believe that the meeting had been

conducted in the way she described and that she had been put in the position of having to resign. The meeting had been arranged to discuss her return to work but had started with a set of personal questions about her health. The claimant was then asked to describe "underlying problems" which she interpreted as relating to work, which she tried to answer. She agreed that the respondent could contact her GP for medical information.

33. The meeting moved on to consider "performance issues" on the part of the claimant who became upset at this point. The Minutes record a change in focus from a discussion about an employee's return to work to the question of whether she is right for the role at all.

34. The dissenting Member took the view that that there must have been some reference to the claimant's "resignation option" during the exchange (P117) Also, the Minutes appear to be missing some content with which the claimant's subsequent response would seem more contextualised. She was asked, *"What [she was] thinking about? About what we discussed?"* the claimant asked if she could think about it, and was given 20 minutes, at a time when her distressed state of mind was apparent ("You are clearly very emotional").

35. The dissenting Member thought it unsurprising that her recollection of the latter part of the meeting, including how the resignation came about and the Minutes she signed, were different from that of Ms Davis and Ms Ironside.

Claimant's Submissions

36. The claimant's representative (her mother) submitted that the respondent requiring the claimant to attend meetings whilst she was off sick had hindered her recovery and that there was, *"no compassion"* shown by Ms Davis at these meetings.

37. She submitted that the claimant was forced to resign at the meeting on 1 August. Ms Davis had been aware of the claimant's *"problems"* from when she was signed off on 2 July and yet no adjustments were made.

38. She submitted that Ms Davis had used the claimant's vulnerability at the meeting on 1 August to force her resignation.

Respondent's Submissions

Knowledge

39. The respondent's solicitor submitted that, while Judge Hendry had decided that the claimant was disabled at the material time, the respondent had to be aware of her disability. He submitted that there was *"clear evidence"* that the respondent had no knowledge of her disability. He submitted that the duty to make reasonable adjustments did not arise and there was no direct discrimination or harassment.

40. In support of his submission that the respondent did not know and *"could not reasonably be expected to know"* that the claimant was disabled, the respondent's solicitor referred the Tribunal to the three "Fit Notes" which the claimant had submitted (P129-131). Each of the Notes gave *"stress-related problem"* as the reason for the claimant's absence which, it was submitted, *"is quite different from depression which is a clinical condition".*

41. The claimant maintained that she had requested her GP not to state in the Fit Notes that depression was the reason for her absence and Judge Hendry had expressed surprise, if that was so and she had confided in her GP that she *"had thoughts of self-harm"*, that she was *"left as it were to her own devices"* (P142, para. 20).

42. The respondent's solicitor reminded the Tribunal that the respondent was a small employer with no in-house HR facility. He questioned whether, in all the

circumstances, particularly when *"the real reason for absence was not given"*, it was reasonable to expect the respondent to, *"read between the lines".*

43. The first time depression was ever mentioned by the claimant was at the meeting on 1 August and even then she only said that she *"was depressed"* (P115). By this time, Ms Davis had taken HR advice and given questions to ask. Her answers to the questions which Ms Davis asked were not indicative of disability and when she asked the claimant if she had been diagnosed with depression she said that she had not.

44. The respondent's solicitor also submitted that when Judge Hendry decided that the claimant was disabled, *"he did not opine on knowledge".*

Harassment

45. The respondent's solicitor said that he presumed that this complaint related to the meeting on 1 August.

46. However, the claimant had turned up for that meeting voluntarily. She was not, *"forced to attend when off sick".*

47. She also attended a meeting on 11 July voluntarily. It was the day after she and her mother had called in to the Kindergarten. She was simply asked to come in *"for administrative reasons*". She could have declined.

48. So far as the meeting on 1 August was concerned, it was submitted that it was conducted by Ms Davis, *"in a measured way".* The respondent's solicitor invited us to accept the evidence of both Ms Davis and Ms Ironside in this regard and also to bear in mind the evidence which the Tribunal heard from other witnesses about Ms Davis' *"professionalism".*

49. The respondent's solicitor also invited the Tribunal to reject the claimant's assertion that she was *"physically detained"*, at the meeting . He submitted that this was a *"highly coloured account"*, not supported by any of the witnesses who were present.

50. Further, both Ms Davis and Ms Ironside disputed the claimant's contention that she was given two options: (1) resign or (2) be dismissed. The respondent's solicitor invited the Tribunal to accept the respondent's evidence that the two options she was given were: (1) a return to work or (2) to remain signed off (although it was accepted that these two options were not set out in the Minutes). Instead, she resigned voluntarily. She did not seek to withdraw her resignation.

51. The respondent's solicitor also submitted that the claimant's assertions about the fabrication of the Minutes were *"extraordinary".* Her assertion that certain paragraphs had been inserted was illogical as those particular paragraphs were not prejudicial to her.

52. The respondent's solicitor invited the Tribunal to find that the respondent had no knowledge of the claimant's disability, that she resigned voluntarily and that there was no harassment. He submitted that the claim should be dismissed.

Discussion and decision

Reasonable adjustments

53. The duty to make reasonable adjustments is set out s.20 of the 2010 Act.

54. The duty has three requirements. So far as the present case was concerned, it was the first requirement with which we were concerned:-

> ***"20. Duty to make adjustments***
>
> *(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 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 is reasonable to have to take to avoid the disadvantage."*

The section is supplemented by Schedules 8 and 21 to the 2010 Act. Schedule 8 sets out specific provisions regarding the duty in the context of employment and occupation, while Schedule 21 contains a number of supplementary provisions. Finally, s.39(5) states that the duty applies to the employer.

The PCP

55. While it was for the claimant to plead the, *"provision, criterion or practice"* ("the PCP"), the Tribunal was mindful that the claimant was represented by her mother who had no experience of employment tribunal proceedings. We decided, therefore, to formulate the PCP which, in our opinion, was, *" the requirement to be fit and able to perform the employee's substantive duties".*

Knowledge

56. Paragraph 20(1) in Schedule 8 sets out limitations on the duty:

> ***"20. Lack of knowledge disability, etc.***
>
> *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 a disadvantage referred to in the first, second or third requirement."*

57. An *"interested disabled person"* in this context is defined by reference to the table set out in Part 2 of the Schedule. These list who is an *"interested disabled person"*, in relation to different categories, *"relevant matters"* and the circumstances in which the duty applies in each case. Where the relevant matter is employment by the employer, the relevant interested person is either an applicant for employment by the employer or an employee of the employer (Schedule 8, para. 5).

58. Accordingly, an employer will only come under the duty to make reasonable adjustments if it knows not just if the relevant person is disabled but also that his or her disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. However, knowledge is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In ***Secretary of State for Work & Pensions v. Alam*** [2010] ICR 665, the EAT gave guidance that a Tribunal should approach this aspect of a reasonable adjustments claim by considering two questions: -

- First, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?
- If not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

59. When considering this issue, we were also mindful of the following provisions in the EHRC Code of Practice on Employment (2011):

"WHAT IF THE EMPLOYER DOES NOT KNOW THE WORKER IS DISABLED?

6.19. [Sch 8, para 20(1)(b)] *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.*

6.20. *The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment."*

60. The Tribunal was of the unanimous view that the respondent did not have actual knowledge of any form of mental illness or mental impairment on the claimant's part.

61. The issue, therefore, was one of so-called "constructive knowledge". In other words, could the respondent have reasonably been expected to know that the claimant was disabled and had it done all it could reasonably be expected to do, by way of reasonable enquiries, based on the information which it had.

62. As to what a respondent could reasonably be expected to know, that is a question for the employment tribunal to determine in all the circumstances of the particular case. The burden of proof is on the respondent, but the expectation is to be assessed objectively on the basis of what was reasonable. When considering this issue, we were assisted by the recently reported decision of the EAT in ***A Ltd v Z*** UKEAT/0273/18/BA.

63. Each member of the Tribunal found the issue to be narrowly balanced and ultimately it was divided (one Member dissenting)

Minority view

64. The dissenting member was of the view that the respondent had not carried out as much investigation of the claimant's condition as could reasonably have been expected in the circumstances. The respondent knew before the 1 August meeting that the claimant might be disabled under the Equality Act 2010 and had sought legal advice referenced in the Minutes. At both earlier meetings on 2 and 11 July, the claimant had described her mental health symptoms to Ms Davis. The Tribunal heard evidence that the claimant had been found by a colleague crying in the Kindergarten toilets. Her GP had signed her off work with "stress symptoms".

65. Ms Davis had been given by her legal advisers a list of questions to obtain medical information, including a request that the claimant consent to GP contact. At the start of the meeting with the claimant (who believed she was attending a meeting to discuss her return to work) Ms Davis opened the discussion with the claimant by asking: *" Can you please tell me why you*

have been signed off with stress-related problems? Have you been diagnosed with depression by GP? Have you been given any other mental health diagnosis? Are you taking any form of medication or having counselling?"

66. The dissenting Member felt that these questions were insensitively asked and ought either have been put to the claimant's GP (with appropriate follow-up discussion) or their purpose and nature communicated to the claimant in advance of the meeting. Putting them bluntly, without warning or context, to an employee with mental health problems, was at variance with the EHRC Code's guidance that, *" When making enquiries about disability, employers should consider issues of dignity and privacy".* It was unlikely to produce a helpful response and may well make the employee feel defensive and vulnerable.

67. The dissenting Member also noted that the claimant had not been permitted to be accompanied at the meeting.

68. In the view of the dissenting Member, Ms Davis should have been alerted to the possibility that the claimant's ill-health was more serious than she had thought and been told when she heard the claimant's comments at the meeting on 2 July at the Kindergarten (P112): - *"Melissa said that she was struggling with a number of issues in her life and that she had reached breaking point when her drink was spiked while out socializing. This was not a planned meeting but Sarah Davis made space to speak to Melissa as she was clearly distressed. Melissa was encouraged to seek to support to address the underlying issues."*

69. Further, at the meeting on 10 July the claimant ,*"stated that she was not any better, that she was not sleeping and that she had been signed off for a further period until 23.07.18. Melissa mentioned that she may need a phased return to work"* (P112).

70. While the claimant said that she had not been diagnosed with depression, at the meeting on 1 August she was distressed and tearful. She had not been aware that such questions would be asked, she was embarrassed about her mental health problems and worried about the stigma attached.

71. In the view of the dissenting Member, the respondent had sufficient information as to potential disability to make further enquiries as to the state of the claimant's health, in addition to bluntly asking her at the meeting. She had given consent to the respondent contacting her GP and had they done so they would have established that she was disabled. It was not reasonable on the part of the respondent, in all the circumstances, to simply accept the claimant's denial that she suffered from depression. The respondent had not done, *"all they can reasonably be expected to do to find out whether this is the case".*

72. The dissenting member was of the view that reasonable adjustments should have been put in place by the respondent for the meeting on 1 August and that these would have included the following: -

- Preparing a form of agenda for the meeting in advance.
- Allowing her to be accompanied by her mother to the meeting on 1 August.
- Enabling some kind of discussion about reduced hours' working, even on a temporary basis (noting that a 4-day week was in place for Pearl Whitelaw).
- Adjourning the meeting when it became clear the claimant was distressed perhaps to reconvene when her GP's report had been received.
- When the claimant said, apparently without any suggestion, "I'm just going to resign", to adjourn the meeting pending receipt of the GP report, rather than arranging to have her resignation letter typed for signature.
- Ensuring the Minutes were clear and included the 2 options the claimant was asked to consider.

Majority view

73. On the evidence which it heard, viewed objectively in light of the size of, and resources available to, the respondent, the majority was of the view that, not only did the respondent not have actual knowledge that the claimant was disabled, but also that it carried out reasonable enquiries and could not reasonably have been expected to have had that knowledge in all the circumstances. The main reasons for the majority coming to that view were as follows.

- At no time throughout her 5 months' employment did the claimant advise the respondent that she suffered from depression.
- She had consistently refused to acknowledge that she had mental health issues and went out of her way to hide her depression from the respondent.
- *"She did not want anyone to know of her depression"* (P43, D1-D3).
- When she was asked specifically, at the meeting on 1 August whether she had been diagnosed with depression, she answered, *"No. I have not been diagnosed with depression"* (P115).
- When she was asked specifically, at the meeting on 1 August if she had, *"been given any other mental health diagnosis",* she answered, *"No"* (P115).
- She also told Ms Davis at the meeting on 1 August that she was not taking any medication or attending counselling (P116).
- The claimant was never medically diagnosed as suffering from depression. The Fit Notes she submitted gave as the reason for her absence, *"stress-related problem"* (P129-131). None of the Fit Notes gave *"depression"* as the reason.
- There was no evidence from any of the witnesses that would indicate she was mentally ill.
- When she applied for employment with the respondent, she intimated that she was not disabled (P74).

- She had *"settled in well"* at work (P96). She was considered to be a good employee. There was no indication when at work that she suffered from depression. In particular, no indication was given to her Team Leader, Stephanie Legge. Ms Legge carried out regular supervisions (P94-106) which afforded the claimant an ideal opportunity of disclosing, in confidence, that she suffered from depression, but she did not do so.
- The claimant had only been absent from work for 4 weeks with *"stress and anxiety"* prior to the meeting on 1 August.
- The purpose of the meeting on 1 August 2018 was to discuss a possible return to work for the claimant. The claimant agreed to attend the meeting. She was not forced to attend. She had been made aware that such a meeting would take place (P113).
- The respondent is a small employer with limited resources and does not have HR expertise. It does not have an HR Department or an HR professional on its payroll. It was reasonable and sensible for Ms Davis to take advice concerning the claimant's return which she acted upon. As advised, she asked questions first about the state of the claimant's health. These questions were entirely appropriate for such a meeting, as the state of the claimant's health was the main factor in determining when she would be able to return, but that did not mean that Ms Davis was aware, or should have been aware, that the claimant suffered from a disability in terms of the 2010 Act.

74. While Judge Hendry decided that the claimant was disabled in terms of the 2010 Act, there was never any diagnosis of depression. He was of the view that, *"The claimant has kept has kept the severity of her condition to a great extent from her GP and family"* (P143, para 24). In the view of the majority, the claimant also kept the severity of her condition from her employer.

75. The claimant and her mother did speak about the claimant's health at the informal meetings on 2 and 10 July and the claimant was upset and tearful for at least part of the meeting on 1 August. However, in the view of the majority, that information, that "evidence", when considered objectively in all

the circumstances and, weighed against the factors detailed above, was insufficient to enable a conclusion to be drawn that the respondent ought reasonably to have known that the claimant was disabled and that her disability was liable to disadvantage her substantially.

76. At the meeting on 1 August when Ms Davis endeavoured to make further enquiries concerning the nature of the claimant's ill health, which had a material bearing on her ability to return, she was met with a blanket denial from the claimant that she suffered from depression or had any other mental health issues. The majority was of the view that it would not have been reasonable in all the circumstances for the respondent to press the matter. In arriving at that view, the majority was mindful of the guidance in the EHRC Code at para 6.19 : *" 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 personal information is dealt with confidentially."*

77. Apart from the claimant's own evidence, there was no evidence whatsoever to support her claim that she was forced to resign. She claimed that Ms Davis gave her two options: resign or be dismissed *"with a black mark on your* CV *and a bad reference".* But that made no sense, as Ms Davis had taken advice and clearly any dismissal would have been unfair, the claimant was a good employee who had only been off work for a short time and there was no basis for a "bad reference" and there was no evidence of any ill will towards her, quite the contrary, in fact. The majority was of the view that her evidence about what transpired at the meeting was neither credible nor reliable; there was corroborative evidence from Ms Davis and Ms Ironside which was credible and reliable, supported by the Minutes which, while not verbatim or comprehensive were reasonably accurate.

78. It may have been better to have refused the claimant's resignation and made a GP referral, but that is not the same as a finding that the respondent could reasonably have been expected to know that the claimant was disabled. Ms Davis said in evidence that prior to telling her that she wished to resign, the

claimant had given the impression that she didn't want to work at the Kindergarten any more. She told her, "No I'm not happy" (P117).

79. The majority was of the view, therefore, that not only did the respondent not have actual knowledge of the claimant's disability, it could not reasonably be expected to have known that the claimant was disabled, based on the information it had, having done all that could reasonably have been expected by way of carrying out reasonable enquiries.

80. Accordingly, as the view of majority prevails, the complaint of a failure to make reasonable adjustments is dismissed.

Direct discrimination

81. The relevant statutory provision is s.13 of the 2010 Act which is in the following terms:-

13. Direct discrimination

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

82. The claimant maintained that she was *"forced to resign*" and that this "dismissal" was the less favourable treatment.

83. The Tribunal was surprised that the claimant resigned when, on the evidence, the possibility of resignation had not been raised before. However, in the majority view, the evidence of Ms Davis and Ms Ironside as to what transpired at the meeting was to be preferred. The Minutes were reasonably accurate, and the claimant had told Ms Davis that she wasn't happy and gave the impression that she didn't want to work at the Kindergarten (P115-117).

84. The dissenting Member was concerned about the accuracy of two elements of the Minutes – the source of the resignation option and the omission of the "2 options" given to the claimant which lay at the heart of the dispute.

85. As the majority view prevails, the Tribunal concluded that the claimant had not been forced to resign as she maintained. The majority rejected her contention that the Minutes had been fabricated, that her signature had been transposed and that she had been physically prevented from leaving the premises. Her evidence in that regard was neither credible nor reliable.

86. The Tribunal was of the view that the claimant was not treated less favourably because of her disability. Accordingly, this complaint is also dismissed.

Harassment

87. The relevant statutory provision is s.26(1) of the 2010 Act which is in the following terms: -

*"**26. Harassment***

(1) A person (A) harasses another (B) if –

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

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

(i) violating B's dignity, or

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

88. When considering this issue, we also had regard to s.26(4):

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

(a) the perception of B;

(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

89. The claimant's submission, so far as this complaint was concerned, was unclear. Our understanding was that it related to the way she had been treated by Ms Whitelaw and the way she was treated by Ms Davis in particular at the meeting on 1 August 2018 when she resigned.

90. So far as the treatment by Ms Whitelaw was concerned, this was recorded in the Supervision Notes on 11 May 2018 (P98). The claimant had been advised previously by her Team Leader, Ms Legge, that Ms Whitelaw could be *"direct"* and in any event, in her view it was entirely reasonable for Ms Whitelaw to challenge the claimant when she did.

91. We heard that Ms Legge communicated the claimant's concerns to Ms Whitelaw and Ms Whitelaw spoke with the claimant and ensured her that it had not been her intention to cause her any distress. That appeared to be an end to the matter. It was not pursued by the claimant.

92. In these circumstances, we were of the unanimous view, having regard to the definition in s.26, that this did not constitute harassment. In any event, even though Ms Whitelaw may have spoken to the claimant sharply, it was not *"related to"* her disability.

93. So far as the conduct of the meeting on 1 August was concerned, we found in fact that the claimant was not forced to resign. While the claimant was upset at the meeting we were not satisfied that this was due to any conduct on the part of Ms Davis *"related to"* her disability and of the sort described in s.26 .

94. We had little difficulty, therefore, arriving at the unanimous view that the way the meeting on 1 August 2018 was conducted and the way the claimant was treated at the meeting did not constitute harassment as defined in the 2010 Act.

95. Accordingly, the majority (one Member dissenting) was of the view that the claim should be dismissed in its entirety.

Employment Judge:	**Nicol Hosie**
Date of Judgment:	**11 July 2019**
Date sent to parties:	**12 July 2019**