Case No. 1303993/2015

EMPLOYMENT TRIBUNALS

Claimant: Mrs B Baldeh

Respondent: Churches Housing Association of Dudley & District Ltd

FINAL HEARING

Heard at: Birmingham **On:** 16, 18, & 20 September 2019

Before: Employment Judge Camp Members: Mr R White
Mr J Sharma

Appearances
For the claimant: in person
For the respondent: Mrs M Peckham, solicitor

RESERVED JUDGMENT

The claimant's claim fails and is dismissed.

REASONS

1. This is a disability discrimination case. The claimant was employed by the respondent as a Support Worker from December 2014 until her dismissal with effect on 18 June 2015. This was the second final hearing. The previous final hearing was in March 2017 and the case came before the Employment Appeal Tribunal in March 2019.

Background

2. By way of background, we refer to the Reserved Judgment of the Employment Tribunal (Employment Judge Dean, Mr P Tsouvallaris, and Mr R S Virdee) sent to the parties on 19 December 2017, to the EAT's decision dated 11 March 2019, and to the written record of a preliminary hearing before Regional Employment Judge Monk on 24 May 2019.

3. The claim originally included two complaints about dismissal: one of discrimination under section 15 of the Equality Act 2010 ("EQA"; "section 15"); one of so-called 'whistleblowing' unfair dismissal, under section 103A of the Employment Rights Act 1996. Both of those complaints were dismissed by the previous Tribunal and the EAT upheld those parts of its decision. All that has been left to us to deal with by the EAT is a section 15 complaint about – and only about – the respondent's rejection of the claimant's appeal against her dismissal.

The facts

4. The EAT ordered that, "*the findings of primary fact in the Employment Tribunal's Judgment of 19 December 2017 remain binding on the parties, save that the words "notwithstanding … assist the Claimant" must be removed from paragraph 51 and it is made clear that paragraph 99 does not contain any such finding.*" The facts can therefore be taken from the previous Tribunal's decision, which we will refer to as the "original decision", and need not be detailed in ours.

5. We also note the "*Agreed Facts*" section of the respondent's document dated 21 June 2019, produced further to an order made at the preliminary hearing on 24 May 2019.

6. The respondent is an organisation that provides housing and related support to vulnerable people. The claimant was employed as a Support Worker. She was on a probationary period for the first six months of her employment. She was dismissed because, essentially, the respondent took the view that she had failed her probation. She unsuccessfully appealed internally against the decision to dismiss her.

7. The claimant is and was at all relevant times a disabled person because of depression. When she was dismissed, however, the respondent did not know and could not reasonably have been expected to know that she had the disability. That, at least, was the finding of the previous Tribunal and it is binding on us, as is confirmed in paragraph 9 of the EAT's decision.

8. After the claimant appealed internally against the decision to dismiss her, during the appeal hearing on 7 July 2015, there was the following exchange (as recorded in the typed version of the minutes of the appeal hearing, which were accepted as accurate by the previous Tribunal and the accuracy of which was not substantially challenged before us):

> *BG* [Ms B Greenidge, the appeal decision-maker] *asked BB* [the claimant] *if she could think of any occasion in conversations with colleagues where her manner might have been seen or described in any way as negative. BB said that one day she was feeling a bit distressed and feeling agitated and trapped in. She described it as like blowing up a balloon, and added that she had seen this pattern before with her mental health and can say things unguarded. She said she can remember standing by a wall and knocking her head on it, and said she could understand that this is unusual behaviour. She went on to say that she has had a breakdown in the past and knows the signals. BG asked if she had spoken with Jillian about this,* [Ms J Hartland, the claimant's line manager]*, BB said that Jillian is not the type of person you can divulge this information to, BG asked if she has spoken to anyone else at CHADD* [the respondent] *about it, BB said she has not as she is a private person.*

9. That part of the meeting is reflected in something in Ms Greenidge's letter to the claimant of 13 July 2015 giving the outcome of the appeal. In a paragraph beginning, "*Relating to your manner at work…*", Ms Greenidge wrote: "*During your appeal hearing you describe that your behaviour can be unusual and that you can say things unguarded and at this point you offered information about*

your mental health, which we were previously unaware of and which you confirmed that you had not divulged to anyone at CHADD".

10. Although the claimant relies on one or two other things, which we will come on to later, it was confirmed to us that what was set out in the appeal hearing notes, no more and no less, was the only information the respondent had at the time of the appeal decision explicitly about the claimant's mental health.

11. The EAT decided that that information opened the door to the claimant to argue that at the time she made her decision, Ms Greenidge (and through her, the respondent) knew or ought to have known that the claimant was a disabled person.

Issues

12. The main issue that was remitted to us by the EAT was put by the EAT as follows: "*whether the Respondent's rejection of the Claimant's appeal against her dismissal was an act of discrimination on grounds of disability under section 15 of the Equality Act 2010*".

13. At the start of this final hearing we discussed with the parties how that broad issue should be broken down into subsidiary issues.

14. Section 15 states:

> *15 Discrimination arising from disability*
>
> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

15. To decide any section 15 claim, we have to:

15.1 identify the unfavourable treatment;

15.2 identify the "*something*" said to arise in consequence of disability;

15.3 identify, in so far as it is not obvious, how that something is said to arise in consequence of disability, and how it is said that that something caused the alleged unfavourable treatment;

15.4 consider the knowledge issue, if the respondent is raising as a defence that it did not know and could not reasonably have been expected to know that the claimant had the disability;

15.5 identify the legitimate aims relied on by the respondent, if the respondent is arguing that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

16. In the present case, most of those things are relatively easy to identify.

17. The unfavourable treatment – and it clearly constitutes unfavourable treatment as a matter of law – is the decision to reject the claimant's appeal against dismissal.

18. One 'something' is easy to identify. It is: how colleagues perceived the claimant's communication with them. Prior to the hearing before the EAT, that was, as best we can tell, the one and only something relied on by the claimant in relation to her claim. It was identified at a preliminary hearing that took place in June 2016.

19. In the EAT's decision of 11 March 2019, there is a suggestion of another potential something, to do with memory problems. In paragraph 10 of its decision, the EAT referred to the claimant as having said (in a so-called 'Impact Statement', prepared by the claimant in relation to the issue of whether she had a disability) that a depressive episode, "*would affect her short-term memory which may have been relevant to another ground on which she was dismissed i.e. that relating to the loss of private data belonging to clients which she had suggested was because she had simply forgotten to put away sensitive documents.*" Similarly, in paragraph 11 of its decision, the EAT referred to, "*the memory issue which I have just mentioned, which may go to the data protection point*".

20. One of the subsidiary issues we have therefore had to deal with is whether the claimant can rely on any something other than how her colleagues perceived her communication with them.

21. This is a convenient point to explain how particular 'something's might have been the cause – or a cause – of the decision to reject the claimant's appeal against dismissal.

22. Unfortunately for the respondent, we had no live witness evidence from the appeal decision-maker, Ms Greenidge. We did not even have a witness statement from her, other than the rather short and uninformative statement that had been relied on at the previous final hearing. We understand that she is very unwell, so there is a good reason for her non-attendance. But that does not help the respondent, because we can only deal with this case on the basis of the evidence that we have before us.

23. We do, however, have Ms Greenidge's decision letter, dated 13 July 2015. We also, of course, have the original decision to dismiss that was being appealed and the Tribunal's findings about that. In addition, the respondent did call as a witness before us Mrs A J Cockette, who has been the respondent's HR Manager since 1 April 2018 and who, before that, was the respondent's Support Services Coordinator. She gave some indirect evidence as to what may have been in Ms Greenidge's mind when she took the decision, based on her conversations with Ms Greenidge at the time.

24. In summary, as set out in paragraph 78 of the original decision, there were five things which had led to the claimant's dismissal and which, potentially, were also reasons for the decision to reject the appeal against dismissal:

    24.1 breach of professional boundaries by loaning a service user money without authorisation;

    24.2 a complaint from a service user about the tone of a text message the claimant had sent to them;

    24.3 two incidents of breaching data protection by not maintaining the confidentiality of service user information. This is the part of the case where the potential new something about memory problems, mentioned in the EAT's decision, might come in;

    24.4 failing to consult with senior staff in relation to an instruction left for the claimant on 1 May 2015;

    24.5 the claimant's communication and how she related with her colleagues and with her manager. This last point is the one that feeds into the something, "how colleagues perceived the claimant's communication with them".

25. Returning to the issues, the respondent does raise a justification defence. Its alleged legitimate aims are:

    25.1 to maintain the standard required of individuals working with vulnerable people;

    25.2 to maintain a workforce where staff can work amicably in a pressured environment.

26. The respondent also maintains that it did not know and could not reasonably have been expected to know that the claimant had the disability.

27. A further issue which would have to have been dealt with had the claimant succeeded on liability, and which was expressly identified by the EAT, relates to remedy. We would put it in the following way: should any compensation awarded to the claimant be reduced to reflect any possibility that the claimant would have been dismissed in any event, for non-discriminatory reasons? We have not dealt with that issue, in light of our decision that the claimant's claim fails.

The law

28. In terms of the relevant law, we refer to the wording of section 15, to what we have just set out about what issues we have to deal with, and to what was set out about disability discrimination law in the original decision. We also note the cases referred to in the respondent's skeleton argument of 20 September 2019. We have sought to apply the law as explained, in particular, in paragraph 31 of the EAT's decision in Pnaiser v NHS England [2016] IRLR 170.

Decision on the issues – knowledge

29. We shall now explain what our decision is on the relevant issues, making further findings of fact, as necessary, along the way.

30. We shall deal first with the knowledge issue: did the respondent not know and could it not reasonably have been expected to know that the claimant had the disability at the time of the decision on her appeal against dismissal – 13 July 2015?

31. First, we repeat and note the previous Tribunal's relevant findings, which are binding on us: up to and including the point at which the claimant was dismissed, the respondent did not know and could not reasonably have been expected to know that the claimant had the disability. We emphasise these findings because it appeared that the claimant wished to go behind them and to rely on arguments in relation to the knowledge issue that had been rejected by the previous Tribunal, a rejection endorsed by the EAT in paragraph 9 of its decision.

32. We have already explained what the claimant principally relies on in relation to the respondent's state of knowledge at the time of the decision to reject her appeal against dismissal: something that she said during the appeal meeting, which is recorded in the appeal meeting notes. In paragraph 50 of the original decision, the previous Tribunal recorded the claimant's concession that the notes of the appeal meeting were accurate and the fact that she had, "*not verbalised any concerns about her mental health or its history to Ms Hartland during the probation review meeting that led to the termination of her employment or to anyone within the respondent during the course of her employment.*"

33. As an aside, and as we have already mentioned, the EAT has ordered that a line be put through the following part of paragraph 51 of the previous Tribunal's decision: "*The claimant confirmed that notwithstanding requests from the respondent who enquired if there was anything they could do to assist the claimant, she had not felt that she could make that disclosure to the respondents.*" We think that the EAT, in seeing a contradiction between that sentence and what the claimant had said during the appeal meeting, may have misread that part of the original decision. On our reading of it, the previous Tribunal was simply referring to the situation as it was during the claimant's employment. Be that as it may, there is and can be no dispute before us that the claimant said nothing about her mental health during her employment but did say what is recorded in the appeal hearing notes about it.

34. In relation to the knowledge issue, the claimant relies on one or two things in addition to what was said during the appeal hearing.

35. The claimant relies, first, on a conversation she had with Mrs Cockette on 29 May 2015, which is referred to in paragraph 77 of the original decision. In that paragraph, the previous Tribunal decided that a contemporaneous email from Mrs Cockette accurately recorded the conversation. Within that email, Mrs Cockette referred to the claimant complaining about being upset and having gone home from work in tears. The claimant argues that the respondent potentially had constructive knowledge[1] of her mental health problems from that.

[1] By actual knowledge, we mean what the respondent knew. By constructive knowledge, we mean what the respondent could reasonably have been expected to know.

36. In relation to this, it seems to us that the fact that someone is in tears at work is not such an unusual or striking occurrence as to make their employer think that they are, or might be, mentally ill. Moreover, we are bound by the previous Tribunal's finding that the conversation on 29 May 2015 did not give the respondent constructive knowledge.

37. Secondly, in her witness statement for this hearing, as well as referring to the telephone conversation with Mrs Cockette on 29 May 2015, the claimant referred to having had a road traffic accident three days earlier, which she alleged had happened due to her crying about unresolved issues at work. In paragraph 10 of the statement, she referred to the contents of a letter she took along to a meeting on 5 June 2015. In paragraph 11, she states, "*I do not believe that these are normal behaviours in an office and that they should have put my employer on notice that there may have been an underlying reason for them.*"

38. In these parts of her witness statement, the claimant is seeking to argue that the respondent had knowledge of disability before dismissal. A final decision has already been made that it did not. In any event, what is described in those paragraphs of her statement is not, to us, suggestive of mental illness, but instead of conflict and upset. Potentially, with hindsight, we might say that there were signs of possible mental illness, but none of them were, we think, signs that the respondent could reasonably have picked up at the time.

39. We return, then, to what the claimant said during the appeal hearing. It is necessary to consider the context within which the claimant made the remarks about her mental health.

40. The context was that Ms Greenidge had asked her, in relation to the allegation that how the claimant related to and communicated with colleagues was inappropriate, whether the claimant could think of any occasion in conversations with colleagues where her manner might have been seen or described in any way as negative. The claimant's response was to describe an incident that happened on "*one day*". The incident consisted of, "*standing by a wall and knocking her head on it*". The notes continue, "*she could understand that this is unusual behaviour*". In paragraph 44 of its decision, the previous Tribunal decided that this incident simply did not happen.

41. In summary, the context within which the claimant made remarks about her mental health was being asked specifically to come up with occasions where her manner might have been seen or described in any way as negative, and the only thing the claimant then identified was a single instance of "*unusual behaviour*" that did not actually happen.

42. Logically, the knowledge question starts with whether the respondent had actual knowledge of disability. The respondent did not. The reference to head-banging (which at the time the respondent would not necessarily have known was untrue), to her "*mental health*", and to a previous "*breakdown*" suggested that the claimant *might* be a disabled person. However, before the respondent could know, one way or another, whether she actually had the disability, the respondent would have to investigate and, probably, get medical and legal / expert HR advice.

43. We move on to whether the respondent ought reasonably to have known that the claimant had the disability.

44. The respondent ought reasonably to have known that the claimant had the disability if it ought reasonably to have done something that would have given it that knowledge. We therefore ask ourselves: what could the respondent have done to have got that knowledge? Realistically, it could only have got that knowledge by something happening along these lines: Ms Greenidge asking the claimant some further questions, which might have elicited some further information, which the respondent might then have investigated; or Ms Greenidge might have looked back at the end of the appeal hearing and thought to herself that this was something she needed to look into, and then have looked into it and gained knowledge that way.

45. The question we are looking into therefore becomes: ought Ms Greenidge to have done something of this kind? We think the answer would be "yes" only if there was something in what the claimant had said that a reasonable employer would, at that time, have thought was potentially relevant to the claimant's appeal against dismissal. Why should an employer go to the time and expense, in relation to someone who was by then an ex-employee, of undertaking investigations and obtaining advice in order to establish something that appeared irrelevant, and therefore, purely academic?

46. In our view, the claimant did not say anything to Ms Greenidge relating to her disability, or that otherwise touched on the knowledge issue, that was sufficiently relevant to the appeal against dismissal to mean that Ms Greenidge (or the respondent more generally) ought reasonably to have looked into it further in such a way as might have given the respondent knowledge that the claimant had the disability.

    46.1 The claimant's essential case during the probation review meeting following which she was dismissed, and at the appeal meeting, was that there was nothing in her behaviour that was inappropriate.

    46.2 When asked to account for colleagues' negative perceptions of her by recalling particular incidents, the claimant referred to a 'one-off'.

    46.3 The claimant did not herself say that she thought her mental health was relevant to the appeal.

    46.4 The only general comment the claimant made at the appeal hearing about behaviour connected with her mental health was that she could sometimes say "*unguarded*" things. The claimant's colleagues' perceptions of her and their difficulties with the way she communicated with them did not comfortably fit into the category of the claimant saying unguarded things.

    46.5 It is conceivable that if Ms Greenidge had cross-examined the claimant and asked her, "What kind of unguarded things?", and specifically led the claimant to attempt to match particular criticisms that the claimant's colleagues' had of her and the claimant's alleged tendency to say unguarded things, Ms Greenidge would have come to wonder whether what the claimant was saying about her mental health was indeed relevant to the appeal against dismissal.

46.6 At the time, however, a reference to something the claimant allegedly did on one day and a vague reference, not tied by the claimant to her colleagues' perceptions of her, to say unguarded things, in circumstances where the claimant had been denying communicating inappropriately with her colleagues at all, was, in our view, not enough to make Ms Greenidge reasonably think the claimant's mental health was sufficiently relevant to her appeal against dismissal for Ms Greenidge to look into it further.

46.7 We note in particular that the claimant herself was not saying that she thought her colleagues had negative perceptions of her because of anything to do with her mental health. It was not something that formed part of her appeal. She only mentioned what she mentioned in response to a direct question about particular conversations with colleagues that might have caused them to have negative perceptions of her. And her response was to refer to a single incident that cannot have been a reason for the claimant's colleagues' criticism of the way in which she communicated with them, because it was an incident that did not, as a matter of fact, happen.

47. The claimant's claim therefore fails because the respondent did not know and could not reasonably have been expected to know that the claimant had the disability.

Something arising

48. Because of our decision on the knowledge issue, it is not, strictly speaking, necessary for us to consider any of the other issues that have been argued before us. However, we shall nevertheless, for the sake of completeness, deal with all liability issues in the case.

49. The thing we want to move on to is the something or somethings said to arise in consequence of disability. Preliminary to that, we shall now look at the question of whether the claimant can rely on any something other than how her colleagues perceived her communication with them.

50. The claimant's claim is what is contained in her claim form. She has never made a relevant application to amend, let alone had one granted.

51. In her claim form, the only references to disability discrimination are:

51.1 a tick in the "*disability*" box in section 8.1;

51.2 in section 8.2, at the bottom of the page, "*During the meeting on 5.6.15 Jill expressed concerns about what she perceived to be my "erratic" behaviour. At no time during my employment did Jill Hartland, as the manager, seek to discuss her concerns with me, in an attempt to find out if I had a disability.*";

51.3 in section 9.2, "*I now suffer from depression and anxiety. This, however, is not the first time I have suffered with depression, but I believe that were it not for the circumstances around my employment and subsequent dismissal, I would not have experienced a relapse at this point in time.*"

52. One reading of what is in the claim form is that the claimant's primary claim was that the respondent had exacerbated her depression. It is, in our experience,

common for individuals who think their employer has caused or contributed to a disability wrongly to label a claim, which is really a personal injury claim that belongs in the County Court, as disability discrimination.

53. The first time the claimant's section 15 complaint was properly set out was at the preliminary hearing on 7 June 2016. At that hearing, the something was identified as: "*how colleagues perceived the claimant communicated with them*". We accept it is just about possible to identify such a complaint from the claim form, although it was arguably generous to the claimant for the tribunal in June 2016 to do so. The claimant therefore did not need to amend her claim form in order to be able to pursue that complaint. However, the claimant would have needed permission to amend in order to pursue a complaint based on another something, because the claim form does not mention any other discernible somethings.

54. The potential for the claimant to be able to rely on another something comes from what was in her Impact Statement. It was produced around 24 April 2016. That was before she, or anyone else, had identified what something(s) she relied on, although it was after it had been established that one of her complaints was a section 15 complaint about her dismissal. This had been done at a preliminary hearing in January 2016.

55. The sole purpose of the Impact Statement was to establish that the claimant was a disabled person. It was not produced to deal with, or provide information about, any other aspect of her claim.

56. When the Impact Statement was prepared, it was not even clear over what time period the claimant had to show she had a disability in order to win her claim. The earliest date referred to in the claim form on which something relevant happened was 1 May 2015. In her Impact Statement, the claimant did not say, directly or indirectly, that the state of health described in the Impact Statement was how she was at any particular date.

57. In addition, the Tribunal that identified one something and one something only had the Impact Statement before it at the time. The claimant has not suggested to us (nor, so far as we can tell, to anyone else) that when that single something was identified, she had wanted to rely on one or more other somethings as well and was prevented or inhibited from doing so. In particular, she has not suggested that additional somethings were identifiable from her Impact Statement and that the Tribunal wrongly failed to identify them.

58. Given all this, the Impact Statement does not help us understand how the claimant was putting her section 15 claim at the previous final hearing. It would, in all the circumstances, be wrong to assume that something mentioned in the Impact Statement remained relevant to her claim once the respondent conceded she had a disability.

59. The case went to trial on the basis of a single something. The respondent and, judging by the claimant's witness statement, the claimant herself prepared for trial on that basis. (It is obvious from all the paperwork that the focus of the case was the whistleblowing claim and not the disability discrimination claim, from the claimant's appeal against dismissal onwards. The focus has shifted, for the obvious reason that the whistleblowing claim failed entirely). In her witness

statement for the previous final hearing, the claimant did not even deal with the single something that was definitely in play, let alone state anything that even hinted that there might be other somethings. The Employment Tribunal's judgment was made on that basis. As best we can tell, there was no hint or suggestion anywhere prior to the EAT's decision of any other something.

60. In order for the claimant to be able to rely on any other potential somethings, she has to be able to satisfy us that:

    60.1 it was part of the claim in her claim form, or that she has been, or should be, given permission to amend to add it;

    60.2 she should be permitted to argue something that was not argued before the previous Tribunal, or that the EAT has implicitly, and without explanation, given her permission to argue it.

61. The claimant did not make an application to amend to us. Even if she had done so, the idea that she should be given permission to amend at this stage is fanciful, in circumstances where, in fairness to the respondent, we would have to reopen large parts of the case that was decided in 2017.

62. The same goes for the idea that the claimant should be permitted to argue something that was not argued before the previous Tribunal.

63. We are therefore left with this question: did the EAT implicitly give the claimant permission to amend and to argue something that was not argued before the previous Tribunal? The answer is: plainly not.

64. It appears to us that what happened was that the claimant's counsel – no doubt doing her best for the claimant, in accordance with her professional duties – introduced into the EAT the notion that the claimant's memory problems might be relevant to an issue other than whether the claimant had a disability. That suggestion had never been made before, by anyone.

65. As has been mentioned already, if the claimant's alleged memory problems are relevant at all, they are relevant to the allegation about breaching data protection by not maintaining the confidentiality of service user information.

66. What the claimant said at the time of dismissal about this allegation is recorded in the original decision in paragraph 81: "*the claimant acknowledged that the behaviours should not have happened,* [that] *mistakes of that nature did not happen on a regular basis and concluded saying "I am in no way justifying my actions and since the last incident double check that all files are put away".*" There was no suggestion that memory problems were, or might have been, relevant.

67. In her letter of 24 June 2015 appealing against dismissal, the claimant wrote this: "*As stated in my response during the review meeting, there have been numerous occasions when other staff have not put files away at the end of their shift. The practice has been so common that as recently as last week a check list has been put on the door as a reminder to all staff.*" Again, she didn't mention any memory problems.

68. We would add that when the claimant was asked by the Employment Judge when giving her evidence at this final hearing how, according to her, the allegation about breaching data protection was because of something arising in consequence of disability – a question asked fully expecting the answer to be something about memory problems – the claimant did not give the expected response. Instead she said this: "*When I am becoming ill, I kind of live in a bit of a bubble – the "balloon" – where I am sheltered around and the rest of everything is outside. My world becomes smaller – just around me. I am not really connecting with anything that is going on outside of that. It is hard to explain.*"

69. In summary, there is no good reason for us to allow the claimant to expand her case from the case that was originally before the Tribunal, in circumstances where:

    69.1 the claimant has not been given permission to amend the claim in any relevant way and the claim form does not mention memory problems or contain any discernible reference to a section 15 claim other than one based on the something, "how colleagues perceived the claimant's communication with them";

    69.2 it had never been suggested prior to the hearing before the EAT that there was more than one something arising in consequence of disability that she relied on;

    69.3 even at the hearing before us, she was inconsistent in terms of what additional something or somethings she might want to rely on.

Causation – "*arising in consequence of disability*"

70. The next issue is: was the relevant part of how the claimant's colleagues perceived her communication with them something arising in consequence of disability? By the "*relevant part*", we mean the parts of the claimant's colleagues' perceptions of her communication with them that led to one of the five reasons for dismissal being the claimant's communication and how she related with her colleagues and with her manager.

71. At the preliminary hearing in June 2016 where the something was identified, Employment Judge Perry recorded in his note of the hearing that he had, "*explained to the claimant* [that] *she will need to provide evidence of the causal connection between her disability and the something arising from*". What the claimant has produced, before the previous Tribunal and before us, is nothing more, in terms of evidence of causation, than her own say-so.

72. Whether there is a causal connection between the something and the disability is a medical question. There is always a temptation to a tribunal to use what we might think of as our common sense to deal with questions of this kind. It is a temptation to be resisted. We are not medical experts, and however much common sense we may have, this cannot replace, or make up for, lack of medical expertise. In some cases, the answer to the question may be blindingly obvious to anyone. This is manifestly not such a case.

73. There are three aspects to this issue of whether how the claimant's colleagues perceived her communication with them was something arising in consequence of disability.

74. First, there is the question of how, in general terms, people with the claimant's condition behave and whether that is the kind of behaviour that could have led people like the claimant's colleagues to have the kinds of perceptions that the claimant's colleagues had of her communication with them. Secondly, there is the question of specifically how the claimant tends to behave when she is depressed, or is at the start of a depressive episode. Thirdly, there is the specific question of whether particular behaviours of the claimant at a particular point in time arose in consequence of her depression.

75. Pausing there, we note that we do not, and the previous Tribunal did not, have even a bare assertion from the claimant in her evidence that particular behaviours that led to relevant perceptions at relevant times arose in consequence of her disability. What we do have from her – and the previous Tribunal had even less – are general assertions, made years after the event, that she *might* have been in a depressive episode at particular times and that this *might* have caused her to behave in a particular way and that that *might* have caused others to perceive her in a particular way.

76. Upon analysis, then, there is truly nothing at all to support the claim on this issue of causation. When giving evidence, the claimant herself was suggesting only that a causal link between the disability and the something was a possibility.

77. Even the suggestion that it is possible there was such a causal link is something we only had the claimant's word for. The claimant has been living with her condition for years and could fairly be described as an expert in her own mental health. Nevertheless, it is relevant, when deciding how much weight to give the word of the claimant on this issue, that:

    77.1 the claimant was attempting to recall what her state of mind was and to assess how her behaviour was affected by that state of mind some 4½ years or so ago;

    77.2 the claimant has been pursuing her Tribunal claim for the last 4 years;

    77.3 the claimant knows that if her relevant behaviour did not arise in consequence of disability, then her claim will fail;

    77.4 the claimant was found by the previous Tribunal to be a "*stranger to the truth*" (paragraph 44 of the decision).

78. To say the least, the claimant starts off on the back foot.

79. In addition, we again mention, and emphasise, that the claimant at the time largely denied any inappropriate behaviour, for example in an undated letter that runs from page 118 to 121 of the trial bundle, seemingly written around the end of May 2015, and in her letter of the 24 June 2015 appealing against the decision to dismiss her. It is not clear to us whether the claimant accepts even now that she behaved in the way she is alleged to have done. The only specific behaviour that the claimant evidently accepts was unusual and possibly caused her colleagues to think negatively of her is banging her head against a wall on a

particular occasion. That behaviour did not occur and therefore cannot have led to dismissal or to the appeal against dismissal being rejected.

80. The claimant's case is effectively this: I did not behave as I am alleged to have done; but if I did, it was a consequence of my disability. It is not impossible for a claimant to run that kind of internally contradictory case, but it is difficult for a claimant running it to win.

81. We also note that there is a mismatch between:

    81.1 on the one hand, what is described in the Impact Statement, and, on the other, the specific things that led to the respondent's allegation that there was a problem with the way in which the claimant interacted with her colleagues;

    81.2 on the one hand, what happened, and, on the other, what we would expect to have happened if it were true that the relevant part of how the claimant's colleagues perceived her communication with them arose in consequence of disability, and if her speculation to the effect that she began to relapse in March / April 2015 onwards were accurate.

82. The claimant's case is rather vague, but in so far as we can establish what it is, it seems to be that from March/April 2015 onwards, she began to slide into a depressive episode and that this resulted in behaviour which caused her colleagues to have negative perceptions of the way in which she communicated with them. If that is what happened, we would expect to see no incidents of relevant behaviour in the first couple of months of the claimant's employment, followed by incidents of increasing severity, with increasingly erratic behaviour from the claimant, culminating in dismissal. That is not the picture the evidence paints.

83. In her witness statement for the previous final hearing, the closest the claimant came to identifying a point in time when her condition allegedly began to manifest itself was in paragraph 38, in which she suggested that the "*trigger for my mental health*" was an incident on 4 May 2015. When questioned about this during the hearing before us, the claimant's answer was to the effect that that was the point in time, if not before, when she was conscious of slipping into a depressive episode.

84. The previous Tribunal's finding that the claimant made no mention at all of her mental health difficulties prior to dismissal means that if she felt that she was slipping into a depressive episode on 4 May 2015, she did not say anything about it for a significant period afterwards.

85. By the time of the appeal against dismissal, the claimant had been to her GP. The GP notes of a consultation on 25 June 2015 record this: "*got dismissed from work. 4 days prior to end of Probationary period. ; says she reported potential fraud and then got dismissed. ; Has not been [*sleeping] *properly for 2 wks prior to that; …. Afraid of slipping back into severe depression like previously*".

86. Under cross-examination, the claimant confirmed that even at this stage, she did not think that her dismissal had had anything to do with disability.

87. In her claim form, the claimant did not say that her dismissal was an act of disability discrimination. One really has to struggle to identify any specific disability discrimination claim at all in the claim form.

88. As already mentioned:

    88.1 the first time there is a clear assertion that the claimant was dismissed because of something arising in consequence of disability was at a preliminary hearing in January 2016;

    88.2 the first time there was an assertion that colleagues' perceptions of her arose in consequence of disability was at the preliminary hearing in June 2016, around a year after dismissal.

89. In the claimant's Impact Statement, there is reference to how the claimant is "*during the initial stages of a depressive episode*" and of how she is later during such an episode. We have to ask ourselves whether that evidence is true in general terms; and if so, whether the claimant was in the initial stages of a depressive episode at the relevant time; and if she was (and in any event), was the particular behaviour that is relevant in relation to her claim a consequence of her depression?

90. The contents of the Impact Statement seem never to have been challenged. However, we have already mentioned that it does not contain assertions that the claimant was as she describes herself being in it at any relevant time.

91. All the claimant was seeking to prove by her Impact Statement, and what the respondent accepted she had proved, was that she had a condition that was likely to recur and that when she was in the acute phase of that condition it had very severe effects on her. Given that the claimant has been suffering from depression for many years and was hospitalised because of it in 2015, the disability issue could only ever have been resolved one way: in the claimant's favour. But nothing in the Impact Statement tells us how the claimant actually was during the first half of 2015.

92. In addition, if we accept, for present purposes, that the claimant believes the contents of her Impact Statement to be true, it does not follow that it is true. At the time it was prepared, she was in litigation, and it is only human nature, when in litigation, to remember things in a way that is helpful to one's case. Perhaps more importantly, the fact that someone believes certain aspects of their behaviour to be manifestations of a condition that they suffer from does not make it so. We repeat that the causation question we are dealing with here is a medical question on which there is no real medical evidence.

93. For now at least, though, we shall assume that when the claimant is in a depressive episode she tends to be as she has described in the Impact Statement.

94. The relevant question for us is, then: was the claimant in a depressive episode at the relevant time?

95. We are not satisfied that she was.

96. Even the claimant herself is not saying that she was in a depressive episode before 4 May 2015. The gist of her evidence – given 4½ years afterwards – is that she might have been. May 2015 was also the earliest date mentioned in the claim form on which something relevant happened.

97. The claimant had no treatment for depression between 2013 and dismissal, and nothing until the GP visit on 25 June 2015.

98. The claimant did not mention anything about her condition to the respondent until her appeal hearing.

99. At this Tribunal hearing, the claimant speculated – and she did not pretend it was more than speculation – that after she injured her back, in or around March 2015, the consequent lack of exercise triggered a relapse into a depressive episode. But even the claimant did not assert that this is what actually happened and we would require at least some supportive medical evidence before we could be satisfied that it did. If this really is, and always has been, the claimant's case, her failure over the last 4 years to obtain medical evidence identifying that a depressive episode began in March or April 2015 speaks volumes.

100. As for the claimant's suggestion that the treatment for eczema that she had in March/April 2015 is relevant, we reject it. The medical records suggest that her eczema flared up in 2014 and that the treatment she was having in 2015 was for a continuation of that flare-up, rather than being for a new episode of eczema. Further, the claimant is not suggesting that in 2014 she was in a depressive episode – quite the reverse. During the whole of 2014, she was having no medication or other treatment for depression at all.

101. We have found it helpful to look at the dates when the claimant was specifically alleged to have communicated with colleagues inappropriately.

102. Mr Griffiths accused her of being rude and dogmatic during her first month of employment, i.e. around January 2015.

103. Ms O'Neill, in terms of allegedly inappropriate communications, complained mainly about a conversation that took place in late January 2015 and things that happened around or before 8 April 2015.

104. Mr Payne referred to an incident that allegedly occurred not long after the claimant started and to something that, according to paragraph 60 of the previous Tribunal's decision, occurred on 30 March 2015. There was a further alleged incident involving Mr Payne, that, according to the claimant (see paragraph 32 of her witness statement for the previous hearing), occurred around 4 May 2015, but it is not mentioned in the decision.

105. None of the statements from colleagues raising complaints about the claimant suggest her behaviour and demeanour changed over time for the worse. The only change that any of them seemed to have reported was a positive change after the claimant returned from annual leave on 8 June 2015: a Senior Project Worker's suggestion that the claimant's attitude changed, in that she was being very professional in the way she was communicating with them and other staff members. This undermines, to some extent, the claimant's case that she was on a downward spiral at that stage.

106. Getting a reliable chronology of everything described in the statements from members of the respondent's staff is difficult. We therefore do not make a great deal of this, but if we assume (and it is a reasonable assumption to make) that Ms Blackford's statement, which is dated 10 July 2015, is roughly in date order, then the things she refers to in the statement's first three paragraphs, which are relevant to the allegation about how the claimant communicated with colleagues, occurred before April 2015.

107. In conclusion on this issue, the claimant has failed to prove that the behaviour that led to criticisms of how she communicated with colleagues (and, potentially, to her appeal against dismissal being unsuccessful) arose in consequence of disability, taking into account, in particular:

    107.1 when things seem to have occurred and what is alleged to have occurred;

    107.2 the lack of medical evidence;

    107.3 the lack of clear evidence from the claimant herself about her own state of health at the relevant time;

    107.4 the claimant's own denials of inappropriate behaviour

    107.5 the lack of evidence from the claimant herself to the effect that she accepts relevant specific behaviour occurred and that it arose in consequence of disability.

Alternative something(s)

108. We have already decided that it is not open to the claimant to rely on any something for the purposes of her claim other than how her colleagues perceived her communication with them. We shall now, nevertheless, briefly consider any other potential somethings.

109. The first difficulty we have is identifying what that other something or those other somethings might be. The claimant has never identified any.

110. We shall assume any other something is to do with the claimant's alleged memory problems. All we have to go on in relation to this is the claimant's evidence, particularly that in the Impact Statement about "*major problems with my short-term memory*". In context, that phrase appears to be being used to describe how the claimant is when she is in a depressive episode. This part of the Impact Statement comes after sentences such as, "*At this stage I will just stay in bed for days at a time.*" Manifestly, that is not how the claimant was in and around April 2015, when the incidents to which her alleged memory problems might be relevant occurred.

111. There is no medical evidence concerning the claimant's alleged memory problems. The claimant's own – limited – evidence on the issue suggests that those problems manifest themselves only when her depression returns. We repeat the points we have already made about there being very little if any evidence as to what the state of the claimant's mental health was at any particular relevant time and how we are not satisfied that the claimant was in a depressive episode at any particular relevant time. Similarly, in the absence of medical evidence, we are not satisfied that if depression had returned in April

2015, it was a cause of the incidents which resulted in the charges of breaching data protection and confidentiality. We again note that prior to the EAT hearing the claimant was not suggesting it was, and that her evidence about it at this final hearing was inconsistent.

112. Even if, then, the claimant were able to rely on a 'something' to do with alleged memory problems, a section 15 complaint based on that something would fail because she would be unable to prove that her memory problems arose in consequence of disability, or that they were a cause of the appeal against dismissal being rejected.

Causation – "*because of*"

113. If we had decided the other issues in the claimant's favour, the next issue would be whether the something "how colleagues perceived the claimant's communications with them" was an effective cause of the decision to reject the claimant's appeal against dismissal.

114. That something was plainly part of the decision to dismiss. In the absence of any evidence directly from Ms Greenidge to the contrary, we assume that it must also have been part of her decision not to overturn the decision to dismiss.

Justification

115. The final liability issue in the case, had we decided the other liability issues in the claimant's favour, would be whether rejecting the claimant's appeal against dismissal was a proportionate means of achieving a legitimate aim.

116. As already mentioned, the legitimate aims are to maintain the standard required of individuals working with vulnerable people and to maintain a workforce where staff can work amicably in a pressured environment.

117. Unquestionably, these are legitimate aims. We don't think the claimant is suggesting otherwise. The 'live' issue is therefore proportionality. Our decision on that issue is that it was proportionate to dismiss.

    117.1 We bear in mind that there were five reasons for dismissal. Of the five reasons, the potentially discriminatory one was, on the evidence we had, the least important.

    117.2 The claimant was on a probationary period. The purpose of a probationary period is to assess whether someone is a suitable fit. The claimant was not, and for substantial reasons, most of which were not potentially tainted by discrimination.

    117.3 What was said in evidence in relation to justification by Mrs A Walsh, who has been the respondent's CEO since shortly after the claimant's dismissal, was compelling. It is accurately set out in pages 9 and 10 of the respondent's skeleton argument of 20 September 2019.

    117.4 We think the respondent is right to emphasise the vulnerability of its service users and the practical difficulties created, or potentially created, by someone behaving in the way in which the claimant seems to have

behaved and exhibiting the kind of symptoms the claimant herself describes in her Impact Statement.

Summary

118. The claimant's claim fails because:

118.1 the respondent did not know and could not reasonably have been expected to know that the claimant had the disability;

118.2 the claimant is entitled to rely on one 'something' only – how the claimant's colleagues perceived her communication with them – and we are not satisfied that that something arose in consequence of disability;

118.3 the respondent has satisfied us that the relevant treatment was a proportionate means of achieving a legitimate aim.

Employment Judge Camp

19.11.2019