EMPLOYMENT TRIBUNALS

Claimant: Mr A

Respondent: C Ltd

Heard at: Manchester **On:** 2 to 4 September 2020, 6 October 2020
8 October 2020 (In Chambers)

Before: Employment Judge Holmes
Ms A Jackson
Mr P A Dobson

Representatives

For the claimant: In Person
For the respondent: Mr P Maratos, Consultant

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that :

1. The respondent did not discriminate against the claimant on the grounds of his disability, and his claim of direct discrimination is dismissed.

2. The respondent did treat the claimant unfavourably by dismissing him by reason of something arising from his disability, but has established that it did not know, or could not reasonably be expected to know that he had that disability. His claim under s.15 fails, and is dismissed.

REASONS

1.By his claim form presented to the Tribunal on 7 March 2019 the claimant brought claims of unfair dismissal and disability discrimination. An anonymisation order has been made, by consent, and hence the claimant , the respondent and other persons referred to in the evidence are referred to by initials. The claimant is not represented or legally qualified. His claims are effectively set out, in narrative terms, in the two page attachment to his claim form.

2.The claims had been discussed at two preliminary hearings, one on 3 October 2019, and the other on 6 January 2020. In essence, the claimant is claiming that the respondent, in failing to give him any more work at the end of January 2019 ,

dismissed him. He claimed that his dismissal was unfair, and also that he had been discriminated against because of his disability. The claimant has formally withdrawn the unfair dismissal claim, which has been dismissed.

2.In relation to the disability claims, the claimant believed that he could bring his claims under s.13. s.15 and s. 19 of the Equality Act 2010. The Employment Judge explored this with him. In relation to the first of these, s.13, direct discrimination, it was explained that such claims require actual or hypothetical comparators. The claimant indicated that he would rely upon two actual comparators, one "D", and the other, his own brother, "J", who, he contends did not have a disability, and who put in sick notes, or took time off work, but were still given more work to do, and were kept on after he was dismissed.

3.In terms of any s.15 claim, to the extent that the claimant was dismissed by reason of his sickness absence, this , he will say, was something arising in consequence of his disability, and , if this is so, it would then fall to the respondent to justify this treatment. There had been a discussion as to whether the claimant might also have any s.19 (indirect discrimination), or s. 20 (failure to make reasonable adjustments) claims, but these seemed to the Employment Judge to boil down to the same issues as the s.15 claims. The need to establish a PCP for such claims was discussed, and the claimant indicated that he was content to rely upon s.13 and s.15. The Employment Judge agreed that this was the best course, with the caveat, clearly expressed to the respondent, that if the Tribunal conducting the final hearing considered that the facts it found did indeed potentially amount to another form of discrimination, wrongly labelled by the claimant, it could, with due notice to the respondent, consider permitting a late amendment to plead the correct from of discrimination. As it turned out, neither party addressed indirect discrimination, and the claims have proceeded as s.13 and s.15 claims. Disability was conceded on 20 December 2019.

4.The claimant appeared in person, accompanied, but not represented, by his partner. Mr Maratos, consultant, appeared for the respondent. The claimant gave evidence, and called "D", and "J". The claimant had made a witness statement for the final hearing, dated 15 May 2020, he had also previously made an "impact statement" in relation to the issue of disability (pages 54 to 59 of the bundle) . That also contains some factual evidence of some of the events which are relevant to the issues in the case as awhile, and not just to disability. The respondent called Richard Burford, and Dawn Thomas as witnesses, the latter appearing by video link on the final day of the hearing. There was an agreed bundle, and references to page numbers are to that bundle, save where other documents, disclosed by the claimant in the course of the hearing are referred to, which bear pages numbers "P1" to "P18". The evidence was concluded on 6 October 2020, and the parties made their closing submissions orally that day. The Tribunal reserved its judgment, meeting in Chambers on 8 October 2020 to deliberate. The Employment Judge apologises to the parties for the delay in promulgation of the judgment, occasioned by pressure of judicial business, and limited access to Tribunal premises and resources, all occasioned by the Covid – 19 pandemic.

5. Having heard the evidence, considered the documents before it, and considered the submissions of the parties, the Tribunal finds the following relevant facts:

5.1 The respondent is an employment business supplying labour to various clients on a casual and permanent basis. One of its clients was KH, a delivery and service provider to a major electrical retail group. It has a warehouse in Irlam, Greater Manchester, and the respondent had been supplying labour for warehouse and driving roles for some time prior to October 2018. The demand for workers to be supplied by the respondent in this way was rather seasonal, with peak demand in November and December each year, tailing off in January of the following year, a can be seen in the charts provided by the respondent at pages 154 to 156 of the bundle. Whilst workers were initially supplied by the respondent, and contracted to it, KH would offer some of these workers positions as employees, whereupon they would cease to be employed by the respondent, and become KH employees. This normally happened after workers had been working at their site for some 12 weeks, and KH considered that they would make good permanent employees. The respondent would still supply causal workers to KH during the rest of the year, when, for example, there was a need to cover sickness absence.

5.2 The respondent, however, offered workers in a pool to KH, and it was the respondent, and not KH who put the names of available workers on a rota. KH would then tell the respondent of its requirements, which the respondent would then meet by offering its workers shifts with KH, usually by text.

5.3 The claimant , having been out of work for around two months, applied, around October 2018, for a job with the respondent working as a warehouse operative at KH . He initially did so online, through “Indeed”, and was then offered an interview , to be held at Irlam Job Centre. He attended that interview on 15 October 2018, which was conducted by Dawn Thomas, a recruitment consultant for the respondent.

5.4 The claimant completed an application form whilst at the interview, and he and Dawn Thomas then discussed that form in the interview. The form is at pages 96 to 100 of the bundle. Following the interview Dawn Thomas completed an Interview Checklist (page 101 of the bundle) which the claimant did not see, or complete any part of. On the application form the claimant’s availability/preferred hours are recorded by Dawn Thomas as “2 – 10”. His employment history appears on the second page of this form, as do other details which the claimant himself completed. He signed and dated the third and fourth pages, the latter containing a 48 hour opt out agreement.

5.5 On the fifth page (page 100 of the bundle) there is a questionnaire about health, which the claimant completed by ticking the relevant boxes. They included:

“Are you waiting for any medical investigations, treatment or admission to hospital?

Do you have any health problems that may have been caused by or made worse by work?”

5.6 There is a note on this document, below these boxes, which reads as follows:

“Note:

Examples of illnesses or other conditions which might be relevant include, but are not limited to:

Vision deficiencies …….. , nervous or psychiatric conditions, …..”

Beneath this note is a box for the provision of details. The claimant ticked the “no” boxes to all the questions, and made no entry in this box.

5.7 In fact the claimant at the time of his interview had a history of mental health issues, with anxiety, low mood, and stress, From his GP records (pages 61 to 91 of the bundle) these appear to affected him from 2015. He was prescribed Citalopram during 2017 and 2018.

5.8 In August 2018 he consulted his GP in connection with low mood, and his previous employment, which he was unhappy with. An incident occurred on 6 September 2018 when the claimant was due to attend a job interview, but he texted the interviewer advising that he could not attend , and expressing suicidal thoughts. This led to Police involvement, and a referral to an emergency doctor.

5.9 The claimant had a further job interview on 10 September 2018 with another potential employer, but this caused him to have feelings of panic , and a desire for self harm. He had another interview for a different job on 11 September 2018, which he was due to start on 19 September 2018. This he felt much better about and was looking forward to starting it.

5.10 On 9 October 2018 the claimant felt suicidal urges, and called an ambulance. He was taken to hospital, but not detained. He was assessed by a practitioner (it is unclear of this was a Consultant) at the Greater Manchester Mental Health NHS Foundation Trust on 11 October 2018, and a report was provided for his GP.

5.11 It was shortly after this incident that the claimant had his interview with Dawn Thomas. Whilst he contends that he informed her, in general terms , without going into details, that he had mental health issues, the Tribunal finds as a fact that he did not.

5.12 Having carried out the interview, and obtained details from the claimant, Dawn Thomas completed a further document, which the claimant would not see, an Interview Checklist, at page 101 of the bundle. In the overall comments/other information section she recorded, as was correct, that the claimant had previously worked at an Argos warehouse, had heavy goods experience, was flexible to work on 4 on 4 off shift rotas, and was available for induction.

5.13 The claimant was successful, and offered a position with the respondent . He was provided with a document “Terms of Employment of C……. Flexi Worker” (page 138 of the bundle), which he signed. The document is dated 15 October 2018, but this seems unlikely to have been the date that it was signed.

5.14 This document is generic, as no individual worker or employee is identified (save by signature at the end) , nor any client to whom their services may be supplied. It is a zero – hours contract of standard terms applicable to all persons such as the claimant who agree to work for the respondent on this basis.

5.15 The claimant shortly after he was accepted by the respondent, in or about October 2018, telephoned Richard Burford, the respondent's Director. In this telephone conversation he informed him that he (the claimant) had another job at a pub at weekends, and this would affect what shifts he could work. He also contends that in this call he mentioned to Richard Burford as well about his mental health issues.

5.16 Richard Burford disputes this. The Tribunal accepts that evidence. He was not told at that stage anything of the claimant's mental health issues.

5.17 Thereafter the claimant was given and duly carried out shifts at KH. He worked through October and November 2018. There were no issues with his attendance or ability to work.

5.18 On 19 November 2018 the claimant attended his GP, with his partner, having suffered a panic attack. He is noted (pages 70 and 86 of the bundle) as having said that he did not enjoy "working for others", and did not enjoy his work. No fit note was issued on this occasion. He was to attend again for review in two weeks time, and was to try with his medication in the meantime.

5.19 The claimant did attend his GP again on 3 December 2018 for review (pages 70 and 86 of the bundle) . On this occasion he said his medication was not working, but he would continue with it. He had arranged an appointment for counselling on 7 January 2019. No fit note was issued on this occasion.

5.20 One night in December 2018 , after 3 December, but before 18 December , the claimant was on his way to work by bicycle. He felt suicidal, and was worried he may ride into traffic. He telephoned Richard Burford, to say that he could was running late, and was feeing panicky. He was worried he may be late, and may not go into work, but, after that conversation he carried on and went to work. In that conversation the Tribunal accepts that he did not inform Richard Burford that he was feeling suicidal, or anything as serious or dramatic as that.

5.21 It is unclear when this incident occurred, but the claimant makes no reference to it when he sees his GP on 3 December 2018, so the Tribunal considers that it was likely to be after that date, and before 18 December 2018.

5.22 The claimant next saw his GP on 18 December 2018. He describes this (para.33 of his impact statement) as an emergency appointment. It is hard to tell from the notes if this was so, but it does not appear to be a follow – up appointment from the previous appointment on 3 December 2018.

5.23 On this occasion (see the notes on page 67 of the bundle) the claimant presented with anxiousness. The notes record how this had been an issue for about 4 years, and the claimant had a very negative attitude to work, having had 7 jobs in two years. He reported daily panic attacks , and having thoughts about ending his own life. He was not finding medication effective. He makes no mention of the incident when he rang Richard Burford on his way into work. On this occasion a fit note was issued for two weeks (page 139 of the bundle) for anxiety.

5.24 Later that day the claimant sent a text to Richard Burford/Donna Lawson (page 140 of the bundle) informing them that he would not be in work because his head was not mentally prepared, as he had had about 2 hours sleep over the past three days because his anxiety was "kicking in really badly". He went on to say that he was hoping to "kick this" as soon as possible, as he really enjoyed the work. He said he would send in the Doctor's note, but would not be taking the 2 weeks on it, this was just what the doctor had recommended.

5.25 The claimant sent a further text that day (P3 in the additional bundle) at 16.33 repeating that he had a doctor's note for 2 weeks, as he had had a serious panic attack, and was suffering with anxiety and depression really badly.

5.26 There then ensued a problem with the claimant's fit note reaching the correct address, and the delay that this then caused to his receiving any sick pay. Further text messages followed on 28 and 31 December 2018 (pages 141 to 142 and P4), in which the claimant was informed of where to send his fit note.

5.27 On 2 January 2019 , at 14.15 the claimant sent a further text saying he would send his sick note in the following day. As it had expired by then, he confirmed that he was available to come in for work that night , and Richard Burford replied that he was alright for staff. The claimant then asked when he could come in to work next, as his sick note was over (pages 143 and P5). Richard Burford replied asking him if he would work 13.30 to 22.00 shifts at KH, to which he replied he would, and he was then offered those shifts on Friday, Saturday and Sunday of that week, which he accepted (page 144 of the bundle).

5.28 The claimant duly went to work on 3 January 2019, but could not complete his shift. He left part way through is shift, at around 4.00 p.m. He suffered a panic or anxiety attack, and attended A & E. He did not call anyone at the respondent to inform them of this.

5.29 The following day, 4 January 2019, the claimant saw his GP (see page 67 of the bundle) . He reported that he had tried to return to work the previous day, but had then had a panic attack. His medication was changed, and he was given advice as to how to manage his symptoms, particularly if his suicidal thoughts returned or worsened. Follow – up was planned for 2 to 4 weeks, and he was given a fit note (page 147 of the bundle) , this time for 28 days from 4 January 2019. The condition put on the note was "anxiety".

5.30 The claimant sent a text later that day, whilst he was at the GP's, informing the respondent of his panic attack the previous day, and how he had left work early to go to A & E. He explained how he was getting a further sick note for 28 days, which he would send in. He apologised for not notifying the respondent (page 146 of the bundle).

5.31 On 11 January 2019 the claimant sent a further text (P8 and P9) in which he complained of not being paid, and querying the amount of SSP to which he was entitled. He went on to say in this text how he had a meeting with the CAB, and would be talking to them about taking legal action against the respondent.

5.32 The SSP issue was subsequently resolved , and the claimant received a payment. In the meantime, the claimant applied for a post with "H" Limited, a care provider. He was interviewed for this role on 12 January 2019 , and was offered the post on 17 January 2019, with a start date of 9 March 2019 (see P15 in the additional bundle).

5.33 On 21 January 2019 the claimant had a further consultation with his GP (in fact a locum) . His condition was reviewed. There had been some improvement to his anxiety and mood. His PHQ9 score (an indicator for depression) was 10/27 , which the Tribunal understands to indicate moderate depression, and his GAD7 score (an indicator for anxiety) was 7/21, which again is an indicator of moderate anxiety. He was to undergo further counselling sessions. No further fit note was issued, but the previous one was still current.

5.34 At 13.20 on 28 January 2019 the claimant spoke (or tried to, it is unclear if he was put through) with his GP on the telephone, saying he was going to harm himself. He was advised to contact the Crisis Team, but he hung up (page 65 of the bundle)

5.35 On 28 January 2019 at 13.41, the claimant sent a text to the respondent (partially at the top of page 148 of the bundle, but with the full version inserted at page 147A) saying this:

"Hi,…. Thank you very much for the SSP I know I was off for a long time, I am feeling better now and have been told by my doctor's if I feel like working again I can so I am messaging to see if you have any work available from Friday to Sunday?"

Richard Burford replied at 13.43 saying this:

"Hi, .. unfortunately it has gone very quiet at KH so there are no spare shifts at the minute."

5.36 The claimant replied that he understood, and asked in a further text, that if any day or night shifts, or for drivers' mates, or anything came available, could he be informed, adding that he would be available every day the following week.

5.37 Richard Burford replied by further text at 14.45 as follows (page 148 of the bundle):

"Sorry …. We won't be offering you work moving forward."

5.38 At 23.51 that day the claimant sent a text to Richard Burford asking for a reason for this. He did not get a response, so at 12.44 on 29 January 2019 he sent a further text asking for a response as to why the respondent would no longer be offering him work moving forward.

5.39 At 12.48 that day, Richard Burford replied as follows:

"Because we have regular lads who have been working at KH for 2/3 months and they are able to complete 5 shifts every week, which is the requirement from the client"

This exchange is at page 149 of the bundle.

5.40 The claimant replied later that day (page 150 of the bundle) , saying that he would now be seeking advice for the CAB, as there were not always 5 regular shifts available, and he quoted his previous message that it had gone very quiet. He said he had been signed off work for 6 weeks, and had he been able to return he would have been able to complete 5 shifts per week. As he had not been given that opportunity he would be seeking advice.

5.41 On 30 January 2019 the claimant commenced early conciliation, a certificate being issued on 14 February 2019. On 19 February 2019 the claimant sent a text asking for his contract, and his start date (page P11) . On 20 February 2019 the claimant was sent is P45 (added to the bundle at pages 159 to 162). His leaving date is shown as 3 February 2019. The claimant submitted his claim form to the Tribunal on 25 February 2019, but it was initially rejected. It was then accepted on 7 March 2019. It was then served on the respondent on 21 March 2019.

5.42 The claimant had applied for other posts. One application he made was to "H" limited, working in the care sector. His application has not been produced to the Tribunal. He gave the respondent's details as his last employer, and by email of 24 January 2019 (added as P in the additional bundle) a request was made by H Limited to Dawn Thomas for a reference for the claimant . A standard form document was provided by H Limited for this purpose, and a reply was requested by 28 January 2019. The claimant had been informed by letter of 17 January 2019 (P13 in the additional bundle) that he had been successful in obtaining this post, but this was subject to satisfactory references.

5.43 The Dawn Thomas for the respondent responded and returned this document to H Limited . She had no first hand knowledge of the claimant's work, and so checked the respondent's system. Having done so , she completed one part of the reference form, in which , in answer to the question "Please give the dates if employed by you." she wrote this:

"Oct 2018 (2 days worked and then been producing sicknotes"

which was the information she had obtained from the respondent's CRM recording system.

5.44 It is unclear when that reference was supplied by Dawn Thomas to H Limited. It was requested for 28 January 2019. Clearly it was received by 21 February 2019, as it led to H Limited asking to see the claimant to discuss this reference with him, and on 21 February 2019 a meeting was held with him for this purposes. A note of this meeting has been produced by the claimant (P15 in the additional bundle). The claimant was able to explain how the reference was not correct, which his new employer accepted. He was informed that his absence levels would be monitored using the Bradford scale of sickness recording (with which the Tribunal is familiar), and any absences recorded and kept on file. No mention is made in this meeting of any mental health issues, or the claimant having made his new employer aware of his medical history.

5.45 In terms of other workers employed by the respondent at KH, in relation to D, and J, J was offered shifts after the end of January 2019, in fact in tax week 4 of the next year,. He had a couple of text messages offering them to him. J did not during the course of his employment with the respondent put in any fit notes, ands was not off work sick at any time. D did not work for some 8 weeks between November and January . He was, however, also offered shifts as a driver's mate between January and April 2019. He too suffered from anxiety and depression, but he too had no time off for that condition, and put in no fit notes. Neither of these workers ever worked 5 shifts per week for the respondent.

6. Those are the relevant facts. In terms of disputed issues of fact, we did not consider that any witness had not told the Tribunal the truth as they understood it to be, but in terms of reliability and accuracy we did consider that the claimant was not always clear in his recollection of events. We were struck in particular by the number of times he would answer a question by saying that he "would have" said or done something, as opposed to stating what he actually did say or do.

7. Further, in relation to one issue of chronology, relating to 30 October 2018, the claimant was shown, on the documents to have been incorrect. His impact statement at para. 6 states that on 30 October 2018 , i.e two weeks after starting his employment with the respondent, he was taken to hospital due to having suicidal thoughts about cutting his wrists. He repeated this assertion in para. 10 of his witness statement, actually making the point that this was 15 days after signing his contract. His medical records, however, reveal there was no such incident. There was such an incident on 9 October 2018, before he started his employment with the respondent. The claimant accepted this, when it was put to him, and agreed that his evidence in both these statements was incorrect. This is not to say the Tribunal considered that the claimant was lying to it, merely that his evidence was not always reliable.

8. Further, whilst it was a central part of his case that he expressly told Dawn Thomas of his mental health issues in the interview, and that he always did so when being interviewed for jobs, he could produce no corroboration of this in respect of any other jobs he had applied for , or had obtained, including his current post . The notes of the meeting he had with H Limited in relation to the reference received from the respondent do not advance his case on this issue. There is no reference at all in this meeting to the claimant's mental health issues. One would have thought, if the claimant's new employer was made aware of these issues as the claimant says he always did, that they would have been discussed at this meeting, but they were not. There is thus no support for the claimant's contentions that he told Dawn Thomas about his mental health, because he always does tell prospective employers about it.

7. We found that Dawn Thomas gave an honest and reliable account of the interview. It was not put to her that she was not telling the truth, and , given that she no longer even works for the respondent, it is hard to see why she would have any reason to give anything but honest evidence. Further, it would be of no consequence or benefit to her not to record on the paperwork that she completed for the respondent that the claimant had told her he had mental health issues. Rather, the opposite, it would be a matter she would want to bring to the respondent's attention, that is the very purpose of the fairly comprehensive medical questions set out on

page 100. We are quite satisfied that if the claimant had mentioned anything in relation to his mental health, Dawn Thomas would have noted it.

8. That is not to say that the claimant does not believe himself that he did so inform her. The Tribunal did detect in him an attitude that he should not have to say too much, merely to raise the issue should put employers on enquiry to look more fully into these issues with him. In his evidence, for example, he accepted that he could not recall if he used the word "disability" in his telephone call with Richard Burford, but said that he should not have to, he should not have to go into detail. The respondent should have accepted he had a disability from the mention of his mental health. On his own case, therefore, he accepts that he may rather have underplayed this, and not mentioned very much to Dawn Thomas. We are satisfied, on a balance of probabilities, that it was even less than that, he did not tell her anything.

The submissions.

9. The parties made submissions. For the respondent Mr Maratos started off with the issue of knowledge. He referred to the declaration that was completed at the claimant's interview at page 1010 of the bundle. The respondent was at a disadvantage when the claimant had not disclosed his condition in this form, and there was insufficient information provided to the respondent for it to know of any disability. The claimant had had a number of jobs, and came across as a confident person. This may have masked his condition. The form at page 99 of the bundle is in the claimant's own handwriting. The work was seasonal, and was distributed amongst others during the claimant's time off work. The arrangement of the work was almost a trial period for KH, who chose its permanent staff not just on attendance. The claimant had accepted that he could be difficult to manage, and found it hard to accept authority.

10. He discussed the s.15 claim, and how the respondent had to maintain its relationship with its client. There was a seasonal drop off in work. In terms of consistency of the evidence, he said the respondent's was more consistent than the claimant's. He had been wrong about the sequence of some events, and could therefore be wrong about other matters.

11. In relation to his claims of direct discrimination, he had no real comparators. None was offered work around the time that he ceased to be offered work around the end of January. Both the claimant and two others got their P45s at around the same time. There was nothing to say that the claimant would not have been offered work at Easter, had he been available, but by then he had another job.

12. The claimant showed no hesitation when he was back off the sick in January, so there was nothing to suggest then that he had any disability. The respondent simply had no awareness of his difficulties. He had chosen in his interview not to disclose his condition, so he cannot try to reverse that , and later say that the respondent ought to have known from any clues that he gave, or ought to have made further enquiries.

13. In terms of any claims that the claimant had intimated before his dismissal, the only reference he had made was to consulting the CAB about his sick pay. He

commended the evidence that Dawn Thomas gave as straightforward and honest. In relation to the reference she had explained that , and it was a mistake.

14. The claimant produced a written submission, entitled "Written Summary Statement" , which the Tribunal considered. Additionally, he responded to the respondent's submissions. His main points were that he should not be penalised for making a mistake in his evidence. Richard Burford had changed his account as well, originally saying that he was not kept on because he could not do 5 shifts a week, which was wrong. His text message that had not been originally included was about sick pay, and he was going to seek legal advice.

15. He did tell Dawn Thomas about his condition. Richard Burford had agreed that there was a telephone call, and it was in this that he had mentioned his mental health as well as at his interview. In relation to applying for a new job, that did not mean that he did not still want shifts from the respondent. He was trying to sort his finances out, and needed as much work as he could get. He would have accepted shifts.

16. His condition is not a visible one, and he can appear confident. He could still be suffering, though that may not be apparent, and he would control his condition. The contract did not say the work was seasonal. KH would only know he was off sick if the respondent told them.

17. He clarified and accepted that he had not made a victimisation claim in relation to the reference.

18. he had been off work for 6 weeks, and was dismissed. "D" , however, was kept on. "J" was offered more work when he was not. The respondent cannot use his sick note like this, to dismiss him.

The Law.

19. The relevant provisions of the Equality Act 2010 are set out in the Annexe to this judgment.

Discussion and findings.

20. As a starting point for both claims, the Tribunal has had to consider what was the reason why the respondent did not offer the claimant any more shifts after 28 January 2019, effectively thereby dismissing him. The claimant submits that it was because of his sick notes, he being off work for 6 weeks. Whilst there has been some lack of consistency in the respondent's case on this, at the end of the day Richard Burford did agree that the claimant's sickness absence was factor, in that he did not see the point, when he came back from a period of sick leave just as the requirements for staff from KH were declining, in putting him back on the rota. Thus his sickness absence, if not the sole cause of the decision , was certainly part of it. The Tribunal has not found the other reasons advanced by the respondent at various stages in the proceedings , however, consistent or convincing. The respondent tried to cast the responsibility for the decision upon KH, suggesting that it was they, and not the respondent, who selected the staff they wanted to work shifts. That was not the evidence, however. Whilst KH doubtless was the arbiter of those staff that it

wanted to go on to employ directly, we find that in the supply of temporary workers in December and January their role was simply to inform the respondent of their requirements, and it was the respondent who put , or did not put, names on the rota. Decisions about that were the responsibility of the respondent, not KH.

a)The s.13 claim.

21. The Tribunal will start with the direct discrimination claims. The claimant has relied upon two comparators, "D" and "J" , both of whom also worked for the respondent on the KH contract. In order to be a comparator, the person(s) in question must have not material difference in their circumstances when compared to the claimant. The claimant relies upon these comparators because they too had time off work sick, but were offered more work with KH , when he was not . Examination of the evidence, however, does not support this. The extent to which either of these comparators were off work sick was almost nil, let alone for 6 weeks.

22. The simple fact is that neither comparator had been off work sick for six consecutive weeks prior to 28 January 2019. Only the claimant had. The circumstances of his comparators therefore were materially different.

23. That, however, need not be fatal to his direct discrimination claim, as he could fall back upon a hypothetical comparator, and if legally represented, he doubtless would have done so. The Tribunal is therefore obliged to explore this possibility to ensure that he is not disadvantaged by reason of lack or legal knowledge or representation.

24. A hypothetical comparator must also have no material differences with the circumstances of the claimant . That therefore means that the hypothetical comparator must be a non – disabled person, working on the same KH contract, who had been off sick in January 2019 for six weeks, for non – disability related reasons. The question then is whether the claimant has shown that such a person would not have been treated the same way, i.e, would have been offered more shifts with KH at that time.

25. Whether that is so requires an examination, as is always required in direct discrimination cases, of the reason why the claimant was treated in the way that he was. The reasons given by the respondent, and by Richard Burford has, as the claimant rightly points out, not been consistent , or necessarily stands up to scrutiny.

26. In the text message exchange by which the termination of the claimant's engagement was effected, he was told the reason was :

"Because we have regular lads who have been working at KH for 2/3 months and they are able to complete 5 shifts every week, which is the requirement from the client"

27. The respondent has also alleged that once a worker became "inactive", i.e he had not accepted work for a period of six weeks, he was classed as inactive and issued with a P45. An examination of these reasons, and Richard Burford's evidence, has revealed that the real reason was neither of these things. The "automatic inactivity" termination process was not supported on the evidence, and

was not applied consistently. There was, we are satisfied nothing "automatic" about the process, the decision not to offer the claimant any more shifts was an actual decision, taken by Richard Burford.

28. However unsatisfactory these explanations may have been, leading to understandable suspicion as to whether were genuine, the Tribunal is satisfied that the claimant was dismissed for the reasons given by Richard Burford, that there was no more, or very little, more work with KH , and the claimant having just come back from sick leave, he saw no point in putting him back on the rota.

29. He would, we are satisfied , have done the same with any other employee in these circumstances, regardless of the reasons for their sickness absence. In other words, he would have treated any non – disabled person in the same circumstances in the same way. There may, the Tribunal agrees, have also been an element of the claimant being considered unreliable , and something of an attendance risk , in this decision. That may be relevant to the next claims to be considered, but the Tribunal is satisfied that the respondent would have treated any non – disabled person assigned to the KH contract, who had been off work sick , or for any other reasons, for 6 weeks at the end of 2018 and beginning of 2019, when KH's requirements were reducing , in exactly the same way. The direct discrimination claim accordingly must fail.

b)The s.15 claim.

30. The Tribunal now turns to the s.15 claim . The first limb is unfavourable treatment because of something arising in consequence of the claimant's disability. There was clearly unfavourable treatment, the claimant was dismissed. Was that because of something arising in consequence of the claimant's disability? Whilst not specifically addressed by Mr Maratos, we consider that it was. As discussed above, his sickness absence was a factor in the decision not to offer him any more shifts. The claimant had been off work sick for 6 weeks. The end of the second period of sickness absence was the end of January, by which time the work at KH was winding down. Richard Burford's clear evidence was that he saw no point in putting the claimant back on the rota for KH when he returned from that absence. He had not been on the rota during his sickness absence, and he saw no point in putting him back on it. The implication is that the claimant would , but for his absence, have been on the rota, even up to the time the work was winding down. Being on the rota did not guarantee work, but being off it meant there would be none. There is thus a link between the sickness absence and the claimant not being on the rota. The sickness absence was something that arose in consequence of the disability, and hence the first limb of s.15 is, in our view, satisfied.

31. The respondent relies , however, on two defences, justification , or in the alternative, upon the defence in s.15(2) of want of knowledge. What must be shown in order for this second defence to succeed was considered in ***A Ltd v Z [2019] IRLR 952.*** In considering this defence HHJ Eady QC (as she was then) said this, at para. 22:

"*The Relevant Legal Principles*

Knowledge of disability

22.By section 15 of the EqA it is provided:

"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."

23.In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long- term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. 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."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

32. That is a comprehensive statement of the law, and we adopt and follow it. Applying it to the facts as we have found them, we consider that the respondent has discharged the burden of proving want of knowledge. The reasons for that conclusion are as follows. Firstly, we do not accept that that the claimant told Dawn Thomas about his mental health issues in the interview. Even if he had done, it is unlikely that he would have given her anywhere near enough information to enable her to know that his condition amounted to a disability. As is clear, in order to have such knowledge, an employer has to know not merely that the employee has the condition, but has to know of its duration, or likely duration, of at least 12 months, and of its substantial adverse affects upon the employee's day to day activities. For the claimant to have told anyone that he had anxiety and/or depression without any more information as to for how long he had had that condition, or was likely to have it, would not suffice to fix them with the requisite level of knowledge. Likewise, if he gave no information as to the effect of the condition upon his day to day activities. Even on the claimant's own evidence he did not do this in the interview with Dawn Thomas.

33. The next occasion upon which he contends that he provided information to the respondent whereby it would be fixed with knowledge of his disability was in a telephone call, at the beginning of his employment , with Richard Burford. Again the Tribunal does not find, as a fact, that he mentioned his mental health in that phone call. Again, even if he did, his own evidence stops far short of him imparting to Richard Burford the necessary details to enable him to appreciate that the condition amounted to a disability.

34. The next occasion which the claimant relies upon is a night, sometime between 3 and 18 December 2018 when, on his way to work by bike, he rang Richard Burford as he was having a panic attack, and was not sure he could go into work. Again, we do not find that in that call he told Richard Burford that he was feeling suicidal, or gave him any further information from which he could ascertain

that his condition amounted to a disability. A condition can be serious, without it amounting to a disability. The claimant criticises Richard Burford for not following up this telephone call, but, it is to be noted the claimant did in fact go into work, and worked more shifts after this incident, not actually going off sick until 18 December 2018.

35. Thereafter on 18 December 2018 the claimant went off work sick, and obtained a fit note (page 139 of the bundle), which was subsequently received by the respondent. The same day he sent a text to the respondent (page 140 of the bundle) in which he informed the respondent that he had not been sleeping because "my anxiety is kicking in really bad". This fit note was for two weeks, but in his text the claimant said that he would not be taking two weeks. The claimant was thus rather underplaying the effects of the condition, and how long it may last. He sent a further text that day (at page P3) saying again he would not be using the two weeks time off, and adding that he had a "serious panic attack" as he was suffering from anxiety and depression really badly.

36. Further it is to be noted that, whilst the GP who provided the fit note was obviously well acquainted with the claimant's medical history, he simply certified the condition as "anxiety", and did not add that it was chronic or long standing. There is thus nothing in the texts from the claimant , or the fit note from the GP, from which the respondent would have been alerted to the fact that this was, in fact, a long standing condition, or was likely to become one. Indeed, the claimant referred to hoping to "kick" the condition, and recover from it. He gave no indication of its long standing nature, rather creating the converse impression.

37. The claimant then came back to work on 3 January 2019, his sick note having expired, but saying he was immediately available for work. That day, however, he could not complete his shift. His text message of 4 January 2019 (pages 145/146 of the bundle and P7/P8) explained this to the respondent. He went to his doctors, and was given a further fit note, dated 4 January 2019, signing him of work for 28 days, for , again, "anxiety" (page 147 of the bundle). In his text he explained that he had been taken to A&E the previous day due to a panic/anxiety attack, and had been advised that he was not well enough to go back to work, and had another sick note for "a possible 28 days".

38. This, then, as at 28 January 2019, when the respondent informed him that there would be no more shifts for him, was the totality of the information from which the respondent could have known that the claimant was a person with a disability.

39. The respondent, in the person of Richard Burford, knew, from , at the latest 18 December 2018, that the claimant suffered from anxiety and depression. From early January 2019 when the first fit note was received, we are satisfied, he knew that the claimant suffered from anxiety. That was repeated when the second fit note dated 4 January 2019 was received, along with a further text from the claimant.

40. Did Richard Burford thereby know that the claimant was person with a disability? Did he know that the condition had lasted 12months, or was likely to? We can see no evidence that he did. Nothing in the fit notes or in anything the claimant said in his text messages gives any indication that this was a long standing condition, or that it was likely to be.

41. Further, quite apart from the duration of the condition, the respondent has also to know of the effect of the condition upon the claimant's day to day activities. Work is not a day to day activity, as such, so a mere inability to go to work is not , in itself , a substantial interference with day to day activities. Quite what effect his condition was having upon the claimant's day to day activities , and for how long it would do so, were things which the respondent would not be able to glean from the very limited information provided to it in the two fit notes and the claimant's text messages. As observed , the fact that a condition may be serious is not the same as it amounting to a disability. There are many serious conditions which are short lived, and anxiety and depression can be reactive as well as pathological.

42. Anxiety, per se, is not a disability. The claimant has objected to this contention when made on behalf of the respondent. It is, however, correct, as a general statement. Whilst certain conditions, e.g. cancer are deemed disabilities, anxiety and depression are not. They may be, but in order to do so, these conditions must satisfy the test of disability in s.6 of the Equality Act 2010. The claimant's anxiety in fact is, and was, a disability. What he is perhaps objecting to is an apparent denial that his anxiety amounted to a disability, which is not denied.

43. It is instructive to consider for a moment the way in which the claimant originally put his case. In his claim form rider (page 14 of the bundle) , in the second paragraph , he says this:

"At the end of Nov beginning of Dec 2018 I started suffering with my anxiety. I have had previous episodes with mild anxiety which was due to personal family reasons in 2014 and one past job position in 2018. This was not something that was recognised as a medical condition as it was only mild episodes for short periods of time, these are noted in my medical records."

He then goes on to describe how in November and December his anxiety had escalated greatly with attacks nearly every day, which he then recognised as a problem.

44. The first point is that this description of his condition is rather at odds with his medical records, which show that he was being medicated for anxiety or depression from 2015, and was having serious issues with anxiety attacks in August 2018 before his employment with the respondent even began.

45. That description, however, is not consistent with the claimant having a disability. He suggests that anything before November 2018 was not significant, or long lasting, and that it was only in November 2018 that condition became serious enough, or chronic enough, to amount to a disability. That description, is, with respect to the claimant , thus plainly wrong, and he was, in fact, a person with a disability rather earlier than that. What is significant, however, about that description is that it reveals a degree of inconsistency about how the claimant self describes. It appears that he would not, until November 2018 , consider himself to have any significant mental health issues, or any disability. This rather reinforces the finding that he did not tell Dawn Thomas about it when he was interviewed.

46. Further, this also shows how difficult it would be for the respondent to know that he had a disability, when he himself appears not to have appreciated until late 2018 he did, or may have.

47. The Tribunal is thus satisfied that the respondent did not have actual knowledge that the claimant's condition was a disability. That is not the end of the matter, however, as the respondent has also to show not only that it did not have the requisite knowledge, but that it could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

48. As para 5.15 of the Code provides , an employer must do all it can reasonably be expected to do to find out if a worker has a disability. 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.

49. The respondent, of course, made no attempts to discover more about the claimant's condition, and look into whether it may amount to a disability. Was it unreasonable of it to fail to do so? In our view it was not. That is for a number of reasons. Firstly, the claimant had informed Richard Burford on one occasion he was having a panic attack, but then went on into work. He , a week or so later, then was off work for 6 weeks. This is very different from a long term sickness absence, where the longer the absence, the more likely it is that it will be reasonable for the employer to make some investigation whether there was any disability in play. He had only been employed for a total of three months, so there was no pattern of absences. Secondly, there had been nothing to alert the respondent to the possibility that this condition, though potentially serious, may amount to a disability. It had no knowledge of the events just before the claimant was interviewed on 15 October 2019. Thirdly, there is the nature of this employment. The respondent supplies hundreds of workers to its clients. Most are on a casual, short term basis, some become permanent employees, in which case they cease to be employed by the respondent. The turnover of employees is therefore very high. The respondent has (it is assumed, there is no evidence that it did) no occupational health department, or HR department. It has little direct contact with its workers. It would be unreasonable, the Tribunal considers to expect the respondent to carry out further investigations and enquiries into an employee's medical condition just because it becomes aware that he has been off work sick for 6 weeks with anxiety, which may or may not be temporary, with no indication from the claimant that it is in fact long standing, or may become so. That the claimant was seeking to come back to work, and saying he was fit to do at the end of January 2019 , rather undermines his argument that the respondent should at that point have required some form of health assessment to be carried out.

50. The claimant appears to have expected the mere mention of anxiety or mental health issues either to have fixed the respondent with the requisite knowledge, or to have required it, at that stage to undertake further enquiries. We do not agree, and having found as a fact that the claimant did not inform the respondent at the outset of his employment of any mental health issues, we are satisfied that the respondent has shown that it did not know, and could not reasonably be expected to have

known, that his condition amounted to a disability. For those reasons, that defence to the s.15 claim under s.15(2) is established , and the respondent is not liable for discrimination arising in consequence of the claimant's disability .

51. On that basis, it is not necessary for the Tribunal to consider the respondent's alternative defence of justification. That is perhaps just as well, as the Tribunal has struggled to understand precisely what it was. It initially relied upon the alleged requirements of KH for permanent staff, and seemed to rely upon that company effectively making the choice of which workers it wanted to retain as staff on its payroll. That was not supported by the evidence, and the justification defence therefore rather shifted during the course of the hearing. It is, however, unnecessary to consider it any further, as the defence based on lack of knowledge does succeed, and these claims accordingly fail.

52. We realise that this will be disappointing for the claimant. Much of his submissions, however, focussed upon what he sees, understandably, as a duty of care on the part of the respondent, an obligation to take his mental health into account. He has perhaps elevated this into an obligation to enquire further into it than the Tribunal, on the facts it has found, considers that it was reasonable for his employer, at that stage, and on what little information it then had, to do so.

The reference

53. There is one further matter which requires addressing. Whilst the claimant has not made this a specific claim, as he is unrepresented the Tribunal has considered whether the provision of the highly inaccurate and damaging reference to the claimant's new employer gives him any additional claim.

54. There are two possible claims, it seems to us. The first would be a direct discrimination claim, the respondent provided this reference because of the claimant's disability. This requires the same exercise as has been carried out above, so it requires an actual, or a hypothetic comparator. There does not appear to be any actual comparator that the claimant can rely upon, he cannot identify any other worker who has been dismissed or left, who was not disabled, but who was provided with an accurate reference. He is thus forced to rely upon a hypothetical comparator, i.e to show that a non – disabled person would not have been provided with such a reference.

55. The Tribunal can see no basis for such a finding. As the claimant has pointed out, and his witnesses have also said, the respondent's records are far from well ordered and accurate. The claimant complained of pay issues , with he and his brother being confused in documents relating to pay, and at page 152 of the bundle the record of his shifts and hours worked, and those of his two comparators have also been challenged as not being accurate. In those circumstances, the Tribunal can see no basis for a finding that , had he not been disabled, the reference provided would have been any more accurate.

56. The second possible claim is one of victimisation, under s.27 of the Equality Act 2010 , which is set out in the Annexe to this judgment. This has not hitherto been identified as a possible claim, but the Tribunal can see how it may be. Had the

claimant done a protected act? To constitute a protected act under the Equality Act 2010 , the claimant must have done something falling within s.27. Those things are

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under the Act;

(c) doing any other thing for the purposes of or in connection with the Act;

(d) making an allegation (whether or not express) that the victimiser or another person has contravened the Act.

57. There therefore has to be a link to the Equality Act 2010, i.e a complaint that there has been a breach of that Act, e,g that there has been some form of discrimination. Had the claimant done so? His texts before his dismissal had raised issues of whether he had been paid the correct level of SSP, but no allegation of disability discrimination was made.

58. The claimant started early conciliation on 30 January 2019. It ended on 14 February 2019. That may mean that the respondent was aware that the claimant was intending to bring an Employment Tribunal claim. He had also in his texts on 29 January 2019 referred to seeking advice from the CAB. There was, however, no indication of what type of claim he may be making. His claim form was not served on the respondent until 21 March 2019. The reference was therefore clearly supplied well before the claimant had instituted these proceedings, and before the respondent was served with them.

59. Thus it seems to the Tribunal very open to question whether the claimant had, before the reference was provided, in fact done any protected act. Further, for the connection to the protected act to be made, the alleged victimiser has to know of the protected act. Alternatively, it is enough if the victimiser believed that the claimant had done such an act, or may do so, even if he had not.

60. The reference request was made to Dawn Thomas. There is no evidence she was aware of the claimant's complaint of disability discrimination, or of his intention to bring a Tribunal claim making such claims , when she provided the reference, which appears to have been 24 January and 21 February 2019. It is thus pure speculation whether the claimant had done any protected act before she provided the reference.

61. Further, even if she was aware of the possibility of disability discrimination proceedings, or the claimant had in fact done a protected act, or she believed that he had done, the Tribunal is quite satisfied that she supplied the reference that she did simply because that is what she believed was the position. It may have been negligent, but it was not, the Tribunal is satisfied , because the claimant had done, or was believed to have done or to be about to do, any protected act.

62. Thus, the Tribunal can see no basis for this treatment being an act of victimisation.

63. That said, the reference is wildly inaccurate , and potentially very damaging to the claimant's new employment, which he almost lost as a result of it. Whilst it is no act of discrimination, or any other conduct over which the Tribunal has any jurisdiction, it could be actionable in the civil courts , where the potential liability in negligent misstatement on the part of a former employer for a reference which was provided in breach of its duty of care was recognised by the House of Lords in ***Spring v. Guardian Assurance plc [1994] IRLR 460*** . That is a matter for the claimant to consider, however, and the Tribunal, whilst sympathising with him for the upset which it doubtless caused him, can do nothing more about it.

Employment Judge Holmes

Dated: 16 December 2020

JUDGMENT SENT TO THE PARTIES ON
17 December 2020

FOR THE TRIBUNAL OFFICE

ANNEXE

The relevant statutory provisions

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.

(2) (N/a)

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) (N/a)

(5) (N/a)

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.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.

(3) (N/a)
(4) (N/a)

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.
