Case No: 2304486/2018/V

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Zelik**

Respondent: **Say Fromage Limited**

Heard on: **15th, 16th, 17th, 18th March 2021**
and in Chambers on 19th March 2021

Before: **Employment Judge Pritchard**
Members: **Ms P Barratt**
Mr M O'Connor

Representation
Claimant: In person
Respondent: Mr C McDevitt

JUDGMENT

1 The Claimant was not a disabled person at relevant times and his claims for disability discrimination (discrimination arising and failure to make reasonable adjustments) are dismissed.

2 The Claimant was not subjected to the alleged detriments on the ground that he had made public interest disclosures and his whistleblowing claim is dismissed.

REASONS

1. The Claimant claimed disability discrimination (discrimination arising from disability and failure to make reasonable adjustments), his disability said to arise from a back injury. He also claimed that he was subjected to detriments for having made protected disclosures. The Respondent denied that the Claimant was a disabled person at relevant times and resisted the claim.

2. The Tribunal heard evidence from the Claimant on his own behalf and from the Respondent's witnesses: Lisa Howard (Director of Operations at relevant times); Susie Kay (Independent HR Professional); and Oliver Reed (Founder and Creative Director). The Tribunal was provided with a bundle of documents to which the parties variously referred. The Claimant placed in evidence three video clips which were viewed by the Tribunal. At the conclusion of the hearing the parties made oral submissions, the Claimant also putting forward written submissions for the Tribunal's consideration.

Issues

3. The issues had been agreed between the parties pursuant to a case management order issued by Employment Judge Hyde dated 29 August 2019. Neither party sought to amend the list of issues. They were placed before the Tribunal as follows:

Disability

3.1. Did the Claimant have a physical or mental impairment?

3.2. If so, did the impairment have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day to day activities?

3.3. Did the Claimant's impairment last at least one year or was it likely to last at least one year or for the remainder of the Claimant's life?

Discrimination arising from disability

3.4. Did the Claimant's absences from work arise inconsequence of the Claimant's disabilities?

3.5. Did the Respondent treat the Claimant unfavourably due to his absence by:

3.5.1. allegedly failing to carry out a fair and reasonable capability process;

3.5.2. dismissing him immediately on 20 August 2018?

3.6. Did the Respondent have actual knowledge of the Claimant's disability and its likely effects, or should the Respondent have they known of the same in the circumstances on account of:

3.6.1. the Claimant's explanation of his injury in emails on 23 and 24 May 2018 to Lisa Howard and his updates on the progress of his recovery;

3.6.2. the length of time the Claimant was absent from work;

3.6.3. the Respondent's alleged failure to investigate the Claimant's condition prior to reaching the decision to dismiss?

3.7. Was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim in that the Respondent could not continue to employ the Claimant indefinitely as it operates a small team of staff (approximately 8 persons) and the Claimant's ongoing absence was causing a problem logistically and the Respondent was also responsible for the payment of SSP. The Respondent engages Driver/Technicians on zero hours contracts as there is not enough work available to financially sustain full or part time employment. As the Respondent had no information about the Claimant's alleged disability it was unable to reach a conclusion about continued employment and even at the appeal stage the Claimant

was refusing to cooperate with providing such information. The Respondent could not continue with uncertainty in such a small business.

Failure to make reasonable adjustments

3.8. Did the Respondent apply the following provision, criterion or practices (PCP) to the Claimant:

3.8.1. Requiring technicians to deliver and assemble equipment with the assistance of the Respondent's clients;

3.8.2. The provisions of the Respondent's absence/capability policy;

3.8.3. Exercising a PILON clause?

3.9. Did these PCPs put the Claimant at a substantial disadvantage with non-disabled persons, namely:

3.9.1. the Claimant's disability meant that it was more likely that he would have a higher degree of absence;

3.9.2. the Claimant's disability meant that it was physically difficult to carry out the duties and caused him physical and mental distress?

3.10. If so, would it have been reasonable for the Respondent to:

3.10.1. hold open the Claimant's post while he recovered from his injury and/or to the duties of his existing post;

3.10.2. postpone the capability hearing to obtain further information on the Claimant's condition;

3.10.3. offer the Claimant alternative methods of attending the capability hearing;

3.10.4. consult with the Claimant as to alternative roles or duties;

3.10.5. dismiss the Claimant with notice instead of making a payment in lieu of notice?

3.11. At the relevant times, did the Respondent have actual knowledge of the Claimant's disability and its likely disadvantageous effects, or should the Respondent have known the same in the circumstances?

3.12. The Respondent requests that the Claimant provides further and better particulars as to which specific provisions of the absence and capability policy put him at a substantial disadvantage with persons who are not disabled. [The Claimant did not clarify this aspect of his claim with any particularity. However, the evidence suggests that he was aggrieved that he had not been warned in advance that he might have been dismissed at the meeting of 20 August 2018; that Lisa Howard had contacted his surgery without his consent; and that the Respondent had failed to refer him to occupational health].

Detriment for making a public interest disclosure

3.13. Did the Claimant disclose the following information:

3.13.1. concerns about the Respondent's alleged failure to provide health and safety training communicated to Lisa Howard by email on 23 and 24 May 2018?

3.14. Did the Claimant disclose information that he reasonably believed tended to show:

3.14.1. the Respondent had allegedly failed, was allegedly failing or was allegedly likely to fail to comply with any legal obligation to which it was subject (namely Manual Handling Operations Regulations 1992); and /or

3.14.2. The health or safety of any individual had been, was being or was likely to be endangered?

3.15. If so, did the Claimant reasonably believe that the disclosures were made in the public interest?

3.16. If so, did the Respondent subject the Claimant to any detriment on the ground that he had made (a) protected disclosure(s) by virtue of any of the following:

3.16.1. alleged failure to adopt a fair and reasonable capability process;

3.16.2. the decision to terminate his employment;

3.16.3. the decision to make a payment in lieu of notice?

4. At the commencement of the hearing, the Tribunal discussed with the parties the fact that the Claimant, who had been represented until this hearing, had pleaded his claim relating to the termination of his employment as one of detriment, not as automatic unfair dismissal. Given that the alleged detriment was described as "the decision" to terminate his employment, rather than the dismissal itself, the Tribunal determined that it would consider the Claimant's claim in this regard as a detriment claim as pleaded and as set out in the agreed list of issues. The Claimant would not be disadvantaged in this regard, not least because the burden of proof in a detriment claim rests on the Respondent.

5. The Tribunal determined that it would consider liability only at this hearing. A further hearing would be held to consider the question of remedy/compensation if the Claimant were to succeed in all or any of his claims.

Findings of fact

6. At material times the Respondent was in the business of providing photographic booths to clients for social events. The Respondent was a small employer with eight office-based employees and a number of Driver/Technicians and a number Hosts employed on zero hours contracts. The Respondent's business was seasonal and fluctuated throughout the year.

At peak times the Respondent might employ up to five Driver/Technicians and up to fifteen Hosts.

7. The Claimant commenced employment with the Respondent on 8 September 2016 as a Driver/Technician. Among other things, his contract of employment provided:

> *6.2 The Company may require you to undergo medical examination by a doctor appointed by the Company, at the company's expense. … You agree that the Company is entitled to receive a copy of any report produced in connection with any such examination and that the Company can discuss the contents of the report with the doctor.*
>
> *9.2 The company may terminate your employment with immediate effect by paying you your salary in lieu of any required period of notice or part thereof.*
>
> *9.4 Nothing in this contract shall prevent the Company from terminating your employment if you're unable (weather due to illness or otherwise) properly and effectively to perform your duties.*

8. The Claimant's duties mainly involved delivering the photographic booths, which were of modular construction, to various venues, setting them up for the clients' use, then dismantling the booths and collecting them afterwards. The booths were weighty items. Information would be obtained by the Respondent in advance as to whether stairs might be encountered. If so, the Respondent would arrange for lifting crew to be present to assist the Driver/Technician. The Claimant was not required to operate the photographic apparatus; that would be undertaken by Hosts or sometimes the client. Hosts might also be required to assist in installing or dismantling the booths and they were provided with training by the Respondent in the use of suction pads and back braces to assist in lifting. On occasions, the Claimant would arrive at a venue to find that there were stairs to be climbed but that the client had not informed the Respondent in advance and lifting crew not had not been engaged to assist. The Tribunal accepts the evidence of Lisa Howard that this would be a infrequent occurrence. In these circumstances, the Claimant would be expected to find someone at the venue to assist which might include the client.

9. The Tribunal finds it more likely than not that the Respondent provided training to the Claimant as part of the induction process at the commencement of his employment, not least because he would have been unable otherwise to do the job. The Claimant was also provided with a comprehensive Driver/Technician handbook which included a section relating to health and safety and instructions as to how to lift. The Claimant was also provided with a set of policies which included a Health and Safety Policy. The Tribunal finds that the Claimant was given informal training or told how to use suction pads and back braces.

10. Following a disciplinary hearing which took place on 4 January 2018, the Claimant was issued with a final written warning on 10 January 2018 for dangerous driving (which had resulted in a road traffic accident) and unsatisfactory conduct (which related to confrontations between the Claimant and a member of the Respondent's staff and between the Claimant and a client). The Claimant sought to introduce elements of the disciplinary procedure as evidence for whistleblowing. However, the Claimant had not pleaded that he

had made a protected disclosure on this date, nor did it appear in the agreed list of issues. The Tribunal makes no finding with regard to the circumstances surrounding the disciplinary hearing.

11. The Claimant suffered from back ache commencing about Christmas 2017 for which he took Paracetamol. His evidence contained in his witness statement is that he experienced pain and numbness in his lower back. It did not prevent him from working and he took no time off. The Claimant did not tell the Respondent he was suffering from backache; as he told the Tribunal: "I kept it to myself".

12. In May 2018, the Respondent introduced a new booth, the Classic Booth, which packed down into four flight cases and which required more assembly than the old booth. It was also heavier than the old booth. The Respondent provided training to the Claimant and a colleague as to the safe assembly and dismantling of the Classic Booth on 16 May 2018 and that it would require two persons to safely undertake the task. This training had originally been scheduled to take place on 23 March 2018 but took place on 16 May 2018 because of a delay in the Respondent taking delivery of the new Classic Booth.

13. On 22 May 2018, the Claimant sustained an injury to his back while dismantling a Classic Booth at a venue in Manchester. He was being assisted at the time by a client.

14. He reported his injury the following day by email to Lisa Howard. He explained that he had experienced a sharp chronic pain in his lower back which worsened throughout the evening and escalated when he was driving home. He said that although a client was helping him lift the top section of the photo booth, the client could not hold the weight causing him, the Claimant, to carry the whole weight of the booth alone, the booth being too heavy of just one person to carry. He stated that:

> *We were offered health and safety training on 23/3/2018 that didn't take place, maybe this would of prevented me from damaging my back, manual handling training should have been put in place when carrying heavy equipment alone. I don't think it's the correct procedure to arrive at jobs and get the client to help with booths on the off chance someone is around to help, two trained people should be there to handle such heavy equipment*

15. The Claimant was signed off as unfit for work by his GP who prescribed painkillers.

16. Lisa Howard replied to the Claimant's email stating, among other things:

> *In terms of how you sustained the injury, we do not expect you to lift the booth on your own and the client was expecting to lift the booth with you. Did you instruct him on the best way to support you in doing this before attempting the lift? Did you give the client the suction handles that we provide specifically for lifting booths? Did you wear the back brace that is provided in the van? These measures have been in place for over 5 months and the fact that the health and safety refresher training was postponed should not have prevented you from using the equipment provided*

17. By email sent the following day, the Claimant informed Lisa Howard of further details as to how his injury had been caused and stated, among other things:

    I have never received any training on the items provided in the van e.g. suction caps and back brace, so how could I have shown the client how to use it

    I have informed SF [the Respondent] *on numerous occasions that the work is putting my health and safety at serious risk and still nothing was being done about it, I have sent videos of jobs that were nearly impossible to carry up and down flights of stairs*

18. On 29 May 2018, upon the Respondent's enquiry, the client confirmed that the Claimant said he had hurt his back while lifting the top part of the booth and that he had helped the Claimant because it was not possible for him to lift the top half of the booth on his own.

19. Lisa Howard sent the Claimant an email on 20 June 2018 informing him of SSP details and that the Respondent may require a doctor's report and / or a second medical opinion if his period of incapacity were to become extensive. The Claimant was asked to confirm that he had received the email but he did not do so.

20. The Claimant remained off work and was unable to attend health and safety refresher training and new Classic Booth training on 22 June 2018.

21. By email dated 17 July 2018, Lisa Howard asked the Claimant if he was feeling better and whether his doctor had given any indication of when he might be fit for work again. The Claimant did not reply.

22. By email dated 7 August 2018, Lisa Howard asked if the Claimant was feeling any better and told him that Oliver Reed would like to obtain a second opinion as to his medical condition. The Claimant told Lisa Howard that his back was still sore and confirmed that he was happy for the Respondent to seek a second opinion but he would like to see a copy of the form before being sent to the examiner. The Respondent did not seek a second opinion from an occupational health advisor or otherwise.

23. By email dated 13 August 2018, Lisa Howard invited the Claimant to attend a fit for work review meeting on 20 August 2018. She stated that the main points for consideration would be the type of work available for Claimant and his ability to undertake the work safe safely and successfully. She also informed the Claimant that she would be contacting his doctor to request medical notes pertaining to his current absence, subject to his consent. She told the Claimant that if he did not consent to the notes being shared, the assessment of his health would be based on the medical evidence already provided. The Claimant was told that if he was unable to attend the meeting it would be held in his absence but that he may submit any relevant information for consideration at the meeting in advance.

24. Although unclear exactly when she did so, Lisa Howard contacted the Claimant's GP surgery to ascertain whether the Claimant had provided his consent for GP records to be disclosed. She was told by the receptionist that no information about the Claimant would be provided without his consent.

25. A copy of the Respondent's sickness absence policy was provided to the Claimant at his request.

26. By email dated 17 August 2018, the Claimant informed Lisa Howard that he would not be attending the fit for work assessment meeting. He said he had concerns about the meeting and felt that the Respondent was not providing specified information in relation to the sickness absence policy and that the policy was not clear what was required. He also stated that he would not be giving his consent to access any medical reports from his GP. He was, however, willing to cooperate to undergo medical examination appointed by the Respondent. The Respondent did not instruct occupational health or any other medical practitioner to provide a second opinion.

27. The meeting took place on 20 August 2018 in the Claimant's absence. Lisa Howard had prepared a number of questions she had planned to ask the Claimant, she sat in a separate place and noted her conclusions as best she could given the fact that the Claimant was not present to provide input.

28. By letter emailed to the Claimant the same day, Lisa Howard informed the Claimant of her decision that he was dismissed with immediate effect with pay in lieu of notice. The Claimant was informed of his right to appeal. In her letter, Lisa Howard set out the reasons for her decision which may be summarised as follows:

    28.1. The Claimant had not supplied any documentary evidence to be considered at the meeting in his absence.

    28.2. The Claimant did not give his consent for the Respondent to access to his GP notes.

    28.3. The assessment of the Claimant's health status and the work he could carry out was therefore based on the fit notes supplied by his GP.

    28.4. Essential elements of the Driver/Technician role requires driving, often for long periods, loading and unloading vans and regular heavy lifting.

    28.5. Given the type of work undertaken by the Respondent and its resources, there were no reasonable adjustments that could be made to enable the Claimant, in his current condition, to undertake the Driver/Technician role safely.

    28.6. There were no other roles available within the organisation and no suitable position to offer.

29. The Claimant appealed on 24 August 2018. The grounds of his appeal were stated as follows:

    29.1. [The Respondent] *did not make me aware in sufficient time and detail that my sickness absence:*

    - *cannot be tolerated long term*
    - *exceeds those levels*

- *give me chance to improve with the time scale sat at the end of which I am going to be assessed*
- *the decision could result in dismissal*
- *the right to be accompanied*

29.2. *I also feel* [the Respondent] *did not make any reasonable adjustments:*

- *to postpone the meeting to another date*
- *to hold the meeting at neutral venue due to my condition*
- *to conduct the meeting over the phone. My mobile number was held*

30. Oliver Reed held the appeal meeting on 6 September 2018. Lisa Howard also attended the meeting. Susie Kaye attended to advise on procedure and support Oliver Reed. The Claimant, who was accompanied, asserted that the Respondent should refer him to occupational health but that he would not consent to the Respondent contacting his GP and seeking relevant information. He said that it was his right not to be discriminated against; when asked the grounds for the allegation he replied: "Well that's for you to find out". The Claimant also made it clear that he remained unfit for work. Oliver Reed informed the Claimant by letter dated 10 September 2018 that his appeal had been unsuccessful and the reasons for that decision.

31. The fit notes submitted by the Claimant to the Respondent in the relevant period show him as unfit for work as follows:

    - 23 May 2018. Low back pain. Cannot lift at the moment.
    - 4 June 2018. Back pain.
    - 18 June 2018. Chronic low back pain.
    - 2 July 2018. Low back pain.
    - 16 July 2018. Low back pain. Receiving treatment.
    - 6 August 2018. Chronic low back pain.

    The last fit note submitted to the Respondent expired on 3 September 2018.

32. The Claimant received osteopathic treatment and was discharged by his osteopath on 28 July 2018 having been given self-care advice.

33. Following an examination of the Claimant on 20 September 2019, commissioned by the Claimant's personal injury solicitors, Mr Korab-Karpinski, Senior Consultant Orthopaedic Traumatological and Spinal Surgeon, provided a report which was placed in evidence before the Tribunal. In respect of the Claimant's back ache before the injury sustained on 22 May 2018, the report stated that the Claimant sometimes experienced pins and needles, mostly in the morning, morning stiffness for one hour and sometimes numbness in lower back when sitting for a long time. Specifically, Mr Korab-Karpinski reported as follows, insofar as might be relevant to these proceedings:

    Opinion, progress and prognosis

    Lumbar Sacral Spine

… I would expect the effects of the incident to resolve in 18 to 21 months from the date of injury without any long term issues. If symptoms continue, I would recommend an MRI scan.

Work

He is presently unemployed. I consider it would have been reasonable for him to have been off work for a period of three months on account of the accident.

Applicable law

Meaning of disability

34. Section 6 of the Equality Act 2010 provides that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

35. When considering whether a Claimant is disabled within the meaning of the Equality Act 2010, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant.

36. In Richmond Adult Community College v McDougall 2008 ICR 431 the Court of Appeal held that the issue of how long the effect of an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the Tribunal hearing. Also see Sullivan v Bury Street Capital Limited UKEAT/0317/19.

37. The words "likely to last" mean that it "could well happen"; see SCA Packaging v Boyle 2009 ICR 1056, HL.

38. In J v DLA Piper UK LLP UKEAT/0263/09 the Employment Appeal Tribunal stated that the Tribunal should make separate findings as to both the impairment and the adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it).

Discrimination arising from disability

39. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

40. The provision requires an investigation of two distinct causative issues:

    40.1. Did A treat B unfavourably because of an (identified) something? This involves an examination of the putative discriminator's state of mind and mental process to determine what consciously or unconsciously was the reason for any unfavourable treatment found. This was confirmed by the Court of Appeal in two cases: Dunn v Secretary of State for Justice [2019] IRLR 298 and Robinson v DWP [2020] EWCA Civ 859. It is not enough for B to show that 'but for' his disability he would not have been in the unfavourable situation complained of, even if he was not well-treated by A and had an understandable sense of grievance.

    40.2. Did that something arise in consequence of B's disability? As the EHRC Code of Practice 2011 explains, there must be a connection between whatever led to the unfavourable treatment and the disability. This is a question of objective fact for the Tribunal to decide in light of the evidence: City of York Council v Grosset [2018] EWCA Civ 1105. It does not depend on the employer's knowledge.

41. In Pnaiser v NHS England [2016] IRLR 170, the Employment Appeal Tribunal summarised the proper approach the Tribunal must take:

    41.1. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

    41.2. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

    41.3. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act the statutory purpose which appears from the wording of secton15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may

include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question – a question of fact rather than belief - and does not depend on the thought processes of the alleged discriminator.

41.4. It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

42. In (1) The Trustees of Swansea University Pension & Assurance Scheme (2) Swansea University v Williams UKEAT/0415/14/DM the Employment Appeal Tribunal held that the words “unfavourable treatment” and “detriment” were deliberately chosen when being included in the Equality Act 2010 and had distinct meanings. Unfavourable treatment involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. It has the meaning of placing a hurdle in front of or creating a particular difficulty for, or disadvantaging, a person because of something which arises in consequence of their disability.

43. The proper approach to be taken in applying section 15(2) was set out in A Ltd v Z 2020 ICR 199 as follows:

43.1. 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 lead to the unfavourable treatment.

43.2. 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 long term effect.

43.3. The question of reasonableness is one of fact and evaluation. 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.

43.4. When assessing the question of constructive knowledge, an employee’s representations as 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 Equality Act purposes, and (ii) because, without knowing the likely cause of the given impairment, it becomes

much more difficult to know whether it may well last for more than 12 months, if it has not already done so.

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

> *"5.14 It is not enough for the employer to show they did not know that the disabled person had a 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 disability may think of themselves as a 'disabled person'.*
>
> *5.15 An employer must do all they reasonably can 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"*

43.6. It is not incumbent upon employer to make every enquiry where there is little or no basis for doing so.

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

44. Unfavourable treatment will not be unlawful under S.15 if it is objectively justified. In Awan v ICTS UK Ltd EAT 0087/18 the EAT overturned an employment tribunal's decision that the dismissal of a disabled employee on the ground of incapacity during a time when he was entitled to benefits under the employer's long-term disability plan was a proportionate means of achieving the legitimate aim of ensuring that employees attend work. The tribunal had wrongly rejected the employee's argument that an implied contractual term prevented his dismissal on the ground of incapacity while he was entitled to such benefits.

Duty to make reasonable adjustments

45. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

46. In the case of the Environment Agency v Rowan [2008] IRLR 20, the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:-

46.1. the provision, criterion or practice applied by the employer;

46.2. the identity of non-disabled comparators where appropriate; and

46.3. the nature and extent of the substantial disadvantage suffered by the Claimant.

The burden of proof

47. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Whistleblowing

48. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H.

49. Section 43B provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: (a) that a criminal offence has been committed, is being committed or is likely to be committed (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (c) that a miscarriage of justice has occurred, is occurring, or likely to occur (d) that the health or safety of any individual has been, is being or is likely to be endangered (e) that the environment has been, is being, or is likely to be damaged (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

50. In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable; see: Babula v Waltham Forest College [2007] IRLR 346 CA. Accordingly, provided a whistleblower's subjective belief that a criminal offence has been committed is held by the Tribunal to be objectively reasonable, neither the fact that the belief turns out to be wrong, nor the fact that the information which the Claimant believed to be true does not in law amount to a criminal offence [or breach of a legal obligation] is sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute.

51. Section 43C provides, amongst other things, that a qualifying disclosure is made if the worker makes the disclosure to his employer.

52. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In Kilraine v London Borough of Wandsworth [2018] IRLR 846, the Court of Appeal held that the concept of

"information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.

53. Section 47B provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Section 48 provides that a Tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months.

54. Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In London Borough of Harrow v Knight [2003] IRLR 140 the Employment Appeal Tribunal stated that the ground on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which cause him to act.Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough. In Fecitt v NHS Manchester [2011] IRLR 111 the Employment Appeal Tribunal held that once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act, the employer has to show the ground on which any act or any deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act.

Conclusion

Disability discrimination

55. The Tribunal accepts that in the period Christmas 2017 to 22 May 2018 the Claimant suffered from backache for which he took Paracetamol. The Tribunal also accepts that he suffered the inconvenience described in his impact statement and as he reported in similar terms to Mr Korab-Karpinski in September 2019. However, the Claimant adduced no credible evidence to show that during this period his backache had a substantial adverse effect on his ability to carry out day to day activities, or that it would have had such effect had he not been taking painkillers. Whilst recognising that work activities are not to be equated to day to day activities, the Tribunal notes that the Claimant continued to work from Christmas 2017 until he sustained a back injury on 22 May 2018, work which required heavy lifting as part of his duties. This supports the Tribunal's conclusion that the Claimant was not a disabled person during this period.

56. The Claimant told the Tribunal that he was not complaining about the appeal process; rather, the thrust of his complaint focussed upon Lisa Howard's

decisions taken on or before 20 August 2018. The last possible act of discrimination therefore took place on this date.

57. It is clear that on 22 May 2018 the Claimant suffered an injury which was a physical impairment, namely a back injury.

58. The Tribunal finds that as a result of the back injury the Claimant experienced pain which affected his mobility. He had difficulties with cleaning, washing up, hoovering, shopping and personal care. His sleep pattern was disturbed. His impairment had an adverse effect on his abilities to carry out day to day activities. This much was conceded by the Respondent during submissions.

59. The substantial adverse effect of the impairment had not lasted 12 months, it had lasted just 90 days. Therefore, the question for the Tribunal is how long, determined as at 20 August 2018, the effect of impairment was likely to last; Richmond Adult Community College v McDougall. The Tribunal must determine whether "it could well happen" that the effect of the impairment would last for at least 12 months or the rest of the Claimant's life; SCA Packaging v Boyle.

60. There was no evidence to show "it could well happen" that the effect of the impairment could last the rest of the Claimant's life and the Tribunal does not consider it further. The essential question is whether "it could well happen" that the substantial adverse effect of the impairment would last for at least one year.

61. The Tribunal recognises that the last medical certificate issued before 20 August 2018 expired on 3 September 2018. The Tribunal finds that sufficient evidence to suggest the effect of the impairment could well last until that date, thus extending the period of the adverse effect from 90 days to 104 days.

62. The medical certificates issued by the Claimant's GP show nothing more than low back pain and that the Claimant had been referred for treatment.

63. That treatment was osteopathic treatment. The Claimant was discharged by his osteopath on 28 July 2018 having been given self-care advice.

64. The Tribunal is unable to conclude that the Claimant was a disabled person at relevant times.

65. As to Mr Korab-Karpinski's report, the Tribunal has given consideration to his opinion that the the effects of the incident were expected to resolve within 18 to 21 months from the date of injury. This aspect of the report does not assist the Tribunal. The report was prepared on the Claimant's behalf in order to pursue a personal injury claim and Mr Korab-Karpinski's view in this regard was informed by his examination of the Claimant on 20 September 2019, over a year after the alleged acts of discrimination. To give weight to this aspect of the report would be an improper application of the legal test set out in Richmond Adult Community College v McDougall.

66. However, Mr Korab-Karpinski's opinion that it would have been reasonable for the Claimant to have been off work for a period of three months is of some relevance. The period of three months from the date of the injury ends on 22 August 2018, just two days after the last alleged act of discrimination. Mr Korab-Karpinski was not giving consideration to precisely the same matters to which the Tribunal must give in this case. Mr Korab-Karpinski was looking forward from the date of injury and its effects on the likelihood of the Claimant

returning to work; the Tribunal must look forward from the last date of alleged discrimination to consider the likelihood of the adverse effect of the Claimant's condition continuing such that it would last for at least one year. Nevertheless, despite the differences, Mr Korab-Karpinski's opinion in this regard tends to support the Tribunal's conclusion that the Claimant was not a disabled person at relevant times.

67. If the Tribunal is wrong is its conclusion that the Claimant was not a disabled person at relevant times, it would nevertheless conclude that the Respondent had neither actual knowledge nor constructive knowledge that the Claimant was a disabled person at relevant times.

68. As to actual knowledge, the Respondent knew that the Claimant was off work having suffered a back injury and that his GP had issued a number of medical certificates stating that the Claimant was suffering from pain, chronic pain, and that he had been referred for treatment. However, there was nothing to suggest that the injury was serious or might lead to complications. It would have been reasonable for the Respondent to assume that the Claimant had suffered a minor back injury caused by lifting which might heal within a reasonably short period of time. Apart from his initial reports of the incident, and apart from telling the Respondent on 7 August 2018 that his back was still sore, the Claimant had provided no further information that might reasonably suggest that the adverse effects of his injury might last for a year or more.

69. As to the period Christmas 2017 to 22 May 2018, the Claimant admits that he kept it to himself and did not tell the Respondent about his backache.

70. The Tribunal concludes that even if the Claimant had a disability determined as at 20 August 2020, the Respondent did not have actual knowledge of it.

71. As to constructive knowledge, it would be unreasonable to expect the Respondent to have known that the Claimant had a disability. In addition to those facts which the Respondent actually knew, as set out in the paragraph above, the Tribunal considers the reasonableness of the Respondent's actions against the background described below.

    71.1. The medical certificates did not suggest anything other than back pain and a referral to treatment. The Tribunal takes judicial notice that a GP might describe pain as chronic after it had lasted about two or three months. Such a descriptor does not suggest that it might last for a year or more.

    71.2. The Claimant had described his injury to Lisa Howard almost immediately after the incident saying he was suffering from intense pain and unable to get out of bed. However, his subsequent emails do not suggest that he continued to suffer from intense pain and was unable to get out of bed; in this latter regard the Claimant was clearly attending GP appointments and able to get out of bed.

    71.3. The Claimant failed to reply to the Respondent's emails asking how he was getting on and thus nothing upon which to put the Respondent on enquiry.

71.4. The Claimant did not engage in the fit to return to work review meeting. He told the Respondent that he would not attend because he had concerns about the meeting, felt that the Respondent was not providing specified information in relation to the sickness absence policy, and that the policy was not clear what was required. In evidence, the Claimant gave different reasons for not wanting to attend the fit to work meeting, namely: because Lisa Howard had contacted his GP surgery; and that his injury prevented him from doing so. The reasons for his non-attendance known to the Respondent were those he stated at the time, not those he stated in evidence.

71.5. The Claimant withheld his consent for the Respondent to seek a medical opinion from his GP meaning the Respondent was effectively prevented from seeking the GP's views.

71.6. Notwithstanding that the Claimant indicated he was willing to consent to examination by an occupational health advisor or medical expert appointed by the Respondent, and indeed it was the Respondent who had suggested that it would seek a second opinion in this way, the Tribunal finds it was not unreasonable for the Respondent not to have made such a referral.

71.6.1. The Claimant's GP was best placed to provide an informed opinion, not least because the Claimant had attended several consultations with him/her.

71.6.2. Referral to an occupational health expert of other medical advisor is likely to have been a costly option for the Respondent which was in straitened financial circumstances at the time.

71.6.3. It is highly likely that an occupational health expert or other medical expert would have sought the GP's records to inform his/her views, disclosure to which the Claimant objected.

71.6.4. It was not unreasonable for the Respondent not to exercise its discretion in clause 6.2 of the Claimant's contract of employment. Contrary to the Claimant's suggestion when questioning the Respondent's witnesses, tt was not a policy requirement with which the Respondent was required to comply.

71.6.5. It is unlikely that a referral to an occupational health advisor or medical expert appointed by the Respondent would have yielded results which would have better informed the Respondent.

72. For these reasons the Claimant's disability discrimination claims must fail. The remaining issues under this head of claim do not fall for determination.

<u>Public interest disclosure</u>

73. The Tribunal moves directly to consider the reason why the Claimant was subjected to the alleged detrimental treatment. In effect, the Tribunal is giving the Claimant the benefit of the doubt for the purposes of its reasoning. Authority for this approach, insofar as it applies to discrimination cases, with which

whistleblowing claims have great similarity, can be found in Laing v Manchester City Council [2006] ICR 1519.

74. Without making any findings, the Tribunal assumes that the Claimant made disclosures qualifying for protection when he sent the emails upon which he relies on 23 and 24 May 2018. The Tribunal also assumes, without making any findings, that the process insofar as it related to the fit to work meeting and its procedure, was unfair and thus subjected the Claimant to a detriment. Similarly, the Tribunal assumes without making any findings, that the decisions to terminate the Claimant's employment and pay him in lieu of notice amounted to detriments.

75. An analysis of Lisa Howard's mental process based upon her evidence before the Tribunal shows that, on the balance of probabilities, the reasons she instigated the fit to work process was to seek a report from the Claimant's GP and enter into discussions with the Claimant about his sickness absence. The Claimant did not attend the meeting and Lisa Howard decided to terminate his employment for the reasons set out in the termination letter. In answer to questions asked by the Tribunal, she explained that the reason for not retaining the Claimant in employment was underscored by the fact that the Respondent was required to pay the Claimant SSP in circumstances of straitened financial means. As to the decision to terminate the Claimant's employment by way of a payment in lieu of notice, the Tribunal suspects it was to avoid liability for a potential unfair dismissal claim which requires a Claimant to have two years qualifying service in employment.

76. Further, the Tribunal has had regard to the time which elapsed from dates on which the Claimant sent his emails and dates when he was subjected to the alleged detriments.

77. Regardless of the merits, wisdom or reasonableness of the Lisa Howard's actions, the Tribunal is satisfied that the grounds for the alleged detriments were in no way whatsoever informed by the fact that the Claimant had raised those matters set out in his emails of 23 and 24 May 2018.

78. The Claimant was not subjected to the alleged detriments on the ground that he had made protected disclosures and his claim in this regard must fail.

79. The remaining issues under this head of claim do not fall for consideration.

Note

Employment Judge Pritchard

Date: 19 March 2021