



EMPLOYMENT TRIBUNALS

Claimant: Mr P Broome

Respondent: Sally-Ann Gosling t/a Riding Farm Equestrian Centre

Heard on: 12th, 13th, 14th, 15th, and 16th April 2021
and in chambers on 4th May 2021

Before: Employment Judge Pritchard
Mr N Aziz
Mr R Singh

Representation

Claimant: Ms G Broome, the Claimant's mother
Respondent: Mr A Richardson, counsel

JUDGMENT

It is the unanimous decision of the Tribunal that:

- 1 By consent the Respondent is ordered to pay to the Claimant the sum of £1,355.20 in settlement of his claim for holiday pay.
- 2 The Respondent failed to make reasonable adjustments to the extent described below.
- 3 The Claimant's claim that he was discriminated against because of something arising in consequence of his disability is dismissed.
- 4 The Claimant's claim of harassment is dismissed.

REASONS

1. By way of an ET1 presented on 15 August 2019 the Claimant claimed disability discrimination. In her ET3, the Respondent resisted the claim.
2. By way of a further ET1, the Claimant claimed outstanding holiday pay. That claim was settled in the terms of this judgment and did not concern the Tribunal further.

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3. Employment Judge Nash considered the claims and issues in the case and issued case management orders at a preliminary hearing held on 4 February 2020.
4. Notwithstanding the clear case management orders issued by Employment Judge Nash, preparation for the hearing was in some disarray. In particular: the Claimant had failed to provide the Respondent with a witness statement dealing with the effect of his alleged disability on his ability to carry out normal day to day activities as required under paragraph 5.2 of the case management order; and the Respondent had failed to comply with the requirements of paragraph 7 of the case management order by providing the Claimant with a hard copy of documents by 15 June 2020 for use at the hearing (instead the Tribunal was provided with no less than twelve batches of documents which did not appear to be in chronological order and which contained duplications). With regard to the first matter, the Claimant told the Tribunal that he wished to rely upon a report issued by Kent County Council dated 12 April 2020 and an undated document from Symbol. With regard to the second matter, the Tribunal determined that the first day of the hearing would be used by the Tribunal members to read the documents before them while the Respondent prepared a paginated chronological composite bundle of the documents. Further, the parties co-operated with each other and provided the Tribunal with an amended list of PCPs in respect of the reasonable adjustments and indirect discrimination claims. Although a composite bundle was prepared and provided to the Tribunal, it was disappointing that the documents were still not all in a chronological order. Nevertheless, the Tribunal was satisfied that a fair hearing could proceed and the parties agreed.
5. The Tribunal heard evidence from the Claimant and from his mother; the Tribunal also heard evidence from the respondent. At the conclusion of the hearing the parties made brief oral submissions.

Issues

6. The issues in the case had been set out by Employment Judge Nash in her case management order. Having read the papers, the Tribunal was concerned that the allegations of direct discrimination under section 13 of the Equality Act should properly be categorised as allegations of discrimination arising from disability under section 15 of the Equality Act. Upon discussion at the start of the second day of the hearing, the parties agreed that section 15 was the appropriate categorization.
7. Further, the Tribunal was concerned about the description of the PCPs set out in the case management order in respect of the claims for indirect discrimination and failure to make reasonable adjustments. The Tribunal gave the parties the opportunity to discuss how the PCPs might properly be described and the parties provided the Tribunal with a revised list.
8. The Claimant had presented a further ET1 claiming holiday pay. This claim was settled between the parties on the first day of the hearing, agreement being reached as to the payment set out in the judgment above.
9. The issues in the case can now be described as follows:

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- 9.1. Although time limits appeared to be in issue, the Respondent conceded that the allegations, if proved, would amount to conduct extending over a period ending within the statutory time limit. Accordingly, the Tribunal was not required to consider the issue of time limits.

Disability

- 9.2. Was the Claimant a disabled person in accordance with the Equality Act 2010 (“EQA”) at all relevant times because of his autism? The Respondent admitted that the Claimant had autistic spectrum condition but did not admit that this impairment had a substantial adverse effect on his ability to carry out day to day activities.

EQA, section 15: discrimination arising

- 9.3. Can the Claimant prove that the Respondent treated the Claimant unfavourably as follows:
- 9.3.1. Not permitting him enough time to carry out tasks;
 - 9.3.2. Subjecting him to unjustified and disproportionate criticism including shouting;
 - 9.3.3. Disciplining him;
 - 9.3.4. Reporting him to the police;
 - 9.3.5. Requiring him to repeat tasks that had been satisfactorily completed;
 - 9.3.6. Requiring or expecting him to purchase tools and equipment in order to carry out tasks;
 - 9.3.7. Requiring him to carry out handyman jobs;
 - 9.3.8. Failing to provide sufficient training;
 - 9.3.9. Preventing, delaying and questioning the Claimant’s taking of annual leave;
 - 9.3.10. Unjustified and disproportionate monitoring of time keeping;
 - 9.3.11. Failing to take steps to protect his health and safety including not using the incident book and providing treatment;
 - 9.3.12. Failing to provide him in effect with a pay rise in April 2019 by decreasing his hours but not his workload;
 - 9.3.13. Requiring or expecting him to come in on his off days / in adverse weather conditions, or to work over his hours for no payment;
 - 9.3.14. An assault by the respondent’s yard manager on the 23 May 2019?

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- 9.4. Did the Respondent treat the Claimant as aforesaid because of the something arising in consequence of the disability?
- 9.5. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- 9.6. Alternatively, can the Respondent show they did not know and could not reasonably have been expected to know that the Claimant had a disability?

Reasonable adjustments: EQA, sections 20 & 21

- 9.7. Did Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?
- 9.8. Did the Respondent have the following PCPs:
 - 9.8.1. Requiring tasks to be carried out in a certain amount of time;
 - 9.8.2. Having a hierarchy of reporting line which did not allow the Claimant autonomy;
 - 9.8.3. Having a disciplinary procedure in place and applying it to the Claimant;
 - 9.8.4. Report to the police any behaviour the Respondent perceives as criminal;
 - 9.8.5. Logging incidents in the incident book and providing treatment of injuries;
 - 9.8.6. Having a rota system in place; and
 - 9.8.7. Having a policy to contact directly with the employee?
- 9.9. Did any such PCP put the Claimant at a substantial disadvantage to a relevant matter in comparison with persons who are not disabled at any relevant time?
- 9.10. If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?
- 9.11. If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant. However it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:
 - 9.11.1. Permitting enough time to carry out tasks;
 - 9.11.2. Permitting him to schedule his own tasks;

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- 9.11.3. Not subjecting the Claimant to unjustified and disproportionate criticism including shouting but investigating when appropriate explaining to the Claimant what was expected and training him;
 - 9.11.4. Not disciplining the Claimant or carrying out a fair investigation and taking a more flexible attitude to bad language and making a plan to avoid recurrence and provide training;
 - 9.11.5. Taking a more flexible approach to the claims demeanour and attitude and encouraging the Claimant behave differently and providing training;
 - 9.11.6. Investigating fairly and not reporting the Claimant to the police;
 - 9.11.7. Taking steps to protect the Claimant's health and safety including not using the incident book and providing treatment;
 - 9.11.8. Not requiring or expecting the Claimant to come in on his own days off / in adverse weather conditions, or to work over his hours for no payment; and
 - 9.11.9. Liaising with the Claimant's mother during sick leave?
- 9.12. If so, would it have been reasonable for the Respondent to have taken those steps at any relevant time?

EQA: section 26: harassment related to disability

- 9.13. Did the Respondent engage in conduct as follows:
- 9.13.1. The Claimant relies on the same conduct as under section 15 (discrimination arising) set out above.
- 9.14. If so, was that conduct unwanted?
- 9.15. If so, did it relate to the protected characteristic of disability?
- 9.16. Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

EQA, section 19: indirect disability discrimination

- 9.17. The Claimant does not rely on indirect discrimination unless the Tribunal accepts that the Respondent did not know or ought not to have known that the Claimant was a disabled person.
- 9.18. Did the Respondent have the following PCPs:
- 9.18.1. Tasks would be carried out in a certain amount of time;

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- 9.18.2. There is a hierarchy of reporting line, which did not allow the Claimant that autonomy;
 - 9.18.3. The Respondent had a disciplinary procedure in place and applied it to the Claimant;
 - 9.18.4. The Respondent is obliged to report any behaviour they perceive as criminal to the police;
 - 9.18.5. The Respondent logs incidents in the incident book and provides treatment of injuries;
 - 9.18.6. There is the rota system in place;
 - 9.18.7. Policy to contact directly with the employee?
 - 9.19. Did the Respondent apply the PCPs to the Claimant at any time?
 - 9.20. Did the responded apply (or would the Respondent have applied) the PCPs to non-disabled people?
 - 9.21. Did the PCPs put disabled people at one or more particular disadvantage when compared to non-disabled people?
 - 9.22. Did the PCPs put the Claimant at that/those disadvantages at any relevant time?
 - 9.23. If so, has the Respondent shown the PCPs to be a proportionate means of achieving a legitimate aim?
10. The Tribunal determined that it would consider the question of liability only at this hearing and that a further hearing would take place to consider the question of remedy if the Claimant were to succeed in all or any of his claims.

Findings of fact

- 11. The Respondent operates a livery business for the stabling of clients' horses and runs a riding school which from time to time includes disabled riders. The Respondent employed 22 individuals at relevant times: members of management, two yard managers and a number of yard grooms and riding instructors.
- 12. The Claimant has autistic spectrum condition. A letter dated 16 July 2009 from the Claimant's GP confirms this.
- 13. In evidence, the Claimant confirmed that he experienced the specific autistic traits set out in a letter dated 17 April 2020 from the Case Officer within the Kent County Council Autistic Spectrum Conditions Team. The Tribunal finds that the following autistic traits in particular adversely affected the Claimant's ability to carry out day to day activities at relevant times: difficulties interacting with others until he gets to know them; struggling with competing demands; forgetfulness (he would forget to make entries in his diary, for example to visit his doctor or dental appointments); anxiety if he was required to change his routine; difficulty interpreting non-verbal language such as body language;

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frustration when confronted and anger when he perceived that he was not spoken to politely.

14. In February 2017 the Claimant was interviewed by a manager working for the Respondent. The Tribunal heard conflicting evidence as to whether the Claimant informed the manager that he was autistic. The Claimant's mother told the Tribunal that the Claimant "would have" disclosed his disability, later asserting that he actually did so. However, the Claimant's mother did not attend the interview. Having previously made job applications to other employers and been rejected because, he believed, he had disclosed his disability, the Claimant did not disclose his disability in his application for employment with the Respondent. In these circumstances, the Tribunal finds it unlikely that the Claimant would then disclose his disability at interview. Further, at interview, the Claimant disclosed that he was partially sighted in one eye and this was noted on the interview form as a medical condition that may affect his ability to work. The Tribunal finds it more likely than not that the interviewing manager would have noted the Claimant's autism on the form had he mentioned it. The Tribunal prefers the Respondent's evidence that the Claimant did not disclose his disability at the time.
15. The Claimant commenced part time employment as a yard groom with the Respondent in February 2017. He was 21 years of age.
16. In August 2017, the Claimant became a full-time employee of the Respondent. His usual start time was 8.00 am but his hours of work varied and on occasions, particularly on Sundays, he might start work at 6.00 am or 6.30 am. The evidence made it clear that he was keen to work extra hours if needed.
17. In September 2017, the Claimant became a rider and was required to complete a Rider Registration Form. He was required to detail "**ANY** disability or medical conditions that may affect your ability to ride or which your instructor should be aware of in case of emergency". The Claimant declared that he was short-sighted. He did not include the fact that he was autistic.
18. On 2 May 2018, a manager reported to the Respondent a complaint made by a disabled employee (described here as A) that when A refused to go out for a drink with the Claimant he grabbed her face, said "look into my eyes", the grip on her face being hard enough for her to feel her teeth. A was more embarrassed than upset about the incident which she said took place some months previously. The Respondent dealt with this matter informally, discussing it with the Claimant, and with A, making it clear to the Claimant that this behaviour was unacceptable.
19. On 15 November 2018, one of the yard managers reported to the Respondent that the Claimant had been shouting while tacking up a horse, shown anger towards the animal, and driven out of the yard at speed. A livery client wrote to the Respondent saying that he had witnessed the Claimant being aggressive towards some of the horses and gave instructions that the Claimant was not to handle his horse until his temperament around horses had improved.
20. Following a disciplinary hearing held on 23 November 2018 at which the Claimant admitted his misconduct, the Respondent issued the Claimant with a written warning for being aggressive towards horses, using aggressive and

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abusive language whilst at work, and leaving the premises without finishing his tasks.

21. On 5 December 2018, the Claimant's mother complained to the Respondent about what she had seen and perceived to be bullying of the Claimant by a colleague. The Respondent held a meeting with the Claimant who said he did not want to take the issue any further.
22. On 24 January 2019, one of the yard managers complained to the Respondent that after a dispute as to whether or not stable lights should be left on, the Claimant had called a colleague a "fucking whore". Following a disciplinary hearing which took place on 10 February 2019, the Claimant was issued with a written warning. In evidence before the Tribunal, the Claimant said he had called his colleague a "fucking horse". The Tribunal finds that highly unlikely: not only is the phrase nonsensical but had the Claimant asserted that he had used those words it is more likely than not that it would have been minuted in the brief notes of the disciplinary hearing rather than, as appeared to be the case, raised for the first time at the hearing.
23. At the beginning of May 2019, the Claimant had support from Symbol, an outreach organisation engaged by Kent County Council. By email dated 11 May 2019, the Claimant's mother informed the Respondent that arrangements had at long last been made for the Claimant to have some support to help him organise his domestic life. The email reads:

[The Claimant] says that he has mentioned to you that, at long last, we have arranged for him to have some support to help him organise his domestic life! Hurray!

He has been allowed six hours maximum each week ...

On Tuesdays, his support will probably start early evening, so he would be free during the day in the event of you needing him.

So, just so you know, it is fairly flexible within certain parameters. He doesn't want to be down on his pay and is always happy to fill in for you if you need him!

24. On 19 May 2019, the Claimant, after being asked to move horses away from the reception area for safety reasons, was heard swearing in front of clients and 8 year old children who were present at the yard. He also swore at the Respondent and, when told not to do so, said "I don't give a shit".
25. The Claimant then posted on Facebook, using obscene language, making mention of his employment. By letter dated 22 May 2019, the Claimant was invited to attend a disciplinary hearing the following afternoon, the allegation being offensive or defamatory comments against the Respondent. The letter made it clear that a possible consequence could be the Claimant's dismissal.
26. At this stage, having not said anything to her up to now about them, the Claimant told his mother of the disciplinary issues with which he had been involved at work. It appears that the relationship between the Claimant's mother and the Respondent, which had hitherto been friendly, became less positive.

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27. The following day, 23 May 2019, the Claimant's mother emailed the Respondent simply stating that the Claimant would not be attending the disciplinary meeting. The Claimant's mother emailed the Respondent further to say that the Claimant would be taking sick leave on 24 May and 26 May followed by prearranged annual leave on Monday to Thursday the following week. She stated that she would be attending the proposed meeting and would be requesting that the Claimant's Support Worker should attend. She asked for the meeting to take place on 1 June 2019.
28. A further incident took place on the morning of 23 May 2019. The details subsequently reported by one of the yard managers was that the Claimant had ignored her instructions, followed her to the tack room where he confronted her and caused her to feel threatened. She thought the Claimant was going to hit her. She stated that the Claimant had pushed past her making contact with her shoulder saying: "let me get on with my fucking work". The office manager confirmed what the yard manager had told her shortly after the incident, namely, that the Claimant had behaved in a very threatening and aggressive manner and that the yard manager was concerned that the Claimant was going to hit her. The office manager had also been informed that the Claimant had left the premises and driven out of the yard at great speed, revving his engine. A client was also present and subsequently wrote to the Respondent describing what he had seen and heard.
29. The Respondent was sufficiently concerned to report the matter to the police on 24 May 2019 and emailed the Claimant's mother informing her of this. The Respondent said that a meeting should take place as soon as possible and asked for the contact details for the Claimant's support worker. The Respondent said that she would be in direct contact with the Claimant and that the attendance of the Claimant's mother would not be required.
30. The Respondent sought legal advice following which she wrote to the Claimant on 28 May 2019 suspending him from his duties. By letter dated 29 May 2019, the Respondent invited the Claimant to attend a meeting to investigate the incident that took place on the morning of 23 May 2019.
31. The Claimant's mother did not provide the Respondent with contact details for the Claimant's support worker.
32. The Respondent employed a disabled person (described as B in these reasons). The Respondent, who liaised from time to time with B's support worker, contacted him. B's support worker provided a telephone number that the Respondent might try to reach the Claimant's support worker. The Respondent made the call and, according to the Respondent, the telephone was answered by a person in the "autism team". There was a subsequent exchange of emails between the Respondent and the Claimant's support worker. These email exchanges make it clear that the Respondent wished to engage with the support worker. Following this exchange of emails, the Respondent had a direct telephone conversation with the Claimant's support worker. The support worker's telephone attendance note records that the Respondent would not provide an incident report but it shows that the details of the incident were reported. The support worker's note records that the Respondent had said: "she wasn't aware [the Claimant] had autism".

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33. On 31 May 2019, the Claimant's mother informed the Respondent that the Claimant was unwell and did not feel he could engage with the Respondent himself. The Respondent was provided with a statement setting out the Claimant's version of events in which, among other things, the Claimant alleged that the yard manager had pushed him back using her hand on his shoulder.
34. The Claimant presented his claim to the Tribunal on 15 August 2019.
35. In the event, the Claimant remained certificated as unfit for work by his GP, said to be suffering from stress at work. He did not return thereafter. He remained certificated and in receipt of statutory sick pay until December 2019 (although, while still employed by the respondent, certificated as unfit for work and receiving statutory sick pay from the respondent, he became self-employed from July 2019 as a gardener from which he realised further income).
36. The Claimant resigned with effect from 2 December 2019.

Applicable law

The meaning of disability

37. 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.
38. 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. In particular, insofar as relevant to this case, paragraph 15 of Appendix 1 of the Code states, among other things, that taking part in normal social interaction or forming relationships are day to day activities.

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.
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

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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 the 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 section 15, 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

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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. Unfavourable treatment will not be unlawful under S.15 if it is objectively justified. This will require A to show that the treatment is a proportionate means of achieving a legitimate aim.

Knowledge of disability

43. The Code 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 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.

44. In A v Z UKEAT/0273/18 the EAT set out the applicable legal principles where knowledge of disability is concerned:

44.1. There needs only be actual or constructive knowledge of the disability itself – not the causal link between the disability and its consequent effects which led to the unfavourable treatment (see City of York Council v Grosset).

44.2. An employer need not have constructive knowledge of the complainant's *diagnosis* but rather must be able to show that it was unreasonable for it to be expected to know that a person suffered an impediment to his physical or mental health, or that that impairment had a substantial and long-term effect (see Donelian v Liberata UK Ltd).

44.3. The question of reasonableness is one of fact and evaluation, but 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.

44.4. 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 because:

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- 44.4.1. in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability, and
- 44.4.2. 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.
- 44.5. When assessing whether an employer has constructive knowledge, the provisions of the Employment Statutory Code of Practice are relevant, specifically paragraphs 5.14 and 5.15.
- 44.6. An employer does not have to make every enquiry where there is little or no basis for doing so.
- 44.7. 'Reasonableness' for the purposes of s. 15 entails a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee.

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.
- 46. 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.
- 47. 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:-
 - 47.1. the provision, criterion or practice applied by the employer;
 - 47.2. the identity of non-disabled comparators where appropriate; and
 - 47.3. the nature and extent of the substantial disadvantage suffered by the Claimant.

Interaction between sections 15 and 20

- 48. Elias LJ stated in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265:

An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment – say allowing him to work part-time – will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified....

49. As Mr Justice Choudhury explained in Northumberland Tyne & Wear NHS Foundation Trust v Ward [2019] UKEAT/0249/18

...it is hard to see how a dismissal could be justified if there was a reasonable adjustment that, if made, would or might have avoided that outcome.

Harassment

50. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010.

51. A person (A) harasses another (B) if A engages in unwanted conduct related to a protected characteristic (disability in this case); and the conduct has the purpose or effect of:

51.1. violating B's dignity, or

51.2. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

52. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

52.1. the perception of B;

52.2. the other circumstances of the case;

52.3. whether it is reasonable for the conduct to have that effect.

53. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

54. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment? Third, was that conduct related to the Claimant's protected characteristic?

55. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 relied upon the judgments of the House of Lords in James and Nagarajan and held that alleged discriminatory words must be considered in context. In Warby the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

56. As Mrs Justice Slade stated in Bakkali v Greater Manchester Buses (South) Ltd [2018] UKEAT/0176/17

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Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant. It was said that without such evidence the ET should have found the complaint of harassment established. However, such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place.

Indirect discrimination

57. Section 19 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

58. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

58.1. A applies, or would apply, it to persons with whom B does not share the characteristic,

58.2. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

58.3. it puts, or would put, B at that disadvantage, and

58.4. A cannot show it to be a proportionate means of achieving a legitimate aim.

59. There is no requirement that an employer knows of an employee's disability in an indirect discrimination claim.

The burden of proof

60. 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.

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61. Thus, the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the Respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

Conclusion

Disability

62. The Claimant has a mental impairment (to use the words in the legislation), namely autism spectrum condition. He is described as "highly functioning" and it is clear that he is an able individual in very many ways: he has dyslexia (not a disability he relies on for the purposes of this claim) but he can read and write; he is computer literate and able to use social media; he is highly articulate (as the Claimant clearly demonstrated when giving evidence to the Tribunal). Nevertheless, as described above, his autism has an adverse impact on his ability to carry out day to day activities. Those effects are more than trivial. Autism is lifelong condition. The Tribunal concludes that the Claimant was a disabled person at relevant times.

63. The Tribunal's conclusion is also supported by the fact that the Claimant had been provided with additional classroom support when he was at school, had been in supported living during his late teens, and had been in receipt of Disability Living Allowance.

Knowledge

64. Although both the Claimant and his mother gave evidence that they "would have told" the Respondent of his autism, their evidence was vague and unspecific save in respect of one instance: the Claimant's mother said that she visited the Respondent's yard to introduce herself and told the Respondent that the Claimant "had a tough time because he was on the spectrum" but that the Respondent "looked past me" and "I don't know if she heard what I said".

65. This evidence must be weighed against the Respondent's evidence that: she did not know the Claimant had autism: she had never been told by the Claimant or his mother that he was autistic; she had no recollection of the Claimant's mother telling her in the yard that the Claimant was autistic; the Claimant had not declared his condition on his interview and riding registration forms; he had not mentioned it at the various meetings and disciplinary hearings, rather he had said he had anger management problems for which she had suggested counselling.

66. The Respondent employs A and B for whom reasonable adjustments were made (as the Claimant confirmed, he felt they were treated more favourably than him). This leads to the inference that had the Respondent known the Claimant was disabled, adjustments would have been made for him also.

67. On the balance of probabilities, the Tribunal prefers the Respondent's evidence that she was not informed that the Claimant was autistic until she contacted the case worker on 30 May 2019. This is supported by the case worker's note.

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68. The Tribunal next considers whether the Respondent ought reasonably have been expected to know the Claimant was a disabled person. As far as the Respondent was concerned, the Claimant was not displaying the same traits as another employee with autism; although the Claimant wore an RDA tee shirt at work, the Respondent did not take this to mean the Claimant himself was disabled because such tee shirts are freely available. As for the Claimant's conduct, this was discussed in the context of anger management for which the Respondent had suggested counselling. On balance, the Tribunal concludes that, until the Respondent was informed that the Claimant had "support", the Respondent was not put on such notice that it would have been reasonable for her to have made enquiries to ascertain whether or not the Claimant suffered from an impediment and might be a disabled person.
69. However, on 11 May 2019, the Respondent was informed that the Claimant now had "support". Although the nature of this support was not made explicit at that stage (the fact that the Claimant had a "support worker" was not made clear until 23 May 2019), the context of the email of 11 May 2019 was sufficiently clear to put the Respondent on notice that it would have been reasonable for her to have made enquiries as to whether the Claimant might be a disabled person. Had enquiries been made, the Claimant's autism and its effects on his ability to carry out day to day activities would have been confirmed. The Tribunal concludes that the Respondent had constructive knowledge of the Claimant's disability from 11 May 2019.

Failure to make reasonable adjustments

70. The Tribunal finds that the Respondent applied the PCPs set out in the list of issues, namely:
- 70.1. Requiring tasks to be carried out in a certain amount of time;
 - 70.2. Having a hierarchy of reporting line which did not allow the Claimant autonomy;
 - 70.3. Having a disciplinary procedure in place and applying it to the Claimant;
 - 70.4. Report to the police any behaviour the Respondent perceives as criminal;
 - 70.5. Logging incidents in the incident book and providing treatment of injuries;
 - 70.6. Having a rota system in place; and
 - 70.7. Having a policy to contact directly with the employee.
71. With regard to the substantial disadvantages to which the Claimant alleges he was put, the Tribunal makes the following findings:
- 71.1. Requiring tasks to be carried out in a certain amount of time: there was insufficient evidence before the Tribunal to suggest that this PCP placed the Claimant at a substantial disadvantage after 11 May 2019 when the Respondent first had constructive knowledge of the Claimant's disability.

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- 71.2. Having a hierarchy of reporting line which did not allow the Claimant autonomy: the hierarchical structure may well have placed the Claimant as a disadvantage by the way in which, because of his disability, he perceived managerial instructions and comments that were made to him. This would include the incidents of 19 May and 23 May 2019.
- 71.3. Having a disciplinary procedure in place and applying it to the Claimant: this put the Claimant at a substantial disadvantage in comparison with those who are not disabled in that the Claimant, given his condition and propensity to react angrily and aggressively in certain situations, was more likely to be subject to it. The Claimant was subject to the disciplinary procedure in the period falling after 11 May 2019.
- 71.4. Report to the police any behaviour the Respondent perceives as criminal: the Respondent reported the Claimant's behaviour to the police on 24 May 2019. This placed the Claimant at a substantial disadvantage given the increased likelihood that such a report might have to be made because of his behaviour caused by his disability.
- 71.5. Logging incidents in the incident book and providing treatment of injuries: there was no evidence that this PCP placed the Claimant at a disadvantage at any time.
- 71.6. Having a rota system in place: whilst recognising that the Claimant checked the rota on 23 May 2019, there was insufficient evidence before the Tribunal to suggest that this PCP placed the Claimant at a substantial disadvantage after 11 May 2019.
- 71.7. Having a policy to contact directly with the employee: the Tribunal is satisfied that this PCP placed the Claimant at a substantial disadvantage to persons who are not disabled in that the Claimant had the autistic traits described under the heading "findings of fact" above.
72. With regard to the four particular disadvantages identified above, the Tribunal must determine a further issue relating to the Respondent's knowledge, namely, whether she knew or could reasonably be expected to have known that the Claimant was likely to be placed at those particular disadvantages. In the Tribunal's view, had the Respondent made enquiries when she had constructive knowledge of the Claimant's disability, it would have been tolerably clear to her that the Claimant would be placed at those disadvantages (the Tribunal is less sure that the Respondent ought reasonably have known that the Claimant would be put at a disadvantage by reporting his conduct to the police but the Tribunal gives the benefit of doubt to the Claimant at this stage of its reasoning).
73. The Tribunal next considers if there were steps that were not taken by the Respondent, that could reasonably have been taken, to avoid those disadvantages. The Tribunal concludes as follows:
- 73.1. It would not have been a reasonable adjustment for the Respondent to have removed its hierarchical structure given the requirement for effective management of the business. Similarly, it would not have been reasonable to allow the Claimant to schedule his own tasks given the demands of the Respondent's business which are dictated by the

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requirements of her clients in which time is of the essence. As to the way in which the Claimant was instructed, the evidence strongly suggest that it was the Claimant's perception of the way he was spoken to rather than the way he was actually spoken to or instructed. In those circumstances, it is difficult to imagine how instructions might have been given which would not have caused him some anxiety or upset.

73.2. Given the seriousness of the allegations, it would not have been a reasonable adjustment to disapply the disciplinary procedure. Indeed, it is difficult to conceive of any reasonable step in relation to the disciplinary procedure, insofar as it was applied in the period after 11 May 2019 which might have prevented the disadvantage the Tribunal has identified. The Claimant's contention that it would have been reasonable for the Respondent to have provided training is not accepted; there was no evidence to suggest how training might have avoided the disadvantage.

73.3. Given the nature of the threat and behaviour of the Claimant as reported to the Respondent, it would not have been reasonable to expect her not to have reported the matter to the police.

73.4. The Tribunal is satisfied that it would have been a reasonable adjustment for the Respondent to have liaised with the Claimant's mother during the Claimant's sickness arising after 11 May 2019. The Claimant's mother had requested this, describing herself as the Claimant's advocate, and provided the Claimant's written authority, yet the Respondent continued to correspond with the Claimant direct. The Respondent also informed the Claimant's mother that her attendance was not required at the proposed meeting to discuss the disciplinary issue which had arisen on 23 May 2019. It would have been a reasonable adjustment to allow the Claimant's mother to act as his advocate at such a meeting given the traits associated with his condition which the Tribunal has described.

74. In conclusion, the Respondent failed to make reasonable adjustments in that she did not liaise with the Claimant's mother during the Claimant's sick leave period. The Claimant's reasonable adjustments claim is successful to this limited extent.

Discrimination arising

75. The Tribunal reaches the following conclusions.

75.1. The Claimant has not proved that he was not permitted enough time to carry out tasks. He had a day list which he was expected to follow but the Tribunal accepts the Respondent's credible and clear evidence that the timetable was flexible in accordance with business demands and that employees would routinely assist each other to complete tasks in a timely manner.

75.2. The Tribunal concludes that the Claimant was criticised (although the evidence did not suggest that such criticism was unjustified or disproportionate in the circumstances). This was unfavourable treatment. The Tribunal does not accept the Claimant's contention that he was shouted at in the way he suggests; the weight of the evidence suggests that it was the Claimant who did the shouting.

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- 75.3. The Claimant has clearly shown that he was subjected to the disciplinary procedure (although the Tribunal notes that no disciplinary penalty was imposed in the period falling after 11 May 2019). Subjecting the Claimant to the disciplinary procedure was unfavourable treatment.
- 75.4. There was no dispute that the Respondent reported the Claimant to the police. The Tribunal accepts this was unfavourable treatment.
- 75.5. The Claimant's evidence relating to his allegation that he was required to repeat tasks that had been satisfactorily completed was sketchy. The Tribunal accepts that his duties required him to re-fill water buckets after they had been emptied by the horses but this was not unfavourable treatment; it was part of the job.
- 75.6. The Tribunal does not accept that the Claimant was required or expected to purchase tools and equipment in order to carry out tasks, nor that he was required to carry out handyman jobs. The evidence strongly suggests that the Claimant did so voluntarily (as did other employees) and, in the Claimant's case, in an effort to please.
- 75.7. The Claimant has failed to prove that the Respondent failed to provide sufficient training. His evidence in this regard was sketchy and vague.
- 75.8. The Claimant has failed to show that he was prevented, delayed and questioned about his requests to take annual leave. Simply put, the Claimant provided no particularised evidence from which such a finding can be made.
- 75.9. The Claimant has failed to prove that the Respondent unjustifiably and disproportionately monitored his time keeping. All employees were expected to attend during their scheduled working hours. This expectation did not amount to unfavourable treatment.
- 75.10. The Claimant adduced insufficient evidence from which the Tribunal could conclude that the Respondent failed to take steps to protect the Claimant's health and safety or that the Respondent did not use incident book or provide treatment. Again, the Claimant's evidence was unparticularised and sketchy.
- 75.11. The Claimant failed to adduce sufficient evidence to show that the Respondent failed to provide him in effect with a pay rise in April 2019 by decreasing his hours but not his workload.
- 75.12. The evidence shows that the Claimant was keen to work extra hours and that he might be requested to do so from time to time. However, the Claimant has failed to persuade the Tribunal that he was required or expected him to come in on his off days. The Claimant was expected to work in unpleasant weather from time to time but that was the case for all employees and was part of the job working with horses. It was not unfavourable treatment.
- 75.13. With regard to the alleged assault by the Respondent's Yard Manager on the 23 May 2019, the Claimant adduced insufficient evidence to show that

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he was assaulted. The weight of the evidence suggests that it was the Claimant who threatened the Yard Manager.

76. The Tribunal finds that the unfavourable treatment identified above arose in consequence of the Claimant's disability. The criticism, the application of the disciplinary procedure, and the Respondent's report to the police arose by reason of the Claimant's conduct and behaviour which was a consequence of his disability.
 77. This treatment arose at a time when the Respondent had constructive knowledge of the Claimant's disability.
 78. The Tribunal next considers whether the Respondent treated the Claimant as aforesaid because of the something arising in consequence of the disability. In each case, the Tribunal concludes that the Respondent subjected the Claimant to the unfavourable treatment because of the "something arising" identified above.
 79. Nevertheless, the Tribunal is satisfied that the Respondent was justified in doing so. The Respondent clearly had the legitimate aims of ensuring harmonious relations between all employees in the workplace and ensuring decency, propriety and the efficient running of the business. Criticising the Claimant and applying the disciplinary procedure were entirely proportionate measures in the circumstances. The Respondent also had the legitimate aim of protecting herself and her yard manager facing perceived threats and it was entirely proportionate in the circumstances to report the matter to the police.
80. For these reasons, the Claimant's claim under section 15 of the Equality Act (discrimination arising from disability) is dismissed.

Harassment

81. The Tribunal has found that the Respondent subjected the Claimant to the following treatment:
- 81.1. Criticised him;
 - 81.2. Subjected him to the disciplinary procedure; and
 - 81.3. Reported him to the police.
82. The Tribunal accepts this was unwanted conduct which created an adverse environment for the Claimant.
83. The context for the treatment was the Claimant's conduct and behaviour. The evidence before the Tribunal made it clear that the Respondent's actions and reasons for them related to this conduct and behaviour, not the Claimant's disability. The Tribunal finds that the treatment did not relate to his disability in sense described in the cases of Warby and Bakkali referred to above.
84. Accordingly, for these reasons the Claimant's harassment claim is dismissed.

Indirect discrimination

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85. Given the Tribunal's findings as to the Respondent's knowledge, it does not fall to the Tribunal to consider the Claimant's claim of indirect discrimination.

Future conduct of the proceedings

86. Given the Tribunal's limited findings in the Claimant's favour (failure to make reasonable adjustments to the extent described above) the parties are encouraged in accordance with Rule 3 of the Employment Tribunal Rules of Procedure 2013 to seek agreement as to remedy. This would have the benefit of avoiding further time, costs and anxiety involved in a further hearing.

87. The case will nevertheless be listed for a further hearing with a time allocation of one day before the same Tribunal panel to consider the question of remedy. Notice of hearing will be issued in due course.

88. If the parties are able to reach agreement as to remedy and settle the matter between themselves, they should inform the Tribunal immediately so that the further hearing can be vacated.

Note

Public access to employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and respondent(s) in a case.

Employment Judge Pritchard
Date: 4 May 2021