Appeal No. EA-2019-000478-OO (previously UKEAT/0213/20/OO)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 27 April 2021
Judgment handed down on 3 August 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

MR DAVID SECCOMBE — APPELLANT

REED IN PARTNERSHIP LIMITED — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	CATHERINE CASSERLEY (Of Counsel) Direct access
For the Respondent	TOM KIRK (Of Counsel) Instructed by: Reed Group Legal Department Academy Court 94 Chancery Lane London WC2A 1DT

SUMMARY

DISABILITY DISCRIMINATION

The Tribunal did not err in law in concluding that the claimant was not disabled or, if he was, the employer did not have actual or constructive knowledge.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against the judgment of Employment Judge Roper sitting in Bodmin on 27 March 2019, determining that the claimant was not a disabled person; or, in the alternative, that the respondent did not know, and could not reasonably have been expected to know, that the claimant was disabled.

2. The claim concerned the claimant's employment with the respondent as a Supply Chain Manager from 28 November 2016 until his summary dismissal on 28 March 2018. The claimant contended that his dismissal constituted disability discrimination and/or that the respondent had failed to make reasonable adjustments. The claimant contended that he was disabled by reason of anxiety and depression; sometimes referred to as severe anxiety and depression.

3. I take the history from the judgment, save that I will refer to some matters the claimant contends the employment tribunal failed to take into account in a manner that constituted an error of law.

4. The Tribunal needed to consider the period prior to the claimant's employment by the respondent insofar as it was relevant to his contention that he was a disabled person at the time of his dismissal and/or in the period before the dismissal, during which he contended reasonable adjustments should have been made.

5. The Tribunal considered the claimant's GP records. The employment judge noted that there was an entry of 18 September 2006 stating "not feeling depressed". The claimant's case was that his mental health impairment began in 2007.

6. In April 2007 the claimant suffered an injury to his back as a result of which he required spinal decompression surgery. An entry in the GP records on 27 October 2008 stated "seems depressed, start fluoxetine". There was a further entry on 12 November 2008 stating "feels mood has levelled okay". The Claimant was referred to counselling. Both of the entries in the GP notes and counselling were referred to at paragraph 7 of the judgment.

7. The Tribunal noted at paragraph 11 that prior to his employment with the respondent, the claimant had worked at another company with Mr Atter, between June 2011 and June 2015. The claimant subsequently worked with Mr Atter at the respondent. During the previous employment Mr Atter knew about the claimant's back condition but was not told by the claimant that he was suffering any mental health issues.

8. The next relevant GP records were in September 2015. On 1 September 2015 it was recorded that the claimant had been admitted to hospital suffering chest pain thought to be due to stress. On 4 September 2015 there was a record noting that a Fit Note (Med 3) had been issued stating that the claimant was not fit for work. It was noted that the claimant felt that he was having panic attacks. The Tribunal noted that the records suggested that the claimant was suffering from stress but did not expressly refer to an entry in the GP records that gave a diagnosis of Anxiety Disorder E200.

9. On 24 September 2015, it was recorded in the GP records that the claimant was still having problems with a grievance and was suffering from anxiety. This was referred to in the judgment. However, the Tribunal did not record the diagnosis of "anxiety disorder, unspecified EU41z" in the GP notes. There was another entry in the GP records with a diagnosis of stress on

13 October 2015. This was referred to in the judgment. It appears from the GP records that the claimant was signed off from his then employment from 1 September 2015 to 19 October 2015. This all occurred prior to the claimant's employment by the respondent. The information from the GP records was not available to the respondent.

10. The claimant commenced employment with the respondent on 28 November 2016. The employment judge noted that the claimant completed an equal opportunities questionnaire in which he was asked to confirm whether he had any health-related issues or impairment for which the respondent might need to make reasonable adjustments. The claimant answered "no".

11. The employment judge noted that the claimant's probationary period was extended on a number of occasions. At paragraph 13, the employment judge considered the management of the claimant by Kelly Holder and noted that the claimant had on 24 October 2017 been subject to performance management and had complained of his "disgust" at being so treated, but had not suggested that any problems in his performance arose from a mental health condition. The employment judge concluded, at paragraph 14, that at the end of December 2017 neither Mr Atter or Mrs Holder had been told by the claimant, or made aware by any other means, that the claimant suffered from any mental health impairment. They did not know about the conditions the claimant relied on in his disability impact statement; severe anxiety and depression.

12. On 26 December 2017, an incident occurred which the parties have agreed I should only refer to as having been extremely traumatic (the traumatic event). It was clear to the respondent that the claimant was extremely upset and subsequently had a period of ill-health. The employment judge referred to an email the claimant sent to Mrs Holder on 5 January 2018 stating of the traumatic event "If I don't explain what it is to someone close to me within the workplace

I will have a breakdown". Mrs Holder replied that she was happy to discuss the matter and would be prepared to do so on a confidential basis.

13. The claimant attended a meeting with Mr Atter on 5 January 2018. At paragraph 15 of the judgment the employment judge noted that it was obvious to Mr Atter that the claimant was extremely upset and that he had broken down and cried during the meeting. Mr Atter stated he felt unqualified to comment whether it was a breakdown in the medical sense. After the meeting Mrs Holder telephoned the claimant and suggested that he contact the respondent's member assistance program. On 9 January 2018, she offered to cover for the claimant on some of his conference calls if he did not feel well enough to undertake them himself. This was referred to at paragraph 17 of the judgment. On 10 January 2018 the claimant attended a meeting with his colleagues and was granted two days of compassionate leave by Mrs Holder. This is dealt with at paragraph 18 of the judgment.

14. The claimant was signed off work from 15 January 2018 due to ill health. On 16 January 2018, the claimant sent a text to Mrs Holder that is not referred to in the judgment in which he said, "I'm barely able to talk about anything or see people without crumbling". He stated he had been signed off work for a week and was to receive counselling without which he stated he would not be able to focus on his own mental health. He stated "I promise I'll be back as soon as I can." A sickness certificate was issued on 16 January 2018.

15. The claimant sent an email to Mrs Holder on 22 January 2018, referred to at paragraph 19 of the judgment, in which he stated "I'm starting to get to a point of coping and being able to control/suppress the outward emotional stuff. It's really hard and I will heal but I'm not fully there

yet". The claimant stated in an email of the same date in respect of a meeting the next day "I most definitely could not face that tomorrow". That email was not referred to in the judgment.

16. The claimant attempted a return to work between 23 and 29 of January 2018. On 30 January 2018, the claimant sent a text to Mr Atter that is referred to at paragraph 20 of the judgment; "I'm bordering on a fuckin breakdown myself and I'm worried about work". In the claimant's witness statement he stated that he also received a call from Mrs Holder and that he had explained to her that he was on the brink and suffering from panic attacks. He stated that Mrs Holder suggested that he see his GP and get signed off work for a couple of weeks. That exchange is not referred to in the employment tribunal's judgment.

17. The claimant was absent due to sickness from 31 January to 19 February 2018. The claimant then returned to work, although he had sickness certificates that covered the period to 16 March 2018. On the claimant's return to work on 19 February 2018 a return to work interview was not conducted. The employment tribunal held at paragraph 21 of the judgment that this was because the respondent's internal system only triggered the fixing of such a meeting when a returning employee requests a meeting under the relevant procedure. The claimant applied at the outset of this hearing to amend the Notice of Appeal to allege as a ground of perversity that this finding was contrary to the provisions of the Employee Handbook. For reasons given at the time, I refused the application to amend.

18. On 27 March 2018, the claimant completed a pro forma document pending a performance review meeting. This was refered to at paragraph 23 of the judgment, including the comment that "Whilst back at work since February 19, the issues that forced my absence in January and February are ongoing and unlikely to be resolved fully for the foreseeable future

(police investigation and psychological/emotional recovery). The employment judge went on to state, "Apart from this comment, the claimant made no reference to any mental health issues, and did not assert at any stage that he was suffering from any mental impairment which gave rise to a disability, and did not mention "severe anxiety and depression", upon which he now relies".

19. The claimant was called to a meeting on 28 March 2018 and dismissed summarily. He was told he was being dismissed because of his poor performance. The employment judge considered the meeting at paragraph 24 of the judgment:

> **It is also clear from the contemporaneous minutes of that meeting that the claimant was very upset at his dismissal following Mrs Holder's explanation of his perceived performance deficiencies. The minutes record that at one stage the claimant: "started waving his arms around shouting "Bollocks" - this is Bollocks - you are getting rid of me because [of the traumatic event]." Another entry records that the claimant: "was pacing around at this point and very aggressive shouting about not following process and this being about [the traumatic incident] …" The claimant did not mention at any stage during this meeting that he was suffering from any mental impairment which gave rise to a disability, and did not mention "severe anxiety and depression" upon which he now relies.**

20. On 29 March 2018, the claimant sent an email seeking to appeal against his dismissal. Initially, the claimant sought to rely upon the contents of the email as material that the tribunal should have taken into account in assessing whether the respondent knew, or reasonably should have known, that he was disabled at the time of his dismissal. That contention was not pursued.

21. The tribunal set out its conclusions on the issue of disability from paragraphs 37 to 42:

> **37. The claimant relies on "severe anxiety and depression" as his mental impairment for the purposes of these proceedings. The respondent points out (accurately in my judgment) that there has never been any such diagnosis despite the disclosure of 10 years of the GP's medical notes. Nonetheless I have considered the matter on the basis of a possible mental impairment, regardless of the absence of any specific diagnosis of severe anxiety and depression.**
>
> **38. In my judgment the claimant was not a disabled person at the relevant times. My reasons for this conclusion are as follows. The only contemporaneous evidence to which I have been referred is that of the GP's medical notes. It is clear that there are only two previous episodes of any form**

of mental impairment which were depression 10 years previously in October 2008 (following back surgery and marital difficulties), and three years previously in 2015 recording stress at work/grievances and anxiety. The claimant's impact statement prepared subsequently for the purposes of these proceedings, is simply not supported by the contemporaneous GP notes, nor by the claimant's interactions with the respondent's witnesses. Mr Atter worked with and knew the claimant well for the four years between June 2011 and June 2015 and I accept his evidence that the claimant did not raise with him any concerns or issues relating to a possible mental health impairment. Similarly, throughout his employment with the respondent, the claimant did not raise with Mr Atter or Mrs Holder the fact that he might have been disabled by reason of any mental impairment. Indeed, he confirmed the contrary.

39. It was clear that the claimant was extremely upset and distressed by the events of Christmas 2017 into January 2018, and understandably so. He communicated this to the respondent who supported him during that time. Mr Atter and Mrs Holder knew that the claimant was distressed and upset, and was off work for stress, as confirmed in his sickness certificates. The claimant did not suggest to them at any stage that he had any underlying mental illness or impairment (long-standing or otherwise). The claimant was certified as fit to return to work by his GP, and he did return to work. At his dismissal hearing at the end of March 2018, the claimant did not complain at any stage that he had a mental impairment or that the respondent's actions in dismissing him related to the same. Indeed, he argued robustly that the respondent had taken that decision for other reasons.

40. Dr Moore's report was also prepared subsequently for the purposes of these proceedings. This refers to a diagnosis of anxiety or depression in 2008, a recurrent diagnosis in 2015, and again in January 2018. It suggests that this condition affects the claimant's concentration. It is not consistent with the claimant's disability impact statement which claims that the impairment had a continual substantial impact on a number of day-to-day activities over a number of years. Dr Moore's report fails to address what in my judgment is a key question, namely whether (at the times relevant to this claim) there was an underlying mental impairment which met the constituent elements of a disability, and even if it did not manifest itself continually, was always likely to recur. There is no cogent evidence of any such condition.

41. I accept that there may well have been varying degrees of anxiety and depression which temporarily may have had a substantial adverse effect on the claimant's ability to carry out day-to-day activities, such as concentration, on the three occasions which coincided with times a significant difficulty in his life. These were his back injury, operation and marital breakdown in 2008; stress at work in late 2015; and the shocking events of Christmas 2017. In each case the claimant recovered and returned to work. There is no medical evidence of any difficulties arising from mental impairment for the seven-year period between 2008 and 2015; nor for the subsequent two year period until Christmas 2017. There is no underlying medical condition or impairment which can be said to be "likely to recur" during this period. I accept the evidence of Mr Atter and Mrs Holder which I find to be important on this point, namely that (despite their close relationship in their respective employments) the claimant did not display, nor tell them of, any alleged underlying mental impairment or related difficulties between 2011 and 2015, nor throughout his employment. I accept their evidence that the first time they knew of any alleged mental impairment amounting to a disability was when they received the disability questionnaire some months after the termination of the claimant's employment in advance of these proceedings.

> **42. For these reasons I do not find that there is any mental impairment which can be said to be either substantial or long-term during the period of the claimant's employment, which is the period of time relevant to this claim. I find that the claimant was not a disabled person for the purposes of the relevant legislation as alleged.**

22. The Tribunal then considered the question, if contrary to its finding the claimant was disabled, whether the respondent knew, or should reasonably have known, that the claimant was disabled:

> **43. In any event, even if I were mistaken on the existence of the disability as alleged, I would have found that the respondent did not know, and could not reasonably have been expected to know, that the claimant was so disabled, for the following reasons. The claimant had a good working relationship with Mr Atter for the four-year period from 2011 to 2015, and subsequently with Mr Atter and Mrs Holder during his employment with the respondent. They had a number of frank and personal discussions during this time. They were aware of the claimant's back injury and consequent difficulties, which is not a disability relied upon for the purposes of these proceedings. However, at no stage during these periods did the claimant ever suggest to them that he had a mental impairment which amounted to a disability. Indeed, he declared to the respondent that this was not the case. It is clear that the respondent had no actual knowledge of the alleged disability.**
>
> **44. The next question is the extent to which the respondent ought reasonably to have known of the claimant's alleged disability. This point has been very ably argued on behalf of the claimant to the effect that (following the claimant's obvious distress and sickness absence in early 2018) the respondent had enough information to make further enquiries and that effectively the burden is on the respondent to show that it was unreasonable for it not to have had the required knowledge. It is argued that a reasonable employer, knowing what it did about the claimant's mental state in early 2018, at the very least should have made its own enquiries at which point the disability would reasonably have been known.**
>
> **45. However, the question whether an employer could reasonably be expected to know a person's disability is a question of fact for the tribunal, and is fact sensitive. The difficulty for the claimant with this case is that the respondent knew of the circumstances of the claimant's distress, understood why the claimant was so affected, had received sickness certificates confirming absence because of stress, and then received a fitness certificate from the claimant's GP confirming that he was fit to return to work. The claimant did then return to work as authorised by his GP. The respondent saw this in the context of the shocking and one-off circumstances of Christmas 2018. This was against the background of the claimant's employment record, at the start of which he confirmed that there were no disability issues, and during which he had had no other absences, and had not raised the possibility of any longer term mental impairment at any stage. In my judgment the respondent was entitled to conclude that the claimant's severe distress was as a result of an appalling but one-off incident, and that his GP had subsequently certified he was fit to return to work. The claimant never argued the contrary position, nor argued the possibility of any mental impairment or disability during his employment. Against this background in my judgment it is entirely reasonable for the respondent to have assumed that the matter was the result of one extraordinary and distressing event which had effectively been resolved.**

46. For these reasons I would have held that the respondent did not know, and could not reasonably be expected to have known, of any alleged disability.

23. As a result of these findings the employment judge dismissed the claim. The claimant submitted a reconsideration application on 14 April 2019, which was dismissed by a judgment dated 16 April 2019.

24. The claimant submitted a Notice of Appeal received by the Employment Appeal Tribunal on 2 May 2019. Initially, it was held pursuant to rule 3(7) of the EAT Rules that there were no reasonable grounds for bringing the appeal. A hearing pursuant to Rule 3(10) of the EAT Rules was held on 26 February 2020. The claimant had been represented in the employment tribunal but was now acting as a litigant in person. He received assistance under the ELAAS scheme. Mathew Gullick DJHC permitted the appeal to proceed on amended grounds. After correspondence about the precise nature of the amendment the grounds of appeal were finalised. Subsequently, there was an application to amend ground 5, which was phrased only as perversity, to include a contention that there was an error of law in the approach that was adopted by the Tribunal to actual or constructive knowledge. I permitted an amendment to assert that the Tribunal failed to have regard to the test in **Gallop v Newport City Council** [2014] IRLR 211 in determining whether the respondent had knowledge, actual or constructive, of the claimant's disability.

25. Disability is a protected characteristic. Disability is defined by section 6 of the Equality Act 2010 (EqA 2010):

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities. …

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(6) Schedule 1 (disability: supplementary provision) has effect.

26. It follows, so far as is relevant to this case, that the claimant had to establish that he had at some stage prior to the alleged discrimination had a mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities Day-to-day activities can include work activities. It is important to note that a person who has been disabled in the past is, in effect, deemed to retain the protected characteristic of disability by section 6(4) EqA 2010.

27. Section 212 EQ EqA 2010 defines substantial as meaning more than minor or trivial.

28. Paragraph 2 of schedule 1 EqA 2010 provides, in respect of long-term effects:

2 Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

29. It is important to note that the long-term requirement relates to the effect of the impairment rather than merely the impairment itself. It is not sufficient that a person has an

impairment that is long term, the impairment must have a substantial adverse effect on day-to-day activities that is long-term.

30. In **Goodwin v The Patent Office** [1999] ICR 302 Morison J set out four conditions that require consideration when assessing whether a person is disabled, at p308B:

> **The words of the section require a tribunal to look at the evidence by reference to four different conditions. (I) The impairment condition. Does the applicant have an impairment which is either mental or physical? (2) The adverse effect condition. Does the impairment affect the applicant's ability to carry out normal day-today activities in one of the respects set out in paragraph 4(1) of Schedule I to the Act, and does it have an adverse effect? (3) The substantial condition. Is the adverse effect (upon the applicant's ability) substantial? (4) The long-term condition. Is the adverse effect (upon the applicant's ability) long-term?**

31. A person can be disabled where the impairment has only a single long-term substantial adverse effect on one day-to-day activity: **Sobhi v Commissioner of Police of The Metropolis** UKEAT/0518/12/BA. The claimant in this case relied on loss of concentration.

32. While it is good practice to deal with each of the conditions identified by Morrison J in **Goodwin** separately, there may be occasions on which it is permissible to focus on the question of whether there is a substantial adverse effect on day-to-day activities without having to establish the precise medical nature of the impairment before so doing: Underhill J held in **J v DLA Piper UK LLP** [2010] ICR 1052:

> **38 We can go much of the way with Mr Laddie's submission. There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier - and is entirely legitimatefor the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected - one might indeed say "impaired" - on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common sense inference that the claimant is suffering from a condition which has produced that adverse effect -in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred. This approach is entirely consistent with the pragmatic approach to the impairment issue propounded by Lindsay J in the Ripon College case and endorsed by Mummery LJ in McNicol's case. It is also in our view consistent with the Guidance. …**

> **39 But we do not think that it follows - if Mr Laddie really intended to go that far - that the impairment issue can simply be ignored except in the special cases which he identified. The distinction between impairment and effect is built into the structure of the Act, not only in section 1(1) itself but in the way in which its provisions are glossed in Schedule 1. It is also reflected in the structure of the Guidance and in the analysis adopted in the various leading cases to which we have referred, which have continued to be applied following the repeal of paragraph 1(1) of Schedule 1 (see, e g, the decision of this tribunal (Langstaff J presiding) in Ministry of Defence v Hay [2008] ICR 1247: see paras 36—38 (at pp 1255—1256)). Mr Laddie's recognition that there will be exceptional cases where the impairment issue will still have to be considered separately reduces what would otherwise be the attractive elegance of his submission. Both this tribunal and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is all too often confusion and error.**
> **40 Accordingly in our view the correct approach is as follows:**
>
> **(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term ffect arising under it) as recommended in Goodwin v Patent Office [1999] ICR 302.**
>
> **(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.**

33. The claimant relied on **Lawson v Virgin Atlantic Airways Limited** UKEAT/0192/19/VP for the proposition that the respondent's knowledge of disability is irrelevant to the question of whether a person is disabled: see paragraphs 40 to 43. At any point in time, there is an objective question to be asked, whether the claimant has a mental impairment that has a substantial adverse effect on his ability to carry out day-to-day activities that has lasted 12 months or is likely to last 12 months, or is likely to recur. The respondent's knowledge is not relevant to that question. However, that does not mean that what a person says, or does not say, about their abilities is irrelevant to the objective question of whether, at the time in question, the person was disabled; often the claimant will be best placed to explain what effects any impairment has on day-to-day activities. What is important is what the person says, rather than to whom it is said - so, for example, if there is a period in respect of which there is no medical evidence the

fact that a claimant told friends, family or an employer that he was continuing to be effected by the condition could be relevant. Similarly, it could be relevant that a claimant did not tell people that an impairment was continuing to have an effect. While caution should be taken to considering what is not said about an impairment, because disabled people may wish to maintain their privacy, particularly if they perceive that there may be an adverse reaction to their disability, there is no rule of law, as the claimant's Counsel contended for, that the fact that a claimant does not refer to ongoing symptoms can never be relevant to the question of disability. In a case in which an individual has previously openly spoken about an impairment the fact there is a significant period during which no mention is made of the impairment could potentially be relevant to the issue of disability. This is not a matter of law, but one of fact and degree.

34. In **SCA Packaging Ltd v Boyle** [2009] ICR 1056 Lord Hope held that when considering whether an impairment is likely to recur the term "likely" means that it could well happen. That phrasing has been adopted in the Equality Act 2010 Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability.

35. In **McDougall v Richmond Adult Community College** [2008] ICR 431 Rimer LJ held that it is necessary to decide whether the definition of disability is met at the time of the alleged discrimination. This reasoning was adopted by Lewis LJ in **All Answers v W** [2021] IRLR 612, at paragraph 26:

> **The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paras [22]–[25] and Rimer LJ at paras [30]–[35]. That case involved the question of whether the effect of an impairment was**

> **likely to recur within the meaning of the predecessor to para 2(2) of Sch 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase 'likely to last at least 12 months' in para 2(1)(b) of the Schedule. I note that that interpretation is consistent with para C4 of the guidance issued by the Secretary of State under s 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, 'account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood'.**

36. It does not follow from the fact that there was a subsequent recurrence of an impairment that there was likely to be a recurrence at the date of the alleged discrimination. The fact that a substantial adverse effect at the date of alleged discrimination is a recurrence of a previous episode does not necessarily lead to the conclusion that the substantial adverse effect was likely to recur at the date of the alleged discrimination: **Sullivan v Bury Street Capital Limited** UKEAT/0317/19/BA per Choudhury P at paragraph 38 (in which SAE stands for substantial adverse effect):

> **Similarly, the fact that the SAE in question is itself a recurrence does not preclude the Tribunal from concluding that, as at the date of the later episode, a further recurrence was not likely. Although in many instances, the fact that the SAE has recurred episodically might strongly suggest that a further episode is something that "could well happen", that will not always be the case. Where, for example, the SAE was triggered by a particular event that was itself unlikely to continue or to recur, then it is open to the Tribunal to find that the SAE was not likely to recur. The triggering event here was, according to the Tribunal, the discussions about remuneration in 2017. The Tribunal found that these were unlikely to continue indefinitely and that the Claimant's condition would improve once these were resolved. In these circumstances, it was open to the Tribunal to conclude that the SAE was not one that was likely to recur, both as at 2013 and as at 2017.**

37. The issue of knowledge of disability has to be considered in a slightly different way for the various types of conduct proscribed by the EqA 2010. There is no reference to knowledge in section 13 EqA 2010, however, as the less favourable treatment must be because of the protected characteristic, which generally requires consideration of the mental processes of the putative discriminator, there can generally only be direct disability discrimination if the putative discriminator knows of the disability.

38. In the case of discrimination because of something arising in consequence of disability specific provision is made in respect of knowledge at section 15(2) EqA 2010:

> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

39. In the case of failure to make reasonable adjustments, provision is made at paragraph 20(1) of schedule 8 EqA 2010:

> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> > **(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.**

40. In **Gallop** consideration was given to what is required for knowledge of disability, at paragraph 36:

> **Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in s.1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties;**

41. The correct approach to adopt to actual or constructive knowledge was analysed by HHJ Eady QC in **A Ltd v Z** [2020] ICR 199:

> **23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:**
>
> **(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment: see York City Council v Grosset [2018] ICR 1492, para 39.**
>
> **(2) The respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect: see Donelien v Liberata UK Ltd (unreported) 16 December 2014, para 5, per Langstaff J (President), and also see Pnaiser v NHS England [2016] IRLR 170, para 69, per Simler J.**

(3) The question of reasonableness is one of fact and evaluation: see Donelien v Liberata UK Ltd [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see Herry v Dudley Metropolitan Borough Council [2017] ICR 610 , per Judge David Richardson, citing J v DLA Piper UK llp [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so", per Langstaff J in Donelien 16 December 2014, para 31.

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

> **"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.**
>
> **"5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."**

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

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

42. In disability discrimination claims medical evidence is often important, but it is important to recognise that the role of experts is to provide evidence, not to determine whether a person meets the statutory definition of disability: See **Vicary v British Telecommunications plc** [1999] IRLR 680, at paragraph 16.

43. In some cases there is a joint instruction of a medical expert. If that is the case, and the expert has reported, if either party proposes to seek to demolish, or substantially discredit the

A evidence notice should generally be given so that the expert can appear for cross-examination. That process applies to a lesser extent where less formal evidence is provided, as in this case, in which a brief letter from the claimant's general practitioner was provided.

B

44. The role the EAT, as an appellate court, should adopt in considering appeals from judgments of the employment tribunal is well established. A high threshold is applied to appeals on grounds of perversity. The respondent relied, in particular, on the summary of HHJ Serota QC

C in **Blitz v Vectone Group Holdings Ltd,** UKEAT/0253/10/DM, at paragraph 118:

> **118. So far as our general approach to the decision of the Employment Tribunal is concerned, we remind ourselves of the very high threshold required for a successful perversity appeal; see Yeboah v Crofton. The need for an Employment Tribunal to provide sufficient reasons to enable the parties to know why they have won or lost respectively is well known and set**

D **out in the cases of Meek and Anya so we do not need to refer to them. There is no need for an Employment Tribunal to refer to all the evidence or all the submissions, and it is pertinent to bear in mind the Judgment of Waite J in RSPB v Croucher [1984] ICR 604:**
>
> **"We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake Industrial Tribunals are not to be expected to set**

E **our every factor and every piece of evidence that has weighed with them before reaching their decision. So it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an Industrial Tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well established by the decisions of the Court of Appeal in the Retarded Children's Aid Society v Day [1978 IRLR 128."**

F

45. I will start by dealing with ground 5 of the notice of appeal: "whether the judgment was perverse on the issue of whether the Respondent could reasonably have been expected to have knowledge of the Claimant's disability". If the tribunal was entitled to conclude that the

G respondent did not know, and could not reasonably have been expected to know, that the claimant was a disabled person, all of the disability discrimination claims were bound to fail, including any claim of direct discrimination based on the respondent knowing that the claimant was a

H disabled person, rather than any perception of disability. Further, if the respondent did not believe

that the claimant had an impairment that had a substantial and long-term effect on his ability to undertake day-to-day activities, it is hard to see how they could have perceived him to do so.

46. I granted permission for the Notice of Appeal to be amended to rely on the contention that the tribunal had failed to have regard to the test in **Gallop**. It is contended that the employment judge failed to have regard to the fact that the required knowledge is not of a specific diagnosis of a medical condition, but of the existence of an impairment that has a substantial effect on day-to-day activities and is long-term. The appellant also contended that, having regard to the guidance in the Code, the respondent was on sufficient notice to investigate further, in which case they would have ascertained that the claimant was a disabled person.

47. The employment judge dealt relatively briefly with the relevant law, but specifically referred to **Gallop**. The employment judge noted that in deciding whether a condition was likely to recur he had to consider whether it could well happen. There is some overlap in the tribunal's reasoning in paragraphs 43 to 45 in dealing with whether the respondent did know of the claimant's asserted disability, or should reasonably have known. It is important to note that the previous two episodes in 2008 and 2015 were both prior to the claimant's employment with the respondent and were not matters about which the respondent's employees were aware . Although Mr Atter worked with the claimant from 2011 to 2015 he had not been told about any mental-health issues, which was not surprising as the period they worked together was between the two previous episodes of mental ill health. The tribunal found as a fact, paragraph 14, that as of the end of December 2017, neither Mrs Holder or Mr Atter had been told by the claimant that he was suffering from any mental health impairment, or had any other means by which they should reasonably have known that he was so suffering. While the employment judge did not split the asserted disability into its component parts to consider knowledge in respect of each, it is clear

from the findings of fact that he accepted that in the early part of 2018 both Mrs Holder and Mr Atter were well aware that, as a result of the traumatic event, the claimant had a period of ill health because of stress that required him to be absent from work. The employment judge considered that there had been periods during which anxiety and depression had temporarily caused substantial adverse effects on the claimant's ability to carry out day-to-day activities. The only one of those periods of which Mrs Holder and Mr Atter were aware was that from the end of 2017 to early 2018. I consider that on a fair reading of the judgment, the employment judge appreciated that during that period the claimant had a mental impairment that had a substantial adverse effect on his ability to undertake day-to-day activities. The employment judge concluded that Mrs Holder and Mr Atter believed that the claimant had substantially recovered, and that to the extent to which there were ongoing consequences of the traumatic event there was no longer a substantial adverse effect on the claimant's ability to undertake day-to-day activities. The employment judge did not consider that Mrs Holder and/or Mr Atter believed, or should have believed, that the adverse effect on day-to-day activities was likely to recur, not being aware of the previous two episodes in 2008 and 2015. Towards the end of his employment, the claimant did not contend that he was continuing to suffer a mental health impairment that substantially adversely effected day-to-day activities. I consider that on a fair reading of the judgment his conclusion was that Mrs Holder and/or Mr Atter knew that there was a period during which there was a substantial adverse effect on the claimant's ability to carryout day-to-day activities, but they did not know that it was long-term, nor should they have reasonably known that the substantial adverse effect on day-to-day activities was long term. That determination is consistent with the approach required by **Gallop** and **A Ltd v Z**.

48. Furthermore, it is clear that the employment judge in considering whether the respondent should reasonably have known of the asserted disability took into account the

submission by the claimant's counsel that the respondent had enough information to put them on notice to make further enquiries. He appreciated that the respondent was required to take reasonable steps to investigate the situation. At paragraph 45 the employment judge took into account a number of factors that led to the conclusion the respondent had not acted unreasonably by failing to make further enquiries. The judge noted that the respondent was unaware of the previous occurrences of mental ill health. On taking up employment with the respondent the claimant had signed a document stating that he did not have an impairment. After his relatively brief period of absence the claimant had been signed back to work. During the dismissal meeting, the claimant did not assert that he had a mental impairment. Even though not spelt out in great detail, I conclude that the employment judge applied the correct legal test.

49. Ground 5, as originally pleaded, was purely on the basis of perversity. It is asserted that a number of specific pieces of evidence were not taken into account. However, when one considers the evidence overall, it is clear that the judge accepted that the claimant had to deal with a very traumatic experience and suffered a period of significant impairment thereafter, but was understood by the respondent to have recovered.

50. I will next consider the specific matters that the claimant alleges the employment judge failed to have regard to. The claimant alleges that the Tribunal failed to take into account "Text message exchange between the claimant and respondent explicitly including reference to the claimant's "mental health"". This is a reference to the text of 16 January 2018 in which the claimant referred to "concentrating on his own mental health" as well as barely being "able to talk about anything or see people without crumbling". While that specific text was not referred to, the judgment includes a number of references to very similar points made by the claimant. The employment judge also took into account other messages the claimant sent in which he

A referred to his condition improving. Tribunal decisions have to be kept reasonably concise. In so doing, it is impossible to refer to every piece of potentially relevant evidence. The tribunal has to form a view on the totality of the evidence, which is what it did in this case.

B

51. The claimant alleges that there was a failure to have regard to his evidence referred to in paragraph 23 of the judgment. That is a reference to the statements the claimant made in the pro forma review document of 27 March 2018. The judge clearly did have regard to what the C claimant said as it was quoted. It is asserted that the employment judge should have taken into account the reference to psychological/emotional recovery. The judge was not required to refer to every piece of evidence. The judge was entitled to take into account the fact that the claimant D did not tell the respondent that he was suffering from ongoing anxiety and depression.

52. The claimant did not continue to rely on the email he sent in an attempt to appeal against his dismissal. E

53. The claimant relies on the reference in the ET3 to a telephone call with Mrs Holder on 30 January 2018 in which he explained how anxious he felt and his difficulty in coping. Mrs F Holder suggested the claimant should visit his GP and be signed off sick. It is clear from the judgment that the employment judge accepted that the claimant was genuinely unwell in the early part of 2018. This matter clearly was taken into account. It is contended the employment judge G did not have regard to paragraph 22 of Mrs Holder's statement. This is a further reference to the call on 30 January 2018. The above reasoning applies. Finally, it is contended that there was a failure to have regard to paragraphs 21 and 22 of the claimant's witness statement. This includes H reference to the telephone call with Mrs Holder on 30 January 2018 The same reasoning applies again.

54. Overall, there are some pieces of evidence that it might have been better for the employment judge to refer to expressly, but I do not consider it can fairly be said that there was a failure to take into account relevant matters, that the decision was perverse or there was any error of law.

55. Key to the judgment was the conclusion of the employment judge that, while in the early part of 2018 the claimant had an impairment that for a relatively brief period had a substantial adverse effect on his ability to undertake day-to-day activities, the respondent's witnesses did not know, and could not reasonably have been expected to know that any effects of the impairment were long-term. That was a decision that the employment judge was entitled to reach on the evidence before him.

56. As the Tribunal was entitled to conclude that the respondent did not have actual or constructive knowledge of an impairment that had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities that was long-term, that was sufficient to defeat the disability discrimination claims brought by the claimant.

57. For completeness, I will deal with the other grounds of appeal. The first ground is that there was an error of law or perversity in the judge's reference on a number of occasions to the respondent's knowledge in determining whether the claimant was a disabled person. I consider on a fair reading of the judgment the judge considered that what the claimant said, or did not say, about his condition could be relevant to the objective question of whether at the relevant time he was disabled. He was not conflating the question of whether, on an objective basis, the disability existed with that of whether the respondent knew about it. The fact that the claimant had not said

anything about a possible mental-health impairment while working with the respondent up to the end of 2017 is consistent with the medical evidence that there had been significant impairment on two previous occasions, both of which preceded the claimant's employment with the respondent, and had resolved.

58. The second ground is that the Tribunal erred in law, or reached a perverse conclusion, on the question of whether the claimant was disabled, having regard to the letter from Dr Moore. His letter was the extent of the medical evidence before the tribunal. The employment judge quoted most of the letter and clearly gave it careful consideration. He accepted that on the occasions of personal difficulty in 2008, 2015 and 2017 there had been periods during which the claimant had an impairment that had substantial adverse effects on his day-to-day activities. However, the employment judge concluded that the medical report failed to deal sufficiently with the question of whether the condition was likely to recur at the relevant points in time. This was not a case of demolishing, or substantially discrediting evidence that might require an expert to be called for cross-examination but was noting that a particular point was not covered in the brief medical evidence the claimant chose to rely on. While the phrasing in paragraph 40 of the judgment that the constituent elements of disability were not “always likely to recur” is a little inadept, on an overview of the judgment it is clear that the judge's conclusion was that when the impairment had previously had substantial adverse impact on the claimant's ability to undertake day-to-day activities the effects had not lasted 12 months or been likely to last more than 12 months, or to recur, nor was that the case at the date of dismissal. The judge considered that the substantial adverse effect was not “always likely to recur” because that had not been the case in the past and was not at the date of the alleged discrimination. In the employment judge's determination there never had been an occasion upon which the claimant had met the statutory definition of disability because he had never met the requirement for his impairment to have a

long-term substantial effect on his ability to carry out normal day-to-day activities previously, or at the date of the alleged discrimination. I do not consider that involved an error of law or could be said to be perverse.

59. At ground 3 it is contended that the judge failed to have regard to the specific diagnostic entries in the GP records of "E200 anxiety disorder" on 4 September 2015 and "EU 41z anxiety disorder" on 24 September 2015. While the specific diagnostic entries were not referred to, the medical records for this period were, and the employment judge accepted that they showed that during this period there was a substantial adverse effect on the ability of the claimant to undertake day-to-day activities. The judge's finding was that it was not long-term. This was a finding he was entitled to reach.

60. At ground 4 it is contended that the judge failed to consider whether the condition was likely to recur. The employment judge clearly had this question in mind and considered that there had not been a time when the condition, on an objective assessment at that time, was likely to recur. The judge considered the question of whether the had been any point at which the definition of disability had been met and concluded the long-term requirement (which includes likelihood of recurrence) was not met throughout the duration of the periodic occurrence of the impairment, which necessarily included the later period when the alleged discrimination occurred. I can see no error of law in this respect.

61. Accordingly, while some matters of evidence were not referred to, I do not consider that they had a material adverse effect on the judge's conclusion. There were arguments for and against the claimant being disabled or having been disabled in the past (and so deemed still to be disabled). It is not the role of the Employment Appeal Tribunal to rehear claims. I conclude that

on both the issues of disability and knowledge, the employment judge reached conclusions that involved no error of law and were open to him on the evidence. The appeal is therefore dismissed.

62.