EMPLOYMENT TRIBUNALS

Claimant: Mr A Thomas

Respondents: (1) Quad Recruitment Ltd
(2) Mr J Roberts

Heard at: **By video** **On:** **27 October 2021**

Before: **Employment Judge S Moore**

Representation
Claimant: In person
Respondent: Mr Hendley, Consultant

JUDGMENT

1. The Respondent did not have actual or constructive knowledge of the claimant's disability at the relevant time.
2. The Claimant's claims for direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments are struck out.
3. The claimant's remaining claims will be heard at the hearing listed on 10 and 11 March 2022.

REASONS

Background and introduction

1. A preliminary hearing was listed before me to determine whether the Respondents had knowledge, or should reasonably have had knowledge of the disability and case management as required.

2. A separate case management order has been made in respect of the remaining claims.

3. I heard evidence from the claimant and Mr J Roberts. I had a bundle of documents prepared by the respondent. I gave an oral decision and the claimant requested written reasons.

Findings of fact

4. I made the following findings of fact on the balance of probabilities.

5. The claimant commenced employment on 3 July 2018. In a judgment dated 23 September 2020 Judge Jenkins found the claimant was a disabled person by reason of anxiety and depression. The judgment records that the claimant confirmed he accepted his heart condition did not amount to a disability and at paragraph 9, there was a finding of fact that the diagnosis and treatment arising from a GP visit in August 2018 for a migraine did not form part of the condition of depression and anxiety.

6. The claimant accepted that the first occasion on which the respondent was made aware he had depression was an email dated 12 May 2019. The claimant had visited his GP on 10 May 2019 and at that consultation was diagnosed with depression. This was the earliest date of the diagnosis. I find this to be the case as there are no earlier GP medical records indicating the claimant had consulted his GP in relation to anxiety and depression and the claimant refers to having been diagnosed with depression at that consultation.

7. The GP signed the claimant off for a period of two weeks until 24 May 2019.

8. It is common ground the claimant sent this fit note to Mr Roberts with a covering email. This stated as follows:

"**I must inform you that I have been diagnosed with depression, I have recently also had numerous panic attack (sic) and therefore have been placed on medication by my doctor."**

9. The claimant accepted under cross examination he had not experienced any panic attacks at work.

10. There had been an earlier email exchange between the claimant and Mr Roberts on 8 May 2019. Mr Roberts had asked the claimant as follows:

"everything alright with you? Seem pretty off with it all lately. XX[1] ok?"

11. The context of this was that day the claimant had left the office as his son had had an accident at school.

12. In his reply the claimant told Mr Roberts that "**this place [work] is literally sucking the life out of me at the moment, surely something has to give soon".**

13. The claimant accepted under cross examination that in the later text message exchange the claimant clarified to Mr Roberts that by the above comment he was talking in general terms such as the atmosphere in the office where everyone was struggling.

14. The only other relevant fact was a further fit note from the claimant's GP dated 24 May 2019. This signed the claimant off for a further two weeks but stated he may be fit for work taking into account the following advice "still in SSR1".

The Law

[1] This referred to the claimant's son, who is not necessary to name in this judgment.

Disability – Knowledge

15. This is a question of fact for the Tribunal. The burden is on the employer to show it was unreasonable to have the required knowledge.

16. The EHRC Employment Code provides that employers must do all they can reasonably be expected to do to find out whether a worker has a disability. (This does not extend to work colleagues and will not apply to the second, third, fourth and fifth Respondents). 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.

17. S15 (2) provides that the discrimination will not arise if A shows they did not know and could not reasonably be expected to know that B had a disability.

18. In respect of reasonable adjustment claims, an additional element of knowledge is required. The first element is the same test as in S15 namely that A shows they do not know or could be reasonably be expected to know that the [interested] disabled person has a disability. Schedule 8 EQA 2010 pt. 3 para 20 states that A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage. Accordingly, the additional element on knowledge for S20/21 claims is that A must also be reasonably expected to know the disabled person is likely to be placed at the disadvantage.

19. In deciding the S15 claims it is necessary to determine who the alleged discriminator was and whether they had imputed knowledge (Gallop v Newport City Council [2016] IRLR 395, EAT). In the Court of Appeal decision in Gallop [2014] IRLR 211, a reasonable employer must form their own judgment as to whether the employee is disabled and not simply rely on advice from an occupational health advisor. The employer must have the requisite knowledge at the time of the unfavourable treatment. In cases where there are alleged series of acts it is necessary to consider whether it gained knowledge at any subsequent stage when the treatment was ongoing.

20. Under S15 (2) lack of knowledge that a disability causes the "something arising" in response to which the employer subjected the employee to unfavourable treatment is not a potential defence **(City of York Council v Grosset ICR 1492, CA).**

21. In respect of the reasonable adjustment claim, the approach in **Ridout v TC Group 1998 IRLR 628, EAT** was endorsed in **Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT.** The Tribunal must consider two questions:

22. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4A(1)?

    a. If the answer to question (i) is "no", ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4A(1)?

23. If the answer to both questions is “no”, then the employer will qualify for the exemption from any duty to make reasonable adjustments.

24. Also in **Ridout** the EAT held that it is not incumbent on an employer to make every enquiry when there is little or no basis for doing so and that ‘people must be taken very much on the basis of how they present themselves’.

25. The issue of constructive knowledge arose in the case of **Donelien v Liberata UK Ltd UKEAT/0297.14.** The knowledge required is that the person has a disability. This must take the Tribunal back to the definition now in S6 EQA 2010. Accordingly it is for the employer to show that it was unreasonable to be expected to know first that a person suffered with a physical or mental impairment, secondly that the impairment had a substantial and long term effect (and further as this was a reasonable adjustments claim, of the substantial disadvantage). In that case the Claimant had a very poor sickness record with erratic and occasional attendance. She did not suffer with a condition giving rise to impairments which had consistent effects. There were occupational health referrals identifying a myriad of different reasons for the absences other fact was that it was difficult to disentangle from what the claimant could not do because of her disability as opposed to what she would not so.

26. In **A Ltd v Z EAT 0273/18** the EAT held that in relation to S15 claims, the complete answer to the S15 question in that particular case was even if the employer could reasonably have been expected to do more (make enquiries), it could not reasonably have been expected to have known about the Claimant’s disability. The Tribunal must also take into account what the employer might reasonably have been expected to know had it made enquiries.

Conclusions

27. There is a limited factual matrix in this particular case on which to decide the respondent had actual or constructive knowledge. It is not disputed that the respondent was told the claimant had been diagnosed with depression on 12 May 2019 and provided with copies of the fit notes.

28. I have concluded that given the very recent diagnosis of depression and that the GP at that stage was signing off the claimant for short periods, as well as advising he may be fit for work, that the respondent could not have been reasonably expected to know that the impairment would be either substantial or long term.

29. I further find that for the same reasons, there was no case to make further enquiries **(Ridout).** The respondent cannot have been expected to know at that stage, on the basis of two fit notes that the impairment would be substantial or long term. There were no facts to indicate that the respondent was aware even during this short period that the impairment was having a substantial or long term adverse effect on the claimant’s ability to carry out day to day activities.

30. As to whether the respondent had done all they could reasonably be expected to do to find out if the claimant had a disability I have concluded that the need to make enquiries was not triggered in the circumstances of

this case.

31. I reject that the email exchange of 8 May 2019 either imparted knowledge to the respondent of the claimant's disability or suggested Mr Roberts was on notice. Firstly, the enquiry by Mr Roberts cannot sensibly be concluded as indicative that he had knowledge or the duty was triggered. The suggestion that the claimant seemed "off" was not sufficient to conclude as such. It was followed by an enquiry about the claimant's son after an incident at school. This was in my judgment a general enquiry as to how the claimant was feeling. The claimant quashed any implication that the "sucking the life" comments were of a personal nature in the later email exchange.

32. Knowledge of the protected characteristic is required for the S13, S15 and S20/21 EQA claims. As such, given that I have found the respondent did not have actual or constructive knowledge, I have determined that these claims have no reasonable prospect of success and should be struck out under Rule 37 (1) (a) of the Employment Tribunal Rules of Procedure 2013.

Employment Judge S Moore

Date 27 October 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON 2 November 2021

FOR THE TRIBUNAL OFFICE Mr N Roche