



EMPLOYMENT TRIBUNALS

Claimant
Mr R Godfrey

v

Respondent
NatWest Markets PLC

Heard at: Central London Employment Tribunal (via CVP) On: 23-26 November 2021

Before: Employment Judge Norris Sitting with Members: Dr V Weerasinghe
Mr P Secher

Representation:

Claimant – Mr T Kibling, Counsel (Direct Access)
Respondent – Mr H Zovidavi, Counsel

RESERVED JUDGMENT

1. The Tribunal finds unanimously that the Respondent did not have actual knowledge of the Claimant's disability.
2. By a majority, the Tribunal finds that the Respondent did not have constructive knowledge of the Claimant's disability.
3. Accordingly, the Claimant's claim fails and is dismissed.
4. The Remedy Hearing provisionally listed for 7 February 2022 is vacated.

WRITTEN REASONS

Background

1. The Claimant worked for the Respondent between August 2006 and January 2011. He commenced as a graduate analyst and by the time he left the Respondent (to join Credit Agricole, also known as Calyon), according to his CV he was a Delta Trader. It is common ground between the parties, at least according to the amended particulars of claim and amended response, that the Claimant's employment with the Respondent terminated by reason of his resignation.
2. By claim form submitted on 31 December 2018, the Claimant complained of disability discrimination. The disability on which he relies is Asperger Syndrome/Asperger's¹, an autism spectrum condition, the formal diagnosis of which he received in 2018.
3. Over the course of several preliminary hearings and after the particulars of claim had been redrafted:

¹ In this decision, we adopt the Claimant's description of his condition: "Asperger's"

- a. The complaints on which the Claimant relies were narrowed to direct disability discrimination (section 13 Equality Act 2010 (EqA)) and/or discrimination arising from a disability pursuant to section 15 EqA.

These complaints arise from failures by the Respondent to consider the Claimant for vacancies in its Super-Sovereign and Agency (SSA) Team in October 2017, October 2018, January 2019 and July 2019 (“relevant vacancies”); and

- b. The Claimant was found to be a person with a disability by reason of his condition, following a preliminary hearing conducted by EJ Snelson in August 2020.
4. The Respondent denies the claim. Among other grounds of resistance, it asserts that it had no knowledge (actual or constructive) of the Claimant’s disability. As we set out below, knowledge is crucial to the success of the claim, regardless of whether it is brought under section 13 or section 15 EqA.

Conduct of the Hearing

5. The Hearing had originally been listed for three days between 26 and 28 April 2021. For reasons that were given at the time, it could not proceed. Since the parties indicated that they intended to call a total of five witnesses, including the Claimant himself, an additional day was added. In the event, on the first day having read in to the case, we heard from the Claimant and we concluded his evidence on day two. We then heard from two witnesses, Mr Alexander Hammacher and Mr Campbell (“Bruce”) Horne, called by the Claimant. Mr Hammacher has known the Claimant since 2003; they met while they were at university. Mr Horne worked at the Respondent between 2007 and 2008, though not with the Claimant, and he worked very closely with the Claimant at Credit Agricole.
6. The Claimant had intended to call another witness, Mr Oliver Welzel, to whom the Claimant reported at the Respondent from 2008. Although Mr Welzel had provided a signed witness statement, the Claimant was unable to contact him in order to call him to give oral evidence. We accordingly heard on the afternoon of day two and the morning of day three from the Respondent’s only witness, Mr Julian (“Luis”) Muscatt, who joined the Respondent after it acquired ABN Amro; he left in 2019 and now works for the Bank of Montreal. The Claimant worked on the same trading desk as Mr Muscatt between 2008 and 2011, though he did not report directly to Mr Muscatt.
7. While Mr Muscatt was giving evidence, efforts continued to trace Mr Welzel. Those efforts proved fruitless and therefore both the Claimant’s and the Respondent’s cases formally closed at lunchtime on day three.
8. Following submissions (to which we paid careful attention but do not replicate in full here), we reserved our judgment and met remotely on day four to conclude deliberations. We had provisionally reserved 7 February 2022 for remedy if required. In light of our findings below, that date is vacated.

Law

9. Section 13 EqA provides that a person (A) discriminates against another (B) if,

because of a protected characteristic, A treats B less favourably than A treats or would treat others.

10. Subsection 15(1) EqA provides that a person (A) discriminates against another (B) if, because of something arising in consequence of a protected characteristic, A treats B unfavourably. According to subsection 15(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. In other words, the burden of proof is on the Respondent to show a lack of knowledge.
11. The Claimant said in a Preliminary Hearing with EJ Spencer on 1 February 2021 that the “something arising” in consequence of his disability was that he “needed quiet and space and would not engage in conversation or social interactions in the same way as others”. EJ Spencer noted expressly in her Order that:

“In relation to constructive knowledge of disability, the Claimant will have to establish that the Respondent ought to have known he was a disabled person. Many individuals may be thought by others to be odd or not adept at social interaction without having any kind of disability. The Claimant says he intends to call one or possibly two witnesses to support his claim that the Respondent ought to have known, while he was employed (and therefore would have continued to have that knowledge thereafter) that he was disabled. Ultimately, this is a matter for proper evidence”.

EJ Spencer further observed: *“it will be the oral evidence rather than the documentary evidence which is key”.*

12. We were reminded of the EAT authority of *A Limited v Z²* in which Eady J considered the approach to be taken to the determination of constructive knowledge for the purposes of section 15:
- a. In that case, the claimant had mental/psychiatric impairments, namely stress, depression, low mood and schizophrenia. She did not disclose her impairments on joining the respondent and “deliberately suppressed” any mention of her mental health problems in her dealings with the respondent (save that she relied on a disclosure to the office manager which the Employment Tribunal found had not taken place as claimed). The claimant had numerous absences from work and, by the date of her dismissal for poor attendance and timekeeping, had provided GP certificates citing “low mood” and “mental health and joint issues”.
 - b. The Employment Tribunal found that given the size and significant resources of the employer in *A Limited*, it was incumbent on them to enquire into the claimant’s mental wellbeing and their failure to do so precluded them from denying that they ought to have known she had a disability.
 - c. In upholding the respondent’s appeal against the determination that it had constructive knowledge, Mrs Justice Eady QC set out the principles to be applied as follows:

“(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

² UKEAT/0273/18/BA 28 March 2019

which led to the unfavourable treatment, see *York City Council v Grosset* [2018] ICR 1492 CA at paragraph 39.

- (2) *The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.*
- (3) *The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*
- (4) *When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.*
- (5) *The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:*
 - "5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
 - 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."
- (6) *It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).*
- (7) *Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries*

yielding results and the dignity and privacy of the employee, as recognised by the Code.”

13. We remind ourselves that similarly, an employer cannot be liable for direct disability discrimination unless it has knowledge (whether actual or constructive) of disability.

Findings and conclusions

The Claimant's condition

14. As Mr Kibling observes for the Claimant, Asperger's is a life-long condition. As a child, the Claimant says he was called "professorial", having won a scholarship to a school where he excelled at maths but was not good with language. He had experienced trouble forming relationships with people (who they were is not specified in his witness statement) and felt adversely judged by them, being subjected to repeated cruel language and comments. He eventually had a psychiatric evaluation in June 2017 at the behest of his employer Aviva, following a breakdown which, according to the Claimant's statement included "accompanying paranoia and signs of psychosis". However he was not given a preliminary diagnosis until 2018, with the recommendation of a full assessment; the formal report (which was not in the bundle before us) and full diagnosis came in September 2019, over a year after the initial evaluation. We have therefore had to decide:
- a. Whether the Respondent ought reasonably to have known that the Claimant had a disability; and/or
 - b. Whether at any stage it had actual knowledge of the same.
15. The Claimant set out in his original particulars of claim a large number of bullet points listing the impact that Asperger's can have. This can include sensitivity to people and/or environment, lower social communication and ability to process social information and inconsistent eye contact/poor eye gaze. He also lists some of the benefits of the condition such as high assimilative, analytical, cognitive and memory capacities. It is unclear whether the Claimant suggests his disability has each of the impacts listed on him. However, the panel notes that save for possible inconsistent eye contact or poor eye gaze, there are few, if any, physical manifestations of the condition so far as the Claimant is concerned.
16. Mr Kibling suggested in his submissions that the Claimant showed "overt signs of an impediment through his style and linguistic content" when giving evidence. The panel is mindful that the way in which parties and witnesses present when giving evidence can be out of character, due to the unusual and stressful circumstances involved, and therefore of the risk of assessing what might be "normal" for a person on the basis of their demeanour in front of a tribunal; on the other hand, we remind ourselves that the Claimant has benefited from primary, secondary and indeed tertiary care (he told us in evidence) since his diagnosis, as to which we return below. We understand that through this care, he has learned techniques to manage his condition, though we did not hear evidence of what those techniques involve.
17. Nonetheless, we found in any event that the Claimant came across as a pleasant and clearly intelligent man; his behaviour before the panel was entirely appropriate and while he spoke quickly, and occasionally did not directly answer the questions put to him by the Respondent's Counsel or had to ask for them to be repeated, in our experience this is well within the normal range of conduct in such circumstances. Indeed, we had reassured him of the same when he sought on more than one

occasion to apologise. We conclude that we cannot rely on his demeanour, style or linguistic content before us to shed any light at all on the Respondent's state of (deemed) knowledge more than a decade ago and well before his diagnosis and treatment.

18. As noted above, the Claimant told EJ Spencer specifically that he "needed quiet and space" and engaged differently in conversation or social interactions. In the Claimant's witness statement he repeats this, suggesting he "might be less fun on the desk, at times need space and quiet (especially when considering [his] portfolio) and often took breaks from [his] desk to do so, and would not engage in conversation or social interactions in the same way as others"; he gives no detail on these latter points. As in the bullet points within the particulars of claim, he also describes being confronted with severe challenges when interacting with and communicating with others, particularly where he feels overwhelmed or perceives a hostile environment, though again giving no detail of such challenges in the workplace while working for the Respondent.
19. Notwithstanding his parents' attempt to refer him to CAMHS as a child, which the Claimant says he resisted, it was not until 2015/2016, when the Claimant was studying abroad, that he says he began to wonder whether there was a possible medical explanation for his "adverse treatment". The Claimant said in his witness statement (without ascribing these comments to anyone in particular) that his condition led to some colleagues describing him as "psychotic", "very strange", "mad", "bizarre" and "extremely odd". The adverse treatment to which he refers is having been subjected to repeated cruel language and comments.
20. Although the Claimant had indicated to EJ Spencer that he would be calling one or two witnesses to support his contention that his behaviour was such that the Respondent must have known of his disability, in the event, he did not call anyone who had worked with him at the Respondent. While, according to the Code and the principles in *A Limited*, it is for the Respondent to show that it did not have knowledge rather than for the Claimant to show that it did, the Respondent clearly could not have called everyone who worked with the Claimant between 2006 and 2011. The Claimant needed to give some context for the Respondent to know where to start.
21. The minority panel member here notes that in the claim form, the Claimant has referred to a "Business Manager for the Global Head of Rates" who promoted the Claimant and approved material bonuses for him on unknown dates, but who also said on a further unknown date: "Ration yourself and be careful because we are not sure about you. We understand from your team that you are working hard and producing good results. However, from our perspective [from the outside] there is an issue in your ability to socially integrate". The Claimant also says that in his fourth year, on being awarded a bonus of £75,000, he was told by a senior manager "this would be double if you were easier to converse with".
22. Further, in the claim form, the Claimant states that an EA (we understand this to refer to a Secretary or Executive Assistant) told him he needed somebody to look after him, called him "very strange" and "bizarre" and said that the way he walked around the desk corner towards her was strange. He also refers to two peers from the 2006 graduate programme, one of whom is said to have told the Claimant, "The way your brain operates is very strange" and another to have told the Claimant, "You are (very) weird".

23. As we have said above and as we go on to set out below however, the Claimant did not elaborate on this evidence in his witness statement, nor did he call anyone who was able to corroborate any of these details. He did not name the Business Manager or the senior manager (it is unclear whether these were the same person), the EA or the peers from the 2006 graduate programme, nor did he put the comments in context. We return to the issue of the EA's comments below.
24. The minority panel member considers it understandable that the Claimant did not want to name people other than Mr Muscatt and observes that in his claim form, the Claimant says that he has only known the impact of his condition since the diagnosis but that those who sat around him in the workplace would have been "fully aware of the daily communication and social interaction problem (and stability and overwhelmedness and instruction issues)".
25. The majority notes however that the Claimant did give several names (including David Larkin, Peter Gillespie, Nick Russell, Aneka Soluja and Richard Hogan) during his oral evidence, but he had not referred to these colleagues in his witness statement and nor had he sought to call them, though he explained that one had said he was unable to give evidence having signed a non-disclosure agreement. We are also mindful that what is set out in the claim form is not evidence. In the circumstances, the difficulty for the majority is that if we ask ourselves, "What is the evidence for the impact the Claimant's condition had on his interactions with colleagues while he worked for the Respondent, and where is it to be found?" we are unable to point to it.

Mr Welzel's evidence

26. As we have indicated, the Claimant had intended to call Mr Welzel, who had not only worked with him but managed him for a substantial period. An internal memo from May 2008 suggests that Mr Welzel indeed had "put his hand up" for the Claimant, from which we infer that Mr Welzel actively wanted the Claimant to work for him. Mr Welzel's witness statement suggests that he came to know the Claimant well and was aware of his "communication difficulties". He does not elaborate further. Without going into any detail, Mr Welzel says that he saw Mr Rad (who was employed by the Respondent between November 2008 and May 2014 and was head of one of the teams) "several times discriminated colleagues" [sic]. He does not suggest that the Claimant was one of Mr Rad's alleged victims, and the Claimant's evidence is similarly that Mr Rad discriminated against a colleague with a physical disability. When Mr Welzel left the Respondent, it appears he invited the Claimant to interview with his new employer.
27. Mr Welzel's statement is very short (less than one page) and although signed, contains five sentences that are in square brackets. One such sentence is "All the impairments that I saw when working with him we were able to make adjustments for". Again, there are no specifics of the "impairments" or the adjustments made. The majority notes that it is unclear whether these bracketed sentences were drafted by Mr Welzel or on his behalf and whether he would have liked to make any adjustments to them; and we were unable to have the advantage of hearing his oral evidence. In the circumstances, we can place only very limited weight on his statement, but in any event, again it does not assist us in understanding the way in which the Claimant's disability manifested itself in the workplace.

The Claimant's examples

28. During the course of his evidence, the panel endeavoured to elicit from the Claimant any conduct that had given rise to the specific comments set out in paragraph 19 above. The Claimant was able to provide only two examples:
- a. As referred to in the claim form and noted above, the Secretary, or "EA", saying that the Claimant was "very strange" and on one occasion when he walked past her desk she said, "Even the way you walk is strange". The Claimant said he believes he was giving her a wider distance than others did; and
 - b. The Claimant and another colleague, Ms Soluja, were at the vending machine and she asked how the Claimant was doing. The Claimant described the conversation as "awkward" and says that she then said to him, "The way your brain works is very strange" (it is unclear whether Ms Soluja is the same colleague who is referred to at paragraph 22 above). The Claimant moved out of her sight and overheard her thank a third colleague for "rescuing" her from the Claimant; he now believes that she may have given a non-verbal cue that she did not want to talk to him which he had not picked up on, as he has since been told that this may have been a frequent situation.
29. The Claimant also said that Mr Muscatt did not invite him to a social event at the Soho Windmill nightclub that Mr Muscatt organised and paid for. In cross-examination however, the Claimant said that a colleague told him to come along in any event, but when Mr Muscatt saw the Claimant, he came over and asked "What are you doing drinking my drinks? It's my broker, not yours; if you want a night out, do it with your guy". This does not suggest that the reason why Mr Muscatt failed to invite the Claimant out for this event was related in any way to his disability.
30. The Claimant did not give us any examples of occasions when he was called "psychotic", "mad", "bizarre" or "extremely odd" or the circumstances leading up to those comments. Nor did he say who had used the words. We have therefore had to look at the evidence of others, and the contemporaneous exchanges between his colleagues, both internally and with those in other organisations, to ascertain what the Respondent ought reasonably to have known up till the Claimant's diagnosis.

Mr Hammacher's evidence

31. It is the Respondent (Mr Muscatt)'s evidence that the Claimant did not stand out. The Claimant contends that this was simply not so and relies on the evidence of Mr Hammacher to support his contention that he has "social style and communication differences".
32. Mr Hammacher's evidence is certainly that the Claimant had a "pattern of social tendencies that seemed ... to be so highly unusual that his 2018 diagnosis of autism provided some context and background to his style". Mr Hammacher says that the Claimant routinely misreads social situations and then responds inappropriately to his own misguided interpretation of what has happened. He gives an example of the Claimant upsetting a manager at their rowing club and then failing to accept his own actions or apologise for them; he says the Claimant in fact made inappropriate comments, blamed the manager and walked away. Mr Hammacher says that the Claimant also made inappropriate comments in their social group at university to the point that he was given the nickname "Gobsmack". The Claimant also refers to this and to the play on his surname "Oddfrey".

33. Mr Hammacher continues that the Claimant will, when confronted about such behaviours, generally react by brushing off the incident and ignoring the social sensitivities involved. He observes that in a pub with strangers this may be “passable” but in a “long-term social situation” it has had an impact on the Claimant’s relationship with their group. In a structured training environment however, as a member of a nine-person team (we infer this is the rowing team), Mr Hammacher says the Claimant was able to cope very well and in a one-on-one or one-on-two situation, he finds the Claimant to be “an engaging person”. He says that the Claimant becomes withdrawn and quiet in group social situations and again throws in inappropriate comments.
34. In oral evidence, Mr Hammacher confirmed that he has only ever seen the Claimant in social rather than professional situations, though he said he would be surprised if the Claimant’s unusual behaviour socially did not transfer itself to the workplace. Mr Hammacher said that the Claimant can be construed as very rude because when people raise his behaviour with him, the Claimant just laughs them off – the Claimant has often not realised an issue has been caused in the first place, let alone whether or not somebody has been offended.
35. Mr Hammacher also explained that he is a qualified medical doctor though he has not practised for 15 years. He told us that he is very cautious about trying to identify a diagnosis in people he knows personally or professionally outside the medical context; it is not the role he does now. He said he had never thought about the Claimant’s symptoms and behaviours and whether there might be a potential diagnosis, though when he heard the diagnosis, Mr Hammacher repeated that this had fitted nicely with the Claimant’s patterns of behaviour. Mr Hammacher never felt it appropriate to suggest to the Claimant he might seek an assessment, though he said the thought of it occurred “at the back of his mind”; however, he balanced it with the fact that the Claimant had got himself into and through university and was then employed in a high-performing job in the City. Mr Hammacher did not feel it was his place to question whether the Claimant should go and seek some advice.

Mr Muscatt’s evidence

36. Mr Muscatt’s witness statement says that he found the Claimant slightly arrogant and that he did not take instruction well, as one should when one is being trained, though Mr Muscatt said he did/does not see slight arrogance as necessarily a bad trait and nor did he feel the Claimant was “different from anyone else”. What he said both in his witness statement and in oral evidence however is that there were trust issues with the Claimant: while the Claimant did not breach the Respondent’s rules to the point that he was the subject of disciplinary action and/or did not fail to meet the FCA’s “fit and proper” requirements, he did fail to adhere to internal trading limits that Mr Muscatt and Mr Rad imposed on him. He said it was his understanding that the Claimant had been dismissed (or “pushed” or “asked” to leave on agreed terms) as a result of the risk that such behaviour presented to the Respondent. As we have noted above in paragraph 1, this is not the Respondent’s pleaded case, which confirms that the Claimant’s employment terminated as a result of his resignation.

Written evidence while the Claimant was employed by the Respondent

37. We note that Mr Muscatt is evidently mistaken in asserting that the Claimant was dismissed from the Respondent and/or left pursuant to a compromise/settlement agreement; Mr Muscatt indeed acknowledged that he knew none of the details and it is clear that this was his assumption which is not supported by the facts. We have therefore looked very closely at the documentation and specifically the

correspondence – both contemporaneous with the Claimant’s employment and after he had left the Respondent – to see if there is evidence that Mr Muscatt or anyone else at the Respondent had any constructive knowledge of disability that might cause us to disbelieve Mr Muscatt’s evidence.

- a. In January 2008, the Claimant’s review from Mr Lynch, then head of Delta Trading where the Claimant was working, described the Claimant as “obviously a smart guy” but that he needed to accumulate more business knowledge. The Claimant himself said on the review form that during the latter part of 2007, he had developed core relationships, skills and abilities;
- b. In May 2008, an email shows that Mr Welzel “put his hand up” for the Claimant to work with him;
- c. On 12 February 2009, there was an exchange about the Claimant between two unknown participants. One asked the other, “What’s [the Claimant] like?” The response is “irritating (plastic) spoon”. There was no further discussion of the Claimant; the conversation in the bundle appears to conclude with discussion of a trade that the Claimant had offered. The original of this document has been redacted so that it has not been possible to see who said what, and we accept that it has been impossible to identify them. However, Mr Muscatt has accepted that he did sometimes refer to the Claimant as a “spoon”. We return to this point below.
- d. In August 2009, Mr Muscatt, a colleague from the Respondent (Mr Devic) and a trader from Rabobank were participants in a Bloomberg chat, though in fact Mr Muscatt contributed nothing to the conversation. The other two men appear to have been making arrangements to meet socially as well as discussing a trade. At one point Mr Deen, from Rabobank, asked “opinions on [the Claimant]?” Mr Devic replied after a few other sentences about their social meeting: “Richard is young and our colleague”.
- e. Another potentially relevant Bloomberg chat took place in April 2010, though we gather with no relevant participants from the Respondent’s management team. Two traders from the Respondent (Mr Hogan and Mr Russell) were initially discussing another colleague called Patrick with a Mr Searle-Barrett from Tradition Financial. Since Patrick/Pat had not arrived at work by 06.45, they call him a “lazy German c...” They were joined by another Tradition trader, Mr Barrett, and continued to discuss Pat’s non-arrival and the amount of alcohol consumed the previous evening, including by other colleagues referred to only as Henry and Sam.

It appears that those on the chat were older than those they were discussing as they referred to “Youth”. Eventually Mr Searle-Barrett said, “U know that Rich geez from your place? Appaz Sam and Rich in club with shirts OFF dancing!!!!” Mr Hogan replied at 07.34, “hahahah oh dear ... he [the Claimant] not in either” to which Mr Barrett said “Nice lad but a TAD strange”. Mr Hogan agreed: “... nice enough but a bit odd I think” and Mr Barrett said, “yes indeed”. Mr Russell said, “Take you at odd”. It appears that the Claimant and Mr Barrett were not otherwise known to each other at the time, because Mr Barrett asked the Claimant’s surname.

- f. We have a memo from October 2010 between a Mr Choudrie and Ms Hawes from HR, apparently anticipating Mr Welzel's departure from the Respondent. Mr Choudrie, whose job title in another email was given as Flow Delta Business Manager, said that he had spoken to the Claimant the previous day about his objectives and that the Claimant "seems to have the right attitude"; he was "left feeling [the Claimant] has been very poorly managed historically". A week later, Mr Rad apparently told Mr Choudrie that they were expecting the Claimant to resign. Ms Hawes commented in another email exchange "Not good", to which Mr Choudrie responded, "Not good short term... but allows opportunity to bring it [sic] new talent...".
38. We accept that those participating in the above conversations would not have known that their words would be scrutinised so carefully by an Employment Tribunal many years later and thus they would be likely to be unguarded. This is supported by the fact that they do make reference to other protected characteristics: there is more than one reference to the Claimant's (and others') age, for instance, and in the Bloomberg chat in August 2009, Mr Devic and Mr Deen are joking about the former hating Italians, though he nonetheless says he will probably marry one, while in April 2010 there is swearing and a reference to requirements of the job being "taken lightly by the foreigners".
39. As regards the February 2009 email, we have noted that while it is not possible to be sure who the participants are, Mr Muscatt has accepted that it may well have been he who called the Claimant an "irritating (plastic) spoon". He agreed in cross-examination, and we so find, that he used the word "spoon", short for the phrase "born with a silver spoon in his mouth" – in other words, a reference to class – by contrast with his own situation, which he said led others to call him "Del boy" because he had been born and grew up in Peckham. The Claimant appeared indeed to accept that the "spoon" reference was unrelated to his disability.
40. In relation to the chat in April 2010 the Claimant explained that "take you at odd" is a broking term suggesting that the participants were creating a market for just how odd he was. However, we note the context of this was a discussion about how the Claimant had behaved in a social setting with another trader, specifically dancing until nearly 04.00 in a night club with their shirts off. This conflicts directly with the assertions in Mr Hammacher's statement that the Claimant's reaction to group-style social situations is to become withdrawn and quiet and also with the Claimant's particulars of claim in which he observes that impacts of Asperger's include "overwhelmedness" and sensitivity to "... light, sound, background noise".
41. We do not accept that this isolated incident, outside work when the Claimant was with some apparently junior colleagues, clubbing and continuing socialising with those from another establishment including dancing into the early hours of the morning with his shirt off, would have been sufficient to put the Respondent on notice of the Claimant's disability. Written references to the Claimant being "odd" or "strange" are restricted to this one short conversation and in the context that the Claimant himself said they had been drinking/were "obviously drunk".
42. If the Claimant's behaviour in the workplace itself was such as to give rise to comment, we have seen no evidence of that, or that anyone thought it was. On the contrary, he was described, as we noted above, as showing "good attitude". He said in cross-examination that he was told he was not integrating and that a "particular boss" (not named) told him to "walk over to the sales desk and be present in front of

them, remind them they have 50 products to sell and push yours". On being prompted to do so, the Claimant says that is what he did. There is no suggestion in the documentation that his interpersonal skills were other than what the Respondent was looking for or expecting, and certainly nothing in line with Mr Hammacher's evidence of the Claimant being "very rude" sometimes, save for (probably) Mr Muscatt's reference on one occasion in early 2009 to the Claimant being "irritating". The majority does not accept that finding someone irritating and/or slightly arrogant is sufficient to put a colleague on notice that they have a disability.

43. The minority panel member disagrees, on the basis there is no context given, and believes that if context had been given, it would have been possible to attribute these comments to the Claimant's disability.
44. In his supplemental witness statement, the Claimant said he was providing a line manager review from 2018 in which it was said that he had "a tendency to not inform seniors of what he is doing". There was no page reference, and this document may not be in the bundle before us, but even assuming that this is a direct quote, we consider this would not be sufficiently unusual, even taken with somebody being irritating, to alert an employer to the fact that an employee is a person with Asperger's or to make enquiries about an autistic spectrum disorder. He also said that he had a bundle showing defamatory remarks, including "dummschnurrer" or "retard"; however, he agreed in cross-examination that these alleged quotations were not in the bundle before us and were not made by anyone who had been at the Respondent while the Claimant was working there.
45. The Claimant further alleged in his statement that Mr Muscatt used to call him "sensitive"; however, he did not give any context for this. While Mr Muscatt did not recall doing so, he fairly accepted that he might have done. In the absence of such context, we do not accept that an employee being sensitive would lead an employer to consider that they had Asperger's. In similar vein, Mr Muscatt also does not recall asking the Claimant at an evening event on an unknown date if he "heard things or saw things" (inferentially, that the Claimant was hallucinating) though he does not deny that he may have done; but again, absent any context for such a question, even if it was asked, it does not lead us to the conclusion that Mr Muscatt found or should have considered the Claimant's behaviour to be consistent with Asperger's.

Written evidence after the Claimant left the Respondent

46. We have set out above all the relevant conversations in which the Claimant was mentioned during the period when he was employed by the Respondent. Thereafter, there were occasional discussions about him as follows:
 - a. In April 2011, Mr Porter from Porta (we were told this was another interdealer broker) sent Mr Muscatt a message saying "Had a drink with [the Claimant] last night... said to say hello". Mr Muscatt's very brief response was "Cool... always knew he'd do well".
 - b. Three months later, Mr Porter again messaged Mr Muscatt. This time he said: "Alright mate, How U doing? Had a chat with a certain Rich Godfrey earlier. Send his regards and wants to know when U fancy a few beers?" Mr Muscatt replied, "Mate, he's so tight he'd never buy a beer! When you next see him let me know and I'll try and get along". Mr Porter responded again with, "Ha haa. Says he's gonna bring his wallet. Fat chance! We are out next Weds/Thurs.

Get yourself along. Will be in the city.” Mr Muscatt concluded the conversation with “Lunchtime? Evenings tricky now as kids back training”.

- c. In November 2012, Mr Benbow, who we were told was acting as a recruitment agent for the Respondent and who had the Claimant on his books, emailed Mr Rad to say that the Claimant had been put at risk of redundancy and wanted to get Mr Rad’s “take” on him. Mr Rad’s response was short: “Richard is a no-go!”. He made no further comment.
- d. Similarly, in January 2013, in a chat between Mr Rad and someone (Mr Michelotti) at Jefferies International, over an hour into the conversation, Mr Michelotti asked “BTW do you know this guy Richard Godfrey?” Mr Rad replied, “Yes... is he joining u guys now?” Mr Michelotti said, “he contacted me... what u think about him? he is good?”. There was no answer from Mr Rad and eventually Mr Michelotti left the chat.
- e. In March 2013, Mr Rad participated in a chat with Ms Simeon of Louis Capital Markets. The conversation started at just after 08.30 and continued sporadically until just before 14.15. Mr Rad was discussing his own position, both domestically and professionally. Shortly before the conversation ended, Ms Simeon asked, “BTW what’s happened to Richard Godfrey? I saw he is out the Calyon [i.e. Credit Agricole]”. Mr Rad replied, “that’s a long time ago”. Ms Simeon pressed him and Mr Rad continued “well, he is trying to find a job. But jobs are hard to find for guys like him”. Ms Simeon persisted, saying that nobody wanted to tell her, but Mr Rad said he was not the right person to ask. Ms Simeon said that Mr Poli (who we heard had been transferred in to become the Claimant’s boss at Credit Agricole and had, according to the Claimant and Mr Horne, taken over the Claimant’s trading book) was her neighbour but would not tell her what happened. Mr Rad eventually said “If [he] does not comment why should I? Change of subject...”. The conversation ended shortly thereafter without further reference to the Claimant.
- f. The following month, Mr Muscatt had a Bloomberg chat with Mr Wong, then of Ignis Investments. The chat started just after 09.00 and towards the end of the conversation 20 minutes later, Mr Wong said, “Oh was trying to IB Richard Godfrey on IB to say hi... I can’t find him on Bloomberg!” Mr Muscatt replied: “He left Calyon a few months back”. Mr Wong asked, “Oh... where is he going next?” Mr Muscatt said, “Still looking for somewhere I think”. Mr Wong said, “there isn’t much around I think” to which Mr Muscatt responded, “yes, can be pretty tough right now I think”. Mr Wong suggested, “He could go back to RBS!” and Mr Muscatt replied “Hmmm... not sure that’s an option”. There was a single further exchange on an unrelated topic before the conversation ended.
- g. A week later, the Claimant emailed Mr Muscatt and asked if he would be free for a “very quick catch-up drink”. Mr Muscatt suggested they meet the following day. He addressed the Claimant as “mate” in his emails and the Claimant responded “Brill, many thanks”. It appears they did meet on 16 April 2013 because two days later, the Claimant emailed Mr Muscatt again to thank him for lunch. (A similar email was sent by the Claimant on 16 January 2015 thanking Mr Muscatt for drinks the previous day, though we did not have any exchange prior to that occasion).

- h. In October 2013, Mr Muscatt and Mr Devic, who it seems had by then moved to Commerzbank, participated in a Bloomberg chat in which Mr Devic referred to having seen the Claimant having lunch with a Mr Dreesbach, who it appears was a mutual acquaintance working at WestLB. Mr Devic suggested it was “very odd to see them together” and asked what the Claimant’s last name is. Mr Muscatt said “Godfrey” and when Mr Devic said he thought the Claimant was still at CA (Credit Agricole) Mr Muscatt said, “No, got dusted over a year ago”. Mr Devic replied, “Oh, very odd encounter then”. The conversation moved on to other topics, including reference to it being easier to use nicknames for people, but without any further discussion of the Claimant. There is no suggestion in this chat that the nicknames the Claimant says he was called by his friends were also used by colleagues in the Respondent’s workplace.
- i. In June 2014, Mr Muscatt had a conversation on Bloomberg with Mr Squire of Canadian Imperial Bank, in which Mr Squire said he had heard from the Claimant the previous week and added, “Shame he’s out again, I actually liked him... not like Dan Stevens”. Mr Muscatt replied, “Ha... they both space cadets... I don’t get most youngsters these days” to which Mr Squire said, “And when I do it costs me plenty”.
- j. Five months later, the Claimant and Mr Muscatt exchanged pleasantries on Bloomberg. Mr Muscatt greeted the Claimant with “Hola amigo, how’s it going?” and they went on to discuss the Claimant’s job search. Shortly afterwards, in another Bloomberg chat, this time with Mr Balax, another of the Respondent’s senior traders, there was a discussion where it is unclear what triggered the conversation but Mr Balax said, “Godfrey waso [sic] onto me but Alex doesn’t trust him at all ... I don’t think you do either”. Mr Muscatt replied, “I am open minded re Rich... but I am not going to be putting my balls on the line and saying we should hire him”. Mr Balax responded, “Hear you, to me it’s either 100% trusted or not – can’t take chance”. Mr Muscatt said, “I’m not even sure HR would allow us to hire him” and Mr Balax agreed, “You’re right probably not”.
- k. Indeed in December 2014, Mr Winward, then Head of Credit Trading Teams at the Respondent, emailed a colleague to say of the Claimant, “Have met him previously, not the right fit for RBS unfortunately (risk issues and no support from RBS people that do know him)”. In the same month, Mr Muscatt and another colleague at the Respondent had a Bloomberg chat in which the colleague Mr Gillespie said, “So, man, wanted to see if I cud [sic] advocate for rich godfrey getting rehired...I’m a big fan”, to which Mr Muscatt replied, “Have mentioned him mate, but not sure he’ll get though HR... not sure either yet whether they will sign off on an external hire...”. Mr Gillespie said he totally understood before adding that four of them in the San Francisco office would like to see the Claimant hired, and Mr Muscatt replied that they were not alone and that he would “continue to push”.
- l. In March 2017, Mr Balax and Mr Muscatt had an exchange over a Microsoft platform. Mr Balax told Mr Muscatt that the Claimant was being approached, probably by a headhunter to return to the Respondent, to which Mr Muscatt responded merely “Hhmm.” Mr Balax replied, “Ahah. Oh well. I keep eyes open for others”. Mr Muscatt’s only response was, “Yes ok”. The following month, Mr Benbow told the Claimant that Mr Konrad, at the time Head of the

Respondent's EGB and SSA/Cov teams, had "done internal due diligence and came back saying no – sorry".

47. In relation to the "space cadet" comment (paragraph (i) above), we heard that Mr Stevens is now Mr Muscatt's boss and that he does not share the Claimant's disability. Mr Muscatt said he used the phrase "space cadet" as a jovial comment to describe young people who enjoy going to the pub and getting drunk. We accept that this was not a reference to the Claimant's disability.
48. It is clear overall that Mr Rad and Mr Muscatt were not prepared to gossip or make negative comments about the Claimant. In particular, Mr Rad's chat with Ms Simeon in March 2013 contained intimate personal details about Mr Rad's own life which we have no doubt he would not have wanted to share in a public forum despite knowing the conversation was being recorded; and he is said to have behaved in an openly offensive manner to a colleague with a physical impairment so we considered it likely that he would not have been inhibited in referring to the Claimant's Asperger's. Just as in all the other chats however, there is no reference at all to the Claimant's mental health or the impact of his condition. We find that it is inherently unlikely, based on the Claimant's evidence about Mr Rad's behaviour in the workplace, that Mr Rad would have refrained from making reference, even indirectly, to the Claimant's manner or the impact(s) to which his condition gives rise, had they been noticeable to Mr Rad.
49. We have considered whether we can draw any inference on constructive knowledge from the limited virtual conversations before us. We have concluded that we cannot. The references that Mr Muscatt makes to the Claimant "not getting through HR" also do not suggest that his concerns are based on any interpersonal issues with the Claimant or alarm over the Claimant's behaviour when he previously worked for the Respondent; on the contrary, they continued to correspond and, as we have noted, met at least twice for a meal and/or drinks.

Mr Horne's evidence

50. Mr Horne said in his statement that he worked extremely closely with the Claimant at Credit Agricole/Calyon from January 2011, i.e. immediately after the Claimant worked for the Respondent. He described the Claimant as "very erudite and fluent ... also comfortable holding detailed discussions with both senior investment managers and issuers". However, he also describes the Claimant's mood swings, being non-communicative, offhand and abrupt during the early part of the day, suddenly returning to "normal" later on.
51. We have considered whether this would have been replicated at the Respondent. We conclude that it would not. The circumstances were quite different. Mr Horne also explains that the job at Credit Agricole put the Claimant under a great deal of pressure, running singlehandedly a global book that had hitherto been run by two traders. Further, the Claimant covered the Japanese and Chinese markets overnight before starting a ten-hour trading day in London. He was frequently – and unsurprisingly - arriving at work "frazzled and showing all the signs of stress". This contrasts with the Claimant's work at the Respondent, where the hours and pressures were nothing like as great; Mr Horne agreed in cross-examination that at the Respondent the Claimant was part of a fairly large team where he would have been supported, whereas he had no support at all at Credit Agricole. Therefore we do not consider the Claimant's workplace demeanour at Credit Agricole relevant to indicate

what he might have been like at the Respondent; and Mr Horne did not work directly with him there so was unable to assist in that regard.

Hypothetical outcome

52. Further, and in line with *A Limited v Z*, we have briefly considered what the outcome might have been if management or HR personnel at the Respondent had observed the Claimant's differences, taken more account of them and realised that they might be the result of a mental impairment or autistic spectrum disorder, as Mr Horne says colleagues did at Credit Agricole.
53. As we have noted, the Claimant says in his witness statement that he has a bundle of documents showing "defamatory remarks" about him and that people who have never met him gossip about him in a slandering way. He repeated some of these hurtful comments in his oral evidence. Since we did not have any of these documents in the bundle that was before us, or any understanding of the context in which these remarks were made or by whom (though we infer that at least one was from someone at Nomura), we indicated that we were unable to take this evidence into account.
54. We say we have only briefly considered this aspect because as we have set out above, the majority of the panel concluded that there was no factor that would have caused anyone at the Respondent without in-depth training in autistic spectrum disorders to have reached such a conclusion. It would be unreasonable to expect an employer without such training to do so, given that Mr Hammacher, who has known the Claimant for many years and observed him in social situations where his behaviours have manifested themselves, and who is medically qualified, not to have done so. Further, as the majority has found, the Claimant's behaviour was undoubtedly exacerbated while at Credit Agricole as a result of the extreme stress and long hours, leading to him becoming, as he described it, "burnout, depressed and paranoid".
55. The Claimant's evidence in cross-examination was that his job was not to "sit and talk", it was rather to assimilate information and make inherently technical decisions. He did not see that lacking the skills of a "social raconteur" were necessary and indeed, it appears that for the most part, prospective and indeed actual employers agreed. The Claimant has had a number of jobs, for all of which we may safely assume he has passed at least one interview. His behaviours apparently do not normally manifest during those interviews (save in one example he gave, to which we return below) to cause employers to repel him. He also told us that on one occasion he had got through to a "final round" of interviews but had become nervous and not presented well, so he did not secure the role. That is entirely in keeping with behaviour for somebody who does not share the Claimant's disability.
56. We find by a majority (without making any criticism of him) that in any event the Claimant would have been resistant to an assessment. Until he had his breakdown, the Claimant did not seek medical advice. This was notwithstanding, on his own evidence, contemplating in 2015/2016 a possible medical explanation for the adverse treatment he felt he was receiving and despite, he said in cross-examination, every recruitment agency he worked with during the relevant time suggesting that he should undergo a psychiatric evaluation.
57. Further, the Claimant told us in oral evidence of an incident in or around 2014 when he was sent to Copenhagen to undertake an interview process with Nordea, a Danish bank. He had passed a phone interview in advance and then spent six or so hours

in interviews in person. The final interview was with a prospective manager and a psychologist; the manager turned his chair away and the psychologist asked a number of inter-personal questions. The Claimant told us he became very distressed and could not remember things because he was so upset. Eventually he could not deal with the questions any longer, at which point he was asked, quite curtly, to leave and told he did not have the job. Despite being mentally disturbed by what had occurred, and apparently reflecting at that time whether he might have any "conditions", and although this had led to him being rejected for a role in such difficult circumstances and at a time when he told us he was making an effort to find employment, the Claimant had not progressed those thoughts to the point where he acted on them.

58. We return to the minority conclusion on this point below.

Evidence relating to Mr Rom Balax

59. Finally, we have considered whether there is any evidence to support the Claimant's proposition that after he had told Mr Balax of his diagnosis in or around late 2018, Mr Balax told Mr Muscatt and that they thus had actual knowledge from that date. For this, we have had reference to the entire WhatsApp transcript between the two from November 2016 to January 2021.

60. This proposition starts from the basis that the Claimant did in fact tell Mr Balax about his diagnosis and that Mr Balax was listening and heard him when he did so. We cannot place the precise date on which this is said to have occurred. It is not specifically referenced at all in their WhatsApp chat. In his witness statement, the Claimant says that his log indicates the call took place on 16 August 2018 and that he told Mr Balax that he had been diagnosed with "mental health issues and about the challenges [he] faced". However, two days earlier in the chat, the Claimant had said he had "a question to do with a matter with FCA" (presumably, the Financial Conduct Authority) on which he thought Mr Balax would have a "good perspective".

61. It appears that in fact they did not speak until mid/late September or even early October 2018, given that on 9 October, the Claimant messaged Mr Balax to say, "Thanks for speaking the other day". He then asked if he could meet Mr Balax later that week for "an Sonia transition catch" [sic] and would like to bring a colleague. There is no further detail on this, and on 11 October, the Claimant simply messaged "thank you". It was more than two years before any more exchanges between them took place.

62. The Claimant says in his witness statement that on 11 October 2018, when he called Mr Balax, the latter was "off-hand and brusque" and acted as though he was scared to talk to the Claimant. The Claimant says he believes telling Mr Balax of his disability and the challenges he had faced had back-fired so that Mr Balax was afraid to talk to him and did not encourage him in re-applying to the Respondent. Elsewhere in his witness statement, the Claimant says again that he discussed his "mental health diagnosis" in both September and October of that year and that Mr Balax became "suddenly non-receptive".

63. In his oral evidence, the Claimant's position was not so clear-cut. He acknowledged that perhaps he had been confused about the date he spoke to Mr Balax and that it might have been that he spoke to Mr Balax about the problems he was having at Aviva, or perhaps they spoke in 2018 once the Claimant had a label on his diagnosis. He was insistent however that Mr Balax was "short, curt and brusque", answering him

in monosyllables, not answering the Claimant's calls or messages and refusing to engage with him. The Claimant said Mr Balax's attitude "changed markedly" and his demeanour was "totally different" after he told Mr Balax of the diagnosis.

64. These assertions are not sustainable on the evidence in the bundle. Every single exchange prior to autumn 2018 is prompted by the Claimant contacting Mr Balax, often trying to arrange a meeting. His attempts are frequently rebuffed by Mr Balax, either with a reason (e.g. January and February 2017) or (e.g. October 2017 and January 2018) by simply not answering the Claimant at all. It is clear that Mr Balax did make time for a short meeting (30 minutes) at the Claimant's request in December 2016 and again – on the Claimant's evidence, after he had told Mr Balax of his diagnosis – in October 2018. In 2020 and 2021, when the Claimant started to contact Mr Balax once more, the responses are certainly not noticeably different in their tone or content from prior to that date.
65. In any event, the Claimant himself contends in his witness statement that there was what he calls a "string of truthless rhetoric" to him from Mr Balax over many years. For instance, he says he felt "fobbed off" by Mr Balax in November 2016 when the latter wrote "Move on do something else while you can". He contends that in March 2017, Mr Balax and Mr Muscatt "ridicule(d)" him, although in fact we have set out at paragraph 46(l) above the substance of their exchange. In his witness statement the Claimant says, "in early 2018 Rom Balax was ignoring all my attempts to contact him [and] ignoring all my messages". However, on his own account, he had not told Mr Balax of his diagnosis by then.
66. It was of course open to the Claimant to call Mr Balax as a witness. Whether or not the Claimant told Mr Balax of the diagnosis, and if he did so, when that was, is nonetheless something of a moot point because there is literally no evidence that Mr Balax told Mr Muscatt. It is speculation on the Claimant's part, denied by Mr Muscatt. We accept that denial. There is also no evidence that Mr Balax really listened to or took in what the Claimant was telling him about his diagnosis. It seems unlikely that he did absorb the detail and/or if he did, allow it to affect their relationship, given the similarity of their exchanges before and after the alleged disclosure.
67. Further, though the Tribunal is not required to make alternative substantive findings, in the absence of actual or constructive knowledge of disability on the Respondent's behalf, as to the reason why the Respondent behaved as it did, the repeated references to HR and to "risk" tend to suggest that it was Mr Muscatt's (mistaken) belief that the Claimant had been required to leave the Respondent via a compromise/settlement agreement. While it does appear (and we so find) that Mr Muscatt was prone outwardly to supporting the Claimant after he left the Respondent– including going out for drinks with him at least twice - though with marked inward reservations, the evidence simply does not suggest to the majority of the panel that Mr Muscatt or anyone else knew or could reasonably be expected to know that the Claimant had a disability. As EJ Spencer noted, considering somebody to be odd or inept at social interaction does not, without more, confer knowledge of a mental impairment that amounts to a disability. Nor does considering them to be slightly arrogant or sensitive.
68. The Claimant says in his witness statement that he "strongly believe(s) they were aware of [his] mental impairment, discussed it and were looking for excuses to block [him]". We infer that by "they", he means Mr Muscatt, Mr Rad and Mr Balax. On the

balance of probabilities however, the majority finds that they were not aware of his Asperger's and nor would it have been reasonable to expect them to be.

Minority conclusion on constructive knowledge

69. The minority panel member notes that in EJ Snelson's decision on the preliminary issue of whether the Claimant is a disabled person within the meaning of the Equality Act, there is a reference to the report of Dr Mike Smith, consultant forensic psychiatrist, dated 5 September 2019, that was before the Tribunal on that occasion. This report, which was not before us, apparently indicated on the strength of a detailed history that Dr Smith took from the Claimant that the Claimant has "persistent deficits in social communication and social interaction across multiple contexts". Since the Claimant's disability is a lifelong condition, it is concluded that he did not possess techniques to manage his condition until his disability was diagnosed in September 2019 whereupon he started receiving NHS care.
70. The minority panel member has also had regard to the evidence of Mr Hammacher, as set out above, including the fact that Mr Hammacher expressed the view that the Claimant's behaviour in a social context would have been transferrable to the workplace environment, entirely in line with Dr Smith's reference to "multiple contexts". The minority panel member notes that Mr Welzel's statement refers to making "adjustments" for the Claimant and the Claimant himself saying in his witness statement that he accepts "some allowances" were made for him during the course of his employment, this point not being challenged in cross-examination. (It is to be noted however that Mr Welzel, who, as we have set out above did not give oral evidence, did not provide any further details of what "adjustments" he allegedly made or why).
71. Additionally, the Claimant's social deficits were visible to Mr Horne who said in his statement that "Management could not have been unaware of these integration issues". Mr Horne further says: "Discussions about his behaviour with other sales colleagues led us to conclude that Richard probably showed all the signs associated with bipolar disorder or autism"³. The minority panel member concludes that at Credit Agricole, the Claimant was working in a more supportive/accommodating environment than was the case at the Respondent and, subsequently, at Aviva.
72. The majority view however is that in line with Mr Horne's evidence, the Claimant, who (Mr Horne said) "tried as much as possible to be on standby 24/7" was given no support at all at Credit Agricole so that, as concluded above, his behaviour in that environment sheds little or no light on what his behaviour might have been like at the Respondent.
73. The Claimant describes his time working at Aviva in his statement. The minority panel members observes that it seems his social deficits were visible to his colleagues and to HR. According to the Claimant, HR threatened to put him on a Performance Improvement Plan (PIP). The Claimant then had a nervous breakdown and was referred to Occupational Health, that referral leading ultimately to the diagnosis of his disability. The minority view is that the Claimant offered no resistance and was not masking his symptoms because even if he wanted to, he did not know how to. The minority panel member concludes that this answers the hypothetical question of what would have happened had the Respondent referred the Claimant to occupational health at the material time.

³ These were references to the Claimant's work and his managers while he was at Credit Agricole

74. The majority view in relation to the hypothetical question is set out above. There was no “trigger event” while the Claimant worked at the Respondent that would have caused its managers to make the referral, which the majority considers the Claimant would have resisted. The authorities confirm that it is not incumbent on an employer to make every enquiry when there is little or no basis to do so.
75. Considering all the above, the minority conclusion is: the Claimant’s persistent social deficits would have been visible to the Respondent and such persistent deficits would have caused a distraction and/or distress to other staff. It is inconceivable to the minority panel member that the Respondent would not have known that such persistent deficits relate to some form of mental impairment, and it would accordingly have been reasonable for it to have known. Moreover, at the time, prior to the diagnosis, the Claimant himself would not have known anything amiss in his social behaviour. Had the Respondent initiated an investigation, the proper diagnosis of the impairment would have resulted as did happen in 2018. Therefore, it can be concluded, that the Respondent did have constructive knowledge because it cannot be said that the Respondent could not reasonably have been expected to know that the Claimant had the disability.

Overall conclusion

76. Consequently, we find (unanimously) that there was no actual knowledge and (by a majority) nor was there constructive knowledge in the mind of the decision-makers at the Respondent.
77. In the circumstances, the claim fails and we do not go on to consider further the reasons why the Respondent did not invite the Claimant to interview for the relevant vacancies.
78. Nonetheless, we end with this observation: the opaqueness of the recruitment process in evidence before us is such that it wholly invites claims of this nature. It is contrary to the EHRC’s Employment Statutory Code of Practice. The complete lack of an open advertisement, clear and documented procedure and transparent competencies or interview process, will inevitably lead some to believe that it is a protected characteristic that has inhibited their progress, and understandably so. If it has not already addressed these inequities, unless and until the Respondent uses a fair process that is designed to eradicate prejudices against applicants, rather than potentially allowing or even encouraging them to be perpetuated, it appears very likely that claims will continue to be brought and will potentially be very challenging for the Respondent to defend.

Employment Judge Norris

Date: 21 December 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21/12/2021

FOR THE TRIBUNAL OFFICE