Case no. 2358072/2012

THE EMPLOYMENT TRIBUNAL

SITTING AT:	**LONDON SOUTH**
BEFORE:	**EMPLOYMENT JUDGE ELLIOTT**
MEMBERS:	**MS S DENGATE**
	MS B BROWN

BETWEEN:

Mr P Mefful

Claimant

AND

Citizens Advice Merton and Lambeth Ltd

Respondent

ON: **21 and 22 April 2022**
(In Chambers on 22 April 2022)

Appearances:

For the Claimant:	**In person**
For the Respondent:	**Mr R Kohanzad, counsel**

RESERVED JUDGMENT ON SECOND REMITTED HEARING

The unanimous Judgment of the Tribunal is that the discrimination claims fail and are dismissed.

REASONS

1. The original full merits hearing took place on 17, 18, 19 and 20 October 2017. The claim has been the subject of a number of appeals to the EAT. Three such appeals were brought by the claimant. The appeal leading to this remitted hearing was brought by the respondent.

This remote hearing

2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

3. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

4. The parties were able to hear what the tribunal heard. From a technical perspective, there were no difficulties.

5. The participants were told that it was an offence to record the proceedings.

6. No witness evidence was taken at this hearing.

The decision of the EAT in case number EA-2020-000447

7. In a Judgment of HHJ Stacey handed down on 20 January 2022 in case number EA-2020-000447, the EAT upheld this tribunal's finding that it was the respondent's interim CEO Mr Davidson who made the decision to dismiss the claimant and the respondent's challenge to our findings on the dismissal decision failed.

8. The decision of this tribunal was that Mr Davidson made the decision to dismiss no later than 19 March 2012. What happened thereafter was a following through of Mr Davidson's decision and a rubberstamping of his decisions (see EAT Judgment paragraph 62). Even after Mr Davidson had left, his decisions and his strategy to dismiss the claimant were implemented by others.

9. The EAT said that we had erred in taking into account matters that post-dated 19 March 2012 in our analysis of the reason for dismissal and that we had misdirected ourselves on the issue of causation on direct disability discrimination, discrimination arising from disability and victimisation.

<u>Direct disability discrimination and discrimination arising from disability</u>

10. The EAT took the view (judgment paragraph 73) that if one looks at the facts we found pre-19 March 2012, it does not appear to sustain a conclusion of the dismissal decision being tainted with direct disability discrimination or discrimination arising from disability. The EAT said that although there had been mention in January 2012 of the claimant having a painful shoulder, it was not linked to his failure to attend the all-staff meeting on 27 February 2012, the failure to provide feedback on the redundancy proposals or the claimant's assertion that he should have been slotted into the Business Manager role without competitive selection. The EAT said it was also inconsistent with the claim for a temporary pay rise on the grounds that the claimant was doing his own role and covering the Operation Manager's role.

11. The EAT pointed out that in our paragraphs 71-72 (January 2020 decision) the disability findings were based on the period April to July

2012 when the claimant was not at work and on our finding the decision to dismiss had already been made. Our finding of fact was that the claimant was off sick in April 2012 and did not return until 9 July 2012

The whistleblowing and victimisation findings

12. The EAT accepted (judgment paragraph 83) that we did not make a primary finding that the dismissal was because of the claimant's protected disclosure nor an act of victimisation for his protected act. The respondent submitted to the EAT that the statutory wording of section 103A Employment Rights Act 1996 was inconsistent with our findings of fact as to the reason for dismissal and in addition the lack of reasoning on victimisation meant that a victimisation finding could not stand and should not be re-opened on this remission.

13. The claimant says that we were clearly troubled by the treatment of his grievance and that the findings we made in our paragraph 73 should now take centre stage.

14. At paragraph 87 the EAT upheld our finding of fact that the primary reason for dismissal was the respondent's view that the claimant lacked capability and engagement. The EAT said that it must follow that the principal reason for dismissal could not be a protected disclosure. The claimant's submission on this point failed at the EAT and it was held that there was no need for us to consider this matter further.

15. In relation to victimisation, the wording in section 27 Equality Act 2010 is different to section 103A Employment Rights Act 1996. The question of causation is whether the protected act had a significant influence or whether but for the protected act the dismissal or detriment would not have happened.

16. The EAT said that in summary the appeal was allowed in part. The findings of disability discrimination under sections 15 and 13 were set aside and revoked. The matter was remitted to us on the narrow grounds on which the respondent was successful. The EAT said that we may also need to revisit our approach to victimisation which, depending on our conclusions on disability discrimination, may need to come into play.

The scope of the remission

17. The scope of the remission to this tribunal was set out in an Order made by the HHJ Stacey dated 20 January 2022 as follows:

18. The matter is remitted to this tribunal to consider on our findings of fact in our decisions of 2017 and 2020, without any further evidence:

    a. Whether Mr Davidson's view that the claimant lacked capability and engagement which the respondent did not wish to manage, which was the primary reason for his decision by 19 March 2012 that the

claimant be dismissed (the Primary Reason to Dismiss) was because of disability (section 13 Equality Act 2010)?

b. Whether the Primary Reason to Dismiss: (i) arose in consequence of the claimant's disability (ii) the date the respondent knew or ought to have known of the claimant's disability (iii) whether the respondent has shown a proportionate means of achieving a legitimate aim.
c. Whether the decision to dismiss made on 19 March 2012 by Mr Davidson was "because of" the protected act on 17 November 2011 (as identified in paragraph 146 of our 2017 decision). The protected act was that at a grievance hearing on 17 November 2011 the claimant complained about bullying and harassment and he made the link between that bullying and his past relationship of a sexual nature with FP.
d. If necessary, to consider remedy for any unlawful discrimination (if any is found).

19. We were asked to consider any outstanding issues of compensation arising from our findings in 2017 that the claimant was unfairly dismissed under section 98 Employment Rights Act. The EAT said for the avoidance of doubt we had already found that there should be no reduction for contributory fault or *Polkey* and there was no challenge to those findings. The respondent submitted that the *Polkey/Chagger* point was within the terms of the EAT's remission if we upheld the section 27 claim.

20. We note that the EAT did not require us to make any further finding on the whistleblowing claim or to our finding that Mr Davidson was the decision maker on the decision to dismiss.

21. Both parties made applications for a review of the EAT's Order of 20 January 2022. Their applications were refused. The EAT's decision of 11 March 2022 was sent to us during submissions and we considered this document.

Documents for this hearing

22. We had written submissions from both parties to which they spoke. They are referred to below but not replicated in full. These submissions were fully considered even if not expressly referred to below, together with any authorities relied upon. We had the original bundle from the 2017 and 2020 hearings.

23. Both parties made oral submissions for one hour each.

24. As ordered by the EAT, we had no witness evidence at this hearing.

The claimant's submissions

25. The claimant submitted that in connection with his discrimination claims

the tribunal should consider Mr Davidson's Redundancy Overview Document (bundle pages 227-229) referred to in our 2020 decision at paragraphs 35 and 36. We found that this document set out Mr Davidson's criticisms of the claimant, including poor performance, failure to engage with the redundancy process and comments on his sickness absence, including (page 228) that the claimant was "*attempting to bring disability into play".* It also said that the respondent had not implemented an OH assessment for the claimant "*on the basis that this could be misconstrued by [him]".* We could not understand how an OH assessment could be misconstrued and it underlined our finding that there was a strategy to dismiss the claimant. It was a document specifically titled "*PM – Redundancy Overview".*

26. This Redundancy Overview document was produced by Mr Davidson for a redundancy panel meeting he attended on 28 May 2012. Our finding was that he was not a neutral attendee at that meeting because our decision was that he made the decision to dismiss by 19 March 2012.

27. The claimant also took the tribunal to Mr Davidson's email of 26 June 2012 at page 385c, which he submitted, also showed us what was in Mr Davidson's mind when he made the decision to dismiss in March 2012.

28. The claimant made submissions as to the extent of his engagement with the redundancy process. This was not within the scope of the remission from the EAT. The claimant submitted that his lack of engagement was reflected in the Redundancy Overview document and was because his health issues and therefore for a disability related reason. The relevant section of the document (page 227) said:

> *"PM has sought to isolate himself from the restructuring and the impacts of his role the beginning of Jan '12 and maintains inconsistent position, a fundamental lack of understanding of the restructuring; and has actively sought to disengage from the redeployment/redundancy process by utilising health problems to make himself unavailable to redeployment, interview or redundancy panels."*

29. On the issue of disability the claimant submitted that Mr Davidson had constructive knowledge of his disability when the decision to dismiss was made by 19 March 2012. We found in our 2017 decision at paragraphs 103-104, that the claimant's email of 10 January 2012 (page 273) alerted Mr Davidson to the fact that the shoulder condition had persisted at that stage for eight months and that the claimant was in considerable discomfort and taking medication for the pain. The claimant submitted that this put the respondent on notice of his disability. The relevant wording in the email said: "*You may not be aware, since May of last year I have had a constant unbearable discomfort that is constantly shooting pain from my neck into my left arm and shoulder; I am currently taking medication for this pain is constant and sometimes unbearable."*

30. Our findings at paragraphs 147-150 (2017 decision) went to the question of knowledge of disability. We found that the claimant had made his symptoms clear to Mr Davidson and to Mr Nicholas in the return to work meeting on 9 July 2012 – which postdated the decision to dismiss. We were supported in that finding by an email from Ms Bartlett dated 31 May 2012, again post the decision to dismiss.

31. The claimant submitted, as per our finding at paragraph 149, that the respondent did not have to have the word "*disabled*" spelt out to them.

32. The claimant made submissions to the effect that events after 19 March 2012 should lead us to infer what operated in his mind when he made the decision to dismiss.

33. On the section 15 claim the claimant took us to paragraph 14 of our 2-2017 decision as to what arose in consequence of his disability. This paragraph came within the section identifying the issues for the hearing. What arose from his disability was said to be his disability-related absence and all the medical appointments (treatments) associated with his disabilities.

34. The claimant also submitted that it was clear from the Redundancy Overview document and the reference to the claimant seeking "*to isolate himself from the restructuring and the impacts of his role the beginning of Jan '12"* that Mr Davidson was of the view that the claimant was using his medical appointment of 18 January 2012 for this purpose. The claimant submitted that Mr Davidson's reference to *"Jan '12"* was a reference to his medical appointment on 18 January 2012 which arose in consequence of his disability. The claimant invited us to draw an inference to this effect.

35. The claimant made submissions as to how we should regard Mr Davidson's email of 26 June 2012 as showing what operated in his mind in March 2012. In that email (page 385c) Mr Davidson said to Ms Harris, Ms Dawkins and others "*The problem is that PM can continue to shift the goalposts day by day, week by week, whilst arranging treatment appointments to block him actually doing work in the business."* The claimant submitted that this showed on a balance of probabilities what was in Mr Davidson's mind and this was a link between his ability to work and his disability related appointments.

36. In dealing with the respondent's objective justification defence in section 15(1)(b) EqA, the claimant reminded the tribunal of the legitimate aim, put as the need to ensure that the organisation could survive with proper management and committed staff willing to go the extra mile – it was in the bottom 3% of CAB in the UK and was in special measures, about to close making 20+ staff redundant.

37. The claimant said that the burden was on the respondent to show that the unfavourable treatment was a proportionate means of achieving that

legitimate aim. The claimant cited ***Akerman-Livingstone v Aster Communities Ltd 2015 3 All ER 725 SC,*** a housing possession case, which considered the objective justification defence in section 15(1)(b) as to the proportionality of achieving the aim. The claimant took no issue with the respondent's aim, but said that dismissal was not proportionate.

38. Subject to our finding that there was discrimination arising from disability the EAT required us to consider our reasoning on proportionality. The claimant reminded us that we found that the Business Manager's role was sufficiently similar for the respondent to concede that the claimant should have been allowed to trial it.

39. On the victimisation claim, the protected act was that at a grievance hearing on 17 November 2011 the claimant complained about bullying and harassment and he made the link between that bullying and his past relationship of a sexual nature with FP. The claimant submitted that we had to look at causation, whether the protected act operated in Mr Davidson's mind when he made the decision to dismiss.

The respondent's submissions

40. The respondent reminded us that the EAT said (paragraphs 73-75):

> *I agree with the respondent's submission that if one looks at the facts found pre-19 March 2012, it does not appear to sustain a conclusion of the dismissal decision being tainted with direct disability discrimination or s.15 discrimination. There is no connection in the tribunal's findings between the nonengagement and performance issues pre-19 March and disability. Although there is mention of a painful shoulder in January 2010, it is not linked to the failure to attend the all-staff meeting, the failure to provide feedback, or the assertion that there should be automatic slotting-in to the business manager role. Furthermore, it is also inconsistent with a claim for a temporary pay rise on the basis that the claimant is doing not only his own, but also the operation manager's, role.*
>
> *The respondent's submissions in the alternative ground relied on must prevail, because in the reasons in paragraphs 71 to 72, the disability findings are all based on the period from April to July 2012 when the claimant was not at work and after the dismissal decision had been taken.*
>
> *The respondent's challenge to those conclusions must succeed and the tribunal decision cannot stand. There was no evidence, or certainly no findings, to support the conclusion that there was disability related discrimination and direct discrimination in a decision made on 19 March 2012.*

41. The respondent said that we were bound by our early findings of fact and the conclusions which follow from them and that the "*arising from*" claim

could not succeed for 5 reasons. Firstly the claimant was dismissed because of his failure to engage with the restructure process, secondly Mr Davidson made the decision to dismiss in March 2012, thirdly that decision was taken because of the claimant's failure to engage in February 2012, fourthly this decision was not in consequence of his disability and fifthly the respondent did not have knowledge of disability until the claimant went of sick in April 2012.

42. The EAT said: "*The respondent's submissions in the alternative ground relied on [that of knowledge] must prevail, because in the reasons in paragraphs 71 to 72, the disability findings are all based on the period from April to July 2012 when the claimant was not at work and after the dismissal decision had been taken".*

43. In the alternative the respondent submits that dismissal was justified.

44. On the victimisation claim, the respondent said that we had to consider whether the reason for dismissal was the protected act. The respondent set out its reasons why the "*train was in motion*" towards dismissal and submitted that the protected act did not cause the dismissal. The respondent said that the train was in motion to pursue the strategy of dismissing the claimant through events in May, June and July 2012 to dismissal in August 2012. The respondent submitted that regardless of any protected act the claimant was going to be dismissed and it was not an effective cause of the dismissal.

45. In the alternative the respondent says that the claimant was always going to be dismissed for reasons unrelated to any act of victimisation which warranted a *Polkey / Chagger* reduction of 100%.

46. The EAT said that the respondent may not raise de novo, 4 years after the 2017 decision, a new challenge to the *Polkey* finding as they should have appealed or cross-appealed that decision at the time. Our finding was that there should be no *Polkey* reduction. The respondent's submission was that whilst that applied to sections 13 and 15 EqA, the question of *Polkey/Chagger* could still arise under section 27 and if that claim succeeded we were invited to make a finding that the claimant would have been dismissed in any event.

Our further findings of fact

Knowledge of disability and the sections 13 and 15 claims

47. Our findings at paragraphs 149-150 of the 2017 decision dealt with knowledge of disability. The respondent submitted that our findings said that knowledge arose on 31 May 2012 and the claimant submitted that the respondent's knowledge arose on 10 January 2012.

48. In our 2017 decision we found that the claimant had made his symptoms clear to Mr Davidson and Mr Nicholas at a meeting on 9 July 2012, that he had a significant impairment in his shoulder that caused significant

pain and resulted in long term sickness absence and was supported by sick notes. In 2017 we were supported in our finding by an email from Ms Bartlett dated 31 May 2012 in which she acknowledged that the claimant appeared to be saying that he had a disability. These findings predated the decision to dismiss so at this hearing we considered the extent of Mr Davidson's knowledge by 19 March 2012.

49. The 10 January 2012 email from the claimant to Mr Davidson at page 273 said: "*You may not be aware, since May of last year I have had a constant unbearable discomfort that is constantly shooting pain from my neck into my left arm and shoulder; I am currently taking medication for this but the pain is constant and sometimes unbearable.*"

50. The majority decision of this tribunal (Ms Brown and Ms Dengate) was that the email of 10 January 2012 did not give Mr Davidson knowledge of disability. The majority decision was that the email did not put Mr Davidson on notice to the fact that the condition was long term. It had not lasted for a year and did not indicate to Mr Davidson that it was likely to last for 12 months or more. The majority decision was that the email did not show Mr Davidson that the condition had a substantial adverse effect on the claimant's ability to carry out normal day to day activities, because the claimant did not give any indication of what it did not permit him to do. Although the claimant said that the pain was sometimes unbearable, he gave no indication of what impact this had on him.

51. The email said that he was going to an appointment and that he would be in to work a bit late that day. Other than the statement of the condition, the majority view was that Mr Davidson could not assume anything else about it and that this email did not give him constructive knowledge of disability. Mr Davidson and the claimant did not work at the same site and Mr Davidson had no way of observing the claimant on a day-to-day basis. The majority considered that the only purpose of the email was to inform Mr Davidson of his reason for being late in to work that day.

52. By a majority, the decision of this tribunal is that the respondent did not have knowledge of disability by 19 March 2012.

53. The minority decision (Employment Judge Elliott) was that the 10 January 2012 email was enough to give Mr Davidson constructive knowledge of disability. It informed Mr Davidson that the claimant had a physical impairment. It informed him that the condition was serious in that it caused him constant and unbearable pain which was being treated by medication. The minority view was that this was enough to inform Mr Davidson that the condition had a substantial adverse effect on the claimant's ability to carry out normal day to day activities because this is the result of being in unbearable pain. It had lasted 8 months and the claimant was attending hospital for an ultrasound/MRI scan and the minority view was that this was a substantial condition that had persisted for a number of months and on a balance of probabilities was likely to last 12 months or more.

54. As to issue 2b as set out by the EAT, the majority decision is that our findings from 2017 paragraphs 149-150 stand and that the date of knowledge of disability was 31 May 2012. As such the claimant was not dismissed because of his disability.

Discrimination arising from disability

55. We have considered whether the claimant was dismissed because of something arising from his disability. The majority decision was that the decision to dismiss was not because of something arising in consequence of the claimant's disability, because the respondent did not know and could not reasonably be expected to know by March 2012 that he was disabled.

56. The minority view (Employment Judge) is that for the reasons stated above, the respondent ought reasonably to have known from the 10 January 2012 email that the claimant had the disability of his shoulder condition. The minority has gone on to consider whether the claimant was treated unfavourably because of something arising from his disability by dismissing him or selecting him for redundancy.

57. The "*something arising*" from disability was put as the claimant's lengthy sickness absences and the need for time off for treatment. The claimant did not go off sick until 4 April 2012. This was after Mr Davidson made the decision to dismiss, so the decision predated any lengthy sickness absence and was not the reason for dismissal. The claimant was dismissed because of his lack of capability and his lack of engagement with the redundancy process. The EAT said at paragraph 73 "*There is no connection in the tribunal's findings between the non-engagement and performance issues pre-19 March and disability"* and that the shoulder condition was "*not linked to the failure to attend the all-staff meeting, the failure to provide feedback, or the assertion that there should be automatic slotting-in to the business manager role."*

58. The minority decision does not depart from the original findings of fact. The claimant's position at this remitted hearing, at which witness evidence was not taken, was that he was "*confused"* when he gave evidence in 2017. This was when he told the tribunal that he did not go to the meeting on 27 February 2012 because he had to "*hold the fort*". He wished the tribunal to find that he did not go to that key redundancy consultation meeting because he had a medical appointment. We unanimously considered that this was the claimant seeking to amend or change his evidence. We declined to change the original unanimous finding of fact, based on the oral evidence in 2017. The unanimous finding of fact was that it was the claimant's choice not to attend that meeting.

59. The minority view is that the fact that the claimant also did not attend a meeting on 18 January 2012 is not enough to displace the original

findings of fact. There was no evidence to support the claimant's position that he was engaged with the redundancy process. All the evidence pointed in the opposite direction. Our unanimous finding is that the Primary Reason for Dismissal stands and that it was not tainted by discrimination arising from disability.

60. We were not persuaded that documents produced post-dismissal informed us as to Mr Davidson's reasoning in March 2012. In any event we had no evidence to show us that the claimant had any interest in engaging with the redundancy process.

61. For completeness and in order to deal with the questions remitted to us, we have considered, in the event that we are wrong about the above, whether dismissal was a proportionate means of achieving a legitimate aim. The claimant takes no issue with the legitimate aim, but complains about proportionality. The claimant's case is that he should have been slotted in to the Business Manager's role. It was conceded by the respondent that the claimant should have been offered this role (see paragraph 64 of our 2020 findings). Had the claim for discrimination arising from disability otherwise succeeded, we find that the respondent would not have succeeded on the objective justification defence.

62. The unanimous finding of the tribunal is that the claim for discrimination arising from disability fails and is dismissed.

<u>The victimisation claim</u>

63. We have considered in relation to the victimisation claim, whether Mr Davidson knew about the protected act. We repeat that the protected act is what the claimant said at the grievance hearing on 17 November 2011. It was verbal. It was not contained within the written grievance of 19 September 2011.

64. It was not in dispute that Mr Davidson was not at the grievance hearing on 17 November 2011 because he did not join the respondent until December 2011. We had no evidential link to show us that Mr Davidson had knowledge of what the claimant said verbally at the 17 November 2011 grievance hearing so we find that he did not have knowledge of the protected act.

65. If we are wrong about this, we have considered whether, notwithstanding the Primary Reason for Dismissal, the protected act had a significant influence on Mr Davidson's decision to dismiss.

66. The claimant relied upon the advice received by the respondent from its advisers. Privilege was waived on this because it was included in the bundle. We had sight of an email from the respondent's advisers Peninsula, to Trustee Ms Bartlett and to Mr Davidson, dated 5 March 2012 at 17:31 hours (pages 293b and 2293c).

> *"Thank you for your enquiry regarding Paul M and his grievance against FP. This is a bit of a no-win scenario.*
> *If you address the issue now then that gives further chance for PM to claim a link to any subsequent attempts to remove him (dismissal for "exercising a statutory right" is automatically unfair I do not suggest that this would be the reason for dismissal .... but it gives him the chance to claim a link). If you do get to a position where he agrees to be compromised out of the business then you may get him to agree that he will let the grievance die as part of settlement .... but I would suggest you don't make this a opening gambit as it alerts him to your possible discomfort over the issue.*
> *If you decide against the potential for compromise and instead head down the more risky route of redundancy then I would be tempted to leave the grievance to one side until the redundancy is completed - so that it would be more difficult for him to say they are linked.*
> *With FP still being off you have a reasonable excuse for not progressing - as far as I am aware he has not chased you yet?"*

67. The next day, 6 March 2012, Mr Davidson sent an email to colleagues stating that his finance officer had confirmed the removal of salary costs for three staff members, which included the claimant. The claimant asked us to find that the dismissal was because of his protected act.

68. The claimant's position was that because the email of 5 March mentioned the grievance, it must have been in Mr Davidson's mind when he made the decision to dismiss. This is particularly because the next day, Mr Davidson wrote to the Trustees about the budget and the salary costs coming out of the budget, including his own salary cost.

69. The written grievance itself did not contain any protected act and our primary finding is that Mr Davidson had no knowledge of the verbal protected act made on 17 November 2011. Even if he did, this correspondence did not show us that Mr Davidson's reason for dismissal was influenced by the protected act. We agree with the respondent's submission that it is common for advisers to cover all the bases when giving legal advice, as to what a prospective claimant might say or claim, whether or not justified. The adviser's job is to look at all possible scenarios and potential claims and give a view. It was advice about how to deal with the grievance in terms of either addressing it or wrapping it up as part of a settlement, so that they did not need to progress it. So far as the advice was concerned, the respondent took what was described as the "*more risky route of redundancy",* leaving the grievance to one side, so that there was less chance of the claimant saying that the two were linked.

70. We find that it was understandable for the respondent to seek advice about what to do about an outstanding grievance when they were considering dismissal of the claimant. This is a dismissal which has been found to be unfair. The advice and correspondence was not enough for us to find that even if Mr Davidson knew about the protected act, that it

had a significant influence on his decision. Dealing with a grievance process is always time consuming for a respondent and the fact that they sought advice about how to deal with it and went with the advice to leave it to one side, is not enough for us to find that the protected act had a significant influence on Mr Davidson's decision. In addition the respondent's financial situation was dire and there was a pressing need to proceed with the restructure and reduce costs. We find that it did not and that the claim for victimisation therefore fails.

The relevant law

71. Section 13 of the Equality Act 2010 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.

72. Section 23 of the Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

73. In ***Chief Constable of Norfolk v Coffey 2019 IRLR 805*** the Court of Appeal (Underhill LJ) stated that: *"…it is now very well established that the comparison exercise under section 13(1) (the so-called "less favourable treatment" question) does essentially the same job as asking whether the treatment complained of was "because of" the protected characteristic (the so-called "reason why" question), and that if the latter question is answered the answer to the former will normally follow*." (paragraph 76).

74. In ***Nagarajan v London Regional Transport 1999 3 WLR 425*** the House of Lords held that the Race Relations Act in that case, did not require that the discriminator was consciously motivated in treating the complainant less favourably, it being sufficient if it could properly be inferred from the evidence, that regardless of the discriminator's motive or intention, a significant cause of his decision to treat the complainant less favourably was that person's race. In a victimisation claim there is no requirement for a complainant to show that the alleged discriminator was wholly motivated by the doing of the protected act. It must have at least a significant, or more than trivial, influence on the decision to dismiss for causation to be established.

75. Discrimination arising from disability is found in section 15 Equality Act 2010:

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim,

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.

76. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

    a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or
    b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

77. On discrimination arising from disability, section 15(2) EqA says that if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability. The proper approach to be taken in applying this was summarised by Eady J in ***A Ltd v Z 2020 IRLR 952***, (at paragraph 23). This included that it is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so and 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. The Guidance in ***A Ltd v Z*** was applied in ***Sullivan v Bury Street Capital Ltd 2020 IRLR 953***, where Choudhury P held that occasional references to mental health problems were not enough. It did not do more than demonstrate awareness of an impairment, as it did not demonstrate knowledge of a substantial adverse effect and the length of the condition. The Guidance set out by the EAT in ***A Ltd v Z*** was also approved by the Court of Appeal in ***Sullivan v Bury Street Capital,*** reported at **2022 IRLR 159** at paragraph 99.

78. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

79. The claimant relies upon the Equality Act Statutory Code of Practice on Employment paragraphs 5.15 and 6.19. Paragraph 5.15 states

    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.

80. Paragraph 6.19 largely repeats this in the context of reasonable adjustments. The Code does not create legal obligations. We are required to take into account any part of the Code that appears to us

relevant to any questions arising in proceedings.

81. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial – see ***Igen v Wong 2005 IRLR 258 (CA)*** per Peter Gibson LJ at paragraph 37.

82. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage v Grampian Health Board 2012 IRLR 870*.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

83. Showing that conduct is unreasonable or unfair is not enough of itself to transfer the burden of proof - ***Bahl v Law Society 2003 IRLR 640.***

Conclusions

84. Our starting point was that as per the decision of the EAT, our finding as to the Primary Reason for Dismissal stood. This was Mr Davidson's view that the claimant lacked capability and engagement, which the respondent did not wish to manage. As set out above we considered whether that decision was because of disability (section 13 Equality Act 2010).

85. The view of the EAT, judgment paragraph 73, was that our findings of fact leading up to the decision to dismiss in March 2012, did not appear to sustain a conclusion of the dismissal decision being tainted with direct disability discrimination or discrimination arising from disability. The EAT said that although there had been mention in January 2012 of the claimant having a painful shoulder, it was not linked to his failure to attend the key meeting on 27 February 2012, the failure to provide feedback on the redundancy proposals or his assertion that he should have been slotted in to the Business Manager role without competitive selection.

86. It was decided at a Preliminary Hearing before Employment Judge Hall-Smith on 9 June 2015 that the claimant was a disabled person at all material times by reason of an impairment of his left shoulder.

<u>Direct disability discrimination</u>

87. On direct disability discrimination, the majority view was that by 19 March 2012 Mr Davidson did not have knowledge of disability so his decision to dismiss was not in any way because of disability. The minority view was Mr Davidson did have constructive knowledge of disability. The minority

finding is that even with constructive knowledge of the claimant's shoulder condition, this was not the reason for Mr Davidson's decision to dismiss. Therefore, our Primary Reason for Dismissal stands; it was because the claimant lacked capability and engagement which the respondent did not wish to manage. The reason for dismissal was not the claimant's shoulder condition. The minority decision was that there was nothing to connect the reason for dismissal with the claimant's disability.

88. The tribunal is unanimous that the claim for direct disability discrimination fails and is dismissed.

Discrimination arising from disability

89. The majority decision is that the respondent did not have knowledge of and could not reasonably have been expected to have knowledge of disability by the date of the decision to dismiss in March 2012. By a majority the claim for discrimination arising from disability fails on this basis alone.

90. Even if the respondent did have knowledge of disability, our unanimous finding would have been that the claimant was not dismissed because of something arising from his disability, namely lengthy sickness absence or medical appointments or treatment. Our Primary Reason for Dismissal stands and we find that the dismissal was not tainted by discrimination arising from disability.

91. Had we been required to consider the objective justification test in section 15(1)(b) we would have found that this defence fails. The respondent conceded that the claimant should have been offered the Business Manager role and this was a more proportionate means of achieving their legitimate aim.

92. The claim for discrimination arising from disability fails and is dismissed.

Victimisation

93. On the victimisation claim we have found above that Mr Davidson did not have knowledge of the protected act when he made the decision to dismiss.

94. Even if he did, our finding is that the correspondence in early March 2012 between the respondent and its legal advisers, did not show us that Mr Davidson was influenced by the protected act when he made the decision to dismiss.

95. The victimisation claim fails and is dismissed.

Remedy

96. As a result of our findings on Remission, the discrimination claims fail and it is not necessary for us to consider remedy for unlawful discrimination.

97. So far as remedy for unfair dismissal is concerned, there has been a payment from the respondent to the claimant. The claimant told the tribunal that this was a part-payment and it did not, in his view, satisfy his entitlement to remedy for unfair dismissal.

98. We ask the parties to seek to agree remedy for unfair dismissal with a view to avoiding the further time and cost of a remedy hearing. If by Monday 23 May 2022 the parties have not agreed remedy, they are to provide their non-availability dates for a remedy hearing.

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Employment Judge Elliott
Date: 22 April 2022