Neutral Citation Number: [2023] EAT 52

Case No: EA-2020-000767-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 April 2023

Before :

HIS HONOUR JUDGE MARTYN BARKLEM

- -

Between :

MRS DEBRA LINGARD **Appellant**
- and -
LEADING LEARNERS MULTI ACADEMY TRUST **Respondent**

- -
- -

Mr N Siddall KC (instructed by Glausyers Solicitors LLP) for the **Appellant**
Mr S Gorton KC (instructed by Cook Lawyers) for the **Respondent**

Hearing date: 30 November 2022

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JUDGMENT

SUMMARY

Disability Discrimination

The claimant, a former headteacher, was successful in her claim of constructive unfair dismissal but failed in her claim of disability discrimination. The latter had originally been framed as arising from hypertension, but a report from a cardiologist jointly commissioned by the parties in the course of the litigation made clear that this was untenable. Further reports from psychiatrists revealed that the claimant's true disability stemmed from mental health issues. In a summary paragraph in its reasons the ET misstated the correct legal tests relevant to claims under, respectively, ss13, 15 and 20 of the Equality Act. The claimant contended that this misstatement led to errors of law and that certain findings made by the ET were perverse. The EAT rejected this, holding that the ET had had regard to the correct tests, and had reached conclusions of fact which were open to it on the evidence.

The respondent cross-appealed in relation to a finding that the claimant had not forged signatures on certain appraisal forms, something which had surfaced only days before the hearing. Rejecting the cross-appeal the EAT held that the positive allegation of forgery by one witness was evidence of opinion not fact, and the ET had been entitled to hold that, whilst genuinely holding the belief which she did, the witness was mistaken.

HIS HONOUR JUDGE MARTYN BARKLEM

Introduction

1. This appeal and cross-appeal arise from a judgment of an Employment Tribunal, sitting at Manchester, Employment Judge Feeney sitting with Mrs Williamson and Mrs Vahramian. The hearing took place between September 2019 and January 2020 written reasons being sent to the parties on 13th of August 2020. In this judgment, I shall refer to the parties as they were before the tribunal.

2. The outcome of the case was that the claimant's claim of constructive dismissal (her employment ended on 23rd March 2017) succeeded but that of disability discrimination failed, and was dismissed.

3. Both the appeal and cross-appeal were rejected on the sift, but each was permitted to proceed to a full hearing following separate hearings under Rule 3(10) of the EAT Rules.

4. The parties were represented by counsel who, in each case, had appeared below, Mr Siddall KC for the claimant and Mr Gorton KC for the respondent. I am grateful to each of them for their skeleton arguments. Mr Sidall's skeleton, in particular, sets out a great deal of the relevant law in this area. I have had regard to everything set out in both skeleton argument and in the oral submissions of counsel, although I have not felt the need to rehearse them all out in this judgment.

5. The appeal hearing was listed for a single day for both appeal and cross appeal to include the giving of judgment, the Notice of Hearing containing the usual provision that the parties should notify the EAT if they felt that that estimate was too short. In the event I was provided with a bundle containing 153 pages, a supplementary bundle containing 149 pages and an authorities bundle containing 17 authorities. Skeleton Arguments totalled 38 pages. Unsurprisingly it was not possible to give judgment on the day. It is important that the parties keep in mind the time estimate as the true volume of material to be put before the court becomes

apparent in the run up to a hearing. The likely consequence of failing to do so is, as here, a very considerable delay in the production of a judgment.

6. I shall deal first with the appeal.

7. The ET1 is undated in the bundle, but the amended particulars are dated 21 April 2017. In those particulars the claimant asserted her disability in the following terms:

> **"6. The Claimant suffers from chronic high blood pressure. The said condition was diagnosed in November 2014 and the Respondent has been aware of the said diagnosis from approximately that date. At the present time the Claimant is in receipt of medication (Lisinopril: 20mg per day) in order to manage the said condition. She has been in receipt of medication to manage her condition since January 2015.**
>
> **7. The effect of the said condition is that (in the Claimant's un-medicated state) it has a substantial, adverse and long term effect on the Claimant's ability to perform her normal day to day activities."**

8. Disability was simply denied in the rider to the ET3.

9. The ET made certain findings in relation to the way in which disability was originally – and plainly erroneously, as it transpired, - pleaded, at paragraphs 74 to 78 under the heading "Medical Evidence". This reads: -

> **Medical Evidence**
>
> **74. The claimant was diagnosed as suffering with Hypertension, she says on 1 November 2014 and received medication for this in January 2015 and has been taking Lisinopril since that time. Initially 10mg then reduced to 5 mg in July 2015 but then increased to 20 mg in November 2015.**
>
> **75. The claimant's evidence was that she still had some symptoms after starting the medication Symptoms continued in June and July 2016 but her disability impact statement had said that lot of her symptoms had disappeared but not entirely. This however is inconsistent with the later experts' reports which concluded that the symptoms she relies on for this**

case where the result of anxiety not blood pressure and accordingly should not have been alleviated by the blood pressure medication.

76. The claimant's GP's note for the relevant period show no indications of any matters relevant to this case in terms of the symptoms the claimant relies on. In November 2014 there was evidence of headaches which the doctor thought could be migraines, although the claimant says she was diagnosed with blood pressure problems although menopausal symptoms were also referred to in November 2014. On 23 December 2014 it was stated that the 24 hour tape (presumably the blood pressure monitor) showed some daytime hypertension and this was confirmed in January. In July 2015 there was reference to having headaches for a few weeks, her blood pressure was high in the morning sometime, she had been very busy at work but at the same time the blood pressure medication was reduced to 5 milligrams, and her readings did improve but then deteriorated a bit in October and therefore her medication was increased to 20mg.

77. There was no recording of any other symptoms other than she had a suspected gallbladder stones until 7 November when it was recorded that she was crying often and feeling anxious and she would like to try time off work. On 21 November it was recorded starting to feel a little bit better, time off helping, has meeting on Wednesday with employer, doesn't feel that things will change but has exit strategy if needed in the future, hopes to be able to stay at work for another twelve months if possible. Checking BP at home has been up and down but was normal this morning, starts counselling this week. On 10 January the GP recorded "long chat with Deborah and husband, classic stress related reaction, BP is generally well controlled, she will monitor with home readings weekly. Long chat as to what decision she has to make re: work". On 5 December 2016 the problem was recorded as stress related problem. On 19 December she stated "ongoing stress, not sleeping well, reduced appetite, is coping BP stable". She saw the doctor again on 9 January, long chat, doing well, keeping strong, continuing with counselling. On 25 January it was stated "feels anxious about this but doing very well, staying strong". On 6 February "long chat, doing very well, staying strong despite pressure, awaiting decision re final settlement, may have to go to

Tribunal if not acceptable figure. BP at home has been fine except when stressed and thinking about work and then it becomes raised, doing lots of walking". On 13 March "doing well, lots of walking and Zumba classes, keeping mind active, things progressing slowly with case, hopes to have a resolution in a few weeks, hoping will go her way". However, of course the respondent would be unaware of these entries until this litigation.

78. The claimant stated that YB was aware of the fact that stressful situations could impact on her health and she pointed to a number of comments including the ones referred to above where it was said that her stress impacted on her blood pressure (form the internal proceedings statement). YB agreed she had made a comment when she cancelled the meeting in September 2016 saying the claimant should not get stressed about this meeting being cancelled but this was a comment she might make in any situation. We do not wholly accept this we find YB was aware the claimant could get stressed and that it might increase her blood pressure but not at all that she had any other symptoms or other condition.

10. By a letter signed by solicitors for both the claimant and the respondent dated 21st of December 2017 (supplementary bundle page 75), a consultant cardiologist, Dr Galasko, was asked to address the issue of disability. Dr Galasko responded in a report dated 8th February 2018 (ibid page 78). In summary he reported that hypertension is generally an asymptomatic condition – a "silent killer" - that the claimant had mild hypertension from 2014 which would not have caused her headaches ("people with mild to moderate hypertension, do not generally suffer from headaches as a result of hypertension") and that stress or an alternative headache condition was a more likely cause of the headaches. He concluded that, on the balance of probabilities, none of the claimant's symptoms of fatigue, palpitations, low motivation, and a lack of emotional resilience were caused by or occurred as a result of her hypertension, and that the hypertension did not give rise to a physical impairment, which would, in any event, not cause a significant adverse effect on her day-to-day life. Put shortly, hypertension did not constitute a disability for the purposes of the EqA 2010.

11. So far as I can see from the papers in the appeal bundle there was, thereafter, no amendment to the formal pleadings. However, a joint report was commissioned from a psychiatrist, Dr Britto, who reported on 17th May 2018. The tribunal's reasons summarised his findings and those of a second psychiatrist as follows:

> **180. The claimant's hypertension expert Mr Galasko advised that the claimant's symptoms of palpitations, headaches, poor sleeping were not due to what was her mild hypertension. He stated her hypertension was not such as to have an effect on her ability to undertake day to day activities. He suggested obtaining a psychiatric report to ascertain whether her symptoms could be the result of a psychiatric condition**
>
> **181. A second report was then agreed and a Dr Britto was instructed. He diagnosed the claimant as suffering from Generalised Anxiety Disorder, the symptoms being headaches and fatigue in 2014 to an inability to concentrate, poor sleep and emotional vulnerability of which the claimant was not aware until 7 November 2016, he said this led to a major depressive disorder of moderate severity starting in September 2016 leading to her sickness absence on 7 November. She had continued to suffer from this onto 20 March and thereafter although on 5 May 2018 when he examined her she still had an anxiety disorder but an improved depressive illness and he did not believe at that point in time she fulfilled the criteria of disability.**
>
> **182. In his report Dr Britto stated that the employer was unlikely to be aware of the claimant's condition and in a second report said there was no evidence of any effect on day to day activities before 7 November 2016.**
>
> **183. The respondent had then requested their own medical report which was agreed and was undertaken by Dr Kaushal, he stated the claimant was presenting with symptoms meriting a diagnosis of moderate depression, isomatic syndrome ICD10F32.11. That it has fluctuated but its onset is credibly pegged to the first mention in the GP's notes in November 2016, he believed that the initial symptoms were associated with the Menopause and that the development into general anxiety disorder was probably contributed**

> **to by organisational stress but that that was not his area. He noted there was no mention of work related stress from mid-2014 until November 2016. He concurred with Dr Britto's opinion that she suffered from a mental impairment that has substantial effects which by this stage had lasted 12 months, he classed it as moderate depression with isomatic syndrome i.e. mood disorders with moderate depressive episodes and believed she had suffered from it from around the middle of 2014 as a result of the Menopausal syndrome, following this report the respondent's conceded the claimant was disabled but did not concede that they had any knowledge of the claimant's disability.**

12. Although the respondent sought to resile from the concession as to disability referred to above, this was rejected by the tribunal following a hearing on 24th September 2019.

13. The issue before the tribunal (so far as the discrimination claims were concerned) was therefore squarely based on the respondent's knowledge of her disability.

14. At the sift stage, HHJ Shanks was of the view that, whilst the tribunal's self-direction in relation to actual and constructive knowledge and the burden of proof in relation to sections 15 and 20 of the EqA at paragraph 237 of the reasons were "inadequate" the question of the respondent's knowledge of her disability was one of fact for the tribunal. He concluded that the tribunal's findings were open to it on the evidence, and in no way perverse. At the Rule 3(10) hearing HHJ Tayler commented that it was strongly arguable that the tribunal, incorrectly and/or inadequately directed itself as to the legal requirement for knowledge and/or constructive knowledge for claims of direct discrimination, discrimination because of something arising in consequence of disability, and claims of failure to make reasonable adjustments and, as a consequence, it was arguable that the tribunal failed to apply or misapplied the correct tests and/or inadequately reasons its determination of those issues. The issue of perversity similarly arose.

15. Ground 1 of the appeal argues that the ET failed to direct itself as to the correct legal test for knowledge in the various disability claims. It says that the tribunal misstated the test at

para 237 of the reasons as being the same in each jurisdiction save for the additional element in a s.20 claim (reasonable adjustments). Ground 2 argues that the basis on which the tribunal found that the respondent did not have reasonable knowledge of the claimants admitted disability was that "the respondent would not have any basis for thinking that the claimant symptoms were long-term" (see paras 239 and 240) There follow 10 sub-grounds which complain about various respects in which, it is said, the tribunal fell into error. These are found at paragraphs 239 to 249 of the reasons. Ground 3 asserts that there was inadequate reasoning for the tribunal's finding (at para 246 of the reasons) that, had a report been sought in January or February 2017 the claimant would have been absent for three months, but that was "not such a long period as to suggest it could well happen that the symptoms would last or be likely to last 12 months".

16. Ground 4 is a perversity ground, containing no fewer than 16 sub-grounds. They broadly mirror the allegations in the first three grounds.

17. I shall set out paras 237 and 238 of the reasons, which are said not to have correctly set out the relevant law. They read as follows:

> **"237. Knowledge is required for a Direct discrimination claim, a Section 15 of the Equality Act 2010 claim and a Section 20 Reasonable Adjustments claim. The extent of the knowledge required in the claims is the same, save there is an additional requirement in respect of reasonable adjustments that the respondent also have knowledge of the substantial disadvantage the claimant is put under because of the provision, criterion or practice the respondent has applied. In the case of that second limb of knowledge the Tribunal would have to consider the substantial disadvantage in relation to each PCP, however, if we find the respondent does not have knowledge of the claimant's disability on the first limb in any event that would defeat the claimant's claims.**
>
> **238. We remind ourselves there must be a substantial adverse effect on day to day activities, it must be long term (12 months) or likely to last 12 months**

There is the concept of constructive knowledge; if the respondent did not know should the respondent have known the claimant was disabled? Was for example the respondent aware of matters which should put them on the alert to make further enquiries and that it is to be expected that those further enquiries would have revealed that the claimant was disabled, i.e. the respondent cannot turn a blind eye"

18. Read in isolation, that is not an accurate summary of the law. There are in fact three separate provisions each of which has different requirements. As summarised by Mr Siddall in his skeleton argument, these are as follows.

a) S 13 (Direct Discrimination): Actual Knowledge of Disability is required;

b) S 15 ("In consequence"): Actual or constructive knowledge is required;

c) S.20 (reasonable adjustments). Actual knowledge OR constructive knowledge both of (i) the fact of disability and (ii) that the disabled person is likely to be affected by the PCP is required

19. Mr Siddall argues that the incorrect statement of the legal test and the reference to "a blind eye" has led the tribunal into a consequent error of law. He points to dicta in **Travel Counsellors Ltd-V-Trailfinders Ltd** [2021] IRLR 450 which equate blind eye knowledge with actual knowledge. He says the errors in self-direction have led the tribunal to consider the issue through an "incorrect legal prism". He points to the respondent's concession that the claimant was a disabled person and submits that it is difficult to understand how it could properly be found that all reasonable investigations - and the tribunal found additional investigation should have occurred – would not have disclosed that fact.

20. Mr Gorton responded to this with the forceful point that, until Dr Galasko pointed out that hypertension was not the cause of any medical issues which the claimant may have had, neither the claimant, her GP (see para 76 of the reasons, set out above) nor her legal representatives had alighted on the point. Indeed, in the joint letter of instruction to Dr Galasko, after the proceedings had begun, there was no mention whatsoever of mental illness. The

claimant's impact statement forwarded to Dr Galasko made mention of stress only in the context of it being a trigger for her headaches.

21. Mr Gorton also submits that, in addition to the composite self-direction at para 237, the tribunal had set out the test for knowledge at paragraph 197 (the s.15 claim) paragraph 204 (direct discrimination) and paras 210 and 211 (reasonable adjustments). It had touched on constructive knowledge at paragraphs 197, 210-211 and 238. I note that at para 211 the tribunal had used the expression "closed their eyes to it" as an illustration as to how constructive knowledge might be found. He goes through the various findings made by the tribunal and submits that, far from asserting an error of law, the appeal is in essence an attack on factual findings made by the tribunal.

22. A useful starting point as to the law is the Court of Appeal's judgement in **Gallop v Newport County Council** [2014], IRLR 211 in which Rimer LJ said as follows, at para 36:

> **36. I come to the central question, namely, whether the ET misdirected itself in law in arriving at its conclusion, that Newport had neither actual nor constructive knowledge of Mr Gallops disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee is a disabled person; and (ii) for that purpose the required knowledge, whether actual or constructive, is of the *facts* constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a "disabled person" as defined in section 1(2)**

23. In Gallop the employer had accepted without question the opinion of an occupational health practitioner that the employee was not a disabled person within the meaning of the legislation. The Court of Appeal held that it was the employer who was required to make the factual judgement as to whether or not an employee was disabled, and cannot simply rubberstamp an advisers opinion that he is not. It went on to hold that employers should ask specific and practical questions directly to the particular circumstances of the putative disability, rather than asking in general terms, whether the employee was a disabled person within the meaning of the act.

24. Mr Siddal is critical of the tribunal's reasoning at paras 239 to 249, in which it set out its reasoning for rejecting the claimant's assertion that the respondent had constructive knowledge of her disability. As these are key, I shall set them out in full, but with the comment that that they should not be read in isolation but in the context of earlier findings. For example, the Occupational Health report referred to at paragraph 239 had been set out in full at para 118, and the tribunal commented, at 119 that

> **"There was no suggestion that these symptoms had persisted for years or that they could not be resolved if the workplace issues were resolved. Neither was there any suggestion the claimant's symptoms would last for 12 months or were likely to last for 12 months at this stage."**

The relevant paragraphs follow: -

> **239. The claimant submitted that following the OH report of 15 November 2016 the respondents had actual knowledge that the claimant had a disability, however, we do not find this is the case as the OH report stated that the claimant was likely to render reliable service and attendance in the future with the resolution of any perceived workplace pressures and with improvements in her blood pressure control and sustained wellbeing, suggested that the stress risk assessment would be undertaken to identify the stresses in the work place and explore solutions. The respondent was advised that she had poor restorative sleep and a limited ability to focus, but it was**

said these were likely to "temporarily impair her performance in work in the short term". OH thought the claimant was likely to remain unfit for two to four weeks. We do not find that the OH report would have or did fix the respondent with knowledge that the claimant had a disability – it was optimistic that the claimant would soon return to school. Therefore, the respondent would not have any basis for thinking the claimant's symptoms were long term

240. There was no evidence that the employer would have known the claimant had multiple symptoms before this, even if by 2018 it was recognised the symptoms had manifested themselves earlier. Dr Britto states this himself.

241. YB accepted that she was aware that the claimant appeared stressed in 2015 and they had a conversation about it but the upshot of the conversation was that the claimant assured her she was fit to work and the claimant did not have any time off work whatsoever, therefore, the severity of the claimant's condition was not apparent, indeed, if it was severe at that stage. We do not rely on comments made by the Headteacher such as "don't get stressed about it" as evidence the respondent knew the claimant had a disability. That is simply an off the cuff remark. If the respondent was sensitive to the claimant being stressed it was out of concern for her blood pressure. Further 'stress' by itself does not mean a person is disabled particularly without knowledge of the symptoms arising from it

242. There was no reason why the respondent should have had knowledge that the claimant condition was a disability in a situation where there was no substantial adverse effect on her work activities until 7 November and the respondent had no or very limited knowledge whatsoever of any effect in her personal day to day activities. The claimant did not argue that she had told YB she could not sleep, was exhausted etc.

243. Further, the claimant did not raise the issue in her grievance, rather, she was concerned she was being discriminated against because of age, if the claimant was not aware herself she was disabled at this stage, it is unreasonable to expect the respondent to know.

244. Further, the claimant in November stated that she hoped to be back to work in January and therefore there was no awareness at this stage that the claimant was likely to be ill for a year or possibly up to a year. The respondent would not think this was a matter which would lead to the claimant meeting the test of disability. Again, the claimant had not been absent for any significant period until she went off work in November.

245. The claimant's fit notes also did not necessary indicate a long-term problem referring to work related stress and not to an underlying condition and neither did the occupational health reports which believed the claimant would be fit after a number of weeks to return to work. (The GPs notes that she was 'staying strong' and was undertaking activities such as attending Zumba classes although her symptoms had not disappeared – however this was not known to the respondent at the time)

Further OH referral

246. We have considered whether the respondent should have referred the claimant to occupational health again we would have expected them to do by end of January/February when the claimant did not return as she had suggested she would do. Would such a report have alerted the respondents to the fact that the claimant had a disability at that stage? We find it would not because there was very limited indication the claimant's absence was likely to be long-term to the extent of 12 months at that stage. She would have been absent for some time by that stage i.e. 3 months but still not such a long period as to suggest it could well happen' that the symptoms would last or were likely to last 12 months. particularly in the light of the fact her grievance or the settlement negotiations may have resolved the workplace issues leading to an alleviation of what the professionals stated were work related symptoms. It is understandable action about the claimant's absence was delayed whilst negotiations were ongoing and her grievance was under consideration. Indeed, the claimant did not reply to Mr Wilsons letter of 17 February till 2 March. Until that point there was a prospect of resolving the matter informally which may have alleviated the claimant's symptoms as suggested by OH.

247. The respondent was beginning to explore obtaining further medical evidence however the claimant resigned before this could be arranged. We have considered whether the respondent did turn a blind eye in failing to arrange a further occupational health report but we have borne in mind that they had taken the view that a Clinical Psychologist's report would be more appropriate. This was a reasonable view to take although the circumstances in which the claimant was required to attend it were not appropriate as we found above.

248. We have considered whether the reference in the 13 March letter inviting the claimant to the psychologist's appointment which stated 'your absence appears to be long term' is evidence the respondent did know the claimants absence was likely to be for 12 months .However we have rejected this as it is evidence the claimant was now not going to return quickly (the reference was to absence) but not that she had symptoms indicative of substantial adverse effect on day to day activities which were likely to last for 12 months. The requirement to attend the Psychologist was to ascertain whether she was fit to return to work or attend any hearings. That report may have indicated her symptoms were by then likely to last a year but the claimant resigned before that appointment could take place.

249. Therefore, in conclusion, we find the respondent did not have knowledge of the claimant's disability at the relevant time and therefore her claims of disability discrimination fail.

25. There is, of course, a duty on an employer to do all that it reasonably could to find out if an employee has a disability, and the burden lies on it to show that it was unreasonable for it to be expected to know that a person had suffered an impediment or that it had a substantial and long term effect. However, as is clear from, e.g. **A Ltd v Z** [2020] ICR 199, what is reasonable will depend on the circumstances. This is an objective assessment and, as Mr Siddall fairly noted at the outset of his skeleton argument, the fact sensitive nature of a tribunal's determination as to actual and constructive knowledge is not generally fertile ground for a successful appeal.

26. Having considered the competing arguments with care, in my judgment the complaints made in the Grounds of Appeal in relation to the tribunal having fallen into error of law are not well founded and are, in reality, a series of complaints as to findings of fact which the tribunal was entitled to make based on the evidence before it. Its reasons dealt with submissions which had been made to it, and had regard to the various issues with which it had to deal. Thus, the references to the OH report and to Dr Britto's firm conclusion as to the likely date that an employer could have known of disability of knowledge (in a report which for the first time indicated there was a mental health issue) were, in my judgment, matters which were plainly relevant to the exercise which the tribunal had to undertake as part of its fact-finding duty. This was in circumstances in which the claimant had herself been unaware of the true nature of her disability, as were her legal advisers, until Dr Galasko's report put paid to the basis of the claim as originally formulated. Dr Britto's report was then received a year after the claim had been brought. The OH and psychiatric expert reports formed part of the evidence, but in my judgment the tribunal was not "rubberstamping" either category. The blood pressure medication was irrelevant, as I understand Dr Galasko's report to conclude. The numerous criticisms of paras 239 to 249 in the grounds of appeal are attempts to undermine what were a series of findings by the tribunal as to both actual and constructive knowledge which, I find, they were entitled to make. Para 247, involving reference to "a blind eye" is an example of the tribunal raising a possibility of the respondent deliberately seeking to avoid constructive knowledge (which would have carried with it a sense that there was a degree of awareness) but dismissing that possibility in the light of other evidence. Whilst para 237 read in isolation might have been an incorrect summary, the proper tests had been set out and discussed earlier in the reasons. In any event, the basis for the findings which were made were, in my judgment, in accordance with the relevant legal tests.

27. For these reasons I dismiss grounds 1 and 2. As to ground 3, read fairly, and in the context of the remainder of the lengthy written reasons para 246 of the reasons adequately states

the reasons for the tribunal having made the findings of fact which it did in relation to the narrow issue dealt with in that paragraph.

28. I turn to the perversity argument. I simply do not understand the relevance to this of the respondent's concession as to the *fact* of disability (but not knowledge) when, over a year after the claim was brought, expert evidence revealed a state of affairs of which neither party had been previously aware. Looking at the other particulars of ground 4 and without dealing with them seriatim, stress had been noted at a much earlier stage but plainly was not thought to have been an indicator of a mental illness as opposed to bringing on headaches. The respondent's argument has to be that, whilst the claimant, her GP and her legal advisers had been entirely unaware from all the material which they had (prior to receiving Dr Galasko's report) that this pointed to disability in the form of mental illness, the respondent, as employer, ought to have interpreted the same facts in a sophisticated way which it actually took a consultant psychiatrist to reveal. Mr Sidall was right, in my judgment, to concede that the fact sensitive nature of a tribunal's determination as to actual and constructive knowledge is not generally fertile ground for a successful appeal. Sub paragraph (xv) of ground 4 seems to me to be a repeat of ground 3, and adds nothing to the perversity argument.

29. The appeal therefore fails. I turn to the cross-appeal. It concerns findings made by the tribunal at paragraphs 158 to 163 which are as follows:

Appraisal issue

> **158. YB had learnt that the appraisals had not in all cases been physically signed by the appraisee although there were signatures on them they were not in all cases the actual appraisee's signature. However, the examples we were referred to were from 2015 and appear unconnected to the 2016 issue.**
>
> **159. At the hearing some of the appraisees agreed they had gone through the appraisal with the claimant, agreed it and C may have then signed it for them (Rebecca Kenyon, Diane Atkin), Helen Quine knew some reviews had taken place but the final one she could not remember**

although she did not go so far as to say it had never happened, although again the signature was not hers. However, JS's evidence was unequivocal - it was simply not her signature and it was suggested that the appraisals had been falsely completed.

160. Michael McKenna's evidence was that no appraisal process had been undertaken with him in 2015 at all, neither was there any evidence of one. He had been on secondment 2013-2014. He had returned to the school and taken 6 weeks adoption leave in 2014/5. As a result of some issues he was, unfairly in his view, put on a support plan in 2015. A meeting was set up to begin the appraisal process but he was unable to attend due to timetable changes, he stated that DL blamed him for not attending. However no further appraisal or mid-year review meeting took place. We accept therefore the appraisal process was not undertaken for Mr McKenna nor, on the other hand, was there any allegedly forged documentation.

161. Accordingly, as there was some area of doubt we find on the balance of probabilities that appraisals were undertaken with the appraisee seeing the appraisal on line and agreeing however we accept that the paper copies were signed by the claimant on behalf of the appraisees. In respect of Janet Shorrock her recollection was clear and we do not doubt her credibility but given the evidence that the others did take place we find that her recollection on the balance of probabilities is at fault.

162. The respondent described these signatures as forgeries, we do not take that view in many cases it was all agreed therefore it was simply a time saving if incorrect procedure to adopt.

163. In the interviews there was some criticism that the claimant was disorganised and did not give staff enough guidance. On 3 March LI provided a critical statement. Clearly these were to provide the material for the disciplinary action the respondents legal adviser had referred to and to which BS would also soon refer. As this never developed in the

> **light of the claimant's resignation we do not know why a disciplinary rather than a capability process was being considered.**

30. The cross-appeal asserts that the ET erred in law and/or came to a perverse decision and/or failed in its Meek fact-finding obligations in respect of its dealing with the evidence relating to the claimant having forged signatures on appraisal documents, as dealt with by the tribunal under the paragraphs above.

31. As with the issue of mental ill health, this issue arose late in the day and was not on the pleadings. However, it was listed by the tribunal at the start of the reasons as being an issue going to the proper measure of loss flowing from constructive dismissal.

32. Here the roles are reversed – Mr Siddall asserts that the cross appeal is misconceived and a thinly veiled assertion of perversity. Mr Gorton asserts that the evidence of Janet Shorrock was clear and credible and that then tribunal has failed to deal with this.

33. I read the relevant witness statements in the supplementary bundle which were before the tribunal. I have reminded myself as to the tribunal’s findings in relation to Yvonne Brown (the YB referred to in the passages above) particularly at paragraph 230 in terms of her approach to the claimant generally. I note Ms Atkin’s statement (supplementary bundle page 139) from which it appears that Ms Brown approached Ms Atkins literally days before the tribunal hearing was to start, in connection with the claimant “forging” her (Ms Atkin’s signature) on a document. Ms Atkins’ statement records that she was subsequently approached by Ms Shorrock who said that she had a witness statement for her to sign. Ms Atkins was not willing to do so.

34. It is clear from the ET’s findings above that it took the view that there was a practice of the claimant appending signatures following appraisals. The only person who positively asserted forgery was Janet Shorrock. There was no equivocation in her statement, it is true, but neither is there any hint of what if any possible motivation there could have been for the claimant to act in the manner with a dishonest intent.

35. Forgery plainly implies dishonesty. Ms Shorrock was adamant that this was an act of forgery, but this was no more than a statement of opinion rather than fact. Having regard to the other evidence before the tribunal as to the insertion of other appraisee's names by the claimant for innocent reasons, and the circumstances surrounding the the way this issue came before the tribunal it seems to me that the tribunal was perfectly entitled to form the view that it did, namely that Ms Shorrock genuinely but mistakenly held the opinion that she did. The reasons are more than Meek compliant.

36. Given this conclusion it is unnecessary for me to address the question which would otherwise arise as to whether this appeal is properly justiciable. The cross-appeal fails.