EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Daniel**

Respondents: **Mr C. Spence, Mrs M. Spence and Mr A. Spence T/A G.E. Spence and Sons (a partnership)**

Heard at: **Teesside Justice Centre** **On: 09 and 10 May 2023**

Before:

Employment Judge T.R. Smith

Ms S. Mee

Ms B. Kirby

Representation

Claimant: **Ms Mellor (The claimant's sister)**

Respondent: **Mr Fakunle (Solicitor)**

Judgement

The claimant's complaint of unfair dismissal is well-founded.

The claimant's complaint of discrimination arising from disability is well-founded.

The claimant's complaint of wrongful dismissal/breach of contract is well-founded.

The claimant's complaint under section 38 of the Employment Act 2020 is well-founded.

Written reasons supplied pursuant to a request dated 18 May 2022

Abbreviations

ERA 96. The Employment Rights Act 1996.

EQA10. The Equality Act 2010.

EA 02. The Employment Act 2002.

The issues.

1.At the start of the hearing the parties agreed the issues the tribunal had to determine and those it did not.

2.Although the second claim form made reference to the National Minimum Wage, the claimant indicated he would be pursuing that by means of civil proceedings and therefore it was not a matter the tribunal needed to adjudicate upon.

3.Due to the shortness of time (the case originally having been listed for four days) the tribunal indicated it would deal with the issue of liability only and remedy, if appropriate, on another date.

Unfair Dismissal section 95(1) Employment Relations Act 196

4.Was the claimant dismissed by the respondent pursuant to section 95(1)(a) ERA 96 by virtue of being issued with a P45?

4.1.If so, on what date?

4.2.If so, can the respondent show that the reason or principal reason was one of the potentially fair reasons set out in section 98 (2) ERA 96 or for some other substantial reason?

4.3.Did the respondent follow a fair procedure in the dismissal of the claimant? Mr Fakunle very fairly conceded that as it was the respondent's case there was no dismissal, if the tribunal found the claimant had been dismissed, as the respondent had not utilised any procedure, inevitably any dismissal would be procedurally unfair.

4.4.Was there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? The tribunal indicated it would address this issue, if necessary, at the remedy stage.

Discrimination arising from disability section 15 Equality act 2010.

5.Did the respondent treat the claimant unfavourably by dismissing the claimant?

5.1.Did the following something arise in consequence of the claimant's disability namely the claimant's absence?

5.2.Did the respondent dismiss the claimant because of that absence?

5.3.Was the treatment a proportionate means of achieving a legitimate aim? The respondent said that its aims were operational efficiency, avoiding disruption and having a cooperative staff.

5.4.Was the treatment an appropriate and reasonably necessary way to achieve those aims?

5.5.Could the respondent show that it did not know and could not reasonably have been expected to know that the claimant had a disability?

6.It was conceded that at all material times the claimant suffered from caudia equina and the respondent admitted that this was a disability within the meaning of section 6 EQA 10.

Wrongful dismissal/notice pay

7.Was the claimant dismissed by the respondent in breach of contract?

Failure to provide a statement of employment particulars

8.Did the respondent fail to provide a statement of employment particulars?

8.1.If so, what award should be made under section 38 EA 02.

The evidence.

9.The tribunal heard oral evidence from :-

- The claimant himself.
- Ms Becky Daniel (the claimant's daughter)
- Mrs Brenda Daniel (the claimant's wife)

10.For the respondent, the tribunal heard oral evidence from: –

- Mr Christopher Spence
- Mr Andrew Spence (son of Mr Christopher Spence)

11.The tribunal also had before it a bundle of documents which initially consisted of 317 pages. With the tribunal's permission a number of further documents were added to the bundle, producing a total page count of 320. A reference to a number in the judgement is a reference to a page in the bundle.

Findings of fact

12.There were numerous factual disputes between parties. The tribunal has not attempted to determine each and every one of those issues. The tribunal has only made findings of facts in respect of the agreed issues.

Background

13.The claimant originally started working for Mr A. Spence's grandfather on 01 June 1981. He was never given a statement of employment particulars.

14.His employment ended, he says, by means of express dismissal on 05 April 2022.

15.It was common ground that if the claimant had been dismissed by the respondent he was entitled to 12 weeks' notice.

16.At all material times the claimant was a farm worker and the respondent operated a mixed farm. The claimant lived in the same small village as the respondent and they knew each other well. Mr A. Spence ran the farm with the assistance of the claimant. During the claimant's absence Mr A. Spence had some support from his father, Mr C. Spence who, prior to the events set out below, had ceased to take a full time active physical involvement in the farm.

The accident.

17.On 07 January 2021 the claimant suffered an accident at work when he slipped and fell on ice.

18.The claimant continued to work whilst in pain, taking painkillers prescribed by his general practitioner.

19.The claimant's condition worsened and following a further consultation with his general practitioner, during a period of holiday from

work, he was admitted to hospital on 04 February 2021 for spinal surgery.

20.Despite the spinal surgery the claimant was left with a physical impairment, caudia equina.

21.The claimant informed Mr C. Spence of his hospitalisation on 05 February 2021 and that he would not be returning to work following the expiration of his holiday on 08 February 2021**.**

Sickness absence.

22.The claimant was discharged from hospital on 08 February 2021 and subsequently supplied the respondent with a fit note, signing the claimant off until 01 April 2021**.**

23.The fit note stated *"Cauda equina and emergency spinal surgery"* as the reason for the claimant's absence.(83). The claimant was to supply fit notes regularly to the respondent, up to 16 April 2022, which gave the reason for absence as being either *"Primary decompression of the lumbar spine"* or "*Cauda equina and emergency spinal surgery".*

24.Cauda equina syndrome produces symptoms of sciatica on both sides of the back, weakness or numbness in the legs, difficulties in urination and defecation (163/167).

25.Under the provisions of the Agricultural Wages Order the claimant was entitled, given his length of service, to 6 months full pay in the case of sickness.. There was some difficulty in respect of payment between the parties, a matter the tribunal did not need to explore. Suffice to say sick pay in accordance with the Agricultural Wages Order was paid, with the last payment appearing on the claimants weekly pay slip dated 10 September 2021 (186).

26.On 01 April 2021 Mr C. Spence wrote to the claimant asking for sight or his medical records to determine whether he could continue to undertake agricultural work.

27.On 12 April 2021 the claimant refused, as he considered it was too early to consider a return to work as he was awaiting physiotherapy.

28.It was a feature of this case that the respondent asked on a number of occasions for the claimant's consent to review his medical records, which were refused. The claimant considered this was harassment and an attempt to engineer his dismissal but the tribunal concluded the respondent was genuinely seeking to ascertain when the claimant was likely to return to work, given Mr A. Spence was having to manage the farm virtually single-handedly with some help from his father and an occasional contractor.

29.Unfortunately the claimant remained unfit for work and various correspondence again took place between Mr C. Spence and the respondent asking for access to medical records which the claimant refused.

30.Probably just after July 2021 the respondent received a personal injury claim notification form from the claimant's solicitors (306/310).

31.The claimant's injury in that form was described as " *Cauda Equina syndrome in the back caused as a result of the claimant falling onto his back and as a result of the accident. The claimant currently has pain in his back, pain radiating into his legs, groin pain, difficulty urinating, shock and distress"* In the section of the form section headed *"rehabilitation"* it was claimed that the claimant *"needs help to gain full mobility back. Struggles to walk up hills and for a sustained amount of time. Struggles to lift or carry things"*

32.On 17 August 2021 the claimant was awarded a Personal Independence Payment.

33.The tribunal noted page 105A in the bundle, which was a document produced by the respondent. Although neither Mr C. nor Mr A. Spence recognised the handwriting the tribunal considered it was likely it was from their accountant. The relevant extracts read as follows "*I spoke to Chris 16.9.21."* [It was accepted this was a reference to Mr C. Spence.] The note went on "*Chris phoned back – the NFU say no further need to pay the employee, give him a seven-day notice to appeal and then if he doesn't contact he can be terminated".*

34.Mr C. Spence accepted that he was speaking to the NFU for advice at the relevant time. The tribunal concluded the reference to, no need to pay the claimant, was a reference to his full pay ending under the terms of the Agricultural Wages Order and Mr A .Spence had sought advice in respect of termination.

35.On 17 September 2021 (105) Mr C. Spence wrote to the claimant against seeking access to his medical records. The letter stated that the respondent was anxious to know when the claimant could return to work, how he could be supported and whether any reasonable adjustments could be made. The letter stated if the medical records were not provided a meeting would be held to make a decision on the matter of employability on the basis of the information then available. The claimant concluded, reasonably, that the respondent was actively considering his termination.

36.On 22 September 2021 (106) the claimant indicated he would be prepared to attend a medical consultation with a view to obtaining an occupational health report at the cost of the respondent and indicated he planned to return to work. He also indicated his father had just died.

37.The respondent then did nothing. The respondent suggested they were waiting for the claimant to contact them as it was not clear how long he needed to recover from the bereavement. The tribunal did not accept that explanation given the claimant said explicitly in his letter of 22 September 2021 *"… Myself and my family need some time to ourselves this week* [tribunal emphasis] *to come to terms with our sad loss".* The claimant was only seeking a deferment of one week and the respondent knew that.

38.So at this point, although the claimant was content to be examined, so the respondent could obtain a prognosis on his condition, the matter was not further pursued by the respondent.

Dismissal?

39.No further meaningful contact, other than the claimant sending in fit notes, took place until 05 April 2022 when the claimant received a P45, addressed to him, through the post (110/112). There was no covering letter. The date of termination of the claimant's employment was stated to be 17 September 2021. The document was headed *" Details of employee leaving work".* It explained how parts 2 and 3 had to be given to a new employer. The claimant considered he had been dismissed. After the expiration of his last fit note the claimant did not supply any further fit notes. The last fit note (109) the claimant supplied was dated 17 January 2022 and covered the period up to 16 April 2022

40.On 21 April 2022 (113) the claimant wrote to the respondent confirming he received the P45 and requested all outstanding holiday pay be paid to him.

41.It was not disputed the claimant was then paid his outstanding holiday pay. Thus the respondent must have received the letter of the 21 April 2022.

42.On 03 May 2022 the claimant received an unsigned document, apparently printed off on 29 April 2022 on which was written *"please note it was not a P 45 sent you. It was a P 60 which is a tax notification for the past year."* Factually that was wrong. The claimant had clearly received a P45 and it gave a backdated termination date.

43.On the same day the claimant presented his tribunal claim form.

44.Mr A. Spence telephoned the claimant on 20 May 2020, after the respondent had received the tribunal claim form, and asserted the claimant was still employed and questioned how the claimant had received a P45. The claimant explained the circumstances.

45.The respondent thereafter contacted its accountants F.E. Metcalfe and Co. They provided a *"to whom it may concern letter"* (115) to the respondent dated 27 May 2022 which stated the P45 had been issued in error and the claimant had been *"reinstated onto the payroll".* The letter first came to the claimant's attention when he saw it as an appendix to the respondent's response.

46.In previous years the claimant had received a P 60 in approximately April of each year.

47.The respondent confirmed by text on 02 June 2022 that the claimant remained on its payroll as an employee.

48.Various attempts then followed by the respondent to engage the claimant in sickness/welfare review meetings, all of which the claimant refused to attend on the basis, he contended, his employment had already entered.

Submissions

49.Both parties made submissions and the tribunal means no disrespect to either for failing to record each and every argument or submission made. The tribunal had full regard to the submissions.

50.Mr Fakunle provided a skeleton argument and concentrated exclusively on whether there was a dismissal and the factual matters which he contended favoured the respondent. He relied upon two authorities namely **Sandle -v- Adecco Ltd UKEAT/0028/16/JOJ** and **Gisda Cyf -v- Barrett UKEAT/0173/08/ZT.**

51.Ms Mellor made a short oral submission and pointed out factual matters which she contended favoured the claimant. She did not refer to any specific authorities.

Discussion and conclusions.

Dismissal

52.The tribunal started by examining whether the claimant had been dismissed. As the claimant made clear before Employment Judge Jerram on 13 September 2022 he relied on the concept of express dismissal only.

53.The tribunal considered the following were the relevant legal principles it had to apply.

54.Express dismissal is defined in section 95 (1) (a) ERA96 as follows: –

"(1) for the purposes of this part an employee is dismissed by his employer if (and, subject to subsection (2)…. only if)

(a) the contract under which he is employee is terminated by the employer)…."

55.It is for the claimant to establish there was a dismissal and the burden of proof is on him and it is the balance of probabilities.

56.The tribunal reminded itself that the evidence it had to examine differed dependent upon whether the tribunal considered that any purported dismissal was unambiguous or ambiguous.

57.If unambiguous by the employer then it had to be taken at face value without the need for an analysis of the surrounding circumstances, see **Southern Franks Charlesly and Co 1981 IRLR 278.**

58.If the tribunal found there was an unambiguous dismissal by the respondent it could not be unilaterally withdrawn without the claimant's consent, even if given by mistake, see **Willoughby -v- CF Capital PLC 2012 ICR 1038.**

59.If however the dismissal was ambiguous the tribunal had to apply an objective test. It was required to look at all the surrounding circumstances and if that did not resolve matters, then had to ask itself how a reasonable employer or employee would have understood matters, in the light of those circumstances.

60.The tribunal considered that here there was an unambiguous dismissal. The tribunal found, and the lay members emphasised, that any employee sent a P 45 with their name on it would take that as notice of dismissal particularly, as here, the document was clearly addressed to the claimant with the date of dismissal was endorsed on it.

61.The tribunal was fortified in this finding by the decision in **Kelly -v- Riveroak Associates Ltd UKEAT/0290/05** which held that the sending of a P 45 with no contra indications was capable of communicating a dismissal (see especially paragraphs 21 to 23 of the judgement).

62.The tribunal did not find the decision in **Sandle -v- Adecco Ltd UKEAT/0028/16/JOJ** of assistance to the respondent despite the urgings of Mr Fakunle . It was clearly distinguishable on its facts as no P45 was issued to the employee in that case and the crux of the case related to whether dismissal could be inferred from the conduct of neither party contacting each other following the ending of an agency assignment.

63.When the claimant requested, following receipt of the P 45 his holiday pay, he was paid it. If there really had been a misunderstanding, the tribunal considered that on receipt of the claimant's letter of 21 April 2021 he would immediately have received a phone call or a text. None were forthcoming.

64.As the tribunal have already noted a mistake is not a defence although a failure of the claimant to accept reinstatement may be very relevant indeed in terms of compensation.

65.However the tribunal did not accept there was an innocent mistake, as alleged, by the accountants of which the respondent was unaware.

65.1.Firstly it considered that a firm of accountants would not mistake a P 60 for a P 45

65.2.Secondly a firm of accountants would need to know a termination date to insert in the P 45 and that could only have come from the respondent.

65.3.Thirdly, the note, 105 A ,which was probably prepared by the respondent's accountant, referring to a conversation on 16 September expressly contemplated dismissal. The tribunal did not consider it was a coincidence that the respondent sent a letter to the claimant on 17

September mentioning a meeting to discuss the claimant's future employability.

65.4.Fourthly the accountants had confirmed in writing (136/137) to the claimant that they did not write directly to the claimant but always sent pay details to their clients to then direct onto their employees. In other words it must have been the respondent who sent the P 45 to the claimant. A further factor which reinforced this finding was the P 45 had the claimant's old address on it. However it was sent by post to the correct address. The respondent lived only a mile from the claimant and knew he had moved. It is likely therefore that the P 45 was posted by the respondent and not by its accountants.

66.Mr Fakunle submitted that as the P45 was sent by the respondent's accountants there could have been no dismissal. For the reasons set out above, on balance it was sent by the respondent. If the tribunal was wrong and it was found the dismissal was ambiguous the tribunal would still have found a dismissal looking at matters objectively and having regard to the surrounding circumstances. The p 45, the lack of contact from the respondent, the payment of accrued holiday pay when asked and the failure to communicate with the claimant until he issued his claim form would reasonably lead the claimant to conclude he was dismissed.

Effective date of termination

67.The next question the tribunal had to determine was what was the effective date of termination. The tribunal noted it was not suggested by the respondent the claim was out of time, despite the date of dismissal endorsed on the P 45. However as this was a jurisdictional issue the tribunal considered it prudent to address the point.

68.The date on P 45 has nothing whatsoever to do with the effective date of termination because termination is a statutory concept see **London Borough of Newham v Ward 1985 IRLR 509, CA.**

69.The tribunal concluded the effective date of termination was 05 April 2022, and not the date given in the P 45. Notice is only given when it is communicated to an employee and if by post, when it is read or when the recipient had a reasonable opportunity to read it, see **Newcastle upon Tyne Hospitals NHS Foundation Trust -v- Hayward 2018 UKSC 22.**

70.The claimant saw the P45 on 05 April 2022 so that was the effective date of termination.

A fair dismissal?

71.That, however is not the end of the matter. Even though dismissal has been established and the claimant presented his claim within time it was also open to the respondent to show that the dismissal was fair. The tribunal can deal with this point shortly given the very fair concession made by Mr Fakunle at the start of proceedings.

72.Section 98 of the ERA 96 provides:-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment……

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case".

73.The tribunal having found the respondent had dismissed the respondent bore the burden of establishing a potentially fair reason for dismissal. It had not.

74. Whilst the tribunal might infer it was for capability that was not the express case of the respondent. As the respondent did not surmount this hurdle the dismissal was unfair.

75.If the tribunal was wrong on that point, and it was found elsewhere this was a capability dismissal, the tribunal examined the section 98(4) question, the "fairness " question.

76.The hallmark of a fair capability dismissal is obtaining up-to-date medical advice , a meeting with the employee, and an appeal process. None of this occurred. The respondent did not even start to demonstrate to the tribunal (the burden of proof on this element being neutral) that it had acted fairly. The claimant had made it clear he was content to be examined by an occupational health professional but that was not pursued by the respondent and no meeting was held with him prior to dismissal.

77.The claimant's dismissal was unfair.

Wrongful dismissal – breach of contract

78.The claimant was dismissed without notice.

79.Under section 86 ERA 96, given the claimant had been employed by the respondent for more than 12 years he was entitled to 12 weeks' notice. The respondent did not argue, and indeed could not argue on the facts, that the claimant was dismissed in circumstances where it could rely upon summary dismissal.

80.The claimants complained of wrongful dismissal/breach of contract must therefore succeed.

81. The sum to be awarded will be ascertained at the remedy hearing, if not agreed.

Written particulars of employment.

82.Section 38 EA 02 provides:-

"(1)This section applies to proceedings before an employment tribunal relating to a claim by worker under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies—

(a) the employment tribunal finds in favour of the worker, but makes no award to him in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (c. 18) (duty to give a written statement of initial employment particulars or of particulars of change (in the case of a claim by an worker) under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday),the tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (in the case of a claim by an worker under section 41B or 41C of that Act) the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5)The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."

83.The claimant has succeeded in respect of a complaint which falls within schedule five.

84.The respondent admitted the claimant had not been given written particulars of employment.

85.In the circumstances the claimant is entitled to succeed, the level of the award being assessed at the remedies hearing.

Section 15 EQA 2010

86.Section 15 EQA10 provides:

"15(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.

(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. "

Knowledge

87.The first issue the tribunal considered was whether the respondent could rely upon the defence available to it under section 15(2) of the EQA10 as, if it could, it was not necessary for the tribunal to then move on to the substantial merits of the complaint.

88.Could the respondent show that it did not know, and could not reasonably have been expected to know that the claimant had the

disability of caudia equina at the date of the alleged discriminatory act namely the claimant's dismissal? . The burden of proof is on the respondent.

89.HHJ Eady QC in **A Ltd v Z [2020] ICR 199,** EAT, summarised the authorities as follows at paragraph 23:

"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see ***City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA*** *at para 39.*

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 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 (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec)*** *at para 5, per Langstaff P, and also see* ***Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170*** *EAT at para 69 per Simler J.*

(3) The question of reasonableness is one of fact and evaluation, see ***Donelien v Liberata UK Ltd] [2018] EWCA Civ 129, [2018] IRLR 535*** *CA at para [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 (2016) UKEAT/0100/16, [2017] ICR 610****, per His Honour Judge Richardson, citing* ***J v DLA Piper UK LLP (2010) UKEAT/0263/09, [2010] IRLR 936, [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 is not [already done so]" [sic], per Langstaff P in* ***Donelien*** *EAT at para 31.*

(5) The approach adopted to answering the question thus posed by s 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 T C Group (1998)***

EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665*).*

(7) Reasonableness, for the purposes of s 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."

90.The tribunal is satisfied that the respondent had actual or in the alternative constructive knowledge of the claimant's disability as at dismissal.

91.The respondent had before it fit notes which explained the claimant was unfit for work and the nature of his condition.

92.The claimant was suffering from *Cauda equina.* It would have been a simple enough task to simply have googled the disease to obtain further information.

93.Thus the respondent knew or ought to have known the claimant was suffering from a physical impairment.

94.The respondent knew or ought to have known that it was long-term given the respondent was still receiving fit notes up to dismissal, some 14 months after the accident.

95.The respondent knew in July/August 2021, from the notification of the personal injury claim of further details of the condition and its effect on the claimants' day-to-day activities.

96.The respondent was offered the opportunity to have the claimant examined by its own occupational expert but did not do so. Had it done

so it would have found the physical impairment had a substantial effect upon the claimant's day-to-day activities.

97.The respondent did not adduce any evidence to show that it was unreasonable for it to be expected to know that the claimant suffered an impediment to his physical health, and that that impairment had a substantial and long-term effect.

98.In the circumstances the respondent has not satisfied the tribunal that the knowledge defence is made out.

99.The tribunal then turned to the merits of the discrimination arising from disability complaint.

100.Section 15(1) (a) contains a double causation test namely:

- The unfavourable treatment must be *"because of"* the relevant *"something"*
- The *"something"* must itself arise *"in consequence"* of the disability see **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305**.

Weerasinghe stresses that the test is whether the unfavourable treatment was because of something arising in consequence of the disability and not simply whether it was as a consequence of the disability.

The EAT decision in **Pnaisier v NHS England and another 2016 IRLR 170** helpfully sets out the steps that must be undertaken.

"(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so to, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial influence on the unfavourable treatment), and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause or, if more than one, a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regards to the legislative history of section 15 of the act…,the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it may be a question of fact arising robustly in each case where something can properly be said to arise in consequence of disability.

(e)…the more links in the chain there are between disability and the reason for the impugned treatment, the harder it is likely to establish the requisite connection as matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…(i)…it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal may ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that causes the unfavourable treatment".

101.It was not disputed that dismissal was potentially unfavourable treatment.

102.The claimant's absences arose as a result of his disability.

103.The tribunal considered that in the mind of the respondent it terminated the claimant's employment because of the claimant's absences. The respondent did not consider it was likely the claimant would return in the near future and it was difficult for Mr A Spence to run the farm on his own. For the reasons already mentioned this was not a mistake by the respondent's accountants. The necessary elements of section 15 (1) (a) are therefore satisfied.

104.Can the respondent establish the justification defence?

Justification

104.The test is whether the unfavourable treatment is a proportionate means of achieving a legitimate aim.

105.To be proportionate the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. In particular the tribunal has to consider whether a lesser measure would be a proportionate means of achieving the employers' legitimate aim, see **Naeem –v- Secretary of State for Justice 2017 UKSC 27**

106.The tribunal was satisfied the respondent had demonstrated a legitimate aim namely to ensure the efficient running of the business. Mr A. Spence could not run the farm on his own. He could not rely wholly on contractors and needed to reach a long-term solution. Nor could he rely upon his father, given his father's age. The position of the claimant's employment needed to be resolved so the respondent could make decisions as to staffing going forward.

107.However the means the respondent took were not proportional. The test for unfair dismissal and section 15 are different but normally a finding of unfair dismissal is likely (but not inevitably) to result in the justification defence being unsuccessful particularly in a case of long-term sickness, see the judgement of Lord Justice Underhill in **O' Brien - v- Bolton St Catherine's Academy [2017] EWCA Civ 145.** The tribunal relies on its reasoning as to why the dismissal was unfair to support its finding that the respondent's actions were not proportionate.

108.Whilst the claimant may ultimately have been dismissed it was not proportionate to dismiss the claimant when the respondent did so without first obtaining medical evidence, it being remembered the claimant had agreed to an examination by an occupational health physician, and holding the meeting with him.

109.It follows therefore that such defence must fail.

110.The case will now be listed for remedies hearing with a time estimate one day. Separate case management orders will be made.

111.The claimant is reminded that the fact the respondent offered to re-instate the claimant may be very relevant as to compensation as will be whether there was a real risk the claimant would have been fairly dismissed at a future date given his health.

Employment Judge T.R.Smith

Date 09 June 2023