EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000219/2023

Held in Glasgow on 15 September 2023

Employment Judge J Young

Mr D Duployen	**Claimant** **In Person**
Connect Appointments Limited	**First Respondent** **Represented by:** **Mr J Lee - Solicitor Advocate**
Whyte & Mackay Ltd	**Second Respondent** **Represented by:** **Ms V Nicholson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that it should not strike out all or part of the claim or make any deposit order under Rules 37 and 39 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

1. In this case, the claimant presented a claim against the first and second respondent contending discrimination by reason of a decision not to engage him in work with the second respondent via the first respondent. It is alleged that the decision amounted to one (or more) of (a) direct disability discrimination under section 13 of the Equality Act 2010 (EA); (b) discrimination arising from disability under section 15 EA; and (c) victimisation under section 27 EA in which the protected act relied upon is previous proceedings in the Employment Tribunal against the second respondent..

2. It was agreed that the relationship between the parties fell within the scope of section 41 EA, the first respondent being the "employer" and the second respondent being the "principal".

3. The first respondent defends the claim on the basis that it does not concede the claimant is a disabled person as defined in section 6 of EA; in any event, they were not aware at the relevant time of any medical conditions which may be relied upon as disabilities and so did not have the "knowledge" required by section 15 (2) of EA; that they had no knowledge of the protected act relied upon by the claimant; and reasons for the decision not to engage with the claimant were unconnected to the claimant's disability or protected act.

4. The second respondent's position is that it had knowledge of the claimant's condition of anxiety and depression as a consequence of the previous Tribunal proceedings but were not in the position to accept knowledge of the other conditions alleged in the ET1; and denied any involvement in the decision not to engage the claimant. While an email was sent to an employee informing them of the application by the claimant, that employee was absent on sick leave at the time and did not return to work until after a decision was taken by the first respondent. It is stated that the second respondent had no other communication informing them of the application.

5. In a Note following preliminary hearing issued 14 July 2023, the claimant was directed to provide (i) further information on the conditions which were said to amount to a disability; (ii) the basis upon which each respondent knew or could reasonably have known that he was disabled; (iii) in respect of his claim of direct discrimination the basis upon which it was claimed that the acts were done on the grounds of disability; (iv) in respect of the claim of discrimination arising from disability, specification of the "something" arising from disability which was claimed to be the cause of the decision by the respondents not to provide him with work; and (v) in respect of the claim of victimisation the basis upon which the first respondent had knowledge of the protected act relied upon and the basis upon which it was said that the decision not to provide the claimant with work was made by each respondent on the grounds of the protected act.

6. The claimant provided further and better particulars of his claim. Thereafter, by applications of 21 and 24 August 2023, the first and second respondent made an application to convene a preliminary hearing to consider strikeout of certain of the claimant's claims or a deposit order under rules 37 (1) (a) and 39 (1) of the Tribunal Rules of Procedure 2013.

7. This preliminary hearing was then convened to consider these applications.

Documents

8. There was produced an "Agreed Inventory of Productions" paginated 3-111 (J3-111) and a separate inventory entitled "Claimant's Supplementary Bundle" paginated 2-19 (C2-19). Reference was made to these productions in the course of the hearing.

Preliminary matter

9. It was intimated on behalf of the second respondent that they would wish to lead a short passage of evidence from a member of their IT department. I was advised that the essence of that evidence related to an email sent by the first respondent to the second respondent on 27 February 2023 (J105) which it was contended was received in the absence of the recipient on sick leave and not forwarded to any other party within the organisation.

10. The authorities have advised caution in conducting any "mini trial" of oral evidence to resolve core disputed facts in strike out/deposit order applications (Hemdan v Ishmail & other **[2017] IRLR 228**, Machkarov v City Bank NA **[2016] ICR 1121**; Kwele-Siakam v Co-op Group **UKEAT/0039/17/LA**).

11. That would appear particularly relevant in discrimination claims which deal in inferences arising and often described as "*highly fact sensitive".* In this case, I considered that it would be in the interests of justice to have the proposed evidence heard along with any other evidence as to communication between the first and second respondent so that such evidence could be properly considered and tested against that background. In any event, I did not consider such evidence would be helpful in any conclusion that the knowledge of the email was not with the respondent at the relevant time albeit the

recipient employee was stated to be on sick absence. The surrounding circumstances of access to work email notwithstanding absence from the workplace would require to be considered and tested. In those circumstances, I considered that the hearing should proceed without the proposed oral evidence.

12. The hearing then proceeded on the basis of submissions from the first and second respondent and the claimant.

Background to the claims

13. The facts of the case have not yet been found and the background summarised here should be understood on that basis.

14. The first respondent is an agency labourer supplier and the claimant applied for work with the second respondent via the first respondent in February 2023 in the second respondent's "*bottling hall*".

15. He was invited for registration interview with the first respondent on 27 February 2023, at which time he confirmed that he had previously worked for the second respondent. The claimant resigned from that employment and then made a Tribunal claim against the second respondent for disability discrimination and constructive dismissal. That claim was successful and he was awarded compensation by Judgment issued 26 September 2022.

16. The claimant's case is that at interview he was asked if he had left the second respondent "*on good terms"* to which he answered "*no*", but "*advised that it was not my fault. I did not go into the details".* He was advised that the second respondent did "*their inductions"* on Fridays but that the interviewer would first need to check with the second respondent about the position because he had previously worked for them. He was told that was something which was done with all former employees of the company.

17. Shortly after the claimant states that he "*realised that the response I gave about not leaving on good terms would have sounded alarm bells"* and so decided to email the interviewer later that day to explain *"about the Employment Tribunal*" claim.

18. He then sent an email to the first respondent on 27 February 2023 at 11.15am (C2) stating:

"Hi Diane,

I would be grateful if you would please pass a message onto the lady who I spoke to at my appointment today about my work experience and my time with Whyte & Mackay. I am sorry I can't remember her name.

I was asked whether or not I left Whyte & Mackay on good terms. I said no but did not provide any details. I think it would be appropriate for me to explain because my answer must cause you concern.

I was forced to make a claim against Whyte & Mackay to the employment tribunal. My claims were for constructive dismissal and disability discrimination and my claims were ultimately successful.

This is why I advised your colleague that I did not leave on good terms and that it was not my fault.

I have not informed you of my disability because I do not expect it to impede my abilities in the role which I have applied for.

If you have any further questions, please do not hesitate to contact me."

19. Earlier that day (10.47am) the first respondent had sent to the second respondent an email (J105) stating:

"Danny has applied for the bottling hall and I see he has been a full time employee up until 2021. I asked why he had left and he had advised due to a disagreement. Would you re-employ? I don't want to book him for induction for the bottling hall without checking with you first."

20. That email was sought to be recalled at 11.18am that day (J107).

21. The position of the claimant was that despite further approaches to the first respondent and being aware that induction was taking place in respect of positions at the bottling hall, no offer was made to him of attending induction or employment.

Submissions of first respondent

22. The submission for the first respondent was to strike out failing which make a deposit order in respect of the claim under section 13 and 15 of the EA but not the victimisation claim under section 27 of EA which it was accepted should go to a full hearing.

23. It was submitted that in each of the section 13 and 15 EA claims, it was necessary that the first respondent had knowledge "*or constructive knowledge"* of the disability and in this case insufficient facts had been pled by the claimant which would amount to any case of actual or constructive knowledge of the claim being with the first respondent.

24. The position of the first respondent was that they had no knowledge of either the claimant's alleged disability or any Tribunal proceedings against the second respondent at the time they interviewed the claimant and sent the email of 27 February 2023 to the first respondent.

25. It was submitted that the extent of the information provided by the claimant was contained at paragraphs 29-31 of his further particulars (J83) namely that an email had been provided indicating that he had made the claims against the second respondent which were successful.

26. It was submitted that there was no support for an argument that the first respondent had actual or constructive knowledge of any disability relied upon. The information did not specify which claim had been successful (constructive dismissal or discrimination) and so no knowledge that the disability claim had been successful.

27. In any event, a disability claim could be successful without the claimant having disability status and therefore the claim may have succeeded based on perceived disability (whether in fact that existed or not) or by virtue of his association with a disabled person.

28. It was also submitted that according to the Judgment issued the previous claim relied on the agreed conditions of depression and anxiety to found disability. In this case, the claimant appeared to rely on various conditions

conform to his further and better particulars (J81-82 – paragraphs 2-17).being depression (relied upon but not pled in the ET1); anxiety (and it was not clear whether that was anxiety and OCD and if OCD that was not pled in the ET1); fatigue (not pled in the ET1); and autism spectrum disorder.

29. The first respondent's position was that they were not aware of the conditions relied upon by the claimant to evidence disability either as relied upon in his successful claim or as narrated within the present case. In the present case, the conditions relied upon were very different from those relied upon in the previous case. Thus on the issue of knowledge, it could not be the case that either respondent were aware of disability simply by knowledge of the previous tribunal proceedings.

30. The knowledge of the first respondent was narrated by the claimant at paragraphs 26-31 of his further and better particulars (J83) and it was flawed rationale for the claimant to conclude that the first respondent, by the information provided, would have "*believed that I previously had and still could have a disability that could affect my work".*

31. Paragraph 37 of the further and better particulars (J84) was also significant wherein the claimant stated that the first respondent *"knew very little about my condition and for all they knew (the second respondent) may actually have wanted me in the role".* That would support the contention that the first respondent would not have actual or constructive knowledge of the claims under sections 13 or 15 of EA.

32. Separately it was submitted that in the section 13 EA claim the claimant had been advised that he should provide comparators. In that respect, he had indicated he relied on actual comparators being "*my wife and various other applicants"* but no detail of "*other applicants"* had been provided (J84). Additionally, paragraph 54 of his further and better particulars made reference to the employment of "*less experienced applicants"* without giving any detail. It was not clear whether he relied only on his wife as a comparator or others.

33. Again separately, in the section 15 EA claim the claimant had been directed to specify what was the "*something*" arising from disability which was said to

be the cause of the decision by the first and second respondents not to provide him to work. In that respect, the claimant had specified that the "*something"* arising from disability was the absences which occurred within the last few months of his employment with the second respondent in 2021 (paragraph 58-60 of further particulars – J86). T

34. The claimant in those particulars states that the second respondent would have known of those absences and their cause but he did not *"know for certain if (*the first respondent*) would have been aware of those absences and that they may have been "informed" of those absences if they did contact (*the second respondent*) to seek approval to employ me…".* He then states that no employer would wish to employ an applicant with known attendance problems and would be the reason why he was not offered employment. It was submitted that was simple supposition on the claimant's part without being based on any evidence.

35. It was also submitted that the claimant's response to the application for strikeout/deposit order did not assist in the matters raised (J95-97). In particular it was stated that the basis for the constructive knowledge of the first respondent was the content of the email of 27 February 2023 but that was nowhere near sufficient to amount to constructive knowledge and was effectively bare supposition as to the reason for refusing to employ.

36. So far as the deposit order was concerned, the fact that the claimant had now gained employment was relevant to ability to pay any deposit ordered. The Bank statement produced by the claimant (J99-103) largely pre-dated first payment of salary received by the claimant in his new employment and the payslip (J104) showed his present earnings.That was counter to his statement that his bank statements would show he had "*no money available to pay a deposit order".* The claimant had also indicated that he could fund any Deposit order from credit card resource.

Submission for second respondent

37. The second respondent advised that they sought a strikeout order in relation to the claims under section 13 and 15 of EA and the victimisation claim under section 27 EA, failing which a deposit order.

38. The submissions made by the first respondents so far as relevant for the second respondent were adopted. In particular, that would include reference to the difference between the conditions relied upon for disability in the previous Tribunal case and what was now relied upon by the claimant to found disability status; that the claimant was being speculative in his claim that the second respondent were the ones most likely to be affected by a disabled applicant and that it made "*more sense that the decision not to employ"* came from the second respondent (paras 35 and 36 of further particulars – J84); and that speculation was involved in asserting that absences were likely to have been in the mind of the second respondent in the claim under section 15 of EA.

39. It was submitted that in order for the claimant to have a prospect of success, he would need to show that the second respondent was actually aware of the application for employment and then that he had been treated less favourably or subject to a detriment on the grounds of disability.

40. The position of the second respondent was that they were simply not aware of the application being made as set out in the ET3 response of both first and second respondent. The first respondent's position (paragraph 8 of ET3 – J31) was that they had not progressed the claimant's application because the claimant only wished employment within the bottling hall and to work with his wife who at that time was working on an ad-hoc shift basis on temporary engagement with no guarantee of any continuous work. That was the difficulty in offering employment and there was no discussion between first and second respondent in the matter as set out at paragraph 15 of the ET3 from the first respondent (J32).

41. As the second respondent had no knowledge of the application being made by the claimant it could not have discriminated against him under section 13

or 15 or victimised him under section 27 of EA. The email of 27 February 2023 sent by the first respondent to the second respondent was received by an individual who at that time was absent through ill health. That individual had emailed his team prior to the email being received from the first respondent to say that he was "*not going to be in today…".* He was absent through ill health in the period to 24 March 2023 conform to the statement of fitness for work (J109) and the self certified sickness absence form (J110). Also, in terms of the archive document (J111), an out of office response was made to the first respondent on that day.

42. In short, there was no factual basis for saying that the second respondent knew of the application.

43. It was acknowledged that there had been steps taken to recall the email from the first respondent to the second respondent of 27 February 2023, and while that message would show on the recipient's email inbox, it would not delete the email of 27 February 2023 which would remain in the recipient's inbox. However the recipient was absent from work at the relevant time.

44. Strikeout was the primary remedy resort but as an alternative, it was submitted that a deposit order should be made in the maximum sum of £1,000 for each of the three claims as a condition of pursuing them.

45. It was submitted that if there was a link which was hard to understand in the claims made deposit order would be appropriate.

Authorities

46. In the submissions made for the first respondent (adopted by the second respondent) reference was made to various authorities.

47. In Sivanandan v Independent Police Complaints Commission and another **UKEAT/0436/14/LA,** certain claims had been struck out as it was shown there had not been identified arguable grounds for asserting certain PCPs. It was indicated that the reliance on such was based on *"bare unsupported assertion*" and that chimed with the matters in this case.

48. Ahir v British Airways plc **[2017] WL 02978862** made it clear that Tribunals should not be deterred from striking out claims *"including discrimination claims*" which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established; and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored. It was stated that the necessary test depends on an *"exercise of judgment*".

49. In this case knowledge was simply what was contained in the email from the claimant to the first respondent of 27 February 2023 and there was nothing in the case to suggest that there was any further discussion between the first and second respondent. It was the position of both first and second respondent that no such discussion took place. The second respondent denied any knowledge of the application.

50. In Garcia v British Airways plc **[2022] EAT14**, strikeout by a tribunal had been upheld at appeal in a claim of age discrimination. It was stated that the claimant's claim on age discrimination in that case rested on *"rather insecure foundation"* and it was submitted that was the case in the present circumstances.

51. On cases involving deposit orders, reference was made to Van Rensburgh v The Royal Borough of Kingston upon Thames & others **UKEAT/0096/07.** In that case, the tribunal made a deposit order on the grounds that the claims had little prospect of success. In that case, it was clear that a view on undisputed facts could be taken and that a tribunal had greater leeway when considering whether or not to order a deposit provided there was a proper basis for doubting the likelihood of the party being able to establish facts essential to the claim. In this case, it was submitted that it was unlikely that knowledge of specific disabilities would be established and those circumstances would favour a deposit order being made.

52. The case of Wright v Nipponkoa Insurance (Europe) Limited **UKEAT-0013-14-JOJ,** it was clear that rules permitted the making of separate deposit

orders in respect of individual allegations provided regard was had to the question of proportionality in terms of the total award made. Additionally, it also made it clear that when determining whether to make a deposit order, a Tribunal is given a broad discretion and not restricted to considering purely legal questions. A Tribunal was entitled to have regard to the likelihood of the party being able to establish the facts essential to their case.

53. In Simpson v Chief Constable Strathclyde Police and another **UKEATS/0030/11,** account was taken of a student loan when considering the resources of the claimant in making a deposit order. In that analogy, the access to credit card funds for the claimant was a relevant consideration.

Code of Practice on Employment (2011)

54. In the course of discussion on the issue of knowledge of disability, consideration was given to paragraph 5.14 of chapter 5 of the Code of Practice on Employment (2011) which states:

"It is not enough for the employer to show that they did not know that the disabled person had a 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.

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."

55. While that paragraph was noted it was submitted that did not give rise to any duty to ask for more information and in this case, the information provided did

not go beyond the claimant saying that he had been successful before the Tribunal in a case which involved constructive dismissal and disability discrimination.

56. Also the claimant had indicated in his email that he did not consider any disability would affect his performance in the work sought.

Submissions from the claimant

57. The claimant adopted his response to the application for strikeout/deposit order (J95-97).

58. He contended that the first respondent did have constructive knowledge of his disability from the email sent to them on 27 February 2023 and that it would not be reasonable for them to assume that implied he was not disabled but associated with a disabled person or that his claim was that he was perceived to be disabled. The email was sufficient to give information that he had a disability.

59. He also disputed the reason given for not engaging him was down to conditions which he made. He pointed to the fact that his wife resigned from the first respondent on 10 March 2023 and he continued to follow up his application until 18 April 2023. If that explanation fell away, then he considered the only possible explanation for a refusal to employ was either discrimination or victimisation following instructions from the second respondent to refuse employment.

60. It was too soon to conclude that the first respondent did not consult with the second respondent about his previous employment or that the first respondent had no knowledge of any absences within the last few months of his employment with the second respondent. In any event, the inclusion of that claim should not incur any additional cost to the first respondent.

61. So far as the second respondent was concerned, he had received information about the application by the email from the first respondent on 27 February 2023. No explanation was given as to why the email had been recalled and, in any event, remained in the inbox of the recipient.

62. As his claim was that discrimination occurred by either the first or second respondent or both striking out the claims against either would not give him a fair hearing. In particular, if the second respondent was struck out, then the first respondent would be free to shift blame without them being required to defend themselves.

63. So far as the conditions relied upon for disability were concerned, he considered that the same conditions were being relied upon in the previous case against the second respondent as in this case. Saying that he had a disability was enough to say that the first respondent had constructive knowledge of disability. In any event, it did not matter what the conditions were that caused the disability, the important matter was that he had advised that he had a disability.

64. The claimant also gave information on his financial position as regards ability to pay any deposit. He advised that from 31 July 2023, he had found employment on a full time basis conform to payslip produced. He provided information on his wife's earnings, child benefit and outgoings on necessary living expenses. He also answered questions on the compensation award in his previous claim and advised that amount had been exhausted in repaying large credit card bills incurred on everyday necessities after resigning from the second respondent and being out of work for a period.

Conclusions

Relevant law

65. There was no dispute between the parties as to the legal principles which would apply either to strikeout of a claim as having no reasonable prospect of success or making a deposit order on the basis that a claim has little reasonable prospect of success.

Strikeout

66. It was acknowledged that the threshold in a strikeout application was high and that where there were facts in dispute, it would only be "*very exceptionally*" that a case would be struck out without the evidence being tested (Ezsias v

North Glamorgan NHS Trust **[2007] EWCA Civ 330**) and that the power to strike out should not be exercised lightly (Blockbuster Entertainments Limited v James **[2006] EWCA Civ 684**).

67. This was particularly so in discrimination claims where:

- only in the clearest case should a discrimination claim be struck out;
- core issues of fact that turn on oral evidence should not be decided without hearing that evidence;
- the claimant's case should ordinarily be taken at its highest; and
- if the claimant's case was completely inconsistent with undisputed contemporaneous documents, it may be struck out.

(Anyanwu & another v Southbank Students Union & Southbank University **[2001] IRLR 305** and Macharov v Citybank NA **[2016] ICR 1121**.)

68. That is not to say that strikeout is not possible in a discrimination claim. (Ahir v British Airways plc **[2017] EWCA Civ 1392).** There it was stated that there may be cases which in terms of Ezsias *"embrace the disputed facts but which nevertheless may justify striking out on the basis of there being no reasonable prospect of success"* and that tribunals should not be *"deterred from striking out claims including discrimination claims which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where full evidence has not been heard and explored perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment…."*.

Deposit order

69. A deposit order can be made in respect of each allegation which is judged as having *"little reasonable prospect of success".* This test is not as rigorous as that for strikeout and a tribunal has a greater leeway when considering whether or not to order a deposit. It was not wrong for a tribunal to make a

provisional assessment of credibility in such an application (Van Rensburgh v Royal Borough of Kingston-upon-Thames and Ezsias v North Glamorgan NHS Trust).

70. The EAT in Tree v South East Coastal Ambulance Service UKEAT/0043/17 expressed in obiter that similar considerations will potentially arise in an exercise of discretion as in an application for strikeout because a deposit may be a significant deterrent to the pursuit of a claim.

71. If a tribunal considers that a specific argument or allegation has little reasonable prospect of success, then it may order a deposit to be paid not exceeding £1,000 as a condition of continuing to advance that argument or allegation. Again, whether or not to make a deposit order is a matter of discretion and does not follow automatically from a finding that a claim has little reasonable prospect of success.

72. Prior to making a decision on a deposit, a tribunal must make reasonable enquiries into the paying parties ability to pay the deposit and take that into account when fixing the level of the deposit. It is not the purpose of a deposit order to make it difficult for the paying party to find the sum payable or to make it difficult to access justice or effect strike out via the back door (H v Ishmeil **UKEAT/0021/16**). However, while the amount of a deposit order should reflect the parties means, it should also be high enough to stand as a warning that the claimant would have an evidential burden to discharge.

Claim against first respondent

Knowledge of disability

73. In the claims under section 13 and 15 of EA, it is necessary for a respondent to have actual or constructive knowledge of the contended disability. That was acknowledged as regards section 13 of EA in Gallup v Newport City Council **[2014] IRLR 211** and for the s15 claim expressly stated at section 15 (2) of EA where the section 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."*

74. In A Limited (Appellant) v Z (Respondent) **[2019] IRLR 952**, the EAT set out principles as to whether or not a person had requisite knowledge for section 15(2) purposes (which would include claims under section 13 of EA).

75. The principles included that the question of reasonableness in these circumstances is one of fact and evaluation and that a respondent may not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15 (2). Additionally, it was appropriate that the question posed by section 15 (2) be informed by the Code at paragraph 5.14. Also, reasonableness for these purposes would entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee all as recognised by the Code.

76. In this case, the claimant intimated by his email of 27 February 2023 that he had been successful in a claim of constructive dismissal and disability discrimination against the second respondent. Also, he refers to disability in terms of *"I have not informed you of my disability because I do not expect it to impede by abilities in the role which I have applied for"* and invites any further questions on those issues. His position is that he was not asked for any further information.

77. I consider that it would be a matter for a full tribunal to assess the impact of this email on the issue of actual or constructive knowledge. Essentially, the issue is one of sufficiency for a tribunal to consider.

78. On actual knowledge the claimant has advised that he was successful in his *"claims"* of constructive dismissal and disability discrimination and that he has a disability. It would be a matter of evaluation as to whether that was sufficient information provided by the claimant to provide knowledge.. Given the combination of his advice that he had success in these "*claims"* and that he considered he was disabled I did not consider his present claim should be struck out/ deposit ordered because his previous claim of disability discrimination may have been on the grounds of perceived or associative disability. A full Tribunal would require to evaluate whether a fair reading

would suggest he was the person who was disabled in that claim and continued to be so.

79. On constructive knowledge as stated in the Code an employer "*must do all they can reasonably be expected to do to find out if a worker has a disability"* and what is *"reasonable will depend on the circumstances".* That would again entail an evaluation by a Tribunal of the circumstances and whether sufficient was provided for the first respondent to make enquiry of the claimant if they required further information. There is no suggestion in this case that enquiry of the claimant as to the nature of his claimed disability in his email would have been met with any resistance or lack of candour.

80. While it was stated that the impairments described by the claimant in this case differ somewhat from that to be the agreed impairments to found disability in the previous Judgment, it is of course not necessary for there to be any particular diagnosis to have knowledge of disability but that the essential features of impairment; substantial and long term effect are present. A full Tribunal would require to consider if enquiry was reasonable to make such assessment.

81. I am of the the view that it would not be appropriate to either order strikeout or make a deposit order in relation to knowledge of disability as I consider it would be a matter for a full tribunal on hearing all the facts and circumstances to make an evaluation as to whether there was sufficient information available to the first respondent to have actual or constructive knowledge of disability.

Discrimination arising in consequence of disability

82. The claimant in this case states that the "*something"* arising in consequence of his disability was likely absences. His position is that not only was that an essential feature of his previous successful claim but that (i) the first respondent being advised that there was a successful claim for disability and (ii) that he considered he continued to have a disability then the inference would arise that there were likely to be absences on account of that disability.

83. The approach to section 15 of EA requires an investigation into two causative issues namely (i) was the unfavourable treatment because of an identified something and (ii) did that something arise in consequence of disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was a reason for any unfavourable treatment found. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence (Sheikh Oleslami v University of Edinburgh **[2018] IRLR 1090).**

84. Clearly if the first respondent shows that the alleged unfavourable treatment in this case (lack of any job offer or induction) was not caused by any absence disability issue then there would be no liability. However, given that issue would involve an examination of what was in the mind of the alleged discriminator (consciously or unconsciously) then that would require to be assessed against full evidence and any inferences which might arise.

85. In the circumstances, I did not consider strike out/deposit order would be apt in respect of this claim..

Comparator

86. Essentially the submission in respect of comparator was that there was uncertainty as to the comparator relied upon by the claimant. However, he has stated a comparator namely his wife who was working with the second respondent.

87. A comparator for direct disability discrimination will be a person who does not have the disabled person's impairment but who has the same abilities or skills as a disabled person (regardless of whether those abilities or skills arise from the disability itself). He offers to show that his wife has the same abilities and skills but she was offered employment and he was not. Additionally, it would also be possible for the claimant to advance a hypothetical comparator in the direct disability claim.

88. In his email of 27 February 2023, he indicates that his abilities and skills would not be affected by his disability and so the reason for the unfavourable treatment is that he is disabled.

89. Again, I do not consider that the lack of certainty over named comparators other than his wife would be sufficient for strike out/deposit order.

Claim against second respondent

90. The position of the second respondent is that they had no knowledge of the application and so no discrimination on any of the claimed grounds could arise.

91. It is accepted that at 10.47am on 27 February 2023, the first respondent sent an email to the second respondent advising that the claimant had applied for a position in the bottling hall and given it was stated he had left "*due to a disagreement",* the second respondent was asked if they would re-employ.

92. Accordingly intimation was made to the second respondent of the fact of the application by the claimant being made but their position is that it went to a recipient who was off ill and so did not see the email and neither was it forwarded to any other individual.

93. That email was sought to be recalled by the first respondent at 11.18am that day, some three minutes after the claimant had advised of his previous successful claim and that he had a disability (albeit not affecting the intended role).

94. That recall email would continue to be in the inbox of the recipient employed by the second respondent when he returned from sick absence. The claimant's position is that the discrimination continued beyond that date.

95. In any event, simply by being absent from work would not necessarily mean that the terms of the email were unknown to the recipient given the access to work email habitually utilised at home, even during ill health absence.

96. Accordingly, it would appear that again evidence of all the circumstances around the exchanges would be required taking into account all inferences which may or may not arise. Given that an email has been sent to the second respondent by the first respondent of the application made by the claimant there would appear to be an evidential burden to be discharged by the second respondent in maintaining that the email was never seen by anyone in their organisation. That would require evidence to be led on the whole circumstances.

97. If there was knowledge of the application by the claimant then the second respondent would be well aware of the previous proceedings which included claims of disability discrimination. They would be aware that absences on account of that disability were a feature of the proceedings. There would certainly be actual or constructive knowledge of disability and the relevant "*something"* arising in respect of the section 15 EA claim.

98. Also with knowledge of the previous claim, the question as to whether or not the reason for refusal of employment was related to or on account of the previous claim would require to be assessed and again only decided on the facts and inferences arising on consideration of all the evidence.

99. I do not consider that there should be a strikeout or a deposit order made in respect of the claims against the second respondent.

Further procedure

100. In terms of the directions given at the previous preliminary hearing, the respondents were given 28 days to respond to the further and better particulars by the claimant. That has not yet happened as this hearing has intervened and so it would be appropriate to allow the respondent 28 days to respond to the further and better particulars lodged by the claimant from the date this Judgment is issued to parties.

101. Disability status is disputed and parties should advise for consideration by the Tribunal if a further preliminary hearing should be fixed on that issue or whether the matter should proceed to a final hearing on all issues.

102. It is noted that the first respondent would be interested in judicial mediation. The claimant seemed uncertain as to his position in that regard. He should consider that position and he should advise the tribunal within 14 days from the date the judgment was issued as to whether he would wish to proceed to judicial mediation.

Employment Judge: **J Young**
Date of Judgment: **10 October 2023**
Entered in register: **13 October 2023**
and copied to parties