A Ltd (appellant) v Z (respondent)

[2019] IRLR 952

UKEAT/0273/18/BA

Employment Appeal Tribunal

1800 *Disability discrimination*

1815.4 *Knowledge of disability*

Equality Act 2010: s 5(2)

For the employer's knowledge of a disability see *Harvey* L [405]–[407]

The facts:

Since 2008, the claimant suffered from mental and psychiatric impairments, namely stress, depression, low mood and schizophrenia. On taking employment with the respondent employer, she did not disclose any of her mental health issues. That failure continued into her employment, with her routinely attributing sickness absences, including a period when she received in-patient psychiatric care, to physical symptoms. During the 14 months in question, she had some 85 days of unscheduled absence, of which 52 were recorded as sick leave. On her return from work after a period of absence she was slightly late and failed to provide evidence to corroborate what she said was the reason for that. The employer's chief executive told the claimant that because she felt unable to depend on her, due to her poor attendance and timekeeping, she had decided the claimant must be dismissed. That decision was confirmed in writing. The claimant complained to the employment tribunal of constructive dismissal. The employer accepted that the claimant was a disabled person for the purposes of s 5 of the Equality Act 2010, but denied that it had knowledge of her disability. The tribunal accepted that lack of knowledge, and went on to address the question of constructive knowledge under s 5(2), ie whether the employer might reasonably have been expected to know of the disability. The tribunal concluded that the employer was fixed with constructive knowledge, concluding that in the circumstances, and taking account of the fact that mental health problems often carried a stigma that discouraged people from disclosing such matters, it had been incumbent on the employer to enquire into the claimant's well-being and that their failure to do so precluded them from denying that they ought to have known that she had a disability. In assessing the amount of compensation due, the tribunal concluded that had the employer enquired into the claimant's health, she would have continued to supress information concerning her mental health issues. Her future loss was assessed accordingly. The employer appealed.

The EAT (Judge Eady QC) by a reserved judgment given on 28 March 2019 allowed the appeal.

The EAT held:

1815.4

Section 15(2) of the Equality Act is directed at the question of the employer's knowledge: where the employer does not have actual knowledge, the question is what might it reasonably have been expected to have known. The test is not what more might have been required of the employer.

The tribunal had sought to answer the question of constructive knowledge in terms of what the employer might reasonably have been expected to do: that was, to have understood that mental health problems often carried a stigma, which discouraged people from disclosing such matters and, therefore, to have made enquiries into the claimant's mental wellbeing. That did not answer the question as to what the employer might reasonably have been expected to know, after having made those enquiries. The tribunal had already found as a fact that the actual knowledge of the employer fell short of knowing anything more than that the claimant had faced a number of difficult personal circumstances and had sometimes experienced stress as a consequence. Of itself, that did nothing more than suggest that she had suffered symptoms that could be seen as unremarkable and unsurprising reactions to life events. As the tribunal found, allowing for the difficulties that arose in relation to the disclosure of mental health problems, it might well have been better had the employer made further enquiries of the claimant. That, however, was not the same as a finding that the employer could reasonably have been expected to know of the claimant's disability. In light of the tribunal's finding that the claimant would have continued to suppress information concerning her mental health problems, the complete answer to the s 15(2) question was that even if the employer could reasonably have been expected to do more, it could not reasonably have been expected to have known of the claimant's disability.

Cases referred to:

Abbey National plc v Chagger [2009] EWCA Civ 1202, [2010] IRLR 47, [2010] ICR 397 *revsg in part* (2008) UKEAT/0037/08 UKEAT/0041/08 EAT/0606/07, [2009] IRLR 86, [2009] ICR 624

Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665

Ali v Torrosian (t/a Bedford Hill Family Practice) (2018) UKEAT/0029/18, 2 May 2018

City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492, [2018] 4 All ER 77, [2018] ELR 445

Contract Bottling Ltd v Cave (2014) UKEAT/100/14, [2015] ICR 146

Crime Reduction Initiatives v Lawrence (2014) UKEAT/0319/13, 17 February 2014

Donelien v Liberata UK Ltd [2018] EWCA Civ 129, [2018] IRLR 535 *affg* (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec)

Hall v Chief Constable of West Yorkshire Police (2015) UKEAT/0057/15, [2015] IRLR 893

Hampson v Department of Education and Science [1989] IRLR 69, [1989] ICR 179, [1990] 2 All ER 25 CA

Hensman v Ministry of Defence (2014) UKEAT/0067/14, [2014] EqLR 670

Herry v Dudley Metropolitan Council (2016) UKEAT/0100/16, [2017] ICR 610, [2017] BPIR 1209

HM Prison Service v Johnson [2007] IRLR 951 EAT

Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, [2012] IRLR 601, [2012] 3 All ER 1287, [2012] ICR 704

J v DLA Piper UK LLP (2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052, 115 BMLR 107, [2010] EqLR 164

Lancaster v TBWA Manchester (2011) UKEAT/0460/10/DA, 14 June 2011

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25 HL

Ministry of Defence v Cannock [1994] IRLR 509, [1994] ICR 918, [1995] 2 All ER 449 EAT

Mutombo-Mpania v Angard Staffing Solutions Ltd (2018) UKEATS/0002/18, 17 July 2018

Paulley v First Group plc [2014] EWCA Civ 1573, [2015] 1 WLR 3384, [2015] RTR 221

Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170

Ridout v TC Group (1998) EAT/137/97, [1998] IRLR 628

Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 EAT

Appearances:

For the employer:

CHRISTOPHER MILSOM, instructed by Kennedys Law LLP

For the claimant:

ROBIN ROBINSON, instructed by the Free Representation Unit

1

JUDGE EADY QC: The appeal in this matter raises questions as to the approach to be adopted to the determination of constructive knowledge for the purposes of s 15(2) of the Equality Act 2010 ('EqA'); to the assessment of proportionality in terms of any justifica

tion of unfavourable treatment under that section; and to the approach to the assessment of loss in a discrimination claim, both in terms of apportionment and in a determination of contributory fault.

2

In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Judgment of the London Central Employment Tribunal (Employment Judge Snelson, sitting with lay members Messrs Ballard and Tyler on 30 January to 2 February 2018; 'the ET'), whereby the ET held that the Claimant's complaint of disability discrimination under s 15 of the EqA was well-founded. The Claimant was represented before the ET by a legal representative; she is now represented by Mr Robinson, acting on a *pro bono* basis through the Free Representation Unit. The Respondent has been represented by Mr Milsom of counsel throughout.

3

The Respondent's appeal was permitted to proceed to a Full Hearing on the following grounds:

(1) whether the ET erred in its approach to the Respondent's constructive knowledge of the Claimant's disability;

(2) whether the ET erred in finding that the dismissal – the unfavourable treatment – was not justified, by erroneously including non-discriminatory factors and/or by impermissibly focusing on procedural steps;

(3) given that the decision to dismiss was also taken at least in part for non-discriminatory Reasons, whether the ET failed to properly apportion loss;

(4) whether the ET erred in its approach to the assessment of loss (applying *Abbey National plc v Chagger* (2008) UKEAT/0037/08 UKEAT/0041/08 EAT/0606/07, [2009] IRLR 86, [2009] ICR 624) and/or in terms of its evaluation of the Claimant's contribution?

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The Claimant resists the appeal, relying on the reasoning provided by the ET.

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The Factual Background

The Respondent is described as a representative organisation that brings together key contractors and trade associations in the construction industry. At the relevant time it had some 15 permanent employees. The Claimant was employed by the Respondent in the part-time role of Finance Co-ordinator from 15 February 2016 until 18 April 2017.

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It was accepted before the ET that the Claimant is a disabled person for the purposes of the EqA by reason of the fact that she suffers from mental and psychiatric impairments, namely stress, depression, low mood and schizophrenia. It was not disputed that the Claimant had suffered from these impairments since 2008. More specifically, psychiatric reports written in 2015 detailed an extensive history of mental health problems, involving serious overdoses and self-harm, regular cannabis abuse, a period of in-patient psychiatric care in April 2015 and a diagnosis of emotionally unstable personality disorder and paranoid schizophrenia (see the ET at para 30).

7

Notwithstanding that history, the Claimant did not disclose any of her health issues to the Respondent when she commenced her employment. As the ET records:

> '31. Prior to the commencement of her employment the Claimant was asked to explain the 30.5 days' sickness absence recorded during the last year of her employment with her previous employer. She attributed the absences to knee surgery, back and neck injuries resulting from a car accident and incidental minor physical disorders. That answer was misleading, deliberately omitting any reference to her psychiatric conditions. On her own evidence (witness statement, para 11) she had taken six days' leave on account of "work-based stress".
>
> 32. Shortly after her employment began the Claimant was supplied with a form which included two "optional" questions (ie answering was optional): whether she had a physical or mental impairment which had a substantial and long-term adverse effect on her ability to carry out normal day to day activities and whether she had a disability which might require adjustments to enable her to fulfil the requirements of her job. She replied "no" to both.'

8

This failure of disclosure continued into the Claimant's employment with the Respondent; the ET recording:

> '33. During her time with the Respondents, the Claimant continued to experience severe mental health problems. As before, these tended to be aggravated when domestic and family difficulties (usually to do with housing difficulties or her son's behavioural issues) became particularly acute. On 24 March 2016, less than six weeks after joining the Respondents, she reported to her community psychiatric nurse that she had been made homeless two days earlier and believed she was on the verge of a breakdown. She received psychiatric care and medication was prescribed. Other crises followed intermittently.

> 34. Consistent with her misrepresentations on joining, the Claimant routinely attributed her sickness absences to physical ailments and, in her dealings with the Respondents, deliberately suppressed any mention of her mental health conditions. There was no sign that this was in dispute until she served her witness statement, which included the brand new assertion that she told Ms Angela Williams, the Respondents' Office Manager, in early March 2017 (by the end of her evidence that she had fixed the date at 1 March) that she had recently been admitted to hospital and was receiving in-patient psychiatric care. For reasons explained in our secondary findings below, we reject her evidence on that point and find that the alleged disclosure was not made.'

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All that said, it was common ground that the Claimant had a very poor attendance record during her employment with the Respondent: in the 14 months in question, she had some 85 days of unscheduled absence of which 52 were recorded as sick leave.

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The ET accepted the Respondent's evidence that it set considerable store by good attendance and timekeeping, that it needed a dependable presence in the role of Finance Co-ordinator and that, because the post holder interacted with other staff members, poor timekeeping in that position was likely to have an adverse impact on the effectiveness of the team as a whole.

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These were concerns duly raised with the Claimant, both informally and in the more formal setting of her probation review in May 2016 and the end of year appraisal in December 2016. Nevertheless, problems with the Claimant's timekeeping and attendance continued into 2017 and on 12 February she was signed off with low mood and she then remained away from work until 18 April 2017, the day of her dismissal.

12

On 20 February 2017, the Claimant wrote to the Respondent to explain her absence. Although she referred to problems with her son causing her to feel 'incredibly depressed' she did not refer to any clinical mental health condition, choosing instead to list various physical maladies, from which she said she was suffering. Moreover, although the Claimant was hospitalised for psychiatric care between 1 and 16 March 2017, she again did not inform the Respondent of that fact. In subsequent emails, she continued to provide

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information about various physical impairments but made no reference to any mental health problem.

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That said, as the ET found, by the date of the Claimant's dismissal on 18 April 2017, as well as knowing of the her absences from work, the Respondent had the following information:

> '4. By the date of dismissal, the Respondents had had sight of a GP certificate of 13 February referring to the Claimant's "low mood", a hospital certificate of 1 March, which stated that she was expected to be an in-patient for four weeks, and a further GP certificate dated 27 March 2017, citing "mental health and joint issues". Both GP

certificates declared her to be unfit for work for three weeks.'

14

When she did return to work on 18 April, the Claimant was slightly late and failed to provide evidence to corroborate what she said was the reason for that. The Respondent's Chief Executive met with the Claimant explaining that because she felt unable to depend on her – due to her poor attendance and timekeeping – she had decided the Claimant must be dismissed. That decision was confirmed by letter of 19 April 2017.

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The ET's Decision and Reasoning

Although the Respondent had conceded that the Claimant was a disabled person for EqA purposes, its knowledge of her disability was in issue. The ET accepted the Respondent's case that it had no actual knowledge of any form of mental illness or mental impairment, and it specifically rejected the Claimant's evidence that she had told the Respondent's office manager, Ms Williams, about her mental health issues (see the ET at para 45). Although the ET accepted that the Respondent had knowledge of the fact that the Claimant had faced a number of difficult personal and family circumstances, and that she had experienced stress and distress on occasions as a consequence, it concluded that: '*the weight of the evidence known to the Respondent's pointed to these symptoms being unremarkable and unsurprising reactions to problems in her life*' (ET para 46).

16

Turning then to the question of constructive knowledge – what the Respondent might reasonably have been expected to know – the ET reminded itself of the relevant statutory language and of the Code of Practice on Employment 2011 issued by the Equality and Human Rights Commission ('the Code'). In the circumstances of this case, the ET concluded that the Respondent *was* fixed with constructive knowledge, reasoning as follows:

> '48. For the purposes of our analysis, the key question is whether the Respondents had constructive knowledge on the date of the alleged unlawful act, namely the dismissal on 18 April 2017. We have recorded in our primary findings the recent information in the hands of the Respondents at the time of the dismissal. It included the GP certificates of 13 February and 27 March and the hospital certificate of 1 March. These materials, it seems to us, amounted to clear evidence that, over a period of more than two months up to the dismissal, during the entirety of which she was away from work, the Claimant experienced a significant deterioration in her mental state and there was a real question about her psychiatric health. We are mindful of the fact that any reasonableness test must take account of the relevant context, which must include consideration of the size and resources of the relevant employer. The corner shop is not to be judged by the standards of a multinational organisation. But the Respondents, although a small employer, are certainly not to be placed in the corner shop category. They run a sophisticated business, have significant resources at their disposal and benefit from a well-educated and well-informed leadership. The Claimant's silence on her mental health could not be taken as conclusive. It is notorious that mental health problems very often carry a stigma which discourages people from disclosing such matters, even to family or close friends. In the circumstances, we conclude that, by the time of the dismissal, it was incumbent upon the Respondents to enquire into the Claimant's mental well-being and that their failure to do so precludes them from denying that they ought to have known that she had the disability.'

17

Having thus found that the Respondent could not avoid liability under s 15 because of lack of knowledge, the ET went on to

consider whether it could nonetheless justify its dismissal of the Claimant (the unfavourable treatment in this case) because of, at least in part, something (her attendance) arising in consequence of her disability. The ET accepted that the Respondent had established a legitimate aim – ie to ensure that it maintained a reliable accounting function – the question was whether the dismissal amounted to a proportionate means of achieving that aim. The ET held that it was not, explaining its reasoning as follows:

> '49. As explained above, we use the term “justification” as a convenient shorthand. We have reminded ourselves of the wording of the 2010 Act, s 15(1)(b), which directs attention to whether the act complained of amounted to a proportionate means of achieving a legitimate aim. There was no dispute that the dismissal was intended to further the legitimate aim of ensuring that the Respondents maintained a reliable accounting function. As to the proportionate means part of the test, despite Mr Milsom's persuasive submissions, we are very clear that the Respondents fall well short of making out the statutory defence. In so far as they are material, our conclusions on the threshold knowledge issue are repeated. The Respondents did not comply with the Code of Practice. They did not hold a return to work meeting. They did not otherwise enquire into the Claimant's current health or her recent problems. They did not propose or moot the possibility of making a referral to OH or involving any other medical expert. Instead, what happened was that Ms Nichol took an intemperate and precipitate decision simply to sack the Claimant on the spot. That was anything but a proportionate thing to do and her action denied her the chance to make a balanced and informed decision. The Claimant's minimal lateness on 18 April 2017 and Ms Nichol's consequential irritation explain but do not begin to justify the drastic step of summary dismissal. There was no need whatsoever for her to act with such haste. Dismissal was plainly not a necessary measure in order to safeguard the legitimate aim which we have identified. Quite the contrary. In the circumstances, the s15 claim succeeds.'

18

Having thus found that the Claimant's claim under s 15 of the EqA had been made out, the ET turned to the question of compensation. In so doing, it reminded itself that any award must be assessed on the basis of the true loss suffered. Thus, if there was a realistic chance that, absent any discrimination, the Claimant would have been dismissed in any event, that possibility must be reflected in the computation of loss (see the guidance in *Abbey National plc v Chagger*, [2009] IRLR 86, [2009] ICR 624 EAT).

19

The ET explained the process it had followed in carrying out this assessment in this case:

> '50. We gave our oral adjudication on this part of the case in two stages. First, on the strength of the “liability” evidence alone, we held that there was a 50% chance that, but for the dismissal, the Claimant's employment would have ended without liability attaching to the Respondents no later than the second anniversary of her joining the company. We made it clear that this was a “long-stop” finding and that it was open to the Respondents to contend at

> the remedies stage for a further diminution in compensation for monetary loss under the *Chagger* principle, having regard to evidence given as part of the remedies hearing. Our purpose in announcing our “long-stop” finding was to give the parties the best chance of resolving what was left in the case at the earliest opportunity. Neither advocate challenged our approach.
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> 51. Having heard further evidence from the Claimant directed exclusively to remedy, together with additional submissions from both advocates, we gave our second *Chagger* adjudication. By that stage, as we have noted, the Claimant was not seeking compensation for monetary loss beyond the second anniversary of the commencement of her employment. Our ruling was that there was a 50% chance of the Claimant losing her employment without liability attaching to the Respondents no later than two weeks after her discharge from hospital in or about September 2017.

52. The consequence of our two adjudications taken with the Claimant's adjusted position on the period of loss claimed is that (subject to the question of contributory fault to which we will shortly turn) compensation for monetary loss should be awarded as to 100% until the appropriate date (14 days after discharge from hospital) and as to 50% from that date until 14 February 2018.'

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The ET then continued:

'53. Our reasons for our initial adjudication are as follows. The *Chagger* exercise here requires us to consider what would have happened if Ms Nichol had not acted in the intemperate way in which she did and had taken the proper course of seeking to enquire into the Claimant's health (in particular her mental health) and offered suitable support. We are satisfied that the Claimant would in those circumstances have acted as she has consistently over many years. She would have suppressed information concerning her mental health problems (current and historic) and would have insisted; consistent with the fact that her last GP certificate had expired, that she was fit and able to work normally. She would not have entertained any proposal for an OH referral or other medical examination which might have exposed the psychiatric history. We arrive at this finding with some confidence. No evidence has been put before us of her acting otherwise. Her reticence may be explained by the stigma of mental disability or by a lack of insight into her own condition (something mentioned in the psychiatric reports which we have seen), or both. Perhaps other factors are also at work. In the end, it is not for us to speculate. Nor is it for us to criticise, and our foregoing remarks should not be suggesting any reproach to the Claimant.

54. Faced with a denial of any residual medical problem, how would the Respondents have proceeded? We are satisfied that, acting reasonably and respecting her dignity and privacy (key considerations as the Code of Practice stresses) they would have felt constrained to leave the matter there. What would have been the upshot of the Claimant's return to work? We are in no doubt that, as before, the quality of her work would have remained high, but we are equally clear that further absences would have followed. Some (for surgery in the summer) had already been mentioned to the Respondents. But we are satisfied that other, unscheduled absences would also have arisen. The Claimant's domestic and family problems were likely to continue to lead to a further need for time away from work. And these problems would have been likely to exacerbate her vulnerable mental state and provoke relapses. In addition, she would have persisted in her habit of poor timekeeping, despite the importance which the Respondents attached to it. Unfortunately, as was apparent from the evidence before us, she appears even now to be unable to regard it as important. In summary, the attendance and timekeeping problems would not have been resolved and, doing the best we can, we concluded that there was a 50% chance that they would have resulted in her employment being terminated without liability attaching to the Respondents by the second anniversary of the commencement of her employment (the Respondents being aware that on that date she would acquire the statutory right to protection from unfair dismissal).

55. The reasons for our second *Chagger* adjudication are these. As already found, the absences and timekeeping problems would have persisted. Those absences included, but were not limited to the scheduled surgery during the summer. The next significant event was the hospitalisation of the Claimant in September. That resulted from a severe mental health episode which was associated with a new housing crisis. None of these problems can be attributed to the dismissal and, we find, all would have arisen as they in fact did, had the Claimant not been dismissed. This is not to say or suggest that she was not affected by the dismissal. On the contrary, as we will explain when addressing injury to feelings, we find that she was hit hard by the initial shock of losing her job and by the longer-term burden of finding herself unemployed. But these considerations do not bear materially upon the *Chagger* analysis. Here we find that the Claimant's position in the workplace would have been at severe risk by September owing to continuing absences and timekeeping problems. The absence from work in September would have been likely to result in the Respondents calling upon the Claimant on her return to justify the continuation of her employment. Acting fairly and reasonably, they would have made it clear the dismissal was now a real possibility. Faced with that harsh reality, she might have acted as before, suppressing any mention of her mental health problems. On the other hand; she might, realising her job was in extreme jeopardy, have faced up to the need to reveal her mental health background and problems. Had she taken the first course the Respondents would have been likely to terminate her employment on her return. Acting reasonably (our analysis assumes that they would have acted reasonably in all respects), they would have operated some sort of procedure involving a meeting on

notice to consider the continuation of her employment and would have paid her in lieu of notice. Any reasonable process would have been completed in two weeks. Had the Claimant disclosed her mental health problems, the Respondents, acting reasonably, would have taken advice, involved OH or other medical resources, considered reasonable adjustments and established a regime for managing her which took account of the fact (or at least, from their point of view, the real possibility) that she was entitled to protection as a disabled person. On this assumption, there is no reason to envisage the Claimant's employment terminating before the end of the period of loss which she claims.'

21

Having thus assessed the likely future loss suffered by the Claimant, the ET turned to the question of contributory conduct. It agreed that the Claimant had contributed to her dismissal by her poor timekeeping, which was not due to her disability, and – duly stepping back and considering compensation in the round – assessed her culpability in that regard as deserving of a 20% reduction in compensation.

22

The Relevant Legal Principles

Knowledge of disability

By s 15 of the EqA it is provided:

'15 Discrimination arising from disability

(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.'

23

In determining whether the employer had requisite knowledge for s 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(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 [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*]', 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.

24

Justification

Discrimination under s 15 of the EqA allows for objective justification on the part of the employer, see s 15(1)(b). This requires (1) a legitimate aim and (2) an objective balance between the discriminatory effects of the condition and the reasonable needs of the party who applies the condition, see Balcombe LJ in *Hampson v Department of Education and Science* [1989] IRLR 69, [1989] ICR 179 CA.

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As Baroness Hale further explained in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] IRLR 601 at para 20:

> 'It is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement … Some measures may simply be inappropriate to the aim in question … A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate …'

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In carrying out the relevant assessment the ET '*must have regard to the business needs of the employer*' see per Singh J (as he then was), at para 44 *Hensman v Ministry of Defence* (2014) UKEAT/0067/14, [2014] EqLR 670; that would include having regard to the size and resources of a particular employer.

27

Loss

The measure of loss in discrimination cases is tortious, see ss 124(6), 119(2)(a) and (3)(a) of the EqA. The objective for the ET is that – as best as money can do it – the complainant must be put in the position she would have been in but for the unlawful conduct, see *Ministry of Defence v Cannock and Others* [1994] ICR 918 EAT.

28

Where the relevant protected characteristic is not the *sole* reason for the unfavourable treatment in issue – where there is also a non-discriminatory reason for that treatment – that will be a relevant matter to which the ET will need to have regard when assessing loss, see the guidance laid down by Underhill J (as he then was) at paras 88 to 91 in *Abbey National plc v Chagger* [2009] ICR 624:

> '88. … the general rule governing compensation at common law, and regularly applied to claims in tort, was classically formulated by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, where he said:
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> 'where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.'
>
> What therefore is required is the comparison of the claimant's current position with what would have been his position if the wrong had not been done. The first step must be to define the wrong in question. … Dismissal is not itself a wrong: what renders it unlawful … is the discriminatory grounds on which it occurs. It is the discrimination which is the essence of the wrong. If that is the right characterisation, then the correct question is what would have happened if the claimant had not been *dis*

> *criminatorily* dismissed: that formulation plainly requires consideration of whether the same dismissal might have occurred but on legitimate grounds. …

89. … Despite the conceptual difference between unfair and discriminatory dismissal, they are alike to the extent that dismissal itself is not inherently unlawful and that it is only the additional vitiating factor – unfairness or discriminatory grounds – which renders it so. It would be unsatisfactory if there were a radically different approach to the assessment of compensation between the two situations.

90. … In order to establish liability in the case of common law torts where damage is a necessary part of the cause of action, a claimant only has to show that the alleged tortfeasor materially contributed to the damage in respect of which he claims, and not that his wrongful act was the only or main cause. There is of course a similar rule in cases of discrimination, though the label "material contribution" is not generally used. But that rule is not relevant to the different issue which arises here –namely whether in assessing compensation it is relevant to take into account the chance that the respondent might have caused the same damage lawfully if he had not done so on discriminatory grounds.

91. It might seem unattractive that a discriminator can reduce, and perhaps in some cases extinguish altogether, the compensation which he would otherwise have to pay by taking credit for potential legitimate grounds for his action when ex hypothesi his actual grounds were illegitimate. But the same objection might be taken to the rule in unfair dismissal cases: the answer in both cases is the same, namely that an award on ordinary compensatory principles requires the *Polkey* question to be asked. It will only assist the respondent if he is able to show that the victim would or might have been dismissed anyway – which will only be an available argument in a fairly limited class of cases (of which discriminatory selection for redundancy may be the most obvious example). In such cases it could equally be said to be unattractive that a claimant should make a "windfall" 100% recovery in circumstances where he was likely to be dismissed in any event, simply because his employer had – it may be subconsciously and only to a small extent – allowed himself to be influenced by discriminatory considerations. There is nothing in the statute to suggest that discrimination is to be treated as a specially heinous wrong to which special rules of compensation should apply.'

29

Submissions

The Respondent's case

Knowledge

The Respondent contends that 'reasonableness' under s 15(2) of the EqA has a purpose: to obtain knowledge. That has two consequences: (1) a procedural or consultative step would not be reasonable unless it led to a practical outcome (see *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664), and (2) a step cannot be regarded as reasonable if its effects are likely to be futile (see *Lancaster v TBWA Manchester* (2011) UKEAT/0460/10/DA, 14 June 2011 at paras 44–50). When assessing reasonableness '*the prospects of success in achieving the desired objective are to be weighted in the balance against the cost and difficulty of taking that step*' see per Lewison LJ in *Paulley v First Group plc* [2014] EWCA Civ 1573, [2015] 1 WLR 3384. By analogy with the approach to be adopted to the question of reasonable adjustments, it was not incumbent upon an employer to make every enquiry where there was little or no basis for so doing (*Ridout v TC 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). It would be insufficient for an ET to conclude that an employer has constructive knowledge merely on the basis that it has been put on notice by certain factors; the ET must go further and determine whether it was objectively reasonable to have made further enquiries as a result (see *Mutombo-Mpania v Angard Staffing Solutions Ltd* (2018) UKEATS/0002/18, 17 July 2018). More specifically, 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.

30

In the present case the ET had fixed the Respondent with constructive knowledge because it had failed to make certain enquiries. It also concluded, however, that – had the Respondent made those enquiries – the condition would not have revealed itself since the Claimant would have made a concerted effort to ensure it was not exposed; see the ET's findings on the assessment of loss at paras 53–54. That approach was unsustainable. If a proposed enquiry would not have yielded the requisite knowledge, it cannot have been reasonable to have had to make it. The ET had thereby erred in its approach to s 15(2); it could not be the function of s 15(2) to impose significant obligations and burdens on employers. Nor should an employer be required to impose itself upon an employee's concerted wish to suppress exposure of a health condition (in particular, a mental health condition). To determine otherwise would run counter to the requirement in the Code that investigations are conducted in accordance with dignity and privacy. At the heart of each of these concepts rested a respect for the individual's autonomy.

31

Justification

Justification is not concerned with process or procedure, but with the substance or practical outcome of the unfavourable treatment, see per Underhill J (as he then was) in *HM Prison Service v Johnson* [2007] IRLR 951 at para 114; as His Honour Judge Shanks observed at para 13 *Crime Reduction Initiatives v Lawrence* (2014) UKEAT/0319/13 '*purely procedural questions are irrelevant to dealing with justification*.'

32

The ET's analysis of justification in this case was overwhelmingly focused on two features: (1) the Respondent's failure to reasonably inform itself as to the Claimant's disability or to moot the prospect of an OH referral, and (2) the intemperate and precipitate nature of the decision to dismiss. Neither were legally relevant features in the way of justification, not least as the reason for the haste was not a disability related factor. Once those matters were stripped away it was apparent that the ET had failed to engage with the fundamental balancing exercise.

33

Loss

The question posed by *Chagger* was no more than a tool by which to grapple with a fundamental question: the extent to which the unlawful conduct causally contributed to loss. In the present case there were two discrete matters that had led to the Claimant's dismissal: lateness and attendance. The former was significant and not related to disability (see the ET at paras 36–40). Apportionment for loss was thus required at the outset to allow for this fact but the ET had failed to address this and instead awarded the Claimant for 100% of her losses. Moreover, the effect of the ET's findings had been that, despite the likelihood that the Claimant would have persisted in her poor timekeeping and continued unplanned absences (see the ET at para 54), there was nonetheless a 100% chance that the Claimant's employment would have continued for a further six months. That finding failed to have regard to the Respondent's legitimate needs and the fact that it intended to address timekeeping and attendance on the day in question (see para 27). It was also inconsistent with the ET's conclusions that

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such efforts would not have made any difference to the outcome (para 54), that the Claimant's absences and timekeeping problems would have persisted (para 55) and that, even had all reasonable efforts been made to discern the Claimant's condition, these would have yielded no results (para 54). These points went either to the ET's assessment under *Chagger* or to contribution.

34

The Claimant's Case

Knowledge

On behalf of the Claimant it is submitted that how an objective test of reasonableness is to be applied will always depend upon the particular statutory context. There was a real danger in attempting to read across on the use of the term reasonable in one statutory context to another. More specifically, the test of reasonableness for the purposes of s 15(2) was broader and different in effect to that in ss 20 and 21 of the EqA (reasonable adjustments).

35

More specifically, the ET had properly applied the test required under s 15(2) and had made permissible findings of fact with which the ET ought not to interfere, see *Donelien* in the EAT at paras 16, 17 and 29. It was important to have regard to the ET's findings of fact as a whole. Doing so, it was apparent that the ET had due regard to the size and the administrative resources of this Respondent and, although the ET had found that the Claimant would have continued to deny her mental health problems (see para 53), it was also possible to see that it felt that it was possible that – when faced with the likely termination of her employment – the Claimant would have decided to tell her employer about the true nature of her problems (para 55).

36

Justification

The Claimant takes issue with the proposition that only matters of substance rather than process can be considered as part of the exercise for determining justification. The correct approach had been summarised in the case of *Ali v Torrosian (t/a Bedford Hill Family Practice)* (2018) UKEAT/0029/18, 2 May 2018, in particular at para 15. It was for the ET to make findings of fact and thus for the ET to determine what was relevant and what were matters of substance and what matters of process (see para 21 *Ali v Torrosian*). In any case, it was apparent that the ET had not concerned itself with matters of process in a similar way to those described in *Crime Reductions Initiatives v Lawrence*. At para 49 the ET was dealing with matters of real substance and its conclusion – that the Respondent's action, in taking an unduly intemperate and precipitate decision, denied it the chance to make a balanced and informed decision – went plainly to the question whether it was reasonably necessary.

37

Loss

The reason for the unfavourable treatment for s 15 purposes did not have to be the only, or even the main, reason – merely an effective reason, see *Hall v Chief Constable of West Yorkshire Police* (2015) UKEAT/0057/15, [2015] IRLR 893 at para 42. Here, the ET was aware that there were two factors in the decision to dismiss – attendance and poor timekeeping – and it was common ground that the latter was not linked to disability. The ET permissibly considered that this was a matter that could be addressed at the remedy stage and the approach at that stage was analogous to that in relation to the *Polkey* assessment in unfair dismissal cases (as to which, see *Contract Bottling Ltd v Cave* (2014) UKEAT/100/14, [2015] ICR 146 EAT Langstaff J presiding). Although the Claimant acknowledged that the ET might have gone further in its reasoning, ultimately it had taken into account the timekeeping issue when assessing contributory fault and had reached a permissible view that this should be assessed at 20%.

38

Discussion and Conclusions

A Respondent will avoid the liability that would have otherwise arise under s 15 EqA if it can show that it did not know, and could not reasonably have been expected to know, of the complainant's disability. A finding that the Respondent does not have actual knowledge of the disability is thus not the end of the ET's task; it must then go on to consider whether the Respondent had what (for shorthand) is commonly called 'constructive knowledge'; that is, whether it could – applying a test of reasonableness – have been expected to know, not necessarily the Claimant's actual diagnosis, but of the facts that would demonstrate that she had a disability – that she was suffering a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.

39

As to what a Respondent could reasonably have been expected to know, that is a question for the ET to determine. The burden of proof is on the Respondent but the expectation is to be assessed in terms of what was reasonable; that, in turn, will depend on all the circumstances of the case.

40

In considering what might reasonably be expected of an employer for these purposes, I am wary of reading across from the approach adopted to test reasonableness in other statutory contexts. Save that the use of this term imports a common objective standard into the assessment, I consider that it is most helpful to see it in the context of the particular provision in question.

1815.4

41

Section 15(2) EqA is directed at the question of the employer's knowledge: where the employer does not have actual knowledge, what might it reasonably have been expected to have known? In the present case, the ET sought to answer that question in terms of what the Respondent might reasonably have been expected to do: that is, to have understood that mental health problems often carry a stigma, which discourages people from disclosing such matters and, therefore, to have made enquiries into the Claimant's mental wellbeing. That, however, does not answer the question as to what the Respondent might reasonably have been expected to know, after having made those enquiries.

1815.4

42

The ET had already found as a fact that the actual knowledge of the Respondent fell short of knowing anything more than that the Claimant had faced a number of difficult personal circumstances and had sometimes experienced stress as a consequence. Of itself, that did nothing more than suggest that she had suffered symptoms that could be seen as unremarkable and unsurprising reactions to life events. As the ET found, allowing for the difficulties that arise in relation to the disclosure of mental health problems (although also mindful of the need for respect for an employee's dignity, as highlighted in the Code), it might well have been better had the Respondent made further enquiries of the Claimant. That, however, is not the same as a finding that the Respondent could

reasonably have been expected to know of the Claimant's disability. That said, in the current case – as Mr Milsom has pointed out – the ET effectively went on to complete the answer to this question, when it later considered what would have happened if the Respondent had made the enquiries suggested of it. As the ET found, the Claimant would have continued to suppress information concerning her mental health problems; she would have insisted she was fit and able to work normally and would not have entertained any proposal for an Occupational Health referral or other medical examination that might have exposed her psychiatric history (see the ET at para 35). That being so, the complete answer to the s 15(2) question in this

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case could only have been that, even if the Respondent could reasonably have been expected to do more, it could not reasonably have been expected to have known of the Claimant's disability.

1815.4

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On this first ground of appeal, I therefore agree with the Respondent. The ET failed to apply the correct test, asking itself only what more might have been required of the Respondent in terms of process without asking what it might then reasonably have been expected to know. In this case, completing this exercise does not require me to engage in any exercise of substitution, still less to remit the case for further consideration. The ET's later findings provide the answer: taking the additional steps that the ET considered would have been reasonable would have taken the Respondent no further; it could not reasonably have known of the Claimant's disability.

44

Having thus upheld the Respondent's first ground of appeal that must mean that the Claimant's claim of disability discrimination fails. As such, it is unnecessary for me to deal with the other grounds of appeal, although in the interests of completeness I have gone on to do so.

45

On the question of justification, the parties agree that the relevant legal principles are summarised in the *Ali v Torrosian* case. In the present case, the ET accepted that the Respondent had a legitimate aim: ensuring that it had a reliable accounting function. The question was whether the Claimant's dismissal was a proportionate means of achieving that aim – whether it was appropriate and reasonably necessary.

46

For the Claimant, it is said that the intemperate and precipitate nature of the decision-making process meant that the Respondent could not show that the Claimant's dismissal was reasonably necessary. That might be a fair criticism in terms of the summary nature of the dismissal, but I think the Respondent is entitled to complain that this does not address the decision taken in a more general sense: the complaint was, after all, not limited to the fact that the dismissal had been without notice.

47

The question for the ET was whether terminating the Claimant's employment was a proportionate means of achieving the reliable accounting function the Respondent sought. This required the ET not only to look at the impact upon the Claimant but to balance that against the business needs of this employer.

48

As the ET acknowledged, this was a small employer, albeit with more resources than many, and it needed its Financial Co-ordinator to be a dependable presence. I do not think I can go so far as to say that, taking those factors into account (as the ET was required to do, see *Hensman*) would have resulted in a different decision, but I agree with the Respondent that the ET's reasoning does not demonstrate the necessary balance in this case. Had it been necessary, I would, therefore, have also upheld the Respondent's second ground of appeal.

49

Finally, turning to the question of loss, it is apparent that the ET was alive to the fact that the Claimant's dismissal was not solely for the disability-related reason of her attendance. The ET also accepted that the Claimant's timekeeping was an issue for the Respondent – punctuality in its organisation being a real priority. The ET did not, however, allow for any reduction in this respect when carrying out the initial task of assessing loss – that is, before considering the question of contribution. It did, however, take this matter into account when assessing that later question – that is, whether the Claimant had contributed to her dismissal – and it assessed that at 20%.

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In oral argument, Mr Milsom accepted that, on the facts of this case, it might have been open to the ET to approach its task in that way. He observed, however, that this might lead an ET into error in cases where the other, non-discriminatory, reason for dismissal could not lead to a finding of contributory fault. That might be so, but I am not persuaded that the ET in this case was wrong to adopt the course it did and I would not have upheld the appeal on this basis.

51

Thereafter, the Respondent's complaint is really as to the ET's assessment of the Claimant's losses, taking into account the risk that her employment could lawfully have been brought to an end in the near future. This, however, was a difficult issue to judge. The Respondent makes a good point that this was a small employer, with a very clear business need for a dependable Financial Co-ordinator, and – given the Claimant had less than two years' service – it might well be thought that the Respondent would have moved to dismiss rather more quickly than otherwise. These were, however, all factors to which the ET had regard in reaching its decision and I cannot say that its conclusion was impermissible. Ultimately, this part of the appeal is really put as a perversity challenge and I do not consider that the Respondent has met the high threshold that thus arises. Had it been necessary to determine the point, I would also not have upheld this ground of appeal.

52

Disposal

The appeal is allowed. The ET's Judgment in the Claimant's favour is set aside and is substituted with the finding that her claim of disability discrimination, contrary to s 15 of the EqA, is dismissed.