Neutral Citation Number: [2024] EAT 198

Case No: EA-2022-000924-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 December 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR P MEFFUL

Appellant

- and -

CITIZENS ADVICE MERTON AND LAMBETH LIMITED

Respondent

- -
- -

The Appellant in person
Mr R Kohanzad (instructed by Peninsula Business Service Ltd) for the **Respondent**

Hearing date: 22 October 2024

- -

JUDGMENT

SUMMARY

Disability Discrimination

The claimant in the employment tribunal was dismissed in 2012 for the given reason of redundancy arising out of a restructuring undertaken at a time when the respondent was potentially facing insolvency.

At a full merits hearing in 2017 the respondent conceded that the dismissal was unfair on the basis that the claimant should have been offered a particular role in the reorganised operation. Other complaints, including that he had been dismissed because of something arising from a disability of the shoulder (section 15 **Equality Act 2010**) were dismissed. The claimant then successfully appealed the dismissal of those complaints.

At a further hearing in 2020 the tribunal then upheld complaints of direct discrimination and under section 15. But an appeal by the respondent against those decisions then succeeded.

Upon further remission the tribunal decided in a further decision in 2022 to dismiss the section 13 and section 15 complaints. In particular the tribunal had found that the dismissal had been decided upon no later than 19 March 2022, although not implemented until August 2022. The section 15 complaint failed because, at the time when the dismissal was decided upon, the respondent had neither actual nor constructive notice of the claimant's disability; and in any event he was not dismissed because of something arising in consequence of his disability. The present appeal, which challenged those decisions in relation to the section 15 complaint, was dismissed. The tribunal had properly concluded, understanding and applying the law correctly, that an email in January 2022 referring to a hospital appointment for the shoulder problem, did not give the respondent actual or constructive knowledge of the disability at that time. It had also properly found that, in any event, the claimant invoking that appointment, as the reason why he could not attend a proposed meeting with which it clashed, did not materially influence the decision to dismiss. The tribunal made positive findings and did not err by failing to find that the burden had shifted, and not been discharged.

HIS HONOUR JUDGE AUERBACH:

Introduction and Litigation History

1. I will refer to the parties as they were in the employment tribunal, as claimant and respondent. In brief outline the history of this long-running litigation thus far is as follows.

2. The claimant was employed by the respondent from 2004. He was the specialist service manager and part of a three-person senior management team. He was dismissed with effect on 15 August 2012 for the given reason of redundancy following a restructuring process. He thereafter presented an employment tribunal claim challenging the dismissal as having been unfair by reason of a protected disclosure, alternatively ordinarily unfair, and as being conduct amounting to direct discrimination because of disability (section 13 **Equality Act 2010**) and/or victimisation (section 27).

3. At a preliminary hearing the tribunal found the claimant not to be disabled but he successfully appealed. At a further hearing the tribunal then found him to have been disabled by reference to a shoulder impairment and a hearing impairment. The claimant was also permitted to amend to add a complaint of discrimination arising from disability in relation to the dismissal. An application to add an individual respondent was refused, a decision which the claimant unsuccessfully appealed.

4. The matter then came to a full merits hearing before EJ Elliott, Ms Dengate and Ms Brown, sitting at London South in October 2017. The respondent conceded that the claimant had been ordinarily unfairly dismissed on the footing that he should have been offered the job of Business Manager in the restructured organisation, at least on a trial basis. In light of that concession the tribunal upheld the complaint of ordinary unfair dismissal on the basis that this was an unfair redundancy. The **Equality Act** complaints were dismissed.

5. An appeal by the claimant, challenging the tribunal's conclusion as to the reason for dismissal, and the dismissal of the **Equality Act** complaints, succeeded. The EAT remitted the matter to the tribunal to decide, in particular, who took the decision to dismiss, when it was taken, and why.

6. There was then a further hearing in January 2020 before the same tribunal panel as in October 2017. The tribunal's unanimous judgment was that the complaints "for unfair dismissal and disability discrimination" succeed. The tribunal found that the decision to dismiss was taken by the interim chief executive, Mr Davidson, not later than 19 March 2012, although his decision was not implemented until August 2012. The primary reason for dismissal was the view that the claimant "lacked capability and engagement, which the respondent did not wish to manage". Alternatively, the need to deal with a grievance raised in 2011, which was a protected act and a protected disclosure, was a further reason for dismissal. The discrimination complaints (sections 13 and 15) succeeded because the burden of proof had shifted to the respondent and it had failed to discharge the burden.

7. The respondent appealed. At a hearing in October 2021 Stacey J allowed the appeal in part, specifically in respect of the upholding of the section 13 and section 15 complaints. She concluded that what the tribunal had said in relation to the grievance was only an alternative finding if it was wrong in its conclusion as to the principal reason for dismissal. As she had concluded that the tribunal did not err in that conclusion as to the principal reason, the making of a protected disclosure could not also have been the principal reason, so the complaint of automatically unfair dismissal for that putative principal reason must now fall way. However, depending upon the tribunal's further conclusions upon remission, the victimisation complaint might then need to be further considered.

8. Stacey J's order set out the precise issues she remitted, and that she remitted them for consideration by the same tribunal panel if possible. The tribunal was to consider those issues drawing on its findings of fact in its 2017 and 2020 decisions, and without receiving any further evidence. Applications by both parties for review of the terms of Stacey J's order were, apart from the correction of a typo, refused by her in a further order.

9. There was then a further hearing before the same tribunal panel in April 2022. In a further reserved decision it dismissed all of the **Equality Act** complaints. The claimant appealed. At a

preliminary hearing, at which he was represented by counsel under the ELAAS scheme, limited amended grounds of appeal were directed to proceed to a full appeal hearing. These impinge only on the section 15 complaint relating to the dismissal. The claimant then applied to the Court of Appeal, seeking permission also to challenge the EAT's dismissal of other grounds relating to the dismissal of the direct discrimination and victimisation complaints, but that was refused by the single judge.

10. At the full appeal hearing before me the claimant, as he has done throughout, represented himself. Mr Kohanzad of counsel appeared for the respondent, as he did at the 2022 hearing before the tribunal. Both of them had put in written skeleton arguments before the appeal hearing. The claimant also tabled a further written skeleton in response to that of Mr Kohanzad, and I heard very full oral arguments from them both over the course of the hearing. In coming to my conclusions I have considered all the arguments that were presented to me on both sides.

The Factual Background – the Tribunal's Decision

11. I need to say a little more about the factual background, as found by the tribunal in its 2017 and 2020 decisions, the precise material issues that Stacey J remitted to the tribunal, and then the material parts of the tribunal's 2022 decision, which is the subject of the appeal that came before me.

12. In the 2017 and 2020 decisions the tribunal found that the respondent as an organisation began to get into difficulties in 2010. By late 2011 it had failed two out of three key audits, was in a financial crisis and was facing imminent administration or insolvency if it did not implement budgetary changes and carry out a restructure. In December 2011 the CEO went on sick leave and Mr Davidson was engaged as interim CEO "to implement a restructure to ensure greater compliance, accountability and efficiency". He remained in that role until the end of June 2012, the CEO having returned.

13. Shortly after his arrival Mr Davidson saw an email from the claimant requesting a pay rise on the basis that his responsibilities had increased following the departure of the Operations Manager and the substantive CEO going off sick.

14. On 10 January 2012 Mr Davidson emailed the claimant that he proposed to convene an interim SMT meeting on 18 January and asking "does 14.00 – 15.30 suit you?" The claimant replied that he had just received a hospital appointment for an ultrasound and MRI on his shoulder and neck, on the 18th at 3pm. He continued: "You may not be aware, but since May of last year I have had a constant unbearable discomfort that is constantly shooting pain from my neck into my left arm and shoulder; I am currently taking medication for this but the pain is constant and sometimes unbearable." He planned possibly to come in earlier on 18 January, but given the time he would need to travel to the appointment and back, he asked if the meeting could start earlier or be rescheduled to another day.

15. On 10 February 2012 Mr Davidson wrote to the claimant informing him of a proposed restructure, and enclosing a restructuring-proposal document and a question and answer document to help set the context. A response was sought by 24 February and the claimant was also informed of a meeting on the evening of Monday 27 February, to which all staff and officers were invited, at which Mr Davidson would present an overview and there would be an opportunity for questions. The claimant did not attend that meeting. It was his evidence to the tribunal that he did not do so because he had to hold the fort at the office. However, the respondent's witnesses' evidence was that the meeting had been held in the evening, and all branches closed, so that everyone could attend. The tribunal found as a fact that the claimant chose not to attend the meeting.

16. Following that meeting, on 9 March 2012 the Trustee Board Chair wrote to all staff that the restructuring would proceed. On the same date the claimant was sent a letter refusing his salary uplift request. The claimant attended a consultation meeting on 12 March 2012. The suggestions made by him included that he should be directly assimilated into the new post of Business Manager.

17. I do not need to set out in any detail what occurred in the following months. But I note that the claimant was off sick from 4 April until 9 July 2012, initially with his shoulder problem, and later also with a hearing problem. The redundancy consultation process in relation to him was suspended

during his sickness absence. But ultimately, although he was interviewed for it, he was not put in to the Business Manager role; and notice of his redundancy took effect on 15 August 2012.

18. In its 2020 decision the tribunal referred to an email from Mr Davidson to a Trustee, of 19 March 2012, that included the phrase "we lose PM in Apr". It found that the decision to dismiss the claimant had been made no later than 19 March 2012, by Mr Davidson, and that thereafter there was a strategy to move towards the claimant's dismissal, albeit delayed for a time by his sickness absence.

19. The tribunal also referred to a document entitled "PM – Redundancy Overview", prepared by Mr Davidson for a meeting of the Redundancy Panel on 28 May 2012. At [36] of the 2020 decision the tribunal said this about that document:

> "**Mr Davidson's Redundancy Overview document also said that they had not implemented an OH assessment for the claimant "on the basis that this could be misconstrued by PM". We could not understand how an OH assessment of a long term sick employee could be "misconstrued". It is a measure that is intended to be helpful to both parties. We find that the respondent and in particular Mr Davidson, as the line manager, did not do this because they did not wish to keep the claimant in employment. They did not wish him to take view and thus misconstrue their intentions, that they may need to make adjustments in order to retain him in employment. This underlines our finding that there was a "PM strategy" to dismiss him."**

20. Further on in the 2020 decision the tribunal found as follows:

> **"71. There was a PM Strategy towards dismissal. They chose not to refer him to OH because they did not wish to give the claimant the impression that they may be prepared to engage with reasonable adjustments and thus retain him. They did not wish him to "misconstrue" the referral. They did not intend to consider the extent to which his ill health and therefore his disability, may have impacted upon his performance or engagement. The reason the claimant was not engaging with the redundancy process was, as we have found above, because he was off sick with a disability related condition. We therefore find that the claimant's disability had a significant and substantial influence on the decision to dismiss. We therefore find that he was dismissed both because of his disability and because of something arising from his disability, namely his absence.**
>
> **72. In wider terms respondent did not wish to deal with the managerial issues raised by the claimant's continued employment, had he been allowed to trial and succeed in the new role. Those managerial issues also included his grievance which we found to be both a protected act and a protected disclosure. We find that the primary reason for the dismissal was their view that he lacked capability and engagement which they did not wish to manage, for example with an OH referral which we find was a disability related reason."**

21. In its appeal from the 2020 decision the respondent challenged the tribunal's conclusion that the dismissal had been decided upon by Mr Davidson no later than 19 March 2012. However, Stacey J held that the tribunal had been entitled to find that the decision was by then set in stone, and that everything that followed was a rubber stamp and mere implementation, not further decision-making. However, she upheld further grounds challenging the tribunal's reasoning in relation to the section 13 and section 15 complaints. In particular she said this:

> **"73. I agree with the respondent's submission that if one looks at the facts found pre-19 March 2012, it does not appear to sustain a conclusion of the dismissal decision being tainted with direct disability discrimination or s.15 discrimination. There is no connection in the tribunal's findings between the non-engagement and performance issues pre-19 March and disability. Although there is mention of a painful shoulder in January 2010 [*sic*], it is not linked to the failure to attend the all-staff meeting, the failure to provide feedback, or the assertion that there should be automatic slotting-in to the business manager role. Furthermore, it is also inconsistent with a claim for a temporary pay rise on the basis that the claimant is doing not only his own, but also the operation manager's, role.**
>
> **74. The respondent's submissions in the alternative ground relied on must prevail, because in the reasons in paragraphs 71 to 72, the disability findings are all based on the period from April to July 2012 when the claimant was not at work and after the dismissal decision had been taken.**
>
> **75. The respondent's challenge to those conclusions must succeed and the tribunal decision cannot stand. There was no evidence, or certainly no findings, to support the conclusion that there was disability related discrimination and direct discrimination in a decision made on 19 March 2012."**

22. In relation to the section 15 complaint Stacey J went on to hold that the tribunal had also overlooked to consider the justification defence.

23. In her order Stacey J remitted various matters to the same tribunal, directing it to consider them "on its findings of fact in its decisions of 2017 and 2020 without any further evidence". In her order she defined "the Primary Reason to Dismiss" as "Mr Davidson's view that the Claimant lacked capability and engagement which the Respondent did not want to manage." In relation to the section 15 complaint the remitted matters were expressed as follows:

> **"Whether the Primary Reason to Dismiss:**
> **(a) Arose in consequence of the Claimant's disability;**
> **(b) The date the Respondent knew or ought to have known of the Claimant's disability**

> **(c) Whether the Respondent has shown a proportionate means of achieving a legitimate aim."**

24. In his review application the claimant sought to have the remission widened beyond consideration of what had influenced the "Primary Reason to Dismiss"; but Stacey J refused that.

25. In its 2022 decision the tribunal identified the issues that had been remitted, noting that it had found that the primary reason for the decision to dismiss, taken by 19 March 2012, was that "the claimant lacked capability and engagement, which the respondent to did not wish to manage".

26. Under the main heading of "Our further findings of fact", there was first a sub-heading referring to knowledge of disability. I will set out that passage of the decision in full:

> "**47. Our findings at paragraphs 149-150 of the 2017 decision dealt with knowledge of disability. The respondent submitted that our findings said that knowledge arose on 31 May 2012 and the claimant submitted that the respondent's knowledge arose on 10 January 2012.**
>
> **48. In our 2017 decision we found that the claimant had made his symptoms clear to Mr Davidson and Mr Nicholas at a meeting on 9 July 2012, that he had a significant impairment in his shoulder that caused significant pain and resulted in long term sickness absence and was supported by sick notes. In 2017 we were supported in our finding by an email from Ms Bartlett dated 31 May 2012 in which she acknowledged that the claimant appeared to be saying that he had a disability. These findings predated [*sic*] the decision to dismiss so at this hearing we considered the extent of Mr Davidson's knowledge by 19 March 2012.**
>
> **49. The 10 January 2012 email from the claimant to Mr Davidson at page 273 said: "You may not be aware, since May of last year I have had a constant unbearable discomfort that is constantly shooting pain from my neck into my left arm and shoulder; I am currently taking medication for this but the pain is constant and sometimes unbearable."**
>
> **50. The majority decision of this tribunal (Ms Brown and Ms Dengate) was that the email of 10 January 2012 did not give Mr Davidson knowledge of disability. The majority decision was that the email did not put Mr Davidson on notice to the fact that the condition was long term. It had not lasted for a year and did not indicate to Mr Davidson that it was likely to last for 12 months or more. The majority decision was that the email did not show Mr Davidson that the condition had a substantial adverse effect on the claimant's ability to carry out normal day to day activities, because the claimant did not give any indication of what it did not permit him to do. Although the claimant said that the pain was sometimes unbearable, he gave no indication of what impact this had on him.**
>
> **51. The email said that he was going to an appointment and that he would be in to work a bit late that day. Other than the statement of the condition, the majority view was that Mr Davidson could not assume anything else about it and that this email did not give him constructive knowledge of disability. Mr Davidson and the claimant**

> **did not work at the same site and Mr Davidson had no way of observing the claimant on a day-to-day basis. The majority considered that the only purpose of the email was to inform Mr Davidson of his reason for being late in to work that day.**
>
> **52. By a majority, the decision of this tribunal is that the respondent did not have knowledge of disability by 19 March 2012.**
>
> **53. The minority decision (Employment Judge Elliott) was that the 10 January 2012 email was enough to give Mr Davidson constructive knowledge of disability. It informed Mr Davidson that the claimant had a physical impairment. It informed him that the condition was serious in that it caused him constant and unbearable pain which was being treated by medication. The minority view was that this was enough to inform Mr Davidson that the condition had a substantial adverse effect on the claimant's ability to carry out normal day to day activities because this is the result of being in unbearable pain. It had lasted 8 months and the claimant was attending hospital for an ultrasound/MRI scan and the minority view was that this was a substantial condition that had persisted for a number of months and on a balance of probabilities was likely to last 12 months or more.**
>
> **54. As to issue 2b as set out by the EAT, the majority decision is that our findings from 2017 paragraphs 149-150 stand and that the date of knowledge of disability was 31 May 2012. As such the claimant was not dismissed because of his disability."**

27. Under a sub-heading of "Discrimination arising from disability" came a further passage which, again, I will set out in full:

> **"55. We have considered whether the claimant was dismissed because of something arising from his disability. The majority decision was that the decision to dismiss was not because of something arising in consequence of the claimant's disability, because the respondent did not know and could not reasonably be expected to know by March 2012 that he was disabled.**
>
> **56. The minority view (Employment Judge) is that for the reasons stated above, the respondent ought reasonably to have known from the 10 January 2012 email that the claimant had the disability of his shoulder condition. The minority has gone on to consider whether the claimant was treated unfavourably because of something arising from his disability by dismissing him or selecting him for redundancy.**
>
> **57. The "something arising" from disability was put as the claimant's lengthy sickness absences and the need for time off for treatment. The claimant did not go off sick until 4 April 2012. This was after Mr Davidson made the decision to dismiss, so the decision predated any lengthy sickness absence and was not the reason for dismissal. The claimant was dismissed because of his lack of capability and his lack of engagement with the redundancy process. The EAT said at paragraph 73 "There is no connection in the tribunal's findings between the non-engagement and performance issues pre-19 March and disability" and that the shoulder condition was "not linked to the failure to attend the all-staff meeting, the failure to provide feedback, or the assertion that there should be automatic slotting-in to the business manager role."**
>
> **58. The minority decision does not depart from the original findings of fact. The claimant's position at this remitted hearing, at which witness evidence was not taken, was that he was "confused" when he gave evidence in 2017. This was when he told the tribunal that he did not go to the meeting on 27 February 2012 because he had to "hold the fort". He wished the tribunal to find that he did not go to that key**

> **redundancy consultation meeting because he had a medical appointment. We unanimously considered that this was the claimant seeking to amend or change his evidence. We declined to change the original unanimous finding of fact, based on the oral evidence in 2017. The unanimous finding of fact was that it was the claimant's choice not to attend that meeting.**
>
> **59. The minority view is that the fact that the claimant also did not attend a meeting on 18 January 2012 is not enough to displace the original findings of fact. There was no evidence to support the claimant's position that he was engaged with the redundancy process. All the evidence pointed in the opposite direction. Our unanimous finding is that the Primary Reason for Dismissal stands and that it was not tainted by discrimination arising from disability.**
>
> **60. We were not persuaded that documents produced post-dismissal informed us as to Mr Davidson's reasoning in March 2012. In any event we had no evidence to show us that the claimant had any interest in engaging with the redundancy process.**
>
> **61. For completeness and in order to deal with the questions remitted to us, we have considered, in the event that we are wrong about the above, whether dismissal was a proportionate means of achieving a legitimate aim. The claimant takes no issue with the legitimate aim, but complains about proportionality. The claimant's case is that he should have been slotted in to the Business Manager's role. It was conceded by the respondent that the claimant should have been offered this role (see paragraph 64 of our 2020 findings). Had the claim for discrimination arising from disability otherwise succeeded, we find that the respondent would not have succeeded on the objective justification defence."**

28. After some further findings pertinent to the victimisation claim, and the tribunal's self-direction as to the law, came a section headed "Conclusions". This opened with the following:

> **"84. Our starting point was that as per the decision of the EAT, our finding as to the Primary Reason for Dismissal stood. This was Mr Davidson's view that the claimant lacked capability and engagement, which the respondent did not wish to manage. As set out above we considered whether that decision was because of disability (section 13 Equality Act 2010).**
>
> **85. The view of the EAT, judgment paragraph 73, was that our findings of fact leading up to the decision to dismiss in March 2012, did not appear to sustain a conclusion of the dismissal decision being tainted with direct disability discrimination or discrimination arising from disability. The EAT said that although there had been mention in January 2012 of the claimant having a painful shoulder, it was not linked to his failure to attend the key meeting on 27 February 2012, the failure to provide feedback on the redundancy proposals or his assertion that he should have been slotted in to the Business Manager role without competitive selection.**
>
> **86. It was decided at a Preliminary Hearing before Employment Judge Hall-Smith on 9 June 2015 that the claimant was a disabled person at all material times by reason of an impairment of his left shoulder."**

29. The tribunal then set out its conclusions in turn in relation to the section 13, section 15 and section 27 complaints. In relation to the section 15 complaint they were expressed as follows:

> **"89. The majority decision is that the respondent did not have knowledge of and could not reasonably have been expected to have knowledge of disability by the date of the decision to dismiss in March 2012. By a majority the claim for discrimination arising from disability fails on this basis alone.**
>
> **90. Even if the respondent did have knowledge of disability, our unanimous finding would have been that the claimant was not dismissed because of something arising from his disability, namely lengthy sickness absence or medical appointments or treatment. Our Primary Reason for Dismissal stands and we find that the dismissal was not tainted by discrimination arising from disability.**
>
> **91. Had we been required to consider the objective justification test in section 15(1)(b) we would have found that this defence fails. The respondent conceded that the claimant should have been offered the Business Manager role and this was a more proportionate means of achieving their legitimate aim.**

The Law

30. Section 15 **Equality Act 2010** provides

> **"(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."**

31. Section 39 prohibits an employer from discriminating against an employee (including contrary to section 15) by dismissal. In relation to the concept of what lawyers call constructive knowledge referred to in section 15(2), in **A Ltd v Z** [2020] ICR 199 (EAT) HHJ Eady QC, as she then was, drew out a number of points from the previous authorities, including the following:

> "**(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 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.**
>
> **… …**
>
> **(5) The approach adopted to answering the question thus posed by section 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 TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).**
>
> **(7) Reasonableness, for the purposes of section 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."**

The Grounds of Appeal

32. The live grounds of appeal before me are amended grounds 1(a), (b) and (c), which relate to the issue of constructive knowledge of disability, and 5(b), which relates to the issue of whether the primary reason for dismissal was because of something arising in consequence of disability. As Mr Kohanzad correctly noted, in order to disturb the tribunal's decision to dismiss the section 15 complaint, the challenges to the tribunal's conclusions on both of those issues need to succeed, as the tribunal's conclusions on each of those issues was alone fatal to that complaint.

33. Ground 1, concerning "constructive knowledge of disability" focuses specifically on the shoulder impairment. The live parts of this ground contend, in summary, as follows.

34. Ground 1(a) contends that the majority's description, in [51], of the email of 10 January 2022 as stating that the claimant would be in to work late on 18 January 2022, was perverse. Ground 1(b) contends that the majority erred by failing to focus on the crucial question of whether the respondent did all that it could reasonably be expected to do, to find out whether the claimant was disabled, and by wrongly focussing on the claimant's purpose in writing that email, rather than on what the respondent should reasonably have understood from its contents. Ground 1(c) contends that the conclusion in the 2020 decision at [36] (see above) does not sit well with, or is inconsistent with, the conclusion in the 2022 decision that the respondent did not have knowledge or constructive knowledge of that disability by 19 March 2012.

35. Ground 5(b) is expressed as follows:

> "**The Tribunal set too high a hurdle and applied the wrong test when it stated at ‖59 [2022 Reasons] that "*the minority view is that the fact that the Claimant also did not attend a meeting of 18 January 2012 is not enough to displace the original findings of fact*". The Tribunal failed to determine whether the Claimant had established a prima facie case. It failed to ask itself *whether the Claimant had proved facts, on the totality of the evidence relied upon, from which the Tribunal could conclude in the absence of any other explanation that the Claimant's absence at the 18 January 2012 meeting, which was for a disability related reason, was (consciously or unconsciously) a reason in Mr Davidson's mind for subjecting the Claimant to the engineered redundancy dismissal*. Had the Tribunal asked itself the stated question, it would have become apparent to it, on the evidence and on its own findings of fact, that the Claimant had established a prima facie case to shift the burden of proof.**"

Discussion and Conclusions

36. I start with ground 1(a), (b) and (c).

37. The majority of the tribunal found at [50] that the contents of the email of 10 January 2012 did not impart actual knowledge of all the factual components of disability. Then, in the course of [51], they also stated that it did not give rise to constructive knowledge. Paragraph [51] should not be read in fragments or alone, but in the context of the decision as a whole. Looking at the decision as a whole, the findings at [51] are part of the tribunal's findings of fact, but they also to a degree foreshadow the conclusion which is to come in the concluding section of the decision later on.

38. That conclusion also followed the tribunal's self-direction as to the law, which included, at [77], specific citation of **A Ltd v Z**, and that the summary of legal principles which it contained had been approved by the Court of Appeal in **Sullivan v Bury Street Capital** [2021] EWCA Civ 1694; [2022] IRLR 15. It also highlighted, from **A Ltd v Z**, the point that "it is not incumbent on an employer to make every inquiry where there is little or no basis for doing so and must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the employee". Further, at [89] the majority conclusion was that the respondent "could not reasonably have been expected to have knowledge of disability", thereby showing again that the majority had on board the correct legal test. It should be assumed that the majority, having stated the law correctly, also applied it correctly, unless I am driven to conclude that they did not.

39. The first strand of ground 1 contends that it was simply factually wrong for the majority to say at the start of [51] that the email of 10 January 2022 indicated that the claimant would be "a bit late in to work" on 18 January 2012, and again at the end to refer to his reason for being "late in to work that day". That is because what he wrote was that he would have to take time out in the *middle* of the day for his hospital appointment, and would probably, for that reason, come in early.

40. But, as the opening words of [51] make clear, the material point of substance was that the email explained that the proposed time of the meeting would not work for the claimant, because it *clashed* with his hospital appointment, which meant that he would not be in the office at that time. That point would have been the same, had the proposed meeting time, and the appointment, both been first thing, in the middle of the working day, or at the end of the day. In so far as the tribunal erroneously placed the clash in the wrong part of the day, that was an error, but not one that was material, as such, to the issue of substance being considered. The point raised by ground 1(a) does not, itself, show that the tribunal's substantive reasoning was legally erroneous.

41. Turning to ground 1(b), the premise of this challenge is that the reference by the majority, in the final sentence of [51], to the purpose of the 10 January 2012 email shows that the tribunal applied the wrong legal test when considering the issue of constructive knowledge. I do not agree. First, it is entirely clear, reading paragraphs [50] and [51] as a whole, that the tribunal majority *did* consider the content of the email, both in relation to actual and constructive knowledge. In the course of [50] they explained why they considered that the content did not cover the factual ground in all the respects necessary to impart actual knowledge of disability. At [51] they then went on to consider what the email told Mr Davidson about the condition, and whether he might have been able to place that into a context of any wider knowledge or observations from working with the claimant.

42. Whether the putative discriminator ought reasonably to have taken steps to find out whether the employee might be disabled must also be judged having regard to *all* the relevant particular circumstances in the given case. I do not think it can be said that the purpose (or apparent purpose)

of the employee's communication, could never be a relevant circumstance or consideration. If, for example, an employee is plainly raising a condition with their employer, because it is affecting his ability to do his job, in a way that needs to be addressed, that fact might make it reasonably incumbent on the employer to investigate further. But in this case the majority's point was, it appears to me, that, on the face of it, the claimant was *only* referring to the condition in order to explain that he genuinely had an important clashing medical appointment which could not be put off, not by way of raising an issue about its impact on his ability to do his job, as such.

43. As Mr Kohanzad correctly submitted, the fact that the tribunal *minority* considered that this email *was* sufficient to give the respondent constructive notice does not by itself mean that the majority erred by coming to a different view. That is because this is a question of fact and evaluation, about which different members of a tribunal panel could properly disagree. I note, in this regard, that a further original strand of ground 1, to the effect that the majority's conclusion on constructive knowledge was, in the light of the contents of that email, perverse, was *not* permitted to proceed to the full appeal hearing that came before me. There was no live ground to the effect that the minority view was the *only* view that could properly have been taken.

44. Reading this passage as a whole, together with the tribunal's self-direction as to the law, and conclusions, I am therefore satisfied that, as well as the tribunal correctly directing itself as to the law, the majority did correctly apply the law and properly had regard to the content of the email and all the relevant circumstances. The reference in the final sentence of [51] to the purpose of the email does not show that they erred by applying the wrong legal approach.

45. Turning to ground 1(c), the claimant relies on the finding, at [36] of the 2020 decision, that the "PM – Redundancy Overview" document, to which the tribunal referred there, referred to a specific decision having been taken, not to refer him for an OH assessment. In light of that, the tribunal's conclusion, in the 2022 decision, that the respondent did not have constructive notice of his disability, is said to conflict with that earlier finding in the 2020 decision, and is said in that sense to

have been perverse. Extrapolating from the reasoning in **Gallop v Newport CC** [2013] EWCA 1583; [2014] IRLR 211 the claimant submitted that the respondent could not hide behind a deliberate decision not to seek an OH report.

46. However, the first difficulty which this strand of the challenge faces is that the "PM – Redundancy Overview" document was tabled for a meeting taking place on 28 May 2012, which was more than two months after the latest date of 19 March 2012 by which, it was found, Mr Davidson had taken the decision to dismiss. The issue for the tribunal was whether the respondent had actual or constructive knowledge at the time when that decision was taken, not at some later time.

47. However, the claimant contended that the May document should have been treated as casting light back on what Mr Davidson knew, or ought to have reasonably known, about him potentially being disabled, at that earlier time when Mr Davidson took his decision to dismiss.

48. As to that, to recap, the relevant chronology, as found by the tribunal, was this. Mr Davidson took the decision to dismiss, by, at the latest, 19 March 2012. Later, in April 2012, the claimant's period of extended sickness absence began. Later, at the end of May, at a time when the claimant continued to be off sick, Mr Davidson tabled the document referred to at [36] of the 2020 decision. As the tribunal wrote, just before paragraph [36], it found that this report included Mr Davidson's "comments on his sickness absence including ...".

49. That passage therefore focused on the respondent's consideration specifically of how to manage that ongoing sickness absence, against a backcloth in which, *before* that absence began, it had already been decided that the claimant was to be dismissed, and implementation of that decision had merely then been delayed on account of that absence. The sense of the discussion is that it was considered that there was, in those circumstances, no need to carry out an OH assessment to help manage the sickness absence; and that to do so might send the wrong signal as to the future.

50. Against that backcloth I do not think that the discussion at [36] of the 2020 decision carried

any necessary implication for what the tribunal might conclude as to whether Mr Davidson ought reasonably to have known, by 19 March 2012, that the claimant's shoulder condition amounted to a disability. The fact that the decision to dismiss had been taken, prior to the start of the sickness absence, provided part of the context for the later consideration, some weeks in to that sickness absence, of whether to seek an OH report. But I cannot see that it was inconsistent for that later document not to be regarded as casting light back on what Mr Davidson ought to have appreciated at that earlier point in time, prior to the sickness absence having begun, when he took his decision.

51. Finally, in relation to ground 1, the claimant argued that the issue of constructive knowledge should in fact have been regarded as settled by the 2017 decision. That was, he said, because, at [148] – [149] of that decision, the tribunal had recorded the respondent as conceding that, if the tribunal considered that knowledge of impairment was enough to amount to knowledge of the disability, then the latter was admitted, and that the tribunal agreed with that submission. However, as a matter of law, knowledge of the impairment *alone*, is not enough. Further, the issue expressly fell to be re-examined as a live issue in 2022 following the decision of Stacey J. So the tribunal did not, in 2022, err by failing to treat the issue as already having been decided in the claimant's favour.

52. For all of these reasons ground 1 fails. This means that the appeal overall must fail, because the majority's conclusion on lack of actual and constructive knowledge, at the relevant time, stands; and that conclusion was, alone, fatal to the section 15 complaint.

53. But, in case I am wrong in my conclusion on ground 1, I turn also to consider ground 5(b).

54. I start by observing that, although paragraphs [58] and [59] of the 2022 decision both start by referring to the minority decision or the minority view, each of those paragraphs goes on to set out, by the end of the paragraph, what the tribunal as a whole unanimously considered and concluded. This is also reinforced by reading these paragraphs together with paragraphs [84] and [89] – [91], which set out the tribunal's ultimate unanimous conclusions. Further, the unanimous finding of the

tribunal, at [59] and at [90], was that the primary reason for dismissal previously found stood, and that the claimant was not dismissed because of something arising from his disability, whether "lengthy sickness absence or medical appointments or treatment."

55. Because, following the decision of Stacey J, the focus had to be on the reasons for Mr Davidson's decision to dismiss, when he took it, the claimant could no longer rely on his later sickness absence as the "something arising" in consequence of disability. The focus of this ground is on his alternative case, that the decision to dismiss him was materially influenced, directly or indirectly, by medical appointments or treatment, which were something arising from disability.

56. One of the matters that the tribunal had previously found did influence Mr Davidson's view that there was lack of engagement on the part of the claimant, was that he had failed to attend the staff meeting on 27 February 2012. At [58] the tribunal referred to the claimant inviting the tribunal to find that his non-attendance at *that* meeting was because he had a medical appointment (which itself was on account of disability). The tribunal rejected that, unanimously, as an attempt by the claimant, at the 2022 hearing, to change his evidence, and declined to depart from its previous finding of fact that he had simply chosen not to attend that meeting.

57. The claimant, however, also sought to argue that the fact that he had raised, in his email of 10 January 2022, that his hospital appointment on 18 January 2012 gave him a difficulty with the proposed meeting that day, had *also* influenced Mr Davidson's decision to dismiss, so that his decision had, by this chain of reasoning, been influenced by something which arose in consequence of the claimant's disability, being his invoking that particular hospital appointment.

58. The claimant sought to rely in this regard on the tribunal's finding at [35] of the 2020 decision, that Mr Davidson's report for the May 2012 meeting set out criticisms of him, including of the claimant's "failure to engage with the redundancy process". The claimant referred to the specific submission he made to the tribunal in 2022, referred to at paragraph [34] of the 2022 decision, that:

> "**… it was clear from the Redundancy Overview document and the reference to [him] seeking "to isolate himself from the restructuring and his role the beginning of Jan '12" that Mr Davidson was of the view that the claimant was using his medical appointment of 18 January 2012 for this purpose. The claimant submitted that Mr Davidson's reference to "Jan '12" was a reference to [that] medical appointment … which arose in consequence of his disability…".**

59. The claimant contends by this ground of appeal that the tribunal erred because it should at least have considered that this passage in the May 2012 report was enough to shift the burden of proof to the respondent to show that Mr Davidson's decision had *not* been materially influenced by the claimant having invoked that hospital appointment in that email of 10 January 2012.

60. Mr Kohanzad's short answer to this ground is that it is established law, confirmed by the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37; [2012] ICR 1054, that the tribunal does not have to consider if the burden of proof has shifted, if it in any event feels able to, and does, make a positive finding as to the reason or reasons for the impugned conduct, which excludes the disability (in relation to a section 13 complaint) or the "something arising" relied upon (in relation to a section 15 complaint), as having had any influence, conscious or not, on the decision in question. He submitted that more recent decisions of the EAT, in particular **Field v Steve Pye & Co (KL) Ltd** [2022] IRLR 948, did not purport to, and could not have, changed the law in this regard.

61. In this case, submitted Mr Kohanzad, the tribunal had indeed made an earlier *positive* finding as to the primary reason for the decision to dismiss, the EAT (Stacey J) had then remitted the matter to the tribunal, to consider further whether *that* factual reason was, in turn, because of something which arose in consequence of disability; and the tribunal had, upon remission, in its 2022 decision, unanimously decided positively that the answer to that question was "no".

62. I agree with Mr Kohanzad about the law. In particular, the discussion in **Field** does not purport to, and could not, gainsay what the Supreme Court said in **Hewage**. But what the discussion in **Field** *does* point up is that, if the tribunal goes straight to the reason why, without considering a factual feature that might have shifted the burden of proof, it may risk failing to consider whether that

same factual feature could also have influenced its view as to whether the thing relied upon by the claimant could confidently be excluded as a material influencing factor on the decision in question.

63. In this case, however, the tribunal did not make any such error. My reasons are these.

64. First, as was identified in Stacey J's decision at [73], there were three particular factual matters found to have influenced the primary reason for dismissal, as reflected in its 2017 and 2020 reasons. These were: the claimant's failure to provide any feedback following the 10 February 2012 consultation letter, his choice not to attend the all-staff meeting on 27 February 2012, and his assertion that he should be automatically slotted in to the Business Manager role. What was *not* among the matters found to have influenced Mr Davidson, was the claimant having raised a problem with the proposed 18 January 2012 meeting on account of his hospital appointment. That episode did not feature in the tribunal's earlier decisions in the context of *this* issue – the reason for dismissal – at all. It only featured in the 2017 decision, by reference to what its significance might be as to the different issue, of knowledge or constructive knowledge of disability.

65. Secondly, I do not think the tribunal erred by not accepting the claimant's submission recorded at paragraph [34]. The tribunal was not bound to read the reference to "Jan 12" in Mr Davidson's report as showing that Mr Davidson's decision to dismiss was materially influenced by him taking the view that the claimant had specifically used his 18 January (disability-related) hospital appointment to isolate himself from the restructuring. The reference to "Jan 12" was not by itself bound to be read as referring specifically to the 10 January email relating to that proposed meeting.

66. The claimant argued in submissions on this ground that the tribunal should have regarded the proposed 18 January meeting as significant. The Operations Manager had left, and part of the purpose of the proposed meeting was for him and Mr Davidson, as members of the SMT, to discuss where matters were in relation to the restructuring. Mr Kohanzad noted, however, that the tribunal found that the specific process of consulting the claimant, as to the restructuring proposal and its

implications *for him*, was found by the tribunal to have begun with Mr Davidson's letter with attachments of 10 February 2012. But in any event, I do not think it can be said that it was perverse not to have regarded the May meeting document as clear evidence that Mr Davidson had been influenced, when dismissing the claimant, by his having indicated that he could not make the proposed meeting on 18 January on account of his hospital appointment.

67. The claimant also argued that the tribunal's reasoning was flawed, because, apart from his failure to attend the 27 February 2012 meeting, the other particular matters said to have informed Mr Davidson's view about non-engagement on the part of the claimant post-dated the decision to dismiss. However, the other particular matters found by the tribunal to have influenced that view, were the claimant's failure to provide feedback on the proposals set out in the 10 February 2012 letter and attachments, and his assertion at the 12 March 2012 meeting that he should be assimilated *automatically* into the Business Manager role. All of these occurred before 19 March 2012.

68. As Mr Kohanzad observed, Stacey J at [73] and [75] of her decision, noted the absence of any *findings* by the tribunal up to the point at which she was giving her decision, that these matters that influenced Mr Davidson's decision were linked to the shoulder disability. But, having regard to the role of the EAT, she, unsurprisingly, plainly felt that she was not in a position to say that there was certainly no *evidence* that had been presented to the tribunal at the previous hearings that could support a finding of such a link; and so she directed remission to the tribunal to consider the issue further on the basis of the *findings* it had previously made and (as she confirmed when making her second order refusing to review the scope of remission) the *evidence* it had previously received.

69. The claimant correctly submitted to me, as such, that therefore the tribunal needed, when reaching its further decision in 2022, to consider all the *relevant evidence* that had been presented thus far; and that it was therefore open to it to make further findings of fact, and thereupon draw further inferences, that might lead it to reach a different decision than it had done previously.

70. However, it is clear from the tribunal's 2022 decision that, on that basis, the claimant did indeed advance submissions to the tribunal in 2022 about features of its previous factual findings, in particular in the 2017 decision, and features of the *evidence* that the tribunal had previously received, on which he relied, and the *further* findings and conclusions that he invited the tribunal to reach.

71. But the tribunal then, in terms, in its 2022 decision, considered the position, specifically in relation to the proposed 18 January 2012 meeting, at [59], and stated in terms that it did not consider that the evidence supported the claimant's position, and indeed that the evidence pointed the other way. The claimant had also argued that certain other documents, though they post-dated the decision to dismiss, nevertheless cast light back on the reasons for that earlier decision. Again, it is clear from its decision that the tribunal had those submissions on board – in particular referring at [35] to the claimant's submission to that effect about an email that Mr Davidson later wrote on 26 June 2012 – but it rejected them in its conclusions at paragraph [60].

72. I do not agree that the statement at the start of [59] that the fact that the claimant did not attend the meeting on 18 January 2012 "was not enough to displace the original findings of fact", in so far as it paved the way for the unanimous finding at the end of [59], bespoke the tribunal making an error in relation to the burden of proof. The overall sense of the paragraph as a whole is that, *taking into consideration* the evidence about what had happened regarding the proposed 18 January meeting, the tribunal still considered that the *overall* evidence and facts still supported the positive conclusion that the primary reason for dismissal was, entirely, because of behaviour on the part of the claimant – as previously identified – that did not arise in consequence of the claimant's disability.

73. I therefore do not consider that the tribunal's failure to accept the claimant's submission as to how it should interpret the reference to "Jan 12" in the May Redundancy Overview document was perverse. Nor do I agree that the tribunal failed, in 2022, to consider the *evidence* that had previously been presented, and on which the claimant relied, when considering further the question of whether the primary reason for dismissal was, in the relevant legal sense, because of something arising in

consequence of disability. Nor do I consider that it erred in failing to consider that there was evidence relating to the proposed 18 January 2012 meeting which should have been regarded as shifting the burden of proof. The tribunal properly concluded that its previous positive findings as to the matters that had influenced the primary reason for dismissal stood, to the exclusion of the claimant's reason for not attending the proposed 18 January meeting also having been a material influence on it.

74. Finally, the claimant sought to argue before me that, as, in the section 15 context, the "something arising" does not need to be the principal reason for the treatment, the tribunal erred by not considering whether his stance in relation to the proposed 18 January meeting could have been a material influence on the decision to dismiss, *alongside* the primary reason for dismissal. However, the difficulty with that argument in this case is that Stacey J in terms confined the remission to the tribunal to the question of whether the primary reason for dismissal (as defined by the tribunal and by her) was because of something arising in consequence of disability; and she specifically rejected an application by the claimant for her to reconsider and wider the terms of remission beyond that. The tribunal did not err by adhering to that remit in terms of the scope of its own further decision.

75. Ground 5(b) of this appeal therefore also fails.

Outcome

76. For this appeal to succeed both ground 1 and ground 5 needed to succeed. Both have failed. The appeal is therefore dismissed.