WHEN CAN YOU BE FIXED WITH CONSTRUCTIVE KNOWLEDGE OF AN UNDECLARED AND HIDDEN DISABILITY? WHAT ARE YOU SUPPOSED TO KNOW?

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Introduction

1. The Equality Act 2010 (**the Act**) protects individuals from discrimination on the grounds of sex, race, disability, sexual orientation, religion, belief, age, pregnancy, maternity, gender reassignment and marriage or civil partnership. Disability is a protected characteristic which may be obvious (e.g. a person in a wheelchair) but which may also be invisible (e.g. a person with depression). Such conditions may become evident only in certain situations, or symptoms may be evident but not the cause. In this paper, I will refer to such conditions as "hidden disabilities".

2. Job applicants and employees are not obliged to notify an employer that they have a particular health condition.[1] The result is that employers may not always know when someone is disabled. This may arise where a job applicant does not disclose a hidden disability in response to a pre-employment health question, or where an employee develops a hidden disability during employment but does not update the employer. In addition, there may be cases where an individual does not disclose a hidden disability because they have not yet realised or acknowledged that they have such a condition or identified themselves as a disabled person.[2]

3. Hidden disability is dangerous terrain for employers. On the one hand they are rightly fearful about asking too many questions about an individual's health for fear of demonstrating prejudice against people with disabilities. On the other hand, turning a blind eye is a high-risk strategy because employers can be fixed with "constructive knowledge" of a disability even where they were not informed of it by the individual. Where constructive knowledge is fixed, employers may be liable for certain disability discrimination claims.

The definition of disability and examples of hidden disabilities

4. The Act contains the relevant provisions regarding disability discrimination in the workplace. The definition of disability contained in the Act does not necessarily correspond with other definitions or perceptions of disability.

5. In most cases, the relevant questions for establishing whether a person is disabled for the purposes of the Act are: [3]

    a. Does the person have a physical or mental **impairment**?

[1] However, concealment of a disability may defeat an argument that an employer should be fixed with constructive knowledge of the disability.
[2] The EHRC Employment Code of Practice 2011, paragraph 5.14.
[3] Certain conditions are automatically deemed to be disabilities without having to meet the different requirements of the definition of disability in the Act. These are: blindness; certain forms of sight impairment; severe disfigurement; cancer, HIV; and multiple sclerosis.

b. Does this have an **adverse effect** on their ability to carry out normal day-to-day activities?
c. Is the adverse effect **substantial**?
d. Is the adverse effect **long-term** (i.e. has lasted more than 12 months, or is likely to last more than 12 months)?

6. It is not necessary for the impairment to have a medically diagnosed cause, because it is the effect of the impairment that matters rather than the cause. There are various mental and physical impairments which may be regarded as hidden disabilities. Examples include, but are not limited to, the following:

a. depression, anxiety and other mental health conditions;
b. post-traumatic stress disorder (**PTSD**);
c. autism spectrum disorder and Asperger's syndrome;
d. obsessive compulsive disorder;
e. attention deficit hyperactivity disorder;
f. learning difficulties such as dyslexia, dyspraxia and dysgraphia;
g. chronic fatigue syndrome and ME;
h. HIV;
i. Crohn's disease;
j. asthma;
k. diabetes;
l. epilepsy;
m. lupus;
n. cystic fibrosis; and
o. rheumatoid arthritis.

7. Normal day-to-day activities are the things people do on a regular or daily basis, such as shopping, eating, reading, writing, walking, travelling and taking part in social activities. Deciding whether an impairment has an adverse effect on such activities is usually straightforward. The more difficult question will usually be whether that adverse effect is substantial. The Act simply says that "substantial" means more than minor or trivial.[4] Where it is not clear whether an adverse effect is more than minor or trivial, it will be necessary to consult additional guidance which sets out a number of factors to be considered, including the time taken to complete a task and the way in which it is carried out.[5] In most cases, medication or coping mechanisms which improve or hide the impact of a condition should be ignored – something which can make concealed disability particularly difficult to spot.

8. Importantly, an employer's knowledge of an individual's impairment (whether actual or constructive) is not relevant to the question of whether a person is, in fact, disabled under the Act. In ***Lawson v Virgin Atlantic Airways Ltd*** the Employment Appeal Tribunal (**EAT**) held that an employment tribunal had erred in considering the employer's knowledge of an employee's condition when deciding whether the impairment was sufficiently long-term.[6]

[4] Equality Act 2010, s 212.
[5] Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability.
[6] [2020] UKEAT 0192/19/1202.

What protection is afforded to disabled people under the Act?

9. The Act protects a wide range of individuals within the field of employment including job applicants, employees, former employees, workers and self-employed individuals, provided that their contract obliges them to perform the work personally. These individuals are protected from the following types of discriminatory conduct:

    a. **Direct disability discrimination:** this occurs where a disabled person is treated less favourably because of the disability itself.
    b. **Indirect disability discrimination:** this occurs where a provision, criterion or practice (**PCP**) applied by the employer puts disabled persons (and the individual) at a particular disadvantage and the PCP is not a proportionate means of achieving a legitimate aim.
    c. **Harassment relating to disability:** this occurs where a person is subjected to unwanted conduct related to a disability (their own or someone else's).
    d. **Victimisation:** this occurs where a person is subjected to detrimental treatment because they have done (or may do) "protected acts" such as complaining about disability discrimination, bringing a disability discrimination claim or getting involved in some way with another person's complaint or claim.
    e. **Discrimination arising from disability:** this occurs where a disabled person is treated unfavourably due to something arising as a consequence of their disability and the treatment is not a proportionate means of achieving a legitimate aim. This form of protection is only available to disabled individuals and does not apply to any of the other protected characteristics covered under the Act.

10. As well as prohibiting discriminatory conduct, the Act imposes a positive duty on employers to make reasonable adjustments for disabled people. The duty to make reasonable adjustments arises where a disabled person is substantially disadvantaged in comparison to non-disabled persons by either a PCP applied by the employer, a physical feature of the work premises or the absence of an auxiliary aid.[7] Where the duty arises, the employer must take such steps as are reasonable to remove or reduce the disadvantage. A failure to do so is discriminatory and gives rise to a claim for **failure to make reasonable adjustments** under the Act.[8] This form of protection is only available to disabled individuals and does not apply to any of the other protected characteristics covered by the Act.

Knowledge of a disability

11. An employer's liability for disability discrimination will, in some cases, turn on whether they have knowledge of the disability in the first place. Three different types of knowledge are relevant here: actual knowledge, imputed knowledge and constructive knowledge.

Actual knowledge and imputed knowledge

12. Simply put, actual knowledge is when an employer actually knows about an individual's disability, for example, because they have been told by that individual. Imputed

[7] Equality Act 2010, s 20.
[8] Equality Act 2010, s 21.

knowledge, on the other hand, arises when knowledge held by someone else is attributed to the employer. The EHRC Employment Code of Practice 2011 (**EHRC Code**) states that knowledge of an individual's disability held by the employer's employee (e.g. a member of human resources or a line manager) or agent (e.g. an occupational health adviser), will usually be imputed to the employer.[9]

13. However, it is worth noting that in ***Hartman v South Essex Mental Health Community Care NHS Trust*** the Court of Appeal held that if an individual discloses *confidential* information about their health to an employer's occupational health adviser, the employer will only be deemed to have knowledge of information which is actually passed on to them.[10] However, where an individual agrees that confidential information may be given to the employer then knowledge will be imputed, even if for some reason it is not passed on to them.

14. Knowledge will not be imputed to an employer if it is gained by a person providing services to the individual independently of the employer, even if the employer arranged for those services to be provided.[11]

Constructive knowledge

15. As discussed further below, liability for certain types of disability discrimination may arise where the employer does not have either actual or imputed knowledge of the disability, but where they *ought* to have known about the disability – this is known as "constructive knowledge". Although the Act does not impose an explicit duty on employers to enquire about an individual's disability or suspected disability, the EHRC Code makes it clear that an employer must take all reasonable steps to find out whether an individual has a disability.[12] There are three important elements to a finding of constructive knowledge.

16. First, constructive knowledge will not be fixed simply because an employer has failed to enquire into a possible disability. It is also necessary to establish *what* the employer might reasonably have been expected to know had it made such enquiries. For example, in ***A Ltd v Z*** the employee was dismissed because of her poor timekeeping and numerous sickness absences, which she explained by reference to various physical ailments but, in fact, were due to mental impairments, namely, stress, depression, low mood and schizophrenia, which amounted to a disability.[13] The employment tribunal found that the employer had constructive knowledge of the disability because it had received GP certificates and a hospital certificate highlighting issues about the employee's mental health, but had failed to make further enquiries before dismissing her. This was unreasonable and meant that they should be fixed with constructive knowledge. However, the EAT held that the tribunal had erred because it had not considered *what* the employer might reasonably have been expected to know had it made such enquiries. The tribunal had found that the employee would have continued to conceal information about her mental health problems, would have insisted that she was able to work normally and would

[9] The EHRC Employment Code of Practice 2011, paragraphs 5.17 and 6.21.
[10] [2005] IRLR 293.
[11] The EHRC Employment Code of Practice 2011, paragraphs 5.19 and 6.22.
[12] The EHRC Employment Code 2011, paragraphs 5.15 and 6.22.
[13] [2019] IRLR 952.

have rejected any medical examination that might have exposed her psychiatric history. Therefore, even if such enquiries had been made, the employer could not reasonably have been expected to know about the disability.

17. Second, the knowledge the employer ought to have had is knowledge of the facts relevant to the definition of disability (i.e. does the individual have a physical or mental impairment which has a substantial, adverse and long-term effect on normal day-to-day activities?). It does not matter whether the employer would have understood that these facts meant that the individual was disabled for the purposes of the Act.[14] Nor does it matter whether the employer knows the name of the actual condition. In ***Jennings v Barts and the London NHS Trust*** the employer's occupational health adviser told the employer that the employee was suffering from PTSD.[15] However, this was a misdiagnosis and it later emerged that the employee was suffering from paranoid personality disorder and severe depression. The employer argued that it could not reasonably have known the true nature of the employee's condition and, therefore, should not be fixed with constructive knowledge. The employment tribunal and the EAT disagreed, holding that if a wrong label is attached to a mental impairment, a later relabelling of that condition is not a new diagnosis made with the benefit of hindsight - it is the same mental impairment with a different name.

18. Third, the knowledge in question must have been present at the time the alleged discriminatory act (or omission) occurred. In cases involving one-off acts this is relatively straightforward, but it becomes more difficult where an act extends over time or there is a series of acts occurring over a period of time. In such circumstances, it is important for employers to keep the position under review. For example, in ***Baldeh v Churches Housing Association of Dudley and District Ltd*** a tribunal rejected the employee's discrimination claim on the basis that the employer did not have actual or constructive knowledge of her disability at the time it dismissed her.[16] However, the EAT ruled that the tribunal had erred in failing to make a finding about whether the employer had gained constructive knowledge of her disability by the time it had rejected her appeal against her dismissal (which formed part of her complaint).

19. Similarly, in ***Lamb v The Garrard Academy*** an employee raised a grievance about problems at work and went off sick. She submitted sick notes stating the reason for absence as reactive depression.[17] The employee argued that constructive knowledge of her disability applied from that point. The EAT disagreed, noting that the sick notes only covered short periods and it was reasonable to have expected the employee to recover once her grievance had been resolved. Accordingly, the employer had not failed to act with reasonable diligence at that point. However, four months later, the grievance process had not been completed and the employee remained off sick. The EAT said that a reasonable employer would have sought occupational health advice at that point and would almost certainly have been told that the employee was disabled. Constructive knowledge was fixed from the four-month point, which led to a finding of disability discrimination.

[14] *Gallop v Newport City Council*, [2013] EWCA Civ 1583.
[15] [2012] UKEAT 0056_12_0502.
[16] [2019] UKEAT 0290/18/1103.
[17] [2018] UKEAT 0042/18/1411.

How does an employer's knowledge of a disability affect liability for the different forms of discrimination?

Direct discrimination

20. In the case of direct disability discrimination, the disability itself must be the conscious or subconscious reason for the treatment. Therefore, knowledge of the disability is a necessary element of liability. This was confirmed in the case of ***Patel v Lloyds Pharmacy***, where an individual who suffered from bipolar disorder brought a direct discrimination claim on the basis that he had been interviewed for a promotion but had not obtained it.[18] The EAT struck out the claim, as there was no evidence that the employer had actual knowledge (or could be imputed with any knowledge) of the disability. In other words, if the employer does not have actual or imputed knowledge of the disability, it will not be possible for the individual to prove direct disability discrimination.

Indirect discrimination

21. Knowledge of an individual's disability is not required in indirect discrimination claims. An employer may be liable for indirect discrimination if a PCP causes disadvantage to disabled persons (and the particular individual), regardless of whether they knew, or should have known, about the disability. This principle was upheld in ***Bevan v Bridgend County Borough Council***, although the employee's damages were reduced by 20% due to her failure to speak up about her condition.[19]

Harassment

22. Knowledge of an individual's disability is not required in harassment claims. Harassment occurs where a person is subjected to unwanted conduct "related to" a disability (their own or another person's). Conduct will, therefore, be covered regardless of the reason for it, provided it has some connection with disability. Of course, this will cover harassing conduct that is meted out because of a known disability. However, other harassing conduct which is *not* on the grounds of an individual's disability will also be covered.

23. In ***Hartley v Foreign and Commonwealth Office Services*** the EAT held that a tribunal had failed to carry out the necessary analysis to decide whether comments made during an employee's performance improvement meeting were related to her Asperger's syndrome.[20] The EAT said that a tribunal must evaluate the evidence in the round and that the alleged harasser's knowledge (or perception) of the victim's disability was relevant but should not be viewed in any way as conclusive.

Victimisation

24. Knowledge of an individual's disability is not required in victimisation claims. The complaint is that the individual has been subjected to detrimental treatment because they have done, or may do, a protected act, not because they are disabled.

[18] [2013] UKEAT 0418/12/0602.
[19] [2014] EqLR 481.
[20] UKEAT 0033/15/2705.

Discrimination arising from disability

25. An employer will have a defence to a claim of discrimination arising from disability where they did not know, or could not reasonably have been expected to know, about the individual's disability. Therefore, the employer must show that they did not have either actual, imputed *or* constructive knowledge of the disability.

26. If such knowledge is established, it is irrelevant whether the employer was aware that the "something" which led to the unfavourable treatment was a consequence of the disability. This is discussed further below.

Failure to make reasonable adjustments

27. An employer will not infringe the duty to make reasonable adjustments if the employer did not know, or could not reasonably have been expected to know, that the individual had a disability *and* was likely to be placed at a substantial disadvantage. Therefore, to avoid liability the employer needs to show that they did not have actual, imputed *or* constructive knowledge of either the disability or the likelihood of substantial disadvantage (or both). This is discussed further below.

What must employers know for constructive knowledge to be fixed?

28. As discussed above, constructive knowledge is only relevant to two types of disability discrimination claim: discrimination arising from disability and failure to make reasonable adjustments claims. However, the knowledge required in these claims is slightly different.

Discrimination arising from disability

29. Constructive knowledge will be fixed where the employer ought to have known facts relating to the individual's disability at the relevant time. Importantly, it is not a defence for an employer say that they didn't know that the *"something"* which triggered the alleged unfavourable treatment arose out of the disability.

30. This was made clear in ***City of York Council v Grosset***.[21] The employee was a teacher who suffered from cystic fibrosis. His employer was aware of his condition and that it was a disability. The employee showed an 18-rated film to a class of 15-year-olds without the school's approval or the parents' consent. During the subsequent disciplinary proceedings, he accepted that his conduct was inappropriate but maintained his error in judgement was due to stress that was connected to his disability. The employer did not accept this explanation and dismissed him for gross misconduct. The employment tribunal upheld a claim for discrimination arising from disability. Although the school was unaware at the time it decided to dismiss that the misconduct was linked to his disability, there was, in fact, such a link. The Court of Appeal upheld the tribunal's decision, concluding that such claims involve a two-stage test:

[21] [2018] EWCA Civ 1105.

a. **Stage one:** did the employer treat the individual unfavourably because of "something"? The first stage applies a *subjective* test, requiring the tribunal to look at what was in the mind of the employer at the time of the treatment in question.
b. **Stage two:** if yes, did that "something" arise in consequence of the individual's disability? The second stage applies an *objective* test, requiring the tribunal to consider whether there was a causal link between the disability and the "something". There is nothing in the Act which requires the employer to have known at the time that the "something" arose in consequence of the disability.

31. In practice, this means that it would be wise for employers to pause to consider whether proposed negative treatment of an employee (e.g. disciplinary action or a performance improvement process) which is based on "something" (e.g. misconduct, poor performance or sickness absence) could potentially have arisen out of a disability. Where there is a possible link, it would be wise to obtain medical evidence on the point and whether any relevant reasonable adjustments should be made before taking action.

Failure to make reasonable adjustments

32. Again, constructive knowledge will be fixed where the employer ought to have known facts relating to the individual's disability at the relevant time. However, in order to succeed in a failure to make reasonable adjustments claim, it must also be shown that the employer ought to have known that the individual was *likely* to be placed at a substantial disadvantage by a PCP, a physical feature or lack of auxiliary aid.

33. This principle was underlined in ***Secretary of State for the Department of Work and Pensions v Alam***, where the EAT emphasised that the employment tribunal must consider two questions concerning the employer's knowledge.[22] First, did the employer *actually* know that the individual was disabled and was placed at a disadvantage due to the disability. If the answer to the first question is no, then the tribunal must ask whether the employer *ought to have known* that the individual was disabled and would be placed at a disadvantage due to the disability. If the answer to the second question is no, then the duty to make reasonable adjustments does not arise. If the answer to either question is yes, then the duty has arisen.

34. Consequently, it may be that despite knowing, or being fixed with knowledge, of an individual's disability, the employer does not know, and it is not reasonable to expect them to know, that a particular PCP, physical feature or lack of auxiliary aid would cause the individual a particular problem. This point was illustrated in ***Thomson v Newsquest (Herald & Times) Ltd***.[23] Here, the employer knew about an employee's mental illness and that this affected her ability to concentrate. However, the employment tribunal held that the employer could not reasonably be expected to have known that this caused her specific problems with opening letters (such that corresponding with her by post placed her at a significant disadvantage in a disciplinary process). Accordingly, the employer did not have the required knowledge and the duty to make reasonable adjustments had not arisen.

[22] [2009] UKEAT 0242_09_091.
[23] ET/121509/09.

How have the Courts and Tribunals approached the issue of constructive knowledge?

Cases where constructive knowledge was fixed

Presence of warning signs

35. In ***DWP v Hall*** the EAT held that an employer had constructive knowledge of a disability (a mental illness) where there had been a number of clear warning signs.[24] These included negative responses to a health declaration form and a refusal to allow the employer access to her medical records against a backdrop of volatile behaviour at work. These facts alone should have set alarm bells ringing for the employer. In addition, a manager and a member of HR knew that the employee had applied for disability tax credit but had made no further enquiries about her health.

36. In ***Donelien v Liberata UK Ltd*** the Court of Appeal held that constructive knowledge should *not* be fixed where an employee's numerous short-term sickness absences were attributable to an array of minor ailments (this case is discussed further below).[25] This would not ordinarily set alarm bells ringing about the possibility of disability. By contrast, sickness absence taken in longer blocks and/or for a single reason should usually be regarded as a warning sign and may mean it is reasonable for an employer to take steps to find out whether the employee is disabled.

Reliance upon inadequate occupational health advice

37. In ***Gallop v Newport City Council*** the Court of Appeal held that an employer had constructive knowledge of a disability where it had outsourced the question of disability status to an occupational health adviser and that advice was inadequate and incorrect.[26] The employee suffered from a stress-related condition and was off sick for extended periods of time. The employee's own GP had made a diagnosis of depression. Yet several occupational health assessments concluded that there was no sign of clinical depression and the individual was *"not covered"* by discrimination legislation. The Court of Appeal held that the key question was whether the employer had actual or constructive knowledge of facts relating to the employee's disability. The employer could not deny relevant knowledge by adopting, unquestioningly, occupational health advice. Here, the occupational health advice was inadequate in that it failed to address the different elements of the disability test. Instead, the employer should have made their own judgement on whether the employee was disabled, rather than "rubber stamping" the medical opinion.

Cases where constructive knowledge was not fixed

Failure to inform employer of possible disadvantage

38. In ***Ridout v TC Group*** the EAT refused to fix the employer with constructive knowledge of disadvantage (in a failure to make reasonable adjustments claim) where a disabled job

[24] [2005] UKEAT 0012/05/3108.
[25] [2018] EWCA Civ 129.
[26] [2013] EWCA Civ 1583.

applicant had not been specific enough about her needs.[27] The job applicant had indicated on a medical questionnaire that she had photosensitive epilepsy, which was controlled by medication. Her interview was held in a room lit by fluorescent lighting, which, unknown to the employer, could have triggered an epileptic attack. Upon entering the room, she expressed disquiet, but the interviewers understood this to be an explanation of why she might need to wear sunglasses during the interview (she was wearing a pair around her neck). In the end, she didn't need to wear the sunglasses, didn't experience any symptoms and didn't tell the employer that she felt disadvantaged during the interview. When she was not offered the job, she brought a claim alleging failure to make reasonable adjustments to the premises. The employment tribunal rejected the claim, holding that employers are expected to make reasonable enquiries based on the information they have, but they are not required to make every possible enquiry, especially where there was little or no basis for doing so. Here, the employer could not reasonably have known of the possible disadvantage to the job applicant unless she had specifically mentioned it, particularly given the rare nature of her disability. The EAT agreed with the tribunal, highlighting that *"…people must be taken very much on the basis of how they present themselves"*. In all the circumstances, the job applicant should have been more specific about her needs.

Failure to co-operate with the employer

39. In ***Middleton v Atlas Cleaning Ltd*** an employment tribunal refused to fix knowledge of a disability in circumstances where the employee had failed to comply with his contractual duty to keep in touch with his line manager about his absence and prognosis (following an accident in which he sustained a serious shoulder injury).[28] During a face-to-face meeting concerning other employment matters, the employee also failed to tell management that he was having ongoing difficulties which meant that he could not perform his job role. In addition, a manager had observed that the employee no longer required a sling and also learned that he was undertaking gardening work during his absence. In all the circumstances, the tribunal decided that the employer could not reasonably have known that the employee was disabled. It was also not reasonable to have expected them to take any further steps to supplement their knowledge at the relevant time.

40. In ***Cox v Essex County Fire and Rescue Service*** the EAT refused to fix constructive knowledge of a disability where an employee self-diagnosed a disability and refused to co-operate with the employer's enquiries.[29] The employee suffered an accident at work and began behaving inappropriately and aggressively towards colleagues. The employer referred him for an occupational assessment, which concluded that he was not disabled. The employee said that he did not need any management support and blocked the employer from accessing his medical records. Later, however, he alleged that the accident at work had triggered bipolar disorder. The employer had sight of the employee's psychiatrist's advice which only went as far as to say that the diagnosis of bipolar disorder was "under consideration". The employee was dismissed for threatening colleagues. After he was dismissed, he was diagnosed with bipolar disorder. The employment tribunal rejected a claim of failure to make reasonable adjustments on the basis that the employer

[27] [1998] IRLR 628, EAT.
[28] ET/2500128/16.
[29] [2013] UKEAT 0162/13/2810.

could not reasonably have been expected to know that he was disabled at the relevant time. The employer had acted with reasonable diligence and asked the right questions, but the employee had failed to comply with these enquiries and there was no definitive diagnosis at the point of dismissal. The EAT agreed with the tribunal, holding that all the employer knew at the relevant time was the employee's own assertion that he had bipolar disorder, which he had self-diagnosed.

Concealment of disability

41. In ***A Ltd v Z,*** the EAT refused to fix constructive knowledge of a disability where an employee would have concealed their disability in the face of an employer's enquiries.[30] This case is discussed further above.

Inadequate occupational health advice not relied upon

42. In ***Donelien v Liberata UK Ltd*** the Court of Appeal held that constructive knowledge of a disability should not be fixed where the occupational health advice was inadequate, but the employer's actions overall were reasonable.[31] Here, the employee had a poor absence record. The absences were attributable to a variety of conditions including hypertension, work-related stress, viral infections, dizziness, breathing difficulties, colds, wrist pain and stomach upsets. The employee was referred for an occupational health assessment and advice was sought on whether she was disabled. However, the report did not answer this question. The employer followed up with the occupational health provider to seek an answer to that question. A further report was provided by a different occupational health advisor who had not met with, or spoken to, the employee. The second report advised that the employee was not disabled, however, it failed to answer the specific questions the employer had raised (for example, whether there was any underlying medical condition which would explain the absences). The employer did not follow up on the second occupational health report. However, they had taken other steps relevant to the assessment of the employee's disability status, such as holding regular return to work meetings, having ongoing discussions with her, and corresponding with her GP. After her dismissal for persistent short-term absence, the employee claimed the employer failed to make reasonable adjustments for her.

43. The employment tribunal refused to fix constructive knowledge of the disability, holding that it was reasonable for the employer to conclude that the employee was not disabled on the basis of the facts before it at the time. In particular, it was unlikely that any of the medical problems were, or would have been, sufficiently long-term to qualify as a disability. Moreover, many of the absences were attributable to temporary illnesses such as colds. These would not normally set alarm bells ringing as to the possibility of a disability. Although the tribunal was critical of the quality of the occupational health advice, it was satisfied that the employer had not unquestioningly relied upon the advice and had done all it reasonably could to discover whether the employee had a disability. In other words, they had not made the same error as the employer in the ***Gallop*** case.

[30] [2019] IRLR 952.
[31] [2018] EWCA Civ 129.

44. The Court of Appeal upheld the decision, highlighting that the HR Manager's letters of instruction to the occupational health adviser had been accurate and the employer had sought clarification after the first report had been received. The Court also rejected the employee's argument that the fact that her manager had adjusted her hours of work meant the employer knew, or should have known, that she was disabled. The Court said an agreement to adjust working hours does not necessarily imply knowledge of a disability.

Conclusion

45. Constructive knowledge of a disability will be fixed on an employer where it would have known facts relevant to an individual's disability had it been reasonably diligent. As discussed above, in failure to make reasonable adjustment claims, employers must also know, or ought to know, about the likelihood of the disabled person suffering a substantial disadvantage. This requires a level of diligence from employers, but there are limits to the investigative steps that must be taken. It should be borne in mind that the test is one of reasonableness, not perfection.

46. Given the risks of being fixed with knowledge of a disability, it is prudent for employers to tackle the issue head on rather than turn a blind eye. This allows the employer either to know about a disability (and respond to that information in a lawful way) or be able to show that they acted with reasonable diligence (meaning that they should not be fixed with constructive knowledge at a later date). To this end, the following steps should be considered:

    a. **Investigate:** gather as much information as possible to understand the individual's health. This includes GP certificates, correspondence and notes of the employer's own interactions with the individual and notes of return to work meetings. It is advisable to reflect on this at an early stage and keep the position under review. This is especially the case where you are considering taking action against someone for something that may be caused by disability as once you are aware of "the something", you are already fixed with knowledge whether or not you know of the disability. So, you might as well understand if they have a disability so you can appreciate whether or not there are legal risks to navigate.

    b. **Decide when to obtain specialist advice:** consider carefully when its right to obtain specialist occupational health advice. Depending on facts, it may be appropriate to wait, but the position should be kept under review. Over time, the individual's condition may evolve from one which does not meet the disability test, to one that does.

    c. **Give clear instructions when seeking specialist advice:** when instructing specialist advisers, take care to summarise accurately the knowledge of the individual's health and ask the adviser to provide a view on whether the individual is disabled by reference to the different elements of the disability test in the Act.

    d. **Follow up where necessary:** where the specialist advice is imprecise, incomplete or contradicts other evidence, this should be followed up and further advice sought.

Crucially, occupational health reports should not be viewed as determinative, but should be treated as part of the overall picture.

e. **Be pragmatic and don't be afraid to make adjustments**: making adjustments will not be viewed as a concession of knowledge of disability and may help to resolve the issue in hand. Where you have information which suggests the individual may be disabled, it would be sensible proactively to address the issue of adjustments.

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