Appeal No: UKEATS/002/18/JW
Appeal No: At the Tribunal
On 17 July 2018
At 10:30am

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

FRANCIS MUTOMBO-MPANIA APPELLANT

ANGARD STAFFING SOLUTIONS LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	In person
For the Respondent	Mr A Gibson Solicitor Morton Fraser LLP 145 St Vincent Street Glasgow

SUMMARY

DISABILITY DISCRIMINATION

The Employment Tribunal found that the claimant, who suffered from essential hypertension but had advised his employer the respondent that he had no disability, was not, on the evidence led a disabled person and that the respondent did not know and could not reasonably have been expected to know of any disability.

On the claimant's appeal, held :-

(1) That the claimant had failed to lead evidence of what particular day to day activities would be affected by his condition. It was not in dispute that working night shift could be a normal day to day activity (Chief Constable of Dumfries & Galloway Constabulary v Adams UKEAT/0046/08) but that did not assist the claimant in the absence of evidence of what he found difficult or couldn't do as a result of his admitted impairment. The Tribunal had correctly concluded that he had failed to discharge the burden of proof on him to do so, and

(2) In any event, even had the claimant proved that he was disabled, the Tribunal's conclusion on constructive knowledge was one that it was entitled to reach, having balanced the relevant factors for and against such knowledge and finding that such evidence as there was supporting constructive knowledge was insufficient to draw the necessary inference.

Appeal dismissed.

Introduction

1. The claimant commenced employment as a flexible resourcing employee with the respondent, which supplies, flexible, casual staff to the Royal Mail Group, on 17 November 2015. Issues arose following his non-attendance at work on four occasions between 21 November and 15 December 2016 and he was advised that his services would no longer be required. He raised proceedings in the Employment Tribunal making a number of claims. One of those was a claim of disability discrimination. A preliminary hearing took place to determine whether the claimant is a disabled person within the meaning of the Equality Act 2010 ("EA 2010"). The Tribunal (Employment Judge L Wiseman) found that the claimant is not a disabled person and that in any event the respondent did not know and could not have reasonably have known of his disability. That decision is the subject of this appeal. Both before the Tribunal and on appeal the claimant represented himself. He was assisted by an interpreter. While the claimant's spoken English is proficient, he relied on the interpreter where he could not call to mind a particular expression or where he wanted to relay a more complex thought. The respondent was represented on both occasions by Mr A Gibson Solicitor. I will refer to the parties as claimant and respondent as they were in the Tribunal below.

The Tribunal's Judgment

2. In so far as relevant to this appeal the Tribunal made the following findings in fact:-

> **"8. The claimant completed the respondent's recruitment process, which included Completion of an Application Form (page 90). The claimant indicated on that form that he did not consider himself to have any form of disability."**
>
> **"9. The claimant also completed a form entitled Your Health (page 105), the purpose of which was to record his particulars should a referral need to made to occupational health regarding any health concerns or adjustments."**

"10. The claimant was employed with the respondent as a Flexible Resourcing Employee from 17 November 2015."

"11. The claimant's Statement of Terms and Conditions of Employment was produced at page 58."

"12. The Statement of Terms and Conditions included a clause regarding Hours of Work, which provided that there were no normal hours of work and that hours of work would vary according to the needs of Angard and the availability of work. The procedure for work was that the respondent would send a text message offering hours of work, and the claimant would respond if he wished to accept that offer of work. The procedure for work was that the respondent would sent a text message offering hours of work, and the claimant would respond if he wished to accept that offer of work. There was no obligation to offer work or to accept it".

"13. There was also a clause regarding Sick Absence, which provided that if a person was absent through sickness or injury during an Engagement (that is, a shift at Royal Mail), there was a requirement to notify the respondent by telephone as soon as possible of this and the likely duration of absence. "Ideally this should be before the start of duty, and must be no later than the first day of absence." All absences were required to be covered by appropriate certification (being a self- certification for absences of up to seven days, and a doctor's certificate for absences of more than seven days)."

"14. The claimant, in the period to November 2015 to November 2016, had worked on a back (or late) shift which involved finishing at 10pm".

"15. The Glasgow Mail Centre informed the respondent of a requirement to move to night shift working in the run up to Christmas 2016. The claimant was offered and accepted a night shift booking for 21 November until 13 January 2017."

"16. The claimant emailed the respondent on November 2016 (claimant's page 6) in the following terms:-

> **"I am writing to let you know of an issue. I have always been in the late shift at Glasgow Mail Centre working shifts finishing at 10pm. However, in the last two weeks, it is look like that my name is in the night shift list.**
>
> **I am writing to advise that my health condition does not allow me to work regular night shifts. Can you remove my name in the night shift list and take it back in the late shift as usual please."**

"17. The claimant received a response later the same day, asking if he would like to book in for the 17.30 – 22.00 shifts instead."

"18. The claimant responded stating he would like to be booked for that shift or any shift finishing at 10pm, and that he would like Christmas shifts."

"19. The claimant received an email on Monday 14 November (page 9) confirming his shifts had been changed for that week to 17.30 – 22.00, staring from that day until Friday".

"20. The claimant emailed again on Thursday 17 November (page 10) in the following terms:-

> **"I am writing to request a clarification about my Christmas shifts. In fact, I was already booked to work Christmas night shifts 10pm – 6am starting Monday 21st November until the 13 January 2017. The problem was that my health condition does not allow me to work regular night shifts, that is why I asked you if you can change my night shifts bookings into day shifts (any one finishing at 10pm).**
>
> **You have sent me an email confirming that you have changed my might shifts to late shifts 5.30pm until 10pm only for this week ending 18 November. You have told me nothing about my christmas night shifts booking.**
>
> **Can you clarify me about my Christmas night shifts as I was already booked for night shifts 10pm until 6am whereas I asked you to change this to late shifts as my health condition does not allow me to do regular night shifts please."**

"21. The claimant failed to attend for work on four occasions between 21 November and 15 December 2016. The Glasgow Mail Centre contacted the respondent to inform them they did not wish the claimant to return to work for them".

"22. The claimant was notified of this on 15 December. The claimant emailed the respondent on 15 December in the following terms:

> **"I am writing regarding a call I have got today letting me know that I am removed from the Glasgow Mail Centre list and I cannot get any more work, that because I did not attend work last night shift. The first think I would like to say is sorry for not attending last night shift. That was because of my health condition that I did not attend. Remember that I told you my health condition cannot allow me to work permanently night shift and I have ask to be retransferred to day shift as before, but you did not. Remember as well that I never asked before to be transferred from day shifts to night shifts, you did that unilaterally without my consent.**

> **Now because I am working more night shifts, and that sometimes my health condition does not follow the rhythm, you are removing me from the job. I thinks that this is not fair because I told you in advance that permanent night shift will affect sometimes my health condition and that the best time for me to work is day shift…….”**

“23. The claimant has Essential Hypertension. This was first diagnosed in March 2011. The claimant’s Doctor, in a letter dated 20 March 2017 (claimant’s documents page 1) confirmed this diagnosis and confirmed the claimant was current prescribed medication which he had to continue to take in order to prevent risks associated with untreated hypertension.”

“24. The claimant takes Amlodipine and Lisinopril tablets daily.”

“25. The claimant’s blood pressure is permanently high and he suffers from lack of energy, headaches, fatigue, dizziness, breathing difficulties and lack of confidence.”

“26. The claimant would, without the benefit of the medication, suffer a worsening of his symptoms and he would be exposed to greater risk of a heart attack.”

3.The relevant parts on the Tribunal’s reasoning on the issues for determination are as follows:-

“49. The claimant provided no evidence regarding the impact of the physical impairment on his ability to carry out normal day to day activities. He made no reference to any day to day activities. There was no evidence to suggest what normal day to day activities were affected by having essential hypertension.”

“50. The burden of proof is on the claimant to show, through his evidence or the production of medical evidence, that the effects of having essential hypertension have a substantial adverse effect on his ability to carry out normal day to day activities. It is for the claimant to provide evidence of what activities are impacted and to explain in what way. The claimant simply gave no insight into any limitations on his day to day activities cause by the physical impairment of essential hypertension”

“51. The only matter referred to was a desire not to work regular night shift. The claimant offered no explanation regarding the impact working regular night shift had on him and/or why this was caused by his impairment.”

“52. I had to conclude that he claimant had not discharged the burden of proof: he had not shown his physical impairment had a substantial adverse impact on his ability to carry out normal day to day activities”.

"53. I next considered the question whether, if the claimant had established he was a disabled person, the respondent knew, or could reasonably have been expected to know, the claimant had a disability. I, in considering this matter, accepted Mr Gibson's submission, that the starting point was the application form completed by the claimant. The form asked the question: 'do you consider yourself to have a disability?' and the claimant responded 'no'. The claimant explained he had answered the question in the negative because he had thought it relevant at the time. Mr Gibson challenged that response on the basis the claimant knew it was a 24 hour operation. I did not consider the matter was clear-cut. I did not gain any impression the claimant was trying to mislead the respondent because he may have been unaware of the effect of regular night shift working on his condition. I considered the material fact to be that the claimant had an opportunity to inform he respondent of his health condition, and he not do so."

"54. The second point I noted was that he claimant completed a Health Form for occupational health referral purposes. The information on the form makes clear that a referral may be made if there are health concerns or if reasonable adjustments are required. The claimant did not take this opportunity to make the respondent aware of his condition."

"55. The third point I noted was that the claimant worked for a year during which time he was offered and accepted work, and undertook mainly late shifts which finished at 10pm."

"56. I concluded, having had regard to these three points, that the respondent had no express knowledge of the claimant's condition."

"57. I next had to consider whether the respondent had constructive knowledge of the claimant's disability. A Tribunal may conclude an employer had constructive knowledge of the disability based on facts apparent to the employer during the employment of the claimant. For example, in the case of Department Work and Pensions v Hall EAT 0012/05 the Tribunal found the employer had constructive knowledge of an employees' psychiatric condition based on the fact the employee had refused to answer questions about ill health and disability before starting her job; the respondent had been aware of unusual behaviour including verbal alterations with colleagues and the respondent had been aware of the employee's claim for disabled person's tax credit".

"58. The claimant, in this case, first made mention of a "health condition" in his emails to the respondent on 11 November 2016 (page 6 of the claimant's documents) and 17 November 2016 (page 10). The claimant, in each of those emails, referred to his "health condition" not allowing him to work on four occasions up to and including 15 December."

"59. There was a dispute between the claimant and the respondent regarding whether he had contacted the respondent to inform them of his non attendance. I did not consider this to be a material dispute in circumstances where there was no suggestion by the claimant that he had, in addition to phoning in to advise of his absence, provided the respondent with information

regarding his health. The dispute regarding whether he made contact or not was not, therefore, material."

"60. I did however note the claimant did not provide a self-certificate for the days' absence."

"61. I asked myself whether the reference to "health condition" and the fact of four odd day's absence was sufficient to infer constructive knowledge of disability on the part of the respondent. I concluded those circumstances should have put the respondent on notice to make further enquiries to ascertain information and gain an understanding of the "health condition" and its impact on the claimant's availability for work. However, I did not consider those circumstances sufficient, particularly given the fact the claimant had worked night shift and had accepted a block booking to work night shift from 21 November to 13 January to infer constructive knowledge of disability."

The Claimant's Arguments on Appeal

4.The claimant presented two discrete arguments on appeal, while acknowledging that the second would become relevant only if the first was successful. First, he contended that the Employment Judge erred in failing to take account of the available evidence provided by him about the effect working night shift had on his health and so erred in concluding that he was not disabled. The claimant contended that the Employment Judge had failed to look carefully at what he had said in his ET1 about his disability, contrary to the guidance given by the EAT in **Goodwin v The Patent Office [1999] ICR302** at page 6, paragraph 1. In any event, the claimant's main argument was that paragraph 49 of the Judgment illustrated that the Tribunal had failed to consider that working night shift can be regarded as a normal day to day activity in the disability context and this had led to the error in the Judge's conclusion. The case of **Chief Constable of Dumfries and Galloway Constabulary v Adams [2009] ICR1034** was relied on in support of the proposition that working night shift could be considered to be a normal working day to day activity in this context. The claimant's position was that the Employment Judge had failed to

acknowledge that proposition and so had erred and that this was sufficient to justify interference with the decision.

5.The claimant submitted that there had been evidence that he could only work night shifts "with extreme difficulty" due to his impairment of essential hypertension. He relied, in particular, on paragraph 6 of the ET1 and paragraphs 6, 17 and 30 of the witness statement that was before the Tribunal. Paragraph 6 of the statement referred to the claimant's blood pressure being permanently high and listed as "adverse effects" that happened to him, lack of energy, strong headache, tiredness, dizziness, breathing difficulty, lack of confidence and possibility of heart attack. Paragraph 17 of the statement linked those "adverse effects" to his regularly working night shifts amongst other things. Further, the claimant submitted that the Tribunal ought to have approached matters by concentrating on what the claimant could not do or could only do with difficulty rather than on the things he could do. In support of that proposition he relied on the case of **Leonard v South Derbyshire Chamber of Commerce [2001] IRLR19** at paragraph 27. He contended that the references in the Judgement to his being able to work late shifts and night shifts had failed to follow this direction.

6. The claimant submitted also that he had provided information to the respondent about his health condition. During the material period, 11 November – 15 December 2016 he had specifically highlighted in his emails to the respondent his *"…….incapacity to work regular shifts due to my health condition".* Accordingly, he contended that there was evidence of the adverse effects of his impairment and his lack of ability to undertake the "normal day to day activity of night shift". He reiterated that it had been wrong for the respondent to rely on activities that he could do rather than those he could not do without difficulty.

7. In advancing the second ground of appeal the claimant submitted that it was for the respondent to demonstrate that reasonable steps had been taken to establish whether or not he was disabled. As no steps had been taken there had been constructive knowledge. He said that the Tribunal had erred in failing to address why the respondent could not have known that he was disabled standing the absence of any enquiries. Relying on the cases of **Donetien v Liberata UK Limited [2014] UKEAT/0279/14** and **Gallop v Newport City Council [2013] EWCA Civ 1583** it was submitted that in the absence of any reasonable steps having been taken by the employer to find out whether he was disabled a Tribunal can and should have correctly concluded that there was constructive knowledge. The Employment Judge herself had recorded that there wasn't even the slightest evidence of reasonable enquiries or investigations that would suggest the taking of the necessary reasonable steps. The error was in concluding that the respondent could not reasonably be expected to know of the claimant's disability against the evidence of no enquiries having been made. The Employment Judge's focus on the application form and questionnaire in the carrying out of night shifts did not matter. These went to actual knowledge but for constructive knowledge the respondent's failure to carry out reasonable enquiries or investigations was sufficient.

8. The claimant submitted that the appeal should be allowed and finding that he was disabled substituted for the Tribunal's decision. Thereafter the case should be remitted back to a different Tribunal so that the claims could be progressed.

The Respondent's Submissions

9. For the respondent, Mr Gibson contended that the Tribunal had been entitled to reach the conclusions that it did on disability on the basis of the available evidence. On the first ground the claimant was wrong to consider that the case of **Chief Constable of Dumfries & Galloway Constabulary v Adams [2009] ICR1034** assisted his case because the Tribunal had taken into account all of the facts, including that working night shift could be regarded as a normal day to day activity. In particular, the Judgment had noted first, that the claimant's contract could request of him that he work night shifts (paras 10 – 12), secondly that the claimant was offered and accepted a night shift block booking from 21 November 2016 to 13 January 2017 (para 15) and thirdly that the claimant did then raise with the respondent a suggestion that his "health condition" did not allow him to work regular or permanent night shifts (paras 16, 20 & 22). However, against that background the claimant had failed to provide any medical evidence supportive of the effect of his impairment on his ability to carry out activities, whether those included working night shift or otherwise. The relevance of the claimant having actually carried out a number of night shifts to duties was that this provided unchallenged evidence that he was able to do so and there had been no evidence from him to the Tribunal of how that activity would be difficult.

10. In any event the Tribunal had correctly identified and applied the appropriate legal test. Before an impairment could be regarded as a disability for the purposes of the 2010 Act, it had to have a **substantial** adverse effect on a person's ability to carry out normal day to day activities. The claimant had simply failed to prove any substantial adverse effect and so it did not matter whether the activities included night shift or not. All the claimant had complained of in his emails to the respondent was that his health condition did not allow him to work regular or permanent night shifts and that *".....sometimes my health condition does not follow the rhythm".* No evidence or explanation was provided in relation to the impact working night shift had on the claimant or why such impact was caused by his

impairment. A desire not to work night shift was not enough against a background of the claimant actually having worked such shifts during the relevant period up to 15 December 2016. It was clear from paragraph 51 of the Tribunal's Judgment that the Employment Judge was well aware that the focus of the claimant's argument related to working regular night shift. Nothing in the information provided by the claimant contradicted the Tribunal's statement in that paragraph that he had offered no explanation regarding the impact working regular night shift had on him and/or why this was caused by his impairment.

11. On the second ground, Mr Gibson contended that even if the Tribunal had been wrong in its primary conclusion, it had been entitled to find that the respondent had no actual or constructive knowledge of the claimant's disability. While the Tribunal had found that the respondent had been put on notice that further enquiries ought to be made, the respondent's position had always been that they did not know of the four separate days of absence at the time and so disputed that there was any more than the email referring to a "health condition" before them. In any event, as that dispute was simply unresolved, the Tribunal had addressed fully why the respondent could not be taken as having constructive knowledge even in the absence of such enquiry. It was important to note that the Tribunal was not indicating that the respondent should have made further enquiries just that they were on notice that such enquiries perhaps ought to be made. The Tribunal was entitled to rely first on the fact that the claimant had indicated on his application form that he was not disabled and did not indicate, when completing a health questionnaire subsequently that he would require any adjustments. Secondly, the Tribunal had made clear findings (at paras 15-21) in relation to what the claimant had actually told the respondent which was no more than that a health condition would prevent him working regular night shifts albeit that against the background of him actually working those shifts until 15 December 2016. Finally, the Tribunal had explained at (paragraph 61) why it concluded that the claimants reference to a

"health condition" even if coupled with intimation of four separate day's absence was insufficient to infer knowledge of disability within the meaning of the Equality Act 2010 on the part of the respondent.

12. For the reasons given, the Employment Judge had not erred in finding that the respondent could not reasonably have known about the claimant's disability. The Tribunal had to deal with all of the evidence before it, including the claimant's contradictory position as between what he had told the respondent when he was first employed and then the reference to "health condition" in his email in November 2016. The Employment Judge looked correctly at what the respondent actually knew together with all the information available and decided that such information was insufficient to infer constructive knowledge.

13. In terms of the proposed remit, while he disputed that any criticism could be made of the Employment Judge in this case, Mr Gibson accepted that as findings in fact had been made and that whatever the outcome of the appeal a substantive hearing was required into the various other claims, he would not oppose the claimant's suggestion that the remit should be to a freshly constituted Tribunal.

Discussion

14. The term "disabled person" is defined in Section 6 (2) of the Equality Act 2010 as a person who has a disability. Section 6 (1) provides that a person (P) has a disability if:-

> **"(a) P has a physical or mental impairment and (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities".**

There was no dispute before the Tribunal or on appeal that the burden of proof is on the claimant to show that he falls within this definition. Further, it is clear from the Tribunal's assessment of the evidence that while the claimant provided evidence of his symptoms and sought to link those with night shift duties, he provided no information about particular activities, work related or otherwise that he was unable to undertake or that were adversely affected by his impairment. There was of course evidence that he sought to draw to his employer's attention that he had a health condition that would in his view affect his ability to undertake regular night shift duties. The sharp question in this appeal is whether the evidence which he provided was apposite to prove the necessary substantial and long term adverse impact on his ability to carry out normal day to day activities. No issue arises in terms of impairment which was conceded and the respondent accepted also that the claimant's hypertension was a long term or permanent one.

15. While the Tribunal's attention was not drawn to the decision in **Chief Constable of Dumfries and Galloway Constabulary v Adams [2009] ICR1034** the respondent did not dispute on appeal that night shift work was capable of constituting a normal day to day activity. However, it may be instructive to consider the context in which Lady Smith found that to be so in the **Adams** case. That litigation involved a police officer who suffered from multiple sclerosis (MS) and had particular mobility problems between about 2am and 4am when working night shift as part of a system of different shifts in the course of his employment. The respondent had contended both before the Tribunal and on appeal that night shift could not be regarded as a normal day to day activity for the purposes of the disability discrimination provisions then in force. Rejecting that argument Lady Smith gave the following reasons:-

"Night shift working is common in the United Kingdom. Examples of it were referred to in the course of the hearing which included offshore workers, those employed in health care and those who work in the emergency services. We can

think of many others where the hotel workers, workers in certain factories, haulage drivers and so on. Whilst they do not constitute the majority, we are readily satisfied that there are enough people who work on night shifts for working from 2am to 4pm to be a normal day to day activity within the meaning of Section 1. When account is then taken of the fact that the activities that the claimant was carrying out when his impairment had an effect on him was the very ordinary activities of walking, stair climbing, driving and undressing, we have no hesitation in finding that the Tribunal did not err in finding that this part of the test was satisfied."

It can be seen from that passage that the claimant in that case had already established the particular physical activities affected by his impairment when he was undertaking night shift duty. In the present case, the dispute is not about whether night shift can constitute a normal day to day activity, which it patently can, but relates to whether the claimant led evidence of what particular activities were affected by his impairment, whether during night shift or otherwise.

16. In the absence of any medical evidence supporting the claimant's contention, it was incumbent on him to give evidence to the Tribunal of the activities he claimed he was less able to carry out and to explain why those activities were affected during night shift only. That there are health risks associated with (untreated) hypertension may be well known, but any impact of that condition on a person's ability to carry out particular kind of work or activity such as that undertaken by the claimant day or night is not something that any Judge would be aware of in the absence of evidence, not least from the claimant himself.

17. It is noteworthy that the claimant sought to introduce evidence at the reconsideration stage of day to day activities such as mobility and physical co-ordination when using public transport that he now sought to claim were affected by his condition. The Employment Judge refused his application to introduce that evidence and set out her reasons for that. No appeal has been taken against the reconsideration decision and so the evidence before me remains that led on 24 April 2017. In those circumstances, I consider that the Employment Judge's conclusion that the

claimant had not shown that he is a disabled person was one that she was entitled to reach. I have so concluded after careful consideration of the passages from his witness statement that the claimant relied on at the appeal hearing. I conclude that these fall short of explaining what activities were said to be impacted by the claimant's condition. It was not sufficient for him to refer to headaches, tiredness and so on without linking that to his ability to carry out the activity he had been undertaking for the respondent or his alleged inability to carry out regular night shift. Although the claimant was representing himself before the Employment Tribunal, he had ample opportunity to do that.

18. I have reached the conclusion that the issue of working night shift does not assist the claimant in the absence of evidence of a relationship between that activity and his impairment and against the background of a proven ability to work late shifts ending at 10pm and indeed some night shifts. The Tribunal was entitled to take into account that the claimant had initially agreed to undertake night shift for a period of weeks when later characterising the claimant's position (at paragraph 51) as a desire not to work regular night shift. Finally, even if a reference to *"…….sometimes my health condition does not follow the rhythm"* could be regarded as a reference to an adverse effect as opposed to a symptom, I consider that it would fall short of the requirement to prove a substantial adverse effect on day to day activities. Accordingly, the claimant's argument that he had given evidence of the problems arising from his hypertension which he sought to link to night shift working does not go far enough. His failure to list particular activities that he could not do or could only do with difficulty because of the impact of that hypertension, resulted in his failing to discharge the burden upon him on this issue. In contrast with the claimant in the **Adams** case, there was no evidence before the Tribunal of what activities were included in night shift work that were more difficult for the claimant as a result of his impairment. Indisputably, a Tribunal ought to concentrate on what a claimant cannot do or can only do with difficulty rather than concentrate on what he can do **(Leonard v**

South Derbyshire Chamber of Commerce), but it is for the claimant to provide evidence of what activities he could only do with difficult or night shift work so as to bring himself within the Section 6 definition. Accordingly, the first ground of appeal fails.

19. While the appeal cannot succeed on the basis of the second ground alone it is appropriate to make some comment on the issue of constructive knowledge and what I would have decided had I allowed the appeal on the basis of the first ground. In the case **Donelien v Liberata UK Ltd [2014] UKEAT/30297/14** the EAT (Langstaff P presiding) confirmed (at paragraph 35) that a Tribunal's conclusion on whether an employer could have done all that it could reasonably be expected to have done to find out whether someone had a disability was a partly factual but largely evaluative one. To overturn a Tribunal's decision on such an issue the appellate Tribunal would have to be satisfied that the conclusion was perverse. The test is of course one of reasonableness.

20. In the present case, the Employment Judge accepted the respondent's submission that the starting point was the application form completed by the claimant followed by the subsequent health questionnaire. No criticism can be levelled at such an approach. In considering whether an employer could, with reasonable diligence, have ascertained whether an employee had a disability, one is looking to see what sort of things should have put the employer on notice. The application form and health questionnaire pointed the employer in the direction of being unconcerned about any impairment on the part of the claimant. It was not until November 2016, after he had been working shifts, including particularly late shifts for more than a year that the claimant first raised the issue of a "health condition". The Employment Judge took the view that this was something that should have "put the respondent on notice to make further enquiries". However, as Mr Gibson pointed out, all that the information would have done was put the respondent on notice that further enquiries should be made as distinct from a conclusion

that the respondent had failed to make such further enquiries. In any event, all that the Tribunal concluded ultimately, (paragraph 61), was that the respondent was on notice that further enquiries should be made to ascertain information about the "health condition" than what the claimant now informed them he had. A health condition is not the same thing as a disability in terms of the Equality Act 2010. That is apparent from the respondent's acceptance in this case that the claimant suffers from an impairment in the form of essential hypertension. The lack of success for the claimant in ground one of this appeal arises from not having established in evidence the particular activities that might be impacted adversely as a result of that impairment. Properly understood, paragraph 61 does not represent a finding that the respondent had failed to take reasonable steps to ascertain that the claimant had a disability. It goes no further than to indicate that some of the facts available, mainly the intimation of a "health condition", arguably coupled with four separate days of absence, was information that a reasonable respondent might do something with. On the other hand, the other information available to the respondent, from the application form, the health questionnaire and the carrying out of night shift following acceptance of a block booking therefor all militated against any constructive knowledge on the part of the employer that the claimant was a disabled person rather than someone with a health condition but not disabled. In my view, the Tribunal was required to consider all of the evidence and draw an inference one way or the other on constructive knowledge and that is precisely the task it carried out in paragraph 61. It is apparent from the use of the expression *"…….I did not consider those circumstances sufficient……"* that the Employment Judge has considered both the facts militating in favour of constructive knowledge and those against and found that the circumstances that potentially could have inferred constructive knowledge were not on their own sufficient to do so. For these reasons I would not have found the test of constructive knowledge established even had I considered that the Tribunal had erred on the issue of disability such that I would have substituted a finding that the claimant was disabled.

Disposal

21. For the reasons given the appeal fails on the first ground and would in any event not have succeeded on the basis of constructive knowledge. The claimant has a number of claims other than disability discrimination outstanding before the Tribunal. While I have not found, having considered the arguments, that the claimant's criticisms of the Employment Judge's decision succeed, there was no opposition for Mr Gibson to the matter being remitted to a freshly constituted Tribunal. I consider that would be appropriate in the particular circumstances of this case standing that the claimant continues to be unrepresented and has conducted these proceedings at least in part through an interpreter, his native language being French. While I have every confidence that the Employment Judge who dealt with the preliminary hearing would continue to deal with matters fairly and impartially, it may provide some reassurance to the claimant that his remaining claims will be dealt with by a Judge who is new to the case. I will dismiss the appeal and remit back to the Tribunal to proceed to determine the remaining claims.