

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 11<sup>th</sup> March 2019

**Before**

**HIS HONOUR JUDGE SHANKS**

**(SITTING ALONE)**

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MRS B BALDEH

APPELLANT

CHURCHES HOUSING ASSOCIATION OF DUDLEY &  
DISTRICT LIMITED

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MS KAREN MOSS  
(of Counsel)

For the Respondent

MRS MICHELE PECKHAM  
(Solicitor)  
Citation Ltd  
Kings Court  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AR

## **SUMMARY**

### **DISABILITY DISCRIMINATION - Disability related discrimination**

The Claimant was dismissed by the Respondent at the end of a six-month probationary period. It was accepted that she was disabled by depression. She claimed that her dismissal was an act of disability related discrimination under section 15 **EqA 2010**.

The ET rejected the claim because:

- (a) They found that the Respondent did not know and could not reasonably have been expected to know that she was disabled at the time of the dismissal;
- (b) They said there was no evidence that her behaviour towards her colleagues (which was part of the reason for her dismissal) “arose in consequence of” her disability;
- (c) There were other reasons for her dismissal in addition which were sufficient;
- (d) The dismissal was justified under section 15(1)(b) **EqA 2010**.

The EAT allowed the appeal because of errors in relation to each stage of the reasoning:

- (a) Although the Respondent did not know about the Claimant’s disability at the time of the dismissal, they may have acquired actual or constructive knowledge of it before the rejection of her appeal and the rejection of the appeal formed part of the unfavourable treatment of which she was complaining;
- (b) There was in fact some evidence that her depression caused the relevant behaviour which the ET ought to have considered;
- (c) It was sufficient for the “something arising in consequence” of the disability to have a “material influence” on the unfavourable treatment: the fact that there may have been other causes as well was not an answer to the claim;
- (d) The ET failed to consider the section 15(1)(b) defence properly; in particular, they failed to address the question whether dismissal was a proportionate response.

The EAT therefore remitted to a fresh ET the issue whether the rejection of the Claimant's appeal was an act of discrimination under section 15 **EqA 2010**.

**A**     **HIS HONOUR JUDGE SHANKS**

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1.       This is an appeal against a Judgment of the Employment Tribunal (“the ET”) sitting in Birmingham (Employment Judge Dean, Mr Tsouvallaris and Mr Virdee), which was sent out on 19 December 2017 following a five-day hearing in March 2017. The ET dismissed claims of unlawful discrimination under section 15 of the **Equality Act 2010** and unfair dismissal under section 103A of the **Employment Rights Act 1996** which arose from the termination of the Claimant’s employment at the end of a six-month probationary period on 18 June 2015. The appeal was allowed through by Laing J at a Rule 3(10) Hearing on four grounds relating only to the section 15 claim, which are encapsulated in the amended grounds of appeal which are at pages 13 and 14 of my bundle.

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2.       The Respondent is a Housing Association providing housing for vulnerable young people. The Claimant was employed as a support worker on 22 December 2014, on six months’ probation. She was experienced in the field but the ET found that she wanted to operate in the way that she had in the past rather than in accordance with the Respondent’s policies and procedures. It was accepted that the Claimant was ‘disabled’ by reason of depression at the relevant time, but there was an issue about whether the Respondent knew or ought to have known about that before the date of the dismissal and that issue was decided against the Claimant.

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3.       Various concerns were raised about the Claimant’s performance over the months before June 2015 and discussed in supervisions. She was then called to a probationary review meeting with a Mrs Hartland on 5 June 2015. The letter dated 29 May 2015 calling her to this meeting said the following:

“The meeting is to discuss your performance in the role of Support Worker. We will be reviewing your progress to date, with particular emphasis on the issues we have discussed

**A** during your supervision sessions and your manner towards the Foyer Team and our service users. These include:

- Breach of professional boundaries by loaning a service user money without authorisation.
- A complaint from a service user about the tone of a text message which you sent to them.
- Two Incidents of breaching data protection in regards to not maintaining confidentiality of service user information.
- Failing to consult with senior staff relating to an instruction left for you on 01 05 15, you stated that another team member told you not to
- Your communication and how you relate with your colleagues and myself.”

**B**

**C** There was then a paragraph about being accompanied by a work colleague, and then the final paragraph says: “I must inform you that possible outcomes of this review meeting include an extension to your probationary period or the termination of your employment”.

**D**

4. As recorded at paragraph 86 of the Judgment, on 17 June 2015 Mrs Hartland wrote to the Claimant confirming that having considered the Claimant’s comments it been decided that she had not made satisfactory progress during her probation period and that therefore it had been decided to terminate her employment with effect from 18 June 2015. She was paid in lieu of notice.

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5. On 24 June 2015 the Claimant wrote a letter of appeal against that decision and that letter is in the supplementary bundle that was produced for me for this hearing at pages 8 to 11. No mention is made in that letter of any kind of depression or disability and that follows, it should be remembered, the Tribunal’s finding that there was no reason that the Respondent ought to have known about it previously. However, the issue was undoubtedly raised during the appeal hearing which took place before Mrs Greenidge.

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A 6. Mrs Greenidge’s letter rejecting the appeal dated 13 July 2015 is at pages 25-27 of my supplementary bundle. At page 26 over to 27 under paragraph 6 she said this:

B “6. Relating to your manner of work, in my review of your supervision documents, notes of your probationary review meeting and line manager’s file notes, there is indication that several of your colleagues have made comment about your manner while at work. During your appeal hearing you describe that your behaviour can be unusual and that you can say things unguarded and at this point you offered information about your mental health, which we were previously unaware of and which you confirmed that you had not divulged to anyone at CHADD....”

C I will not quote that letter further, but I note at this stage the findings of the Tribunal at paragraphs 96-98 of the Judgment where they describe what was discussed at the appeal hearing and they say that the Claimant referred to her behaviour being such that she had seen the pattern before with her mental health and could say things that were unguarded. She informed the appeal hearing that she had had a breakdown in the past and knew the signals. At paragraph 98 the ET D say: “Having heard all the evidence we find that the claimant’s statement to [Mrs Greenidge] about her mental health was the first time that the claimant had given any indication to the respondent at that mental health was fragile such as to put note the response on notice that her E behaviour was evidence of impairment that had long-term and significant adverse effect on her ability to undertake normal day-to-day activities (sic)”. Mrs Greenidge rejected the appeal and the decision as to dismissal therefore stood.

F 7. The Claimant brought a claim of disability discrimination which is the one that is relevant for my purposes today. It was specifically under section 15 of the **Equality Act 2010** and I G remind myself at this stage exactly what section 15 says:

(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.

H (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.

**A** The issues in relation to the disability discrimination claim were set out at paragraph 7(b) of the Judgment as follows:

- B** I. The respondent accepts the claimant was a person with a disability at material times; that is by depression.
- II. Should the respondents have had either actual or constructive knowledge of the disability at the material time?
- III. Was how colleagues perceived the claimant's communication with them "something arising from her disability"?
- IV. Did the "something arising from her disability" materially influence her dismissal?
- C** V. If the required causal link is established, does the respondent have a legitimate aim in treating the "something arising from" as a reason for dismissal?

**D** 8 Issue V is clearly a misdescription of the real issue which arises out of section 15, namely whether the Respondent could show that dismissal was a proportionate means of achieving a legitimate aim. It is perhaps significant that the Tribunal completely omit any reference to proportionate means in their description of that issue. All the live issues, that is issues II to V, were decided against the Claimant at paragraphs 102-107 of the Judgment. The Claimant appeals against the Employment Tribunal's conclusions on each of those steps in the reasoning.

**E** 9. Issue II: Should the Respondents have had either actual or constructive knowledge of the disability at the material time? It is clear that the Employment Tribunal made a finding of fact which cannot be challenged at this stage about the state of the Respondent's knowledge of her disability before the actual dismissal on 17 June 2015. But it is also clear that on their findings of fact, it is certainly arguable that the Respondents could reasonably have been expected to know that she had a disability before the rejection of her appeal which took place on 13 July 2015. Mrs Peckham for the Respondent did not really challenge that but the issue came down to this: she says that the only claim that was in play related to the original dismissal decision and thus any knowledge acquired thereafter was in effect irrelevant. Ms Moss for the Claimant says in response that the relevant unfavourable treatment included the outcome of the appeal, as well as



A the original dismissal decision. I will come back to this issue which seems to me determinative of this appeal, after I have considered the next steps in the reasoning.

B 10. Issue III: Was how colleagues perceived the Claimant's communication with them 'something arising from her disability'? That issue was dealt with by the Tribunal at paragraph 103 where they said this:

C "The claimant's communication with her colleagues was considered to be blunt and suggestive that the claimants way of doing things was the right way of doing things. We have heard no evidence to suggest and lead us to conclude that the claimant's communication with her colleagues and managers was anything other than her personality trait and was something to do with or arising from her disability".

D That, I am afraid to say, was just not right. There was evidence from the Claimant herself on this point which is recited by the Tribunal at paragraphs 33-36, and that was in addition to the passage in Mrs Greenidge's letter which I have already quoted. In those paragraphs the Claimant herself described how she would respond aggressively to others while suffering a depressive episode. E She also said that such an episode would affect her short-term memory which may have been relevant to another ground on which she was dismissed i.e. that relating to the loss of private data belonging to clients which she had suggested was because she had simply forgotten to put away sensitive documents. F Therefore, this link in the reasoning simply cannot be supported.

G 11. The next part of the Tribunal's reasoning related to issue IV: Did the 'something arising from her disability' materially influence her dismissal? On this, the Tribunal said at paragraph 104 of the Judgment:

H "Our findings of fact lead us to conclude that the respondent's decision to terminate the claimant's employment was for the reasons outlined to the claimant in the invitation to the probation review meeting [76] and not something arising from her disability. The claimant asserts that her perceived communication may have been something arising from her disability. We observe that the detailed reasons for concern in the claimant's performance referred to communication as the 5<sup>th</sup> element of concern most significantly in respect of her communication with work colleagues and her managers and we have no doubt that each of the other 4 reasons why the claimant's behaviour was unsatisfactory would have caused the employer to had concerns and considered her unsuitable to continue in their employ".

**A** In other words, as I understand their reasoning, they are saying the other four points raised in the  
letter of 29 May 2015 would on their own have led to the loss of her job, that is excluding her  
**B** communication and how she related with colleagues and Mrs Greenidge herself. Quite apart  
from the memory issue which I have just mentioned, which may go to the data protection point,  
it is clear that all that is required is that the ‘something’ (in this case inadequate communication  
with colleagues) only has to have a ‘significant influence’ in causing the relevant unfavourable  
treatment; it does not have to be the sole or principal cause. Again, the Tribunal’s reasoning in  
**C** so far as it suggests that because there were four other reasons for her dismissal that was the end  
of this issue is clearly deficient, although the conclusion they reach at paragraph 104 (if  
confirmed) may well be relevant to the question of compensation on the basis that absent any  
**D** discrimination, the Claimant would have been dismissed in any event.

12. Issue V: The justification issue, which as I have already indicated was misdescribed in  
the list of issues, is dealt with at paragraphs 105-107 of the Judgment. The ET record at paragraph  
**E** 105 the legitimate aim for which the Respondent contended, namely to maintain standards  
required of individuals working with vulnerable people and maintain a workforce where staff can  
work amicably in a pressured environment. So far, so good. Thereafter, unfortunately, the  
**F** reasoning is really quite deficient. The ET refer a number of times to the Respondent’s lack of  
actual or constructive knowledge of the Claimant’s disability. In the context of justification that  
is simply irrelevant. They then round off this part of the Judgment in the final sentence of  
**G** paragraph 107 as follows:

“We find that the claimant was dismissed for something other than her mental health issues and  
the respondent’s decision has been and had a proportionate means of achieving a legitimate aim  
to ensure that it cared for vulnerable young people and for their staff who worked within a  
pressured environment and sought to maintain high professional standards and team work.”

**H** I am afraid that sentence reveals a number of errors. First, the issue was not whether she was  
dismissed for something other than her mental health; the issue was whether she was dismissed

**A** for something which arose in consequence of her disability. Second, the legitimate aim is  
described but the Tribunal do not engage at all with the Claimant's disability, or the question  
**B** whether the dismissal was a proportionate means of dealing with the legitimate aim because they  
make no attempt to balance the prejudice to the Claimant of losing her job for something  
potentially arising out of her disability against the need to achieve the legitimate aim; they simply  
do not engage with the justification defence properly.

**C** 13. Thus, subject to the point about the scope of the claim which I mentioned at the start of  
dealing with the grounds of appeal, it is clear to me that the ET's decision cannot stand. Mrs  
Peckham fairly accepted that the decision was deficient in many ways and she did not strongly  
**D** argue on any of the points that I have alluded to, but she strongly argued that it was only the  
dismissal itself and not the appeal decision that was in play before the ET.

**E** 14. I therefore ask myself whether the ET should have considered the rejection of the appeal  
as part of the unfavourable treatment about which the Claimant was complaining. Mrs Peckham  
says very simply that the only complaint made was 'dismissal'. She refers to the issues as  
described in the Case Management Summary, which is at page 53 of my bundle and paragraph  
**F** 9.4, where the Judge says, "The claimant relies upon only one act of unfavourable treatment /  
detriment that is her dismissal for both the discrimination and whistleblowing complaints". Then  
in the Judgment itself the Tribunal set out the issues under disability discrimination. I have  
**G** already read them into the record but relevantly issue number IV is described as: did the  
'something arising from her disability' materially influence her dismissal; there is no mention of  
the appeal.

**H**

**A** 15. On the other hand, the Claimant was of course a litigant-in-person in pursuing her claim. Her ET1 form refers to discrimination on the grounds of disability and then recites the appeal and the appeal decision letter. The bundle which the Tribunal had included the appeal letter and the  
**B** appeal outcome letter and a short statement was also put in by Mrs Greenidge who heard the appeal. She was not in fact called to give evidence because she had left the Respondent in the  
**C** meantime, but it was accepted that she would have been called by the Respondent otherwise. For whatever reason, the ET did make findings about the state of knowledge of Respondents between the actual date of dismissal and the appeal. The outcome of an appeal against a dismissal is, one can say, integral to the overall decision to dismiss.

**D** 16. The Tribunal at paragraph 99 made some rather sweeping findings, which I may say at this stage I do not think are part of the findings of primary fact, to effect that the Respondent's management of the appeal was fair and reasonable and not tainted by, among other things,  
**E** discrimination so as to render the decision to terminate unreasonable or unfair or discriminatory. Therefore, in fact, at paragraph 99 the Tribunal appear to have themselves considered the effect of the appeal on the overall decision to dismiss.

**F** 17. Looking at the whole picture, as I have just outlined it, I think the ET should have considered the appeal decision as part of the overall decision to dismiss the Claimant and decided whether it was itself discriminatory under section 15 of the **Equality Act 2010**. For the reasons  
**G** indicated, I simply cannot say that if that issue had been properly considered, the Claimant would have lost on section 15 and, therefore, it seems to me that I must allow this appeal and remit the case to that extent, even though unfortunately it is nearly four years since the dismissal.

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**A** 18. There was a further ground of appeal which arises out of one specific finding of fact, at  
paragraph 51 of the Judgment, where it says this: “The claimant confirmed that notwithstanding  
**B** requests from the respondent who enquired if there was anything they could do to assist the  
claimant she had not felt she could make that disclosure [ i.e. as to her mental health issues] to  
the respondents”. The Claimant says that she did not accept before the Tribunal that there had  
been requests from the Respondent as to whether they could do anything to assist her. Mrs  
Peckham does not suggest that the Claimant did make any such concession, or that there was any  
**C** other basis for the Tribunal inserting the words “notwithstanding ... assist the Claimant” in their  
Judgment. No notes have been obtained from the Employment Judge to support them. In the  
circumstances, it seems to me right to say that there was no evidence for the implicit finding in  
**D** those words and that they should not stand, although given that the Claimant was not allowed to  
appeal on anything to do with findings about the Respondent’s knowledge pre-dismissal, it is  
hard to see that the omission of those words can make any substantial difference hereafter.  
Nevertheless, it seems to me that the best way to deal with this matter is to say that the Judgment  
**E** should be edited to remove those words before any further reference is made to it by either side.

**F** 19. There was some debate as to whether the case should be remitted to the same or to a fresh  
Employment Tribunal. On reflection, I consider that it will have to go back to a fresh Tribunal.  
A lot of time has gone by. The Tribunal made, I am afraid, some serious errors in the Judgment.  
Although there is not and could not be any suggestion of bias, I accept that there is always an  
**G** instinctive desire on the part of any Tribunal to justify conclusions that they have already reached.  
Although the matters to be remitted are in a sense new, namely whether the decision on the appeal  
was discriminatory, I have decided that they were ones that the Tribunal ought to have considered  
**H** in fairness to the Claimant as a litigant-in-person. Therefore, for all those reasons, I consider that  
the matter should go to a fresh Tribunal.

**A** 20. I am therefore going to direct as follows, subject to any submissions by the parties:

(1) The appeal is allowed on all four grounds;

**B** (2) The issue whether the Respondent’s rejection of the Claimant’s appeal against her dismissal was an act of discrimination on grounds of disability under section 15 of the **Equality Act 2010** and, if so, what compensation (if any) she is entitled to should be remitted to be decided by a fresh Employment Tribunal.

**C** (3) The matter is to be listed before an Employment Judge for directions to be given as to its further conduct in the light of the EAT’s Judgment, subject to the following directions:

**D** (a) any **Polkey**-type issue is to be determined at the same hearing as that on liability; and

**E** (b) any findings of primary fact in the ET’s Decision of 19 December 2017 are binding on the parties subject to the omission from paragraph 51 of the words “notwithstanding... assist the Claimant”.

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