

Wilcox v Birmingham Cab Services Limited UKEAT/0293/10/DM

Keywords: *Direct Disability Discrimination – Constructive Knowledge – Reliance on Medical Evidence*

C suffered from agoraphobia which gave her travel anxiety and prevented her from using public transport. She asked to work closer to her home and resigned when R refused to move her on a permanent basis. The ET held that R did not have sufficient knowledge of her disability for any duty to make adjustments to arise.

FACTS

C was required to take a pay cut which meant that she could no longer afford to pay for parking. C did not wish to use public transport and asked to work closer to home. R's CEO met with C and asked her why she would not use public transport and whether there was an underlying medical condition preventing her from using it. C said that using public transport made her anxious but that she had never investigated whether there was an underlying medical condition. C followed up the request in writing but did not mention her travel anxiety. C was not moved to the bureau she requested and was then signed off sick with "work related stress", never to return to work.

During C's sick leave the parties continued to communicate as a result of R's attendance management procedure and a grievance that C had lodged. Initially C did not mention her travel anxiety. C also tried to delay R's attempts to procure a medical report because she was embarrassed about her condition. Eventually R obtained a report produced by C's GP which stated that the Appellant was suffering from a great deal of anxiety about travelling and which recommended that she be allowed work at a venue closer to home. R would not agree the move on a permanent basis since it was subject to the exigencies of the LSC contract. C refused to see R's own occupational health advisors. R's advisors produced a report based on C's medical notes which stated that "there was no substantial evidence of a psychiatric diagnosis" and no medical grounds for absence from work or alternative travel arrangements. During the ET proceedings, after C had resigned, C instructed an expert, Mr Briscoe, to provide a medical report.

HELD

The ET held that R did not know and could not be expected to know, before it received Mr Briscoe's report, that C was disabled. C appealed and argued that the ET's finding that R could not be expected to know about C's disability was perverse. The EAT rejected the appeal. Although the EAT described itself as troubled by the conclusion that R did not have actual or constructive knowledge after receiving the GP's report it upheld the ET's decision. Even though R could have constructive knowledge when there was no precise diagnosis the question of whether constructive knowledge should be imposed was a question of fact. The ET was entitled to find that R did not have actual or constructive knowledge until it was able to obtain "authoritative medical advice", not least because in this case it was difficult to disentangle the effects of any mental impairment from C's unhappiness about her working conditions. The finding that R did not know of C's disability also led the EAT to reject the direct discrimination appeal. Finally, the EAT upheld the ET's finding that the claimed adjustment was unreasonable.

COMMENT

Only imposing constructive knowledge on an employer if they have an "authoritative" medical opinion is, on the face of it a surprising proposition. However, the question of whether a respondent has constructive knowledge is a question of fact. Where a claimant has made it difficult to obtain independent advice about their disability and the employment relationship is under strain, respondents would appear to be able to argue that they were entitled to be skeptical about assertions made by the claimant about his/her disability and to wait for their own medical advice.