Reserved judgment

EMPLOYMENT TRIBUNALS

Between

Claimant: **Mr R G P Bilson**

Respondent: **London Borough of Lambeth**

Heard at London South Employment Tribunal on 31 January 2018

Before Employment Judge Baron

Representation:

Claimant: ***Schona Jolly QC & Rachel Barrett***

Respondent: ***Daniella Gilbert***

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

1 That the Tribunal does not have the jurisdiction to consider the claim by the Claimant of the Respondent 'Making False Allegations' as being unlawful discrimination;

2 That the allegation of unlawful discrimination by the Respondent in retaining emails of 22 October and 20 November 2014 on the Claimant's file and/or its email server is struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013;

3 That an order be made under rule 39 of the 2013 Rules (relating to a deposit) in relation to the remaining claims.

REASONS

Introduction

1 On 15 August 2017 the Claimant presented a claim to the Tribunal. The principal claims were under the Equality Act 2010 based upon the protected characteristics of race, religion or belief and disability. The Claimant described himself as being male, black and a Rastafarian. I state straightaway that the claim concerning disability discrimination is based

upon the allegation that employees of the Respondent perceived the Claimant to be a disabled person, when in fact he is not disabled.[1]

2 The Claimant also ticked the boxes on the claim form ET1 to indicate that he was making claims for notice pay and 'other payments'.[2] There was a preliminary hearing by telephone on 2 November 2017 at which an order was made that this preliminary hearing be held. On 13 December 2017 the Claimant's solicitors applied for leave to amend the claim in accordance with draft Grounds of Complaint sent with that letter.[3] Leave was granted by EJ Balogun on 23 January 2018 for the amendments to be made. The effect of granting leave was that certain of the allegations originally made were not to be pursued.

3 In summary, the issues to be decided at this hearing were as follows:

3.1 Whether the Tribunal had the jurisdiction to consider all or any of the claims being made taking into account the statutory time limits;

3.2 Whether to make any strike out or deposit orders under rules 39 or 37 of the Employment Tribunals Rules of Procedure 2013;

3.3 Whether to refer the disability claim to the CJEU.

4 The basic facts which are material as background for this hearing are not in dispute and I copy them from the submissions of Miss Jolly and Miss Barrett:[4]

1. C, a social worker, applied for a job with R in January 2017. He was offered the role of Independent Reviewing Officer ('IRO') with a start date of Monday 6 February 2017. On Friday 3 February 2017, he was informed that the new job would not start the following Monday as R needed references covering the prior 5 years (R had previously requested and been supplied with references covering 2 years). On 13 February 2017, R told C that his job offer was withdrawn. The central issue in the case is the reason why R decided to withdraw C's job offer.

2. C had previously, in 2014, worked for R as an agency worker on a short term contract. R informed C on 13 February 2017 that his job offer was withdrawn because "when we checked your employment history it came to light that when you were in Lambeth as an agency worker this contract was terminated and you were asked to leave". C disputed this account, provided further information, and asked for the decision to be reviewed. However, on 8 March 2017 R confirmed its decision to withdraw the job offer.

3. Under cover of a letter dated 10 July 2017, in response to a Freedom of Information request, R provided C with a further document pertaining to the withdrawal of his job offer. This comprised the reproduced (cut and pasted) text of emails from Marichu Canete, Team Manager. One email, dated 20

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[1] The heading to the section in the particulars of claim relating to religion or belief discrimination is 'Perceived religious belief'. That is clearly misleading.

[2] It appears that these money claims are not being pursued as they are not mentioned in the draft list of issues prepared by each of the Claimant and the Respondent.

[3] For the sake of clarity it is noted that in the Grounds of Complaint Heidi Farr was referred to a the Second Respondent. She is not a party to these proceedings as an individual.

[4] I have deleted references to page numbers in the bundle.

November 2014, claimed of C "He came to work one morning "high" and was hearing voices then shouted in an open plan office!!!". C understood that R based its decision to withdraw the job offer on these historic allegations. C avers that the allegations are entirely false ('the False Allegations').

4. C notified ACAS on 7 August 2017 and submitted an ET1 on 15 August 2017 alleging that he had been discriminated against because of disability, race and religious belief, all protected characteristics for the purposes of the Equality Act 2010 ('EqA'). C is black and a Rastafarian. He is not disabled. He contends that the False Allegations caused R to wrongly perceive he had a mental impairment causing auditory hallucinations, and this materially influenced the decision to withdraw his job offer. C's case is that Ms Canete relied on stereotypes pertaining to C's race and religion when making the False Allegations. Further, the Respondent wrongly accepted the False Allegations to be true because of C's race and religion.

5. R presented its ET3 on 18 October 2017 denying the claims. R's case is that the job offer was withdrawn because C's previous contract was summarily terminated for misconduct, specifically shouting at Ms Canete. R's Grounds of Resistance ('GoR') contain an application to strike out certain passages of C's GoC, or alternatively for deposit orders to be made (see further below).

6. On 2 November 2017 a telephone preliminary hearing ('PH') was conducted by EJ Elliott, and case management directions given. In accordance with those directions, on 1 December 2017 R disclosed further documents to C. Following a request for specific disclosure from C's solicitors, R disclosed further documents on 20 December 2017.

7. On reviewing the 1 December 2017 disclosure, C became aware that the person within R who raised concerns about his job offer was Service Manager Heidi Farr. Ms Farr raised concerns verbally on 1 February 2017 with Margaret Noonan, Interim Team Manager, and followed up with an email dated 2 February 2017. On 7 February 2017 she set out her concerns in an email to the relevant managers. She referred to historic emails from Ms Canete including the allegation "he had come into the office "high" hearing voices and shouting". She added "he has a "reputation" which is why his employment was brought to my attention by staff in CLA who remember him". She attached a Word document containing the copy and pasted text of emails from Ms Canete.

8. On 13 December 2017 C applied to amend his claim (1) to clarify one allegation in light of R's ET3, and (2) to add allegations arising from the further information provided on 1 December 2017. His application was granted by order of EJ Balogun dated 23 January 2018.

5 I will deal with the three issues before me in the order set out above. Before so doing, I wish to thank all three counsel for the effort put into the preparation of the written submissions and the clarity of those submissions, then backed up by oral submissions.

Time limits

6 The claims are all of direct discrimination within section 13 of the Equality Act 2010. The starting point is to state the factual allegations of less favourable treatment made by the Claimant as amended. Those are in paragraph 16 of the Amended Grounds of Complaint, and are as follows:

6.1 The making of the ‘False Allegations’. That phrase was defined in paragraph 13 as being the comments by Ms Canete in an email dated 20 November 2014 referred to in paragraph 7 of the summary of facts above.

6.2 (1) The retention of the False Allegations about the Claimant on file from 22 October 2014 and 20 November 2014 which remain on the Claimant’s file and/or the Respondent’s server to date and (2) the willingness to use old emails as a basis for HR decisions in preference to a formal reference.

6.3 The repetition of the False Allegations and a further allegation by Ms Farr in an email of 7 February 2017 that the Claimant had a ‘reputation’.

6.4 The withdrawal of the job offer on 13 February and 8 March 2017.

6.5 The reliance by the Respondent on False Allegations and email from Ms Farr dated 7 February 2017 leading to the withdrawal of the job offer.

6.6 Misrepresenting to the Claimant as to the reason that the job offer was withdrawn.

7 On looking at the amended pleadings in detail it appears that there is the possibility of some confusion as to the protected characteristic(s) relied upon in respect of each of the above factual allegations. Paragraph 16 of the Grounds of Complaint has been amended with a new sub-paragraph inserted and two of the original sub-paragraphs deleted. However, paragraph 18 was not amended. My understanding is that the Claimant relies upon disability (or the perception of disability) in respect of the final three allegations above, and that the reference in paragraph 18 now ought to be to paragraphs 16 (d-f) of the Grounds of Complaint. The Claimant relies upon both religion and race in respect of each of the factual allegations.

8 The Claimant gave evidence. The basic chronology has been set out above. Based on his oral evidence and the documents provided to me I find the additional facts as below. I am bearing in mind that this hearing is not intended to be a ‘mini-trial’ on the merits of the claims. It is necessary to set out the chronology is some detail.

9 The Claimant was in 2014 employed by an agency and was assigned to the Respondent. The Claimant accepted that there was an incident on or about 22 October 2014, which was shortly before his fixed term contract was due to expire. I am not making any finding as to the incident itself. As a consequence of the incident the Claimant’s then effective line manager in the Respondent, Ms Canete, terminated the engagement. That was done by an email of 22 October 2014 timed at 11:48. The Claimant decided, in his words, to ‘move on’ and not pursue the issue that had arisen. It was more important to him that he should have a good reference. One was provided to the Claimant’s agency on 31 October 2014 by Monica Saunders who stated that the Claimant was ‘good’ in respect of

seven specified qualities and that the Respondent would re-employ him. The reason for leaving was stated to be 'contract expired'.

10 Over two years passed. In 2017 the Claimant enquired about employment by the Respondent, was offered a post, and then the offer was withdrawn on 13 February 2017 as already recorded. The detail of what then occurred needs setting out. The Claimant and Carmel Howard, a senior HR officer with the Respondent, exchanged emails between 13 and 16 February 2017 concerning what had happened in 2014. On 13 February 2017 Ms Howard told the Claimant that on checking the Claimant's employment history it was discovered that he had been an agency worker and that his contract was terminated and he was asked to leave. The Claimant replied and provided Ms Howard with a copy of the reference from Ms Saunders. He said there were issues with Ms Canete's management style.

11 The Claimant pressed Ms Howard for an answer on 24 February. It is apparent from documents in the bundle that she took legal advice and corresponded with executive officers in the Respondent about the matter. The Claimant contacted David Michael, Service Manager, on 27 February 2017 asking for his assistance to resolve the matter and he replied saying that Ms Howard was 'pushing for it to be resolved.' Following at least one further reminder, Ms Howard wrote to the Claimant on 8 March 2017. She said that the Respondent's records referred to the Claimant having raised his voice to Ms Canete and refusing her request to move away from the open plan area of the office. The Claimant replied within an hour saying that he disputed that version of events. Later that day the Claimant sent a further email asking seven specific questions 'with a view to making a formal complaint'. The Claimant said in his witness statement that he raised a formal complaint online that day, and received an automatic response saying that a further response would be sent within 21 days. There was no relevant document in the bundle but the evidence was not challenged, and I accept it. The Claimant pursued the matter on 6 April 2017 and then sent an email on 20 April complaining about the delay and saying that the complaints procedure was 'not fit for purpose'. On the same day he contacted Jonathan Evans, the Interim Director of HR.

12 Eventually a reply was received on 27 April 2017 saying that complaints about employment applications fell 'outside the remit of the Corporate Complaints policy.' The Claimant then replied on the same day expressing concern that the element of his complaint concerning 'freedom of information' had not been dealt with, and saying that he would be taking legal advice.

13 On 30 April 2017 the Claimant contacted three Councillors, and at about the same time he also contacted the Local Government Ombudsman. On 3 May the Claimant contacted Mr Evans again complaining that his request under the 'freedom of information act' had been ignored. A reply was sent the same day referring the Claimant back to the email of 27 April rejecting his complaint. The Claimant them sent an email to the Chief Executive, Sean Harris, on 2 June 2017 saying he had no confidence in

the Respondent, and that the email was the 'ultimate attempt to resolve this matter.'

14 The Claimant referred in that email to the taking of legal advice. I accept his evidence that the purpose of taking such advice at the time would have been in connection with the 'failure to respond to [his] requests and complaints, and [the Respondent's] lack of transparency.'

15 On 2 June 2017 the Claimant also sent a formal request under the freedom of information legislation asking for information relating to his employment from August to November 2015. That produced a reply on 10 July 2017, which is an important date in this claim. With the reply was a document containing the contents of four emails which had been copied into the document. The first one was the one from Ms Canete of 22 October 2014 already mentioned confirming that the Claimant's engagement at the Respondent had been ended.

16 The other three are a chain. The first is dated 22 October 2014 and is from Ms Canete to Alison Nimmo and Bill Turner. In it Ms Canete said that she had terminated the Claimant's contract, and then:

> The reason is that Gad has shouted at me in an open plan office and continued to do despite me having to speak to him in private.

Then on 20 November 2014 Michael Taylor asked 'what happened to Gad?' Ms Canate replied:

> In confidence please:-
>
> He came to work one morning "high" and was hearing voices then shouted in an open plan office!!!

17 The Claimant then searched the internet for free advice and made some telephone enquiries. He was unable to find a firm of solicitors to assist, and had an unfortunate experience with a website which purported to offer advice for a fee. Eventually he found his current solicitors who were prepared to act, at least initially, on a *pro bono* basis. Contact was made with ACAS under the early conciliation procedure on 7 August 2017. The certificate was issued on 10 August 2017, and the claim form was presented on 15 August 2017.

18 Further documents were provided to the Claimant as part of the standard disclosure process on 1 December 2017. They were internal emails from early February 2017, and it is as a consequence of those documents being disclosed that the application to amend the claim was made.

19 There was no disagreement between Miss Barrett and Miss Gilbert as to the law. The Tribunal has a discretion whether to extend time where it has expired on the basis that it is just and equitable so to do. There must be grounds for exercising that discretion. Both referred to the elements in section 33 of the Limitation Act 1980 as referred to in *British Coal Corporation v. Keeble* [1997] IRLR 336.

20 Miss Barrett submitted that that part of the second allegation relating to the retention of emails on file and on the Respondent's email server from 2014 to 2017 was, at the least, arguably conduct extending over a period within section 123(3)(a) of the 2010 Act. Miss Gilbert submitted to the

contrary. She referred to the distinction between a one-off decision with continuing consequences and a decision or omission which determines the conditions under which a claimant operates. The difficulty facing the Tribunal at this juncture is that there is no evidence before it as to any policy or decision concerning the retention of emails generally, or in relation to the Claimant specifically. I conclude below that this specific allegation is to be struck out.

21 The principal submissions concerned the events of 2017. The job offer was withdrawn on 13 February 2017. Time started running at the latest from that date in respect of that point and related points. Miss Barrett submitted that until 10 July 2017 the Claimant was not aware of the facts material to his claim and thereafter he was seeking legal advice. Any delay in 2017 would not adversely affect the cogency of the evidence. The Claimant could not be blamed for any delay from February to July 2017 as the Respondent had not provided him with the key documents. The Claimant was seeking to obtain the information by various means. Having obtained the information on 10 July 2017 the Claimant then acted as quickly as he could taking into account his desire to obtain legal advice, and the difficulty in doing so. Further he notified the Respondent very promptly of his intention to take legal action.

22 Miss Gilbert submitted that any ignorance of the material facts must itself be reasonable. The Claimant, she said, could and should have challenged the reason for his dismissal in 2014 at the time and in so doing it was likely that Ms Canete's email of 22 October 2014 would have been discovered. Further, if he had made a formal freedom of information request earlier then the email would have come to light. It was not up to the Respondent to tell the Claimant how to obtain information. The Claimant is an educated man and was capable of undertaking an internet search.

23 Miss Barrett submitted that the period to February 2017 should be ignored when considering any impact on the cogency of the evidence, and that the delay thereafter did adversely affect the matter. Miss Gilbert told me that Ms Canete had left the employment of the Respondent and her whereabouts were not known. There would be serious prejudice to the Respondent in not being able to adduce evidence as to what occurred in 2014 and the meaning of the email of 20 November 2014.

24 The other elements of the guidance in *Keeble* are really encompassed in the submissions made above.

25 My decision is that it is not just and equitable to extend time in respect of the first element of the claims in these proceedings, being that Ms Canete made false allegations in 2014. I entirely accept that the Claimant was not aware of the matter until 2017. I do not accept that he should have been expected in the circumstances to make further enquiries of the Respondent in 2014. There was an incident and it appears that there are different views as to the rights and wrongs of it. The Claimant was a contract worker, and he decided to move on. I do not see that he can be blamed retrospectively for not pursuing the matter within the Respondent at the time.

26 Without wishing to detract unduly from the guidance in *Keeble* it is the prejudice to each of the parties which is critical, after taking into account the fact that there is a time limit. It is obvious that the Respondent would be unduly prejudiced by not being able to adduce evidence from Ms Canete, and I also consider that a fair trial would simply not be possible. The Tribunal would only have the evidence of the Claimant. It would then have to speculate as to why Ms Canete made the statements which she did. That cannot be a proper basis for a finding of discrimination because of the Claimant's race, or his religion or belief.

27 I consider that it is just and equitable to extend the time in respect of allegations relating to 2017. When the job offer was first withdrawn on 13 February 2017 the Claimant had no reason to suspect that the decision made by the Respondent had any connection with the protected characteristics upon which the Claimant now relies. There was simply mention made of the 'reason for leaving employment'. Thereafter the Claimant took what I consider to be reasonable steps to obtain further information from the Respondent. The emails in question were provided on 10 July 2017. Discrimination law is not straightforward, especially this aspect of disability discrimination. It is well known that obtaining free legal advice is, regrettably, extremely difficult. The Claimant did what in my view was reasonable, and within a reasonable time frame. He was indeed fortunate to find a firm which has been willing to act on a *pro bono* basis.

28 The prejudice to the Claimant in my not extending time in the circumstances is that he would not be able to pursue claims which may have validity, and in particular would not be able to pursue the claim of discrimination because of perceived disability. I refer to that claim further below. There is no specific prejudice to the Respondent in my extending time, save of course for having to defend the claim. The incidents are relatively recent, and are documented. I would have thought that steps would have been taken by now by the Respondent's Legal Services Department to gather all material evidence.

Strike out or deposit orders

29 A preliminary point arose. In paragraph 54 of the Grounds of Resistance the Respondent applied for certain of the allegations originally made to be struck out. Some of those allegations were not pursued in the amended Grounds of Complaint. Only the first, second and sixth allegations remained the subject of the strike out application. There was no revised application following the Grounds of Complaint having been amended. The skeleton argument prepared by Miss Gilbert referred to all of the claims in connection with the application. Miss Barrett accepted that the Tribunal could deal with all the allegations, even though her skeleton argument only covered three of them.

30 Miss Gilbert acknowledged that a claim should not be struck out where the central facts are in dispute, but that where the facts as pleaded by the claimant do not show a *prima facie* case of unlawful discrimination then the claim should be struck out. Miss Gilbert submitted that the documentary evidence showed that the Claimant's key claims could not be substantiated. The comments upon which the Claimant relied were not

inherently or obviously related to any protected characteristic. Further, there was no assertion that the decision makers were made aware that the Claimant possessed the protected characteristics relied upon. It is clear from the emails that the reason that the job offer was withdrawn was because there were concerns about his conduct. No attempt had been made to demonstrate differential treatment by comparison with an actual or hypothetical comparator. This, said Miss Gilbert, was a case which was bound to fail.

31 Miss Gilbert in her submissions said that there was no evidence that the matters on which the Claimant relied were attributed to black men as stereotypes. The reference to 'high' need not necessarily refer to the effect of marijuana which the Claimant said resulted from an incorrect perception of Rastafarians using the drug. Finally, there was nothing from which the Tribunal could conclude that those references related to any assumed mental impairment amounting to a disability.

32 The essence of the submissions by Miss Barrett was that these matters are in dispute, and that the Claimant ought to be allowed to present evidence and argument as to stereotypical attitudes towards black men and Rastafarians. As far as mental impairment is concerned then the outcome would depend upon what was perceived by those in the Respondent who were involved. Oral evidence was needed. The motives of the putative discriminators were critical and would have to be ascertained by the giving of evidence.

33 I have reminded myself of the tests in rules 37 and 39 of no, or of little, reasonable prospects of success. Those words mean what they say. I was, perhaps inevitably, referred to the comment by Lord Hope in paragraph 37 of his speech in *Anyanwu v. South Bank Student Union* [2001] ICR 391 HL that discrimination issues of the kind raised in that case should only decided after hearing the evidence. Tribunals are less frequently referred to paragraph 39:

> Nevertheless I would have held that the claim be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals should not be taken up by having to hear evidence in cases that are bound to fail.

34 I also referred counsel to *ABN Amro Management Services Ltd v. Hogben* UKEAT/0266/09 in which Underhill J reversed the decision of the Employment Tribunal and struck out a claim of age discrimination because it did not have any reasonable prospect of success. Leading counsel for the claimant had argued that evidence to support the claimant could have been obtained in cross-examination of the Respondent's witnesses. On the facts Underhill J described the prospect of success as 'fanciful'.

35 I conclude that the allegation concerning the retention of the emails of 22 October and 20 November 2014 has no reasonable prospect of success, and it is struck out. I fail to see how there is any reasonable chance of the Claimant demonstrating that some unnamed person at some unknown date decided to retain them, or not delete them, because of either the Claimant's race or his religion.

36 I have concluded that the remaining allegations have little reasonable prospect of success, and my reasons for so doing are set out in a separate document.

Reference to the CJEU

37 Miss Jolly submitted that the matter be referred to the CJEU, with the following proposed questions:

> *Does the Framework Directive prohibit discrimination on grounds of disability in circumstances where:*
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> *i) The claimant is not disabled for the purposes of the Framework Directive, but*
>
> *ii) S/he is perceived to be disabled by the alleged discriminator?*
>
> *If so, what must the alleged discriminator perceive in order for the prohibition to apply?*

38 Miss Jolly provided very substantial written submissions in support of her application. I agree entirely with the issues on the point mentioned in paragraph 12 of the submissions that the questions before me are whether it is necessary for there to be a reference in order for the Tribunal to give judgment, and if so, whether the Tribunal should exercise its discretion to make a reference.

39 Miss Jolly referred to *English v. Thomas Sanderson Blinds Ltd* [2009] ICR 543 heard under the Employment Equality Sexual Orientation) Regulations 2003, and *EBR Attridge Law LLP v. Coleman* [2010] ICR 242 heard under the Disability Discrimination Act 1995. Neither of those cases dealt with the specific issue of perceived disability under the Equality Act 2010. Of more importance is the next authority of *J v. DLA Piper* [2010] ICR 1052 where the question of perceived disability discrimination was specifically raised. That case was heard under the 1995 Act. I set out the headnote to the report and an extract from the judgment of Underhill J is below.

> *Per curiam* It was contended that, even if the claimant was not in fact disabled, if the respondents withdrew the offer of employment to her because they *believed* that she was disabled, such discrimination on the ground of perceived disability is contrary to European Union law and should be treated as proscribed by the Disability Discrimination Act 1995. It was contended that, although Directive 2000/78/EC does not explicitly extend to such cases of perceived disability, it could be inferred that such discrimination is covered. That step could not be adopted without a reference to the European Court of Justice, and, while the analogy with the case of associative discrimination could be seen, it was not self-evidently correct.

40 Miss Jolly then referred to *Peninsula Business Services Ltd v. Baker* [2017] ICR 714 in which Laing J commented that the point was ‘problematic’. Finally, Miss Jolly referred me to the decision of HHJ Richardson in *Chief Constable of Norfolk v. Coffey* UKEAT/0260/16. I set out a significant part of the judgment.

> *Perceived Discrimination*

[46] I start from the proposition, not seriously in issue before me, that the definition of direct discrimination contained within s 13 of the *Equality Act 2010* is sufficiently broad to encompass a case where the putative discriminator A treats B less favourably because A perceives that B has a protected characteristic.

[47] The Explanatory Notes to the *Act* give a simple example which will fall within the provision:

> "If an employer rejects a job application form from a white man whom he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception."

[48] Prior to the enactment of the *2010 Act* the definition of direct discrimination applicable to disability (then found in s 3A(5) of the *Disability Discrimination Act 1995*) appeared to require that B should actually have the characteristic. This is the background against which Underhill P considered, in *J v DLA Piper*, that a reference to the European Court of Justice would be required to establish whether perceived disability would come within the legislation: see paras 60 to 64, in which he gave reasons for declining to allow the point to be argued in that appeal.

[49] I consider that the position is now clear. Section 13 is wide enough to encompass perceived discrimination; and it makes no distinction in this respect between the protected characteristic of disability and other protected characteristics. I would add that I see no reason to doubt that the European Court of Justice would recognise direct discrimination on the grounds of perceived disability. The ECJ has now consistently said that the *Equality Directive*, along with the linked *Racial Discrimination Directive 2000/43/EC*, is not to be interpreted restrictively and is to apply to persons who suffer less favourable treatment or particular disadvantage by virtue of a prohibited characteristic even if those persons do not themselves have the protected characteristic: see the associative discrimination case of *Coleman v Attridge Law* [2008] IRLR 722 applied more recently in an indirect discrimination case, *Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia* [2015] IRLR 746 (see paras 42 and 56).

[50] While I consider the position to be clear in principle, this does not mean that it will necessarily be straightforward for an ET to decide whether a putative discriminator perceived a person to be disabled. Underhill P set out some potential difficulties in *J v DLA Piper*:

> "62. ... What the putative discriminator perceives will not always be clearly identifiable as 'disability'. If the perceived disability is, say, blindness, there may be no problem: a blind person is necessarily disabled. But many physical or mental conditions which may attract adverse treatment do not necessarily amount to disabilities, either because they are not necessarily sufficiently serious or because they are not necessarily long term. If a manager discriminates against an employee because he believes her to have a broken leg, or because he believes her to be 'depressed', the question whether the effects of the perceived injury, or of the perceived depression, are likely to last more or less than 12 months may never enter his thinking, consciously or unconsciously (nor indeed, in the case of perceived 'depression', may it be clear what he understands by the term). In such a case, on what basis can he be said to be discriminating 'on the ground of' the employee's - perceived - disability? ..."

[51] Now that perceived discrimination is encompassed within s 13 of the *Equality Act 2010* this question must be tackled as part of UK domestic law as well as part of EU directly applicable law. As Underhill P said, the answer will be clear enough in some cases, but may be very difficult in others. The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.

41 Miss Jolly referred to two first instance decisions of Employment Tribunals sitting in Cardiff and Bedford where different approaches had been

adopted as to what had to be perceived.[5] Miss Jolly also made interesting submissions on European law and in particular the meaning of disability. With respect I do not consider I need to summarise those submissions for the purpose of my decision.

42 I decline to make a reference to the CJEU at this stage. The first proposed question is whether the Framework Directive covers perceived disability discrimination, whatever that might mean in any particular circumstances. It appears from *DLA Piper* and *Coffey* that the principle is not in dispute. The uncertainty is how to apply that principle in any particular situation. Miss Jolly made the following general submission:

> 73. The tribunal, as a court of first instance, retains a discretion whether to make a referral even where the questions are necessary to the outcome of the case.[6] C submits that a reference at this stage is both appropriate and necessary. This is an important area of law which has been in a state of uncertainty for a long time, giving rise to inconsistent approaches by different employment tribunals (*Dawson, Fortt*) and EAT judges (*Baker, Coffey*). There is a real concern that given the uncertain timeframe in which the UK courts will retain the facility to refer to the CJEU, first instance judges should not take an overly cautious approach in accessing this guidance. In the unusual circumstances surrounding Brexit, C submits that time is of the essence. Any delay in reference is likely to lead, in practice, to an inability to make the reference request in sufficient time.

43 I entirely accept that clarification as to the test to be applied is required. I also have considerable sympathy with the point about the potential difficulty in not now making a reference.

44 Miss Jolly then dealt with the submission by Miss Gilbert on behalf of the Respondent that any reference would be premature in the absence of a finding of fact that the Claimant was perceived to be disabled. Miss Jolly submitted that the key facts of the case are not in dispute. Further, and importantly, she said that the Tribunal would not know what facts it has to find without knowing the relevant legal threshold. The guidance off the CJEU was therefore required.

45 I am with Miss Gilbert on this point. The contents of the documents are not in dispute. What is not known is the interpretation put on them by those involved in 2017. HHJ Richardson said in paragraph 51 of *Coffey* that perceived discrimination must be tackled as part of domestic law and directly applicable EU law. In my view what is necessary is for there to be a hearing and facts found by the Tribunal. Then consideration can be given in the particular circumstances as to whether the concept of perceived disability discrimination applies. If the trial Tribunal considers it necessary to make a reference then that can be done at that stage, subject of course to whatever arrangements may then be in force as to the making of references.

46 In coming to my conclusion I have noted Article 94 of the Rules of Procedure of the CJEU:

> *Article 94*

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[5] *Fortt v. Chief Constable of South Wales Police* Case No. 1601986/14 & *Dawson v. The Appropriate Adult Service and anor* Case No. 3400802/15.

[6] Was the word ‘even’ included in error?

Content of the request for a preliminary ruling
In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;
(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;
(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

47 In the light of that Article I consider that I am not in a position to make a reference until facts have been found as to what was perceived.

Employment Judge Baron

13 February 2018