

# Employer's reasonable efforts found to be sufficient to avoid having constructive knowledge of a disability

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# Employer's reasonable efforts found to be sufficient to avoid having constructive knowledge of a disability

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An employer's reasonable, though not perfect, efforts to discern whether an employee's numerous sickness absences were caused by disability have been found to be sufficient to prevent it having constructive knowledge of her disability.

Ms Donelien was employed as a court officer by Liberata UK Limited from 1998. Ms Donelien claimed to suffer from a number of health conditions, including hypertension and stress. In 2009, Ms Donelien was absent for a total of 128 days on various ill-health grounds, some of which related to hypertension and stress, whilst others were for colds or stomach upsets and some went unexplained. Liberata referred Ms Donelien to its occupational health service in May 2009, posing a number of questions in the referral. The report came back in July 2009 to state that Ms Donelien was not disabled, but as it failed to answer the questions posed, a more detailed version was produced at Liberata's request. Despite the new version still failing to give insufficient answers to the questions, Liberata did not follow up a second time, but instead held 'return to work' meetings and attempted to discuss the situation with Ms Donelien. Ms Donelien was uncooperative and refused to give Liberata permission to speak to her GP.

Liberata took the view that Ms Donelien was not disabled and summarily dismissed her in October 2009 due to her repeated absences. Ms Donelien argued that she was disabled and that whilst Liberata did not actually know about her disability, her employer should have known had they taken sufficient trouble to find out and made reasonable adjustments.

Ms Donelien was found to have been disabled from August 2009. The EAT considered whether Liberata should have known and held that although Liberata did not revert to occupational health

to press for answers to its questions on a second occasion, it did engage with Ms Donelien and considered two letters from Ms Donelien's GP as requested. The EAT found that Liberata did all it could reasonably have done to make its own decision that Ms Donelien was not disabled rather than blindly relying on the report from occupational health.

This case reassures employers that whilst they must take reasonable steps to ascertain whether an employee is disabled to avoid a finding of constructive knowledge (even where the employee is being obstructive, as in the present case), the test is not a 'counsel of perfection'. Nonetheless, employers should keep their minds open to the possibility that numerous sickness absences may be caused by an underlying disability.

Donelien v Liberata UK Ltd UKEAT/0297/14

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