



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs A Normand

Respondent: Northumberland Tyne and Wear NHS Foundation Trust

Heard at: Manorview House Hearing Centre **On:** 3, 4 & 5 June 2019
North Shields Hearing Centre **On:** 24 September 2019

Before: Employment Judge Arullendran

Members: Ms D Newey
Mr S Hunter

Representation:

Claimant: In person
Respondent: Mr J English (solicitor)

REASONS

1. The claimant has brought a claim of disability discrimination under section 15 of the Equality Act 2010 on the grounds that the respondent treated her unfavourably by writing a negative reference.
2. The issues to be determined by the Employment Tribunal were as follows:
 - i. Did the respondent know the claimant was disabled or could it reasonably have been expected to know the claimant was a disabled person as defined in the Equality Act?
 - ii. Did the respondent treat the claimant unfavourably in the writing of the reference?
 - iii. Was that treatment because of something arising in consequence of her disability?
 - iv. Does the respondent show that treatment was a proportionate means of achieving a legitimate aim?
3. We heard witness evidence from the claimant, Angela O'Dell (mental health team manager) and Kelly Haslem (community clinical manager for Sunderland and

South Tyneside children and young people service ('CYPS')). We were provided with a joint bundle of documents consisting of 203 pages and further documents were added at pages 204 to 209 at the request of the claimant without any objections being raised by the respondent.

The hearing

4. This matter was originally listed to be heard on 3, 4 and 5 June 2019. Due to the availability of Tribunal resources, the first day of the hearing was converted to a reading day. Evidence was heard from the claimant on 4 June 2019, however the claimant made an application for an adjournment on the morning of 5 June due to her ill-health. The application for an adjournment was opposed by the respondent, however the adjournment was granted by the Tribunal on the grounds that it was in keeping with the overriding objective to deal with cases fairly as the claimant was clearly exhibiting signs of suffering from a migraine, for which she had taken medication, and exhaustion from lack of sleep the previous night which affected her ability to conduct cross examination of the respondent's witnesses. This matter was then relisted to be heard on 24 September 2019.
5. The claimant was permitted to stand and walk around the hearing room, as necessary, without asking for prior permission, as a result of the medical issues she was experiencing with her back. The claimant was advised to ask for extra breaks whenever she needed them and these were all accommodated by the Tribunal.

The Facts

6. These findings of fact are made on the balance of probabilities.
7. The claimant is a qualified social care worker. At the relevant time she was employed by an agency, Ranstad Care, and she was placed on a fixed term assignment with the respondent at CYPS at Monkwearmouth Hospital from 9 October 2017 as a locum care coordinator. The claimant's contract was for an initial period of six weeks and it is common ground that the contract was extended on three occasions by mutual agreement between the claimant, the respondent and the agency.
8. The respondent is a large NHS trust with hospitals across the Northumberland and Tyne & Wear region. The respondent provides a range of mental health, learning disability and neurological care services across the north-east of England.
9. It is common ground that the claimant has osteoarthritis in her spine and some disc degeneration, as set out in the letters from the claimant's medical specialists at pages 69 and 70 of the bundle. The claimant has been in receipt of personal independence payment from 10 April 2017 as set out at page 73 of the bundle and she applied for a blue badge in March 2018 with the support of her GP, as set out at page 74. However, the claimant accepted in cross examination that she had never informed the respondent that she was in receipt of personal independence payments or that she had applied for and been awarded a blue

badge, despite stating in her application for the blue badge that she needed it for work purposes.

10. The claimant's evidence is that she had informed Ranstad about her back condition and that the previous agency she had worked for, Reed, had obtained a medical report from an occupational health adviser about this. However, the claimant did not adduce any evidence from either Reed or Ranstad at this hearing as to the nature of any information they had been given by the claimant about her disability or, indeed, about whether the claimant had ever asked them to forward this information on to any prospective employers, including the respondent. It is common ground that the claimant's position was advertised as a full-time post but the claimant asked, via her agency, if she could be employed to work four days per week, which was agreed by the respondent. However, when Ms Haslem sent an email to the claimant offering to extend her assignment with the respondent on 19 January 2008, at pages 102 to 103 of the bundle, the claimant replied by email dated 22 January 2018 requesting a reduction of the four days per week down to three days per week. The claimant stated in her email that 'I have arthritis in my spine and degenerative disc disease and I am finding four days a week bit too heavy for me, especially in this cold weather.' Ms Haslem replied to the claimant on 22 January 2018, which can be seen at page 101 of the bundle, agreeing to reduce the claimant's work days to 3 days per week. It is common ground that the respondent agreed to this reduction in hours within 5 minutes of the initial request from the claimant and without making any further enquiries or holding any discussions with the claimant.
11. It is common ground that the claimant did not inform the respondent of her disability when she began her employment in October 2017 and the respondent did not keep a formal note of the claimant's absences from work because she was employed by and paid through an agency and, therefore, the sick leave was unpaid. All the information in the respondent's possession about the claimant's absences from work originates from the claimant by way of emails advising the respondent the reason why the claimant was absent from work on any given occasion. The claimant accepted in cross examination that none of the absences from work, with the exception of one sickness absence, were related to her disability of disc degeneration/osteoarthritis, or indeed any of the other illnesses she has subsequently disclosed to this Tribunal.
12. It is common ground that in January 2018 Ms Haslem was promoted to the position of community clinical manager and Ms Angela O'Dell, team manager of the mental health team, became the claimant's line manager. Ms O'Dell was not initially aware of the claimant's health concerns until the claimant requested a reduction in her working hours in January 2018. The claimant did not request any reasonable adjustments from the respondent other than the reduction of her working days from 4 to 3 per week. The respondent's evidence is that the claimant did not use crutches at work and she did not walk with a limp. The claimant's evidence is that she used a cushion on her chair, however she did not inform the respondent why she needed to use a cushion and she accepted in cross-examination that she did not use crutches at work. The claimant says that Ms Haslem should have known that she was a disabled person because Ms Haslem has attended equality and diversity training and because she is a

qualified nurse. Ms Haslem's uncontested evidence is that she has only ever trained as a mental health nurse and that she does not have a general nursing background.

13. It is common ground that the claimant was absent from work due to a kidney stone/kidney infection in January 2018 and had to undergo surgery. The claimant wrote to the respondent on 30 January 2018, which can be seen at page 104 of the bundle, advising the respondent that she had been discharged from hospital and that she was being treated for a kidney infection. The claimant stated in her email that she had cancelled her appointments that week but she made an offer to work from home to complete a piece of work for one of her clients. Ms O'Dell replied to claimant on 31 January 2018, which can be seen at page 104 the bundle, advising the claimant that she did not need to work from home and the issue would be sorted out the following week.
14. It is common ground that the claimant was unwell in early February 2018 and that her husband contacted the respondent on 5 February to advise the respondent that the claimant had flu.
15. The claimant sent an email to the respondent dated 12 February 2018, which can be seen at page 108 of the bundle, advising them that she had a chest infection and stated that she hoped to be back in work the following day. However, the claimant was not well enough to return to work the following day and she wrote to the respondent on 13 February 2018, which can be seen at page 110 of the bundle, offering to work from home. Ms O'Dell replied to the claimant, as can be seen at page 109 of the bundle, advising the claimant that she should probably rest and not to worry about working from home.
16. Ms O'Dell spoke to claimant on her return to work in February 2018. The claimant claims that this was a back to work meeting at which she provided information about her medical condition, however the respondent's evidence is that this was not a formal meeting and that it was merely a quick discussion to make sure that the claimant was feeling well enough to return to work and that the claimant did not disclose any medical information about any long-term health conditions at this point. We prefer the evidence of the respondent that there was no formal return to work meeting between the claimant and Ms O'Dell because this is entirely consistent with the claimant being an agency worker rather than a direct employee and it is consistent with the evidence from both sides that the respondent did not keep records of the claimant sickness absence because she was employed by an agency and not by the respondent directly.
17. It is common ground that the claimant was allowed to work from home and that she often had meetings which took place off-site and she was not wholly based in the office. On 28 February 2018 the claimant sent an email to the respondent, stating that she could not come into work because her daughter's school was closed and Ms O'Dell confirmed that it was fine for the claimant to work from home.
18. The respondent did not keep a record or breakdown of the number of cases that the claimant or any of her colleagues were managing at any one time, however it

is common ground that regular supervision meetings did take place. Ms O'Dell carried out regular supervision meeting with all the staff that she managed, including the claimant, and it is common ground that it is essential that care plans are kept up to date for patients. Ms O'Dell sent an email to the claimant on 2 March 2018, a copy of which can be seen at page 150 of the bundle, asking to arrange a time to review the claimant's caseload. Ms O'Dell spoke to the claimant to see if she had capacity to pick up an additional case which was to be transferred from the neuro pathway into the mental health team, in which the claimant worked. Ms O'Dell's evidence is that she believed the claimant was more than capable of dealing with this particular individual given claimant's background as a social worker. It is common ground that the claimant met with Ms O'Dell on 12 March 2018 and they agreed that the claimant had capacity to take on further cases. However, she noted that the claimant had not completed a care plan for a particular young person.

19. Ms O'Dell was made aware by a senior clinical psychologist on 10 April 2018 that the claimant had made reference to an online diagnostic tool with respect to a young person with a personality disorder, however there were concerns raised by the assistant psychologist, who was also working with this patient, about the use of this tool. Ms O'Dell raised these concerns with the claimant, particularly as the diagnostic tool, with no evidence base, should not be used to diagnose a personality disorder in someone under the age of 18 and it should only be used by a person who was clinically qualified, which the claimant was not. Ms O'Dell met with claimant on 16 April 2018 to discuss these concerns. Ms O'Dell informed the claimant that the diagnosis usually followed a multidisciplinary assessment, however claimant indicated that she was not aware of this. The claimant accepted that she had downloaded the diagnostic tool but maintained that she had not used it to diagnose anyone, but had merely handed it to the family for their information. It was agreed at the end of this meeting that the case would be transferred to another colleague.
20. A second concern was raised by Ms O'Dell during the meeting of 16 April in that a family had made a complaint that they had been waiting for a home visit but the claimant had not been to see them. The claimant's evidence is that Ms O'Dell asked her to produce her private diary, however there is no evidence that the claimant was asked to review her personal diary during this meeting and the claimant accepted in cross examination that she told Ms O'Dell that she would "go and check" her diary. Later that day, the claimant informed Ms O'Dell by email that she was taking sick leave due to her back pain and a migraine headache related to cervical spondylitis and a copy of the email can be seen at page 118 of the bundle. It is common ground that the claimant never returned to work after this date.
21. The claimant contacted Ms O'Dell by email and asked to arrange a meeting. A copy of the emails can be seen at pages 122 to 127 of the bundle. It is common ground that the parties arrange to meet on Wednesday 25 April 2018. However, on 23 April 2018 the claimant sent an email to the respondent resigning from her position and a copy of this can be seen at page 128 the bundle. The claimant stated that she was having ongoing health problems with her back and neck which had recently led to her request a reduction in her working hours but she

thought she would struggle to catch up with her workload following her recent time off. The claimant offered to carry out a handover process, if required.

22. Ms O'Dell informed the claimant that she did not need to carry out a handover process because the relevant information was held electronically and a copy of this correspondence can be seen at pages 131 to 132 of the bundle. Ms Haslam asked Ms O'Dell to carry out a brief headline review of the claimant's caseload after her resignation in order to see who the case should be reallocated to. The respondent found, as a result of this review, that there was a lack of evidence of any assessment of young people's mental health presentation and there was limited indication of any case formulation or therapeutic intervention with a number of young people. Ms O'Dell informed Ms Haslam of her findings although she did not make a written report of her review.
23. It is common ground that an external training event was held on 30 April 2018, but the claimant was informed that she did not need to attend. The reason why the claimant was not required to attend that training was because the respondent was prioritising the substantive members of its team and it did not feel that agency staff should be prioritised at this stage as the training would be cascaded down and the agency staff would be trained at a later date.
24. The claimant says she did not receive any job offers from Ranstad after she had resigned from her employment with the respondent, which she claims is unusual. She also says that she registered with a number of other employment agencies, including Sanctuary Personnel, which resulted in the agencies carrying out DBS checks and approaching the respondent for a reference. A reference request was sent by Sanctuary Personnel on 23 May 2018 to the respondent. Copies of the requests made by Sanctuary Personnel can be seen at pages 139 to 140 of the bundle. The claimant's evidence is that she did not know this reference request had been made as it was not for a specific post but was just a general request. The reference request was made by way of a standard reference template from NEPO Authority Social Care. Ms Haslam provided the completed reference on 7 June 2018 and a copy of the completed reference can be seen at pages 142 to 144 the bundle. It is common ground that much of the reference is positive but Ms Haslam marked three matters as being unsatisfactory which were written communication, report writing and the ability to manage effectively a large caseload. The reason why the respondent rated the matters as being unsatisfactory were because of the issues that had come to light after reviewing the claimant caseload following her resignation. The reference also stated that the respondent would not be reemploying the claimant due to high levels of sickness and uncompleted documentation as some young people were left with unclear plans of care. The respondent's evidence is that the claimant's absence record was judged on the same basis as they would have judged the absence record of an employee and we accept the respondent's evidence that the claimant had several absences from work in the relatively short period of employment, as corroborated by the claimant's own evidence and emails. The claimant's evidence is that Ranstad did not have sight of the reference at pages 142 to 144 and that they did not need a reference in order to place her with a client. It is also common ground that this reference was not sent to any other

agency or employer and that the claimant was not put forward for any specific posts though Sanctuary Personnel.

25. The claimant says that she was told by Sanctuary Personnel that the reference they had received from the respondent was rather negative and she sent an email to the respondent on 26 July asking for the reference to be amended, although the claimant had not actually seen the reference. The claimant wrote the respondent again on 10 August 2018 asking for the reference to be amended (page 161), which they refused to do, but the respondent agreed to provide the claimant with a neutral reference, as set out at page 174 of the bundle, to which the claimant agreed.
26. The claimant started training for her new job with Relate in May 2019 and she told the Tribunal that she has also been working at the Premier Inn hotel on a part time basis since 3 June.

The Law

27. Section 15 of the Equality Act 2010 provides
“(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.
(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.”
28. Section 136 of the Equality Act 2010 provides
“(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.”
29. In Basildon & Thurrock NHS Foundation Trust v Wearasinghe UKEAT/0397/14 the EAT held that the Tribunal had to identify the “something” which had to be arising in consequence of the disability and that it is unfavourable to B.
30. The respondent refers us to the case of Pnaiser v NHS England & Another [2016] IRLR 170 and in particular paragraphs 31 and 69 of that decision as to the proper approach to be adopted by Tribunals on the question of disability and knowledge.
31. The respondent also refers to the Equality and Human Rights Commission Code of Practice on Employment, and in particular chapters 4.9, 4.25 onwards and 5.
32. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry: A Ltd v Z EAT 0273/18.

33. We refer to the guidance in the case of Madarassy v Nomura International Plc [2007] IRLR 246 in which the Court of Appeal stated that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts indicate the possibility of discrimination. They are not, without more, sufficient material from which a Tribunal “could conclude” that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

Conclusions

34. Applying the relevant law to the facts we find that the respondent accepts the claimant was a disabled person at the relevant time. However, we find that the claimant never told the respondent that she was disabled or that her medical conditions were such that they could amount to a disability. We note that the impact statement produced by the claimant for this hearing is at odds with the claimant own evidence about what she told the respondent throughout her placement with them (e.g. the use of crutches) and, in the circumstances, we find that the respondent could not reasonably have been expected to know the claimant was a disabled person on the basis of the information they had received from her at the time she was employed by them. The fact that the respondent allowed the claimant to reduce her working days from 4 days to 3 days per week does not automatically lead to an assumption that the respondent should reasonably have known that the claimant had a disability. There is no evidence in front of us that the claimant told the respondent how her medical condition affected her ability to carry out day-to-day activities and the reference to the cold weather making it too “heavy” to work 4 days per week is, in our opinion, insufficient to alert the respondent to the possibility that the claimant’s back condition may have a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. We accept the respondent’s evidence that the claimant’s managers had never seen the claimant use elbow crutches, as alleged in the impact statement, or walking with a limp. Furthermore, the fact that the claimant used a cushion in the workplace cannot automatically lead to an assumption that the claimant’s medical condition affected her ability to carry out normal day-to-day activities on a long-term and substantial basis, nor can the fact that Ms Haslem has attended equality and diversity training necessarily mean that she is equipped to identify which workers have a disability within the workplace, particularly as no evidence was adduced as to the contents of that training. Applying the guidance in A Ltd v Z, we find that there is no evidence that, had the respondent made enquiries of the claimant’s health, the claimant would not have continued to keep the details of her disability quiet, as she had throughout her employment.
35. As we have found that the respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person at the time of her employment with them, there is no requirement for us to make findings on the remaining issues as set out at paragraph 2, above. However, for completeness, we find that the respondent did not treat the claimant unfavourably in the writing of the reference, which is at pages 142 to 144 of the bundle, because we find that the respondent provided the information which was

requested of it by Sanctuary Personnel on the pro forma provided by that agency and there is no evidence in front of us that the respondent did not genuinely believe that the information provided on that reference was anything other than factually correct. The respondent's uncontested evidence was that they measured the claimant sickness absence against the policy they implemented for their own employees and, in the circumstances, there is no evidence that the claimant was treated any differently from any of the respondent's employees. We note that the majority of absences which the respondent relies upon in the reference, which would be the "something" arising in consequence, relate to matters other than the claimant's disability, such as a chest infection, flu and a kidney infection; we also note that the criticisms raised by the respondent of the claimant's performance in the workplace may have been resolved at the forthcoming review meeting on 25 April had the claimant not resigned when she did, but this is not a matter that this Tribunal can speculate on and no evidence has been presented about what the potential outcome of the review meeting might have been had the claimant attended instead of resigning. Further, there is no suggestion that the criticisms raised by the respondent of the claimant's work were related in any way to her disability and, there is no evidence that the poor performance was "something" arising in consequence of the claimant's disability.

36. In the circumstances, we find that the reference was completed by the respondent with information which was factually correct at the time and on the basis of the information held by the respondent at that time and, therefore, the claimant was not treated unfavourably. In light of this finding, we are not required to make any findings on the remaining issues as set out in paragraph 2 above.
37. The unanimous decision of the Employment Tribunal is that the claimant's claim for disability discrimination contrary to section 15 of the Equality Act 2010 is not well-founded and is dismissed.

EMPLOYMENT JUDGE ARULLENDRAN

**REASONS SIGNED BY EMPLOYMENT
JUDGE ON**

.....19 November 2019.....

REASONS SENT TO THE PARTIES ON

20 November 2019

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