



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Barugh

**Respondent:** North East Care Homes Limited

**Heard at:** Teesside Magistrates Court      **On:** 3<sup>rd</sup> & 4<sup>th</sup> March 2020

**Before:** Employment Judge Martin

**Members:** Mrs C Hunter  
Mr D Morgan

***Representation:***

**Claimant:** Ms E Barugh (Employment Consultant)

**Respondent:** Mr A Scott (Counsel)

## RESERVED JUDGMENT

The claimant's complaint of disability discrimination is not well-founded and is hereby dismissed.

## REASONS

### Introduction

1. The claimant gave evidence on her own behalf. Mr S Gibson (General Manager), Ms R Deakin (Deputy Manager), Ms S Natrass (Training Manager), Ms D Ford (Team Leader) all gave evidence on behalf of the respondent. The Tribunal was provided with an agreed bundle of documents marked Appendix 1.

### The law

2. The law which the tribunal considered was as follows:-

Section 6 (1) of the Equality Act 2010 A person (P) has a disability if--

- (a) P has a physical or mental impairment, and

- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Section 15 (1) of the Equality Act 2010 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.

Section 15 (2) EA 2010 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.

The Tribunal considered and was referred to an extract from Harvey on Industrial Relations Law paragraphs 405 – 407 thereof and considered the case set out at paragraph 4.603 of Reynolds v CLFIS (UK) Limited 2015 IRLR 562.

The Tribunal also considered the EHRC Code of Practice in relation to disability and noted that an employer should do all they can reasonably be expected to do to find out if a person has a disability even if one has not been declared. It is noted that not all workers will consider themselves to be disabled. The Code of Practice on Employment 2011, in particular at paragraph 5.14 states that it is not enough for the employer to show that they did not know that the disabled person had a disability. They must show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formerly disclosed, as for example not all workers meet the definition of disability may think of themselves as “a disabled person”.

At paragraph 5.15 it states that an employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment.

Paragraph 5.17 deals with when employers may be assumed to know about disability.

### The issues

3. The respondent conceded that the claimant is a disabled person under the definition of Section 6 of the Equality Act 2010.
4. The Tribunal had to consider whether the respondent knew or could reasonably have been expected to know that the claimant had a disability.
5. The Tribunal then had to consider whether the respondent had treated the claimant unfavourably. The unfavourable treatment relied upon is her dismissal.

6. The Tribunal then had to consider whether the unfavourable treatment was because of something arising in consequence of the claimant's disability. The "in consequence of her disability" is her disability related absence.
7. The Tribunal had to consider whether the respondent could show that the treatment was a proportionate means of achieving a legitimate aim.

Findings of fact

8. The respondent is a care home based in Middlesbrough.
9. The claimant has a problem with her right wrist. During the course of these proceedings, the respondent accepted that the claimant suffers from a disability pursuant to the provisions of the Equality Act 2010. The claimant describes her arm as a "poorly arm". She uses a wrist support. In her evidence to the Tribunal, she indicated that she made adjustments so that she is largely able to do most things. Those adjustments were the use of a wrist support and using left arm more.
10. The claimant previously worked at the respondent's care home. She knew the deputy manager. She left to commence employment at the employer where she sustained the injury to her right wrist.
11. In 2016 the claimant made a claim for an industrial injuries disablement benefit. She was awarded the benefit. Her disability was initially assessed at 30 percent. (page 28 of the bundle). She made a further claim in 2017. Her disability was provisionally assessed at 15 percent (page 29 of the bundle). She made a further claim in 2017, when her disability was finally assessed at 15 percent (page 30). She receives an industrial injuries disability benefit and continues to do so (page 30 of the bundle).
12. The claimant applied to work as a member of bank staff with the respondent. She saw the position advertised on Facebook. The application form is at page 67 – 76 of the bundle. The claimant works part-time as a HR assistant with her sister's HR consultancy firm as is noted at page 68 of the bundle.
13. In the application form at page 70, the claimant was asked about her health details. She was asked if she had mental or physical disability and indicated that she did not. She was also asked if adjustments were required to accommodate her disability and she stated none. The form is signed by her on 17<sup>th</sup> January 2019 (page 70 of the bundle). In evidence to the Tribunal on cross examination, the claimant said that she did not consider herself to have a disability. She said that she was not registered disabled. In evidence, she indicated that she did not get disability benefits, but she acknowledged on cross examination that she was receiving the industrial benefits disability allowance. In her evidence she said that she did not consider herself to be disabled as she could do most things adjustments by using her wrist support and using her other arm. She also said that she had only been assessed as fifteen percent disabled so she did not consider herself to be disabled.

14. At the same time as completing her application form she also completed a declaration of health and medical fitness which is at page 75 of the bundle. She indicated that she ticked she had been said that she had been an in-patient or out-patient at a hospital within the last five years. She also ticked yes to say that she regularly took a prescription medication but indicated that she was not registered disabled. She also indicated that she was happy to undergo a medical examination and to give consent for them to contact her GP. That form is also signed and dated on 17<sup>th</sup> January.
15. The interview took place with the claimant on that day. The claimant was interviewed by Donna Ford and Rachel Deakin. The parties describe the interview as fairly relaxed because the claimant knew Rachel Deakin. Notes of the interview and the claimant's answers to the various questions and marks/scores are at pages 77 to 85 of the bundle. Both of the two interviewers marked the claimant separately, although only one made notes at the interview. There were no notes referring to any issues which the claimant had with her wrist or any disability, save there is a note on page 81 stating that on 29 February (which should have been 29 January) the claimant needed time off due to a physical appointment.
16. The claimant in her evidence, said that when she attended at the interview she was wearing her wrist support. She said she regularly wore her wrist support. She said that she either wore a flesh coloured wrist support or a black wrist support if she was wearing a jacket. It appears from her evidence that she largely wears a wrist support which will blend in, so it was not necessarily obvious at Tribunal that she was wearing a wrist support immediately. Ms Ford and Mrs Deakin said in evidence that the claimant was not wearing a wrist support when she attended at interview but the claimant said that she was wearing her wrist support. This Tribunal finds that the claimant was more likely to be wearing a wrist support. We accept her evidence that wearing her wrist support was something she did regularly. This is supported by her evidence that she wore it regularly as an adjustment. It is also quite clear from the fact that she wore either a flesh coloured or one that blended in that she did not like to draw attention to it. We accept that neither of the respondents' witnesses may have actually noticed the wrist support at the interview, but it was more likely than not that the claimant was wearing it so we accept the claimant's evidence in that regard.
17. The claimant says that she told the respondent about her injury and her long-term condition as well as about the treatment she was receiving. The respondent's witnesses said that there was no discussion about her condition at interview but they accept that she did tell them about her operation. The Tribunal accepts that the claimant did tell the respondent of the planned operation to her arm on 29<sup>th</sup> January at interview as is noted on page 81 as 29<sup>th</sup> February. We also accept that she told them that the operation was designed to improve the condition of her arm. We do not consider that she would have gone into a lot of detail about it. At interview. That would be consistent with the documentary evidence as there is only a short note at page 81 about the appointment. Indeed, that is also consistent with our own observations from the claimant's evidence namely that she was reluctant to indicate in her evidence that she had a disability. That is also

consistent with the claimant not stating on the application form that she had a disability. It is therefore unlikely that she would have gone into detail with the respondents at the interview about her condition when she had expressly not referred to it on the application form. In her own evidence to the Tribunal, the claimant indicated that she did not tell the respondent about her disability because she did not consider herself to have a disability despite receiving disability benefits. Therefore we think it is unlikely that she would have gone into detail with the respondent about the operation other than indicating that she hoped it would make the situation better. The claimant herself, from our observations, is reluctant to describe herself as disabled. She talks in evidence about her “poorly arm”. We think it is therefore unlikely that she would have gone into any detail at an interview where she was trying to obtain employment.

18. The respondent did not ask the claimant any questions about her responses to the health questionnaire. We accept the respondent's evidence that there are a lot of applications filled in in a not dissimilar manner, for example we accept that a lot of people may have had an in-patient/out-patient appointment in the last five years and it may not be that unusual for a person to be taking medication. Those responses would not necessarily alert the respondent to any issue bearing in mind the claimant had not declared any disability.
19. The claimant started her training on 31<sup>st</sup> January. By that time the claimant had had the operation on her arm two days earlier. She was wearing a plaster on her wrist. The claimant said that she did tell Mrs Natrass, who was running the training session something about the problem with her wrist. Although Mrs Natrass said that the claimant did not tell her a lot about her arm, it is quite clear that something was said at the outset of the training, because Mrs Natrass said she noticed that the claimant was wearing a support and asked her about it. Mrs Natrass also said in her evidence that she specifically asked the claimant if she could participate in certain parts of the training, particularly relating to moving and handling. She said that the claimant was taking some form of pain relief. It was clear that Mrs Natrass knew that there was a problem with the claimant's right arm. Indeed Mrs Natrass decided not to allow the claimant to undertake the hoist training as a result.
20. The respondent's sickness absence procedure is at page 47A of the bundle. It sets out the procedure to follow in relation to the reporting of sickness absence. It also sets out the requirement to provide evidence of incapacity after seven days, otherwise a self-certification form would be sufficient.
21. The training which the claimant was undertaking was specific training with regard to the role and included induction training. Induction training included briefing on staff related matters including the employee handbook; probationary periods; sickness policy and reporting absence amongst other things (page 128D). Mrs Natrass' evidence was that the claimant was not provided with detailed training on the handbook, but that the training programme involved informing employees of the probationary period of three months but it did not give a great deal of information about the handbook or staffing arrangements bearing in mind that all of those matters were dealt with over the course of one day as part of the induction training. Mrs Natrass' evidence is supported by the details of that

training at pages 128C to D. We think that some information was given to the claimant in that regard but not in any great detail.

22. On 6<sup>th</sup> February 2019 the claimant started having problems with her right arm. Mrs Natrass noticed that the claimant was experiencing problems and took her into a room where she removed the claimant's dressing. The claimant says that she told Mrs Natrass about the problems with her arm and the treatment she had received. Mrs Natrass said that the claimant did not go into much detail. However, Mrs Natrass was concerned enough about the claimant's arm to remove the dressing and observed that the claimant had screws and plates in her arm. She commented that she herself had had screws and plates previously in her arm and was sympathetic to the problem. We find that it is likely that there was some discussion about the problems the claimant had previously had with her arm and the treatment she had received. We think that, at this stage, there was clearly a much more detailed discussion about the claimant's wrist. The claimant would have to explain the problem with her arm and would discussed the treatment she had received, namely the recent surgery. We prefer the claimant's evidence that there was a much more detailed discussion about her condition at that stage and the problems she had with her arm. Indeed, that is also supported by the fact that Mrs Natrass indicated that she observed the claimant taking pain relief which she said she thought was tramadol which is a very high type of pain relief. Mrs Natrass was also sufficiently concerned about the claimant that she actually said in evidence that she brought it to the attention of another colleague and indicated that she was going to be monitoring the situation. Further, Mrs Natrass also said that she was the one who suggested that the claimant go to hospital when she saw the extent of the claimant's injury to her right arm. As this conversation largely took place on a one-to-one basis, it is quite clear that there would have been some detailed discussion about the claimant's condition; what had happened and what treatment she had received.
23. In her evidence Mrs Natrass said that, although she had some concerns she did not raise it specifically, but she did say that she mentioned it to someone in the office.
24. The claimant was taken to the hospital and did not return to undertake her training until some three weeks later on 26<sup>th</sup> February.
25. The claimant also had a discussion with Mrs Deakin informing her that she would have to leave the induction and had a problem with her arm and had to go to hospital. Mrs Deakin said that the claimant did not give her much detail about the condition. She said that she told the claimant to keep in touch and that could recommence the training at any time.
26. No-one at the respondent company (Mrs Deakin; Mrs Natrass or anyone else) got in touch with the claimant to check how she was doing after she had left the training abruptly on 6<sup>th</sup> February 2019.
27. The claimant returned to training on 26<sup>th</sup> February to continue her induction training. In her evidence Mrs Deakin said that she simply asked the claimant if she was OK and the claimant said she was. She said that was the extent of the

discussion. There was no return to work interview with the claimant. When the claimant returned to work she was wearing a bandage on her wrist.

28. The claimant finished her training on 8<sup>th</sup> March.
29. The respondent does not employ staff until their DBS certificate and references have been received, although it allows staff to undertake their training during that interim period. When the claimant had completed her training her DBS certificate was still outstanding. Mrs Deakin said that she could and did obtain a DBS assessment at stage four to enable the claimant to shadow shift, but she would not be employed at that stage or allowed to undertake any shifts. The claimant's DBS was not received until 19<sup>th</sup> March.
30. The claimant did not go onto the payroll until 19<sup>th</sup> March. The respondent says that that is when she started her probationary period namely on 19<sup>th</sup> March. At that stage she should have been issued with a contract of employment which would have included her probationary period of 3 months. However, it appears that the respondent did not issue the claimant with a contract of employment at that stage although they would now usually do so.
31. The claimant commenced working with the respondent on 5<sup>th</sup> April after her plaster and wrist support had been removed. That is consistent with page 179.
32. Again, no enquiries were made by the respondent, including Mrs Deakin, about the claimant's arm. Mrs Deakin said that she simply again asked the claimant if she was OK, but did not pursue the matter.
33. As a bank employee, the claimant would indicate what hours she could work. The respondent would then ascertain what shifts needed to be covered and then provide shifts to the claimant.
34. The claimant worked various hours for the respondent over the next three weeks which totalled approximately a hundred and four hours in total. The claimant said that, at the beginning, sometimes she would go in for a shift and then not be required. She said she would only be paid for a couple of hours.
35. The claimant said that she attended at work on 30<sup>th</sup> April. She says that she was unwell. She said that she had been working at her other job as a HR assistant until about 12 o'clock. She said that she came into work and was sent home. The respondent says that the claimant phoned in sick and there is a note of this. Mrs Deakin said in evidence that she received the telephone call and made a note of this at page 181 of the bundle. The note indicates that the claimant had phoned in at 8.50 am and that the claimant was feeling unwell.
36. The Tribunal accepts Mrs Deakin's evidence in that regard, which is consistent with page 181 which indicates that the claimant did not attend work for any time on that particular day, which is contrary to what happened the previous week when the claimant was paid for a couple of hours (page 180). We also note that the note at page 181 is consistent with what the claimant said in evidence, namely that she was feeling unwell that day.

37. The claimant came in on 5<sup>th</sup> May. She indicated that she was feeling sick and dizzy and was sent home. That is consistent with page 182 of the bundle. She then phoned in later that day to say that she was not coming in the following day, 6<sup>th</sup> May 2019 (page 183).
38. On 7<sup>th</sup> May 2019, the claimant came into the office and indicated that she could not work the following day on 8<sup>th</sup> May because she was not feeling well ( page 184). On 8<sup>th</sup> May 2019, the claimant telephoned to say that she could not work her shift on 9<sup>th</sup> May 2019. In her evidence, the claimant said that she was suffering from vomiting and diarrhoea. She said it was usual policy for the respondent for her not to be able to come into work forty-eight hours. The respondent noted the claimant's various absences over that period; the absence forms being at pages 181 – 185 of the bundle.
39. Mr Gibson who is the registered general manager for the home reviews the sickness of all staff on a monthly basis. He reviewed the sickness absences on 8<sup>th</sup> May and became aware that the claimant was not in work. He was concerned that the claimant's attendance was below the standard required. He was provided with the forms at pages 181 to 185 and contacted the administrator to find out the hours the claimant had worked and what she had been paid for.
40. Mr Gibson said in evidence that, as the claimant was still in her probationary period, he decided to terminate her employment as he was concerned about the impact of her attendance on the Service and the needs of the residents of the Home. He considered the needs of the residents to be paramount. He said in evidence that as the claimant had not been in regular attendance this was having an impact on the staff as well as other staff had to cover for her.
41. Mr Gibson said that he was given information about the claimant's hours of work; when she had commenced work; and what hours she had been paid in terms of training. The training hours of 69.5 hours were paid to her on 19<sup>th</sup> March 2019 when her employment commenced.
42. Mr Gibson decided to terminate the claimant's employment during her probationary period. He wrote to her using a standard termination template. His letter of termination is at page 171 – 172 of the bundle. It states that she was employed on a zero hour's contract and that there are concerns about her attendance which does not meet the standards required. He refers to the requirement for the home to be staffed appropriately and adequately to meet the needs of the residents and that her continued absences are impinging on his ability as the registered manager to ensure that happens. He goes on to indicate that he has lost trust and confidence in her in failing to attend her rostered shifts. He indicates that he has decided to review her performance since the commencement of her employment on 27<sup>th</sup> February. He concludes that it has not reached an adequate standard. Accordingly he indicates that he is dismissing her within immediate effect. He states that he will not be seeking to recover the DBS or training costs.



43. On 14<sup>th</sup> May the claimant contacted ACAS in relation to these proceedings. ACAS then contacted the respondent on or about 23<sup>rd</sup> May. Mr Gibson indicated that he then asked for enquiries to be made through his administrator. His administrator produced an e-mail at page 173 of the bundle. That email states that the claimant was paid for a hundred and four hours of work and sixty-nine point five hours of training. She was off sick the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 30<sup>th</sup> April and 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> May. It goes on to say also not forgetting she was not on the rota for February and March due to her broken arm.
44. In the ET3 response form, which was completed by Mr Gibson, it states that the claimant was sick on 1<sup>st</sup>, 2<sup>nd</sup> of April and goes on to refer to 30<sup>th</sup> April and 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> May. The claimant says that she was not off sick on the 1<sup>st</sup> and 2<sup>nd</sup> April as she was not rostered to work on those days, which is consistent with page 180 of the bundle. Contrary to what was stated at page 173, she did in fact work on 5<sup>th</sup> April.
45. In his evidence to the Tribunal, Mr Gibson said that the claimant was dismissed for her attendance or absences on 30<sup>th</sup> April through to 9<sup>th</sup> May. He said that he had checked with payroll the details of the claimant's hours and when she commenced work. He said he looked at what she had first been paid since 19<sup>th</sup> March 2019. He said she appeared to have worked one hundred and four hours; had been paid seventy-two hours training, but had sixty-one hours off sick. He was relying on that information and the information at pages 181 – 185 which showed the days she was off sick. He said that he was not looking at any other absences, despite what had been said at page 173 of the bundle, as that was simply him gathering information following the contact from ACAS regarding these proceedings.

#### Submissions

46. The claimant's representative submitted that the respondent should have known that the claimant was disabled. She submitted that the claimant had been treated unfavourably by being dismissed which related to disability related absences as well as other absences.
47. The respondent's representative submitted that the respondent did not know and could not reasonably have been expected to know the claimant was disabled. He was also submitted that the claimant had not been dismissed for disability related absences at all and that all of the absences related to matters which were unconnected to her disability.

#### Conclusions

48. The Tribunal reminded itself that the burden of proof is on the claimant to prove the reason for the unfavourable treatment and that it related to something arising in consequence of her disability.
49. This Tribunal finds that the respondent should reasonably have been expected to know that the claimant had a disability. We find that Mrs Natrass was made aware of sufficient details about the claimant's physical impairment at the

beginning of February 2019. She was aware that the claimant had a plaster on her wrist when she commenced her training in January 2019. She was fully aware that the claimant had a problem on 6 February when the claimant had to leave the training abruptly on that day. There was substantial evidence to alert her to the fact that the claimant might have a problem, which might amount to a disability:- She looked at the claimant's injury on the day when the claimant had to go to hospital; she knew the claimant had plates and screws in her arm and was in pain - thinking that she was taking high levels of pain relief; she advised the claimant to go to hospital; she had earlier in the training suggested that the claimant did not undertake hoist training because of her arm; she had mentioned her concerns about the claimant to another colleague on the course; she had decided to monitor the claimant; she had also mentioned it to someone in the office; she knew the claimant did not return to complete her training for another 3 weeks and was wearing a plaster. We also find that there she would have been told by the claimant about her condition in some detail when she was in a separate room looking at the claimant's arm. The deputy manager was also aware that the claimant had to stop her training to go to hospital and was not able to recommence her training for another three weeks.

50. We find that two senior managers had substantial information about the claimant's potential condition which should have alerted them to make further enquiries. They were aware in particular that the claimant could not undertake some of the tasks in training and had to stop her training for medical reasons. We would have expected the respondent to have made further enquiries to ascertain whether the claimant might have a disability based on the information they had at that stage. If they had made the enquiries we would have reasonably expected them to make, the respondent would have known that the claimant had a disability.
51. We find that the claimant was dismissed for absences from 30<sup>th</sup> April to 9<sup>th</sup> May (although there is some inconsistency in the respondent's evidence as to whether or not she was dismissed for alleged absences on 1<sup>st</sup> and 2<sup>nd</sup> April) as well as for those subsequent absences.
52. In relation to those earlier absences, we accept the claimant's evidence that she was not required to work 1<sup>st</sup> and 2<sup>nd</sup> April and that she did in fact work on 5 April 2019. Her evidence is largely supported by the respondent's own documentary evidence at page 179, which contradicts their email at page 173.
53. However, even if one took into account that the claimant may have been dismissed for those absences earlier in April, there is no evidence that any of those absences related to her disability. The absences from 30<sup>th</sup> April to 9<sup>th</sup> May were for sickness and dizziness and did not have anything to do with the claimant's disability. Even if the claimant was wrongly dismissed for absences on 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> April; since none of those absences related to her disability she could not have been dismissed for a disability related in relation to those absences either. Accordingly, we do not find that dismissal was because of any disability related absence.
54. We accept Mr Gibson's evidence that he did not take account of any absences in February and March. At that stage, the claimant was not even an employee and

would appear not to have been scheduled to work until 5<sup>th</sup> April. From Mr Gibson's point of view, although the claimant had completed her training, she was not eligible to work for the respondent until her DBS had been completed and references received. Her probationary period did not actually commence until after her references and DBS were received. There was no evidence to indicate that there were any concerns about her not commencing work until April. The issue for Mr Gibson related to the period after the claimant had commenced work and in his opinion she was not providing the standard of attendance required.

55. As we have found that, none of those absences for which the claimant was dismissed related to her disability discrimination, she was not treated unfavourably because of her disability
56. For those reasons we find that the claimant's claim for disability discrimination is not well-founded and is hereby dismissed.

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**EMPLOYMENT JUDGE MARTIN**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 27 March 2020**

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