



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms. D. Navarro  
**Respondent:** Eurostar International Ltd

**London Central** **On: 4 August 2020**  
**Before:** Employment Judge Goodman

## Representation

**Claimant:** Mr N. Toms, counsel  
**Respondent:** Mr. A. Ross, counsel

## PRELIMINARY HEARING

# JUDGMENT

1. The claimant was disabled within the meaning of the Equality Act by physical impairment of the right arm and right breast pain.
2. The claimant was not a disabled person by reason of fatigue or any mental impairment.
3. The final hearing will be on 10-12 February 2021.

# REASONS

1. This hearing was to decide whether the claimant was disabled within the meaning of the Equality Act.
2. The claimant was and is employed by the respondent as a customer service team member. She has brought claims that the respondent:
  - (1) failed to make reasonable adjustment for disability, when she asked in January 2019 for a change in her shift pattern so that she could take 2 days off at a time to rest, and
  - (2) treated her unfavourably because of something arising from disability when on 6 August 2019 she was given a warning for sickness absence.

## Evidence

3. The claimant gave evidence of the impact of her condition on her ability to carry out day to day activities. I was provided with a bundle of documents containing the GP

records, occupational health assessments, notes of return to work meetings, and sick notes.

### **The Claim**

4. The grounds of claim were drafted by the legal department of her trade union, RMT. Paragraph 2 states:

“The Claimant has a disability within the meaning of Section 6 of the Equality Act 2010 ("EA") in the form of physical impairment due to her undergoing a double mastectomy in June 2018. The Claimant underwent the operation as she has the breast cancer gene which meant she was highly likely (85%) to develop breast cancer. Since the operation the Claimant has continued to experience discomfort and pain around the scars and she has functional restrictions which are likely to be permanent”.
5. A narrative of events then commences. Paragraph 4 states: “following her return to full contractual hours, the Claimant found it increasingly difficult to cope with her shift roster because she feels unsafe working in crowded situations and it does not allow sufficient rest periods between her shifts. She is fit to carry out her role but it has become exhausting due to her disability”.
6. Paragraph 6 refers to a request for altered shift patterns in January 2019 to give her “48 hours between her two periods of working and help to prevent the extreme fatigue caused by her disability”. This is the reasonable adjustment claim.
7. Paragraph 8 narrates that the request was not granted for business reasons, and when she was told this in June 2019, “the Claimant was very upset about the outcome of her grievance and the comments made by Ms Stone. She went off sick and attended her GP who diagnosed her as severely depressed and prescribed anti-depressant medication”.

### **Relevant Law**

8. Disability is defined in section 6 of the Equality Act 2010. A person is disabled if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on (his) ability to carry out normal day-to-day activities. Employment tribunals should assess the evidence to make findings on: (1) whether the claimant has an impairment (2) whether the impairment has an adverse effect on his ability to carry out normal day-to-day activities and (3) whether it is substantial ,meaning more than trivial - **Aderemi v London and South Eastern Railway Ltd (2013) ICR 591**. These questions are to be decided by the employment tribunal based on all the evidence – **Adeh v British Telecommunications plc (2001) I IRLR 23**, and “it is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant is a physical or mental impairment with the stated effects.” – **McNicol v Balfour Beatty Rail Maintenance Ltd (2002) ICR 1498**. Except for very specialised work, work activity can be a normal day-to-day activity –**Banaszczyk v Booker Ltd. (2016) IRLR 273**.
9. The statutory guidance on the meaning of disability says that the term mental or physical impairment must be given its ordinary meaning. The cause does not have to be established, nor must it be the result of an illness. “The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of the physical nature may stem from an underlying mental impairment, and vice versa”.
10. The test of disability is a functional one – **Ministry of Defence v Hay (2008) ICR 1247**. It must be assessed as at the time of the discriminatory acts alleged. If an illness is being treated, the tribunal must look at the deduced affect, without treatment.

**Factual Findings**

11. In July 2018 the claimant, then 46, had an elective double mastectomy on medical advice, after being found to have the gene that put her at high risk of breast cancer, after the illness of various female relatives. A few days after discharge she had right sided pain related to a drain which was (with its contralateral counterpart) removed. She went on to make a good recovery, but in August 2018 it was noted that she had fibrosis in the right lower breast at the drain site.
12. In October 2018 she was reviewed by an occupational health physician, Dr Ledda. He said that because of the surgery she should not strain the upper limbs and the operated area, and some restrictions would have to be permanent. He recommended that she avoid handling heavy weights at work, such as the Tensator, and piles of newspapers, and that she should not be placed on her own in a hostile situation, for example with delayed passengers.
13. She also had a discussion about her return to work with the respondent, and said that she was not in pain but she could still feel fibrosis and “it gets annoying when I’m more active”. Asked about medication, she was taking painkillers if necessary. She wanted to avoid the pushing and shoving when people were in a rush. She reported “some issues of my right arm”, and that she had pain in the right side occasionally.
14. She went back to work in November 2018, building up over several weeks to a full week’s work. She already had a flexible working pattern because of childcare –her daughter was then 8, and worked an early shift on Monday, a full day on Tuesday and Friday, and then a Sunday morning, 32 hours in total over the 4 days.
15. Towards the end of the phased return to work, on 4 January 2019 it was noted that she took Doliprane, 1000mg once a day, which she obtained in France. In evidence it was explained that this was equivalent to 2 ordinary paracetamol tablets. She also saw her GP the same week saying she still had a lot of pain in her right breast laterally. There was no pain in left side. The GP referred her back to the breast clinic at the hospital.
16. There is a further occupational health report on 19 January 2019. She was taking painkillers “when she required them”. The adviser also completed a mental health assessment and noted mild depression and moderate anxiety symptoms. The claimant said she had had professional support when her mother passed away, at present she felt she was coping well. The adviser recorded “she has been performing her contractual hours since the end of December 2018 and managing as well as she can”. The adviser recommended that she was not on her feet for more than 2 hours at a time, and then have sitting work for an hour before getting back on her feet. This was to help manage the breast pain while she waited for a clinic appointment. The claimant explained in evidence that this is because the weight of the breast implants. The adviser also recommended that she avoid crowded environments where people might knock into her. There is no mention of tiredness or fatigue.
17. In March 2019 she saw a breast surgeon at Guy’s and St Thomas’s Hospital. She reported pain in the right breast and a possible lump there, but no symptoms on the left. She was worried in case she had cancer. She was reassured that the lump was not a tumour, only scar tissue, and advised that the pain was because of capsular contracture. There is no mention of right arm pain or restriction of movement. Nor is there any mention of fatigue, although the question may not have been asked which she had been referred for breast pain.
18. Following an absence from work in May 2019 because of flu and peri-menopausal symptoms, there was another referral to occupational health, who reported on 5 June 2019 that the scar tissue was said to be causing hardness in the area, and the pain

had not improved. It helped her that she did not have to stand more than 2 hours of time, but working peak shifts had “exacerbated her anxiety as she worried about being in crowded environments as it increases the risk of being accidentally bumped into by passengers”. She also reported being pre-menopausal, so tired and emotional most of the time. As reported, this was not linked to breast pain arm pain or working hours.

19. She saw her GP on 14 June 2019, and reported feeling depressed. The GPs note of the history included an episode of depression 3 years ago, an assault at work 2 years ago, her mother dying in April 2017, the mastectomy in 2018, and that lately she had been “depressed and sad again... work hasn’t been supportive, feel like they act as if nothing happened and for her having the surgery was a big deal.” She was up and down. She was given a four-week trial of an antidepressant.
20. She was then seen by an occupational physician, Dr Wladyslawska, who reported on 28 June after a telephone consultation that the pain around scars had persisted “and have been resulting in functional restrictions”. She also reported adverse impact on the psychological well-being to combinations of worries around her health and chronic pain condition. A few weeks earlier this had deteriorated, and she was signed off work prescribed antidepressants. She suffered poor sleep and fatigue. This is the first mention of fatigue.
21. On 3 July 2019 the GP prescribed a sleeping tablet.
22. The next occupational health report is dated 16 July 2019, a telephone consultation like the others, and noted that since the surgery she had worked in the ticket office, which avoided being bumped by others, and doing check-in for Business Premier. She was doing better on the antidepressant medication.
23. On 25 July 2019 she had a discussion with respondent about her health and fitness for work. She was asked about her concern about working in crowded areas and on peak days, having a fear of being pushed, which she said caused anxiety, and the claimant replied: “it’s not an issue of peak/off-peak days working, or fear of being pushed et cetera. Every day now feels like a peak day as it is always busy, I’m scared to be touched”. She said the restriction (to the ticket office) was good and, “I feel safe compared to before.” She also said the pain was something she was going to have to live with, as the surgeons could do no more. The manager asked if she could ask the GP about coping mechanisms for working in crowded areas, because the station was getting busier and, “as you said every day feels like a peak day now”. The claimant said that it was upsetting her to have to explain so often, she was attending too many meetings and having to repeat herself. She also reported that she was concerned about the antidepressants she had recently started to take, as it affected the sleeping pattern.
24. There is a further occupational health report of 18 October 2019. This listed ongoing breast pain which “results in ongoing functional restrictions”, and that she did not respond well to basic analgesia. There was an associated adverse impact on the psychological well-being, and the worry made her tired and lethargic, she spoke of exhaustion. Antidepressants had had a positive impact on her mood.
25. At the following discussion with the managers on 31 October, (after presentation of her claim to the employment tribunal), the claimant associated her depression and tiredness with the operation. She did not think more counselling would help. She said “constantly explaining myself and not getting anywhere the support help I need... Gets on my nerves”. She could not understand why her case was not taken seriously and “the only excuse given this business needs”. The main issue was the duty roster.
26. Turning from the documents to the claimant’s witness statement and answers to questions, she states that she has had ongoing nerve pain since the operation, and

the because of this she cannot raise her right arm or carry weights. She said the arm was now really stiff, but not painful – the pain is around the right breast scar. She has difficulty getting dressed. In evidence she explained that she could not manage a back zip in her uniform dress without aid from colleagues, and if no one was there to help would put on a jacket or cardigan to cover the gap. She also had trouble waving passengers on in a queue, she said her left arm was insufficient for this. She could not raise herself out of the bath because of the stiff or weak arm, and took a shower instead. She walks to the shops 10 minutes away, but now does daily shopping, carrying the bag in the left hand, rather than the weekly shop she did before. She cannot pick up furniture to clean under it, or manage a heavy Hoover, so uses a smaller device, and takes breaks during cleaning. She avoids crowded trains, because she doesn't want to stretch out her right arm to hold the bar when standing, and does not use the left arm instead. She also mentioned 'electric shocks', which happen now and again, and are not painful, but make her jump. She finds it painful to stand so long because of the weight of the implants. She falls asleep unexpectedly, which she relates to the antidepressants. The main problems are using the right arm, and fatigue and tiredness related to perimenopause and mild anaemia. She says "one day off is not enough to rest". She also mentioned that she now never ran or did physical exercise. In answer to questions, it seems that she went running in the park very infrequently before surgery because of needing childcare, and would occasionally follow an exercise video on YouTube when she wanted to regain control of her weight.

27. It was put to the claimant that she rarely saw her GP about the ongoing pain, and also that "stage 1 contracture", the hospital assessment in March 2019, was the mildest level, and said to be asymptomatic. She replied that the doctors had made it plain she must live with it, so she did not return to report breast pain, there was no point.

### **Discussion**

28. What is the impairment? There is a physical impairment in the right breast pain related to the contracted scar tissue in the breast, for which she takes occasional paracetamol. She also has a stiff arm. Difficulty with the right arm has never been noted by the doctors, and she said it was not painful. It could be related to being fearful and wanting to protect her right breast, leading her to avoid raising it, or perhaps it is because of tightening in the scar as she raises her right arm, but this is speculative explanation of something otherwise unexplained. The claimant herself had been told by a family member it could be nerve pain from the operation. The cause may be unexplained, but it appears genuine.
29. There seems to be a mental impairment in the form of a mild depression, diagnosed by an adviser in January 2019, but not of such severity but not in such seriousness that she went to see her doctor but not so severe that she claimant went to see her doctor, felt in need of counselling, which was clearly explored, although the adviser felt any measures were needed. There was no mention of tiredness or fatigue in the consultation. Fatigue was not mentioned until after absence for an unrelated cause (flu and perimenopausal symptoms), the consultation then with the GP and prescription of an antidepressant. In time, this coincided with the claimant being informed that a grievance about not being given a shift change was unsuccessful, but it is not clear which went first.
30. The physical impairment is substantial, meaning, more than trivial. The respondent has made adjustment for it. It also appears long-term.
31. The claimant suggests that fatigue is related to the physical impairment. It is possible that the effect of constant pain is to make the sufferer low in mood, but there is no evidence of this, and such evidence as there is about when the claimant began to report fatigue indicates that it was a consequence of the depression and poor

sleeping that began around June 2019, and has fluctuated since. The cause is not clear, but seems to be related to menopausal symptoms and discouragement when her grievance about shift patterns was unsuccessful. It is not suggested that the claimant is misleading the tribunal, only that when presenting a claim and preparing a statement, her more recent symptoms were foremost in her mind. Assessing what symptoms she had and when, and looking at the evidence as a whole, this is the finding.

32. The mental impairment (depression, with or without fatigue) was not substantial until June 2019. It seems to have had no reported effect on day-to-day activities until then. Since then it has had the effect of causing her to fall asleep suddenly, likely to be a response to medication or disturbed sleep. The claimant has had depression in the past, as reported to the HR adviser in January and the GP in June, but there is nothing to suggest an underlying condition. As of June or July 2019, it could not be said that it was likely to be long-term (more than 12 months), on the test of "could well happen", although in the event, and assuming there has been no improvement since October, it has proved to be. At that time, it was a recent condition which was responding to treatment. Episodes of depression in the past had resolved with treatment. Nothing suggested it was to be long-term.
33. To conclude, the tribunal finds that the claimant was a disabled person by reason of physical impairment in breast pain, and stiffness of the right arm, unable to stand for more than 2 hours. The tribunal does not find that the claimant was a disabled person by reason of depression or fatigue.

#### **Further Case Management**

34. The parties will want to revise the list of issues and assess the time estimate for the hearing in the light of these findings. A hearing date has been set for a hearing at Victory House, although that may change if Covid-19 restrictions later in the meantime. The parties are invited to agree directions for full disclosure, a hearing bundle, and exchange of witness statements, but if there is difficulty, they should apply, and a remote case management hearing will be listed.

EMPLOYMENT JUDGE – Goodman

Date : 5<sup>th</sup> August 2020

JUDGMENT SENT TO THE PARTIES ON

07/08/2020.

FOR THE TRIBUNAL OFFICE