



EMPLOYMENT TRIBUNALS

Claimant: Ms. S. Golden

Respondent: Ash Waste Services Ltd

HELD AT: Mold

ON: 5th September 2019
(8th October 2019 in
chambers)

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr. J. Halson, Solicitor

Respondent: Ms. L. Gould, Counsel

RESERVED PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is:

1. At all material times the claimant had a physical impairment, namely interstitial cystitis (also known as “painful bladder syndrome”), which impairment had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities; the claimant was at all material times a disabled person within the definition of disability in section 6 Equality Act 2010;
2. The respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person at any material time;
3. The claimant’s claims that the respondent treated her unfavourably because of something arising in consequence of her disability (s.15 Equality Act 2010), and that it failed to make reasonable adjustments in accordance with a statutory duty (sections 20 and 21 Equality Act 2010), are dismissed.

REASONS

1. The issues:

- 1.1. In a situation where the claimant says that she has a history of urinary tract infections and related issues, where she has recently been diagnosed with interstitial cystitis (painful bladder syndrome) and having an anterior prolapsed bladder (cystocele), I had to determine whether she was a disabled person in accordance with the statutory definition and applicable Guidance;
- 1.2. Subject to my finding in relation to disability I had to decide whether the respondent knew at a material time that the claimant was a disabled person and, if it did not know, whether it ought reasonably to have known that she was a disabled person.

2. The facts:

- 2.1. The respondent is a large employer engaged in the provision of waste disposal services and the claimant was employed by it as a field-based business development manager (BDM) from 26 February 2018 until her dismissal on 22 June 2018. Her line manager was Mr Barry Gould, Sales Manager. BDMs are expected to conduct four appointments with clients or potential clients per day and a minimum of five “cold calls” per day in addition to following up existing quotes and making appointments for another day; this involved considerable travelling away from the office with or without colleagues including Mr Gould. She was subject to target achievement.
- 2.2. At her induction on 26 February 2018 the claimant completed a standard “Employee Details Form” (page 67 of the trial bundle to which all further page references refer unless otherwise stated). As well as providing basic identification details she indicated, by ticking the appropriate box entitled “health details”, that she did not have a disability. She left blank the section for details, presumably in the light of her first answer, and she left blank the section for completion with any suggested adjustments to the working environment if they were required. She signed and dated the form. The claimant’s assertion that the respondent altered or fabricated the form was unconvincing; I did not believe the claimant’s assertion that the respondent must have falsified the document because with both previous and later employers she had stated on such forms that she had “bladder issues”. I have no reason to doubt that the claimant may have given other employers different details but I did not believe the claimant in relation to the respondent’s Employee Details Form. She did not raise this allegation of falsification until during cross-examination at this hearing, and she blamed her solicitor for not raising the matter sooner, including upon disclosure and compilation of the hearing bundle of documents which she accepted that she had seen in advance of the hearing; the claimant said that she had raised it with him; I found this evidence unconvincing.
- 2.3. The claimant was absent from work from 6 March to 10 March 2018 (four days) and self-certified the nature of her absence as relating to

“sickness/Norovirus”; she visited her doctor. She confirmed that she was fit to return to work. She completed a back to work interview form on 13 March 2018 confirming those details; she signed that form (p68-69). The claimant does not suggest that Norovirus is related to interstitial cystitis or cystocele.

- 2.4. On 4 May 2018 the claimant sent an email to Mr Gould requesting two days holiday and attaching a holiday request form. In her email she told him that she needed time off “to have a cyst removed from my ovary”. She appreciated that the request was at short notice but it arose because of the cancellation in the hospital’s list. She confirmed that the procedure was under general anaesthetic and that she would be a day-patient. In those circumstances she sought only to have two days absence, (Tuesday for the procedure and Wednesday) saying that she would return to work on Thursday, 10 May 2018 (p.42). The claimant gave no further details. In her evidence the claimant accepted that Mr Gould knew nothing more about her medical situation than she had explained in her email of 4 May 2018. She believed that the procedure was routine and not problematic. The claimant accepted that this procedure was not related to interstitial cystitis or cystocele.
- 2.5. Up to this point the claimant had never mentioned to Mr Gould that she had a bladder condition or any issue related to or affecting her bladder. The claimant’s evidence on what she said to whom was inconsistent, vague, and ultimately unconvincing when she suggested that Mr Gould knew all about her bladder problem which she said was “public knowledge”; she had already repeatedly said that she had not told him about it, and she said in turn that she had only told one colleague, that everyone knew about it and that she had told Mr Gould all about it. She then said she had given Mr Gould details of her bladder problems. I found Mr Gould’s evidence to be more consistent and credible when he denied all knowledge and specifically that the claimant had not mentioned her bladder to him.
- 2.6. During the course of the removal of the ovarian cyst the surgeon “nicked” the claimant’s bladder and it was perforated. This injury required repair. Mr Gould heard of this by a message passed on via the claimant’s boyfriend. It was the claimant’s boyfriend who used the expression “nicked her bladder” and said that it occurred as a complication during the routine ovarian surgery. I note that the claimant does not suggest that she is disabled or has ever been disabled by reason of a perforated bladder. The claimant repeatedly said in evidence, as she told the respondent at the time, that she went into hospital for a routine operation for the removal of an ovarian cyst that went wrong. The claimant does not assert that her ovarian cyst or its removal, was in any way related to interstitial cystitis or cystocele or any long-standing bladder problems and there is no evidence before me to suggest a relationship.
- 2.7. Until this point there was no reason for Mr Gould, and therefore the respondent, to know or suspect that the claimant had an ongoing and long-term issue with her bladder. There was no reason for the respondent to know the claimant’s symptoms about which she was very discreet for perfectly understandable reasons. The claimant lived with frequent urinary tract infections creating the need for frequent urination, sometimes with urgency

and sometimes with leaking; on occasions she would get up during the night three to four times to visit the toilet and some days she had a near constant urge to urinate, or otherwise just ongoing pain; she avoided drinks that would irritate her bladder such as tea, coffee, fizzy or citrus drinks. She wore protective pads daily and was very self-conscious about other people noticing an odour of urine. She regularly took medication although her evidence that the record of medication contained within the trial bundle was incomplete or inaccurate was unconvincing, and I cannot make any clear finding as to the full extent of the claimant's reliance upon medication. Once again, the claimant's attempts to blame her solicitor and/or the hospital authorities for providing inaccurate or incomplete medical records were not convincing but I make no finding as to the exact extent of her medication. I accept the claimant's evidence that she has been undergoing investigation for bladder-related problems for several years having first consulted her general practitioner in July 2012 because of frequent urination which was "interfering with [her] life" and that these issues continue to date. The claimant has visited very many hospitals in a number of locations where she has lived or worked over the period of some seven years because of bladder issues which have only recently been diagnosed. She has taken medication for her long-standing bladder problems.

- 2.8. I find that the claimant concealed her symptoms from Mr Gould out of a natural shyness about them and because she found them upsetting. This was evident in her evidence, and demeanour giving evidence, and the apparent upset that it caused her having to discuss such matters during the hearing. I fully understand that; her emotions were evident. I accept from all that I heard from both the claimant and Mr Gould that these matters were not discussed at work and I believe from what I have heard that she would have found it very difficult to speak of such matters, would likely have become emotional (as she did repeatedly during the hearing when necessarily giving such details under cross-examination) and that Mr Gould would have been very conscious of that; he was not so conscious at the material time because the claimant not only did not inform him but concealed matters from him. I understand her reluctance and upset at having to give details of her symptoms at this hearing and that, if anything, this would appear to corroborate my finding that she does not easily raise such matters and did not raise them with Mr Gould or the respondent's management generally.
- 2.9. The claimant confirmed in her evidence that she did not wish to discuss her medical condition with the people in headquarters who made or confirmed client appointments; I find therefore that she did not wish such matters to be a factor in working arrangements or for anyone else to know her personal health issues.
- 2.10. To all outward appearances the claimant led a busy professional life and an active social life. During her work and her relations with colleagues, touching as they would on social life as well, the claimant gave nothing away that would indicate her personal health circumstances and she took precautions and made efforts to ensure that this was the case. In fact, Mr Gould understood the claimant to be very happy and to lead an active life unaffected by the distressing symptoms that she described in the hearing. Mr

Gould considered that the claimant's outward appearance was "bubbly keen.... smart and well-presented" and that she never gave him any cause to believe that she was coping with distressing bladder-related symptoms. She did not want him to know. She repeatedly referred in her evidence to her belief that men found it difficult "to discuss women's down below". I find that the claimant concealed her symptoms and bladder condition from the respondent and, in all probability, would not have discussed it upon any enquiry. Nothing said by either witness, (the claimant and Mr Gould), or anything contained in any of the documentation led me to believe that the claimant would have discussed her painful bladder syndrome and symptoms with the respondent or her colleagues generally; she would not have informed them of those symptoms and the effect they had on her everyday life had she not been dismissed and commenced this litigation. I find that she would not have done so and did not do so (albeit she may have mentioned something about it to one colleague in privacy whilst travelling with him in a car on a field visit, as she initially said in evidence). She clearly found it difficult even to disclose the details during the hearing when the onus was on her to prove disability and it was necessary for her litigation for her to go into detail.

- 2.11. The claimant was distressed and angry at the perforation of her bladder during the routine ovarian procedure. She sent a picture of her scar to Mr Gould to emphasise her need for a longer period of absence and she relied upon her father and her boyfriend to inform Mr Gould of her situation while she convalesced. They telephoned him on different occasions and on none of those occasions was the claimant party to the conversation. Neither her father nor her boyfriend gave evidence to the tribunal. I accept Mr Gould's clear, cogent and credible evidence that neither of them gave him any details of the claimant's general bladder condition and distressing symptoms, or their effect upon her; they confined any comment to the perforation and repair of her bladder following the cystoscopy and the claimant's convalescence and absence from, and return to, work.
- 2.12. The claimant submitted two fit notes to the respondent, 11th of May and 22nd of May 2018, referring only to bladder perforation. In a covering email of 18th May (P 44) the claimant referred to the 11 May fit note (P 45) and explained that she felt awkward about not being in work although she had been reassured that she was fit to drive saying that she would be signed off as being sick (that is she could return to work) "as people have catheters for months". She offered to work from Widnes or home the following week and to book appointments for the week after. She apologised.
- 2.13. The claimant returned to work on 24 May when there was a return to work interview the record of which appears on a Back to Work interview form at pages 73 to 74. The claimant signed and dated it. Once again, her evidence that the meeting was carried out over the telephone and that she may or may not have signed the form and may or may not have signed the form on a later date was given in a faltering, confusing, vague and unconvincing manner. I find that there was a face-to-face meeting on 24 May when the claimant signed and dated the form. On that form the claimant confirmed that she had attended hospital for a routine operation that went

wrong and that further surgery was then required but that she was fit to return to work. She indicated that the absence was caused by a surgical accident. She did not disclose either orally or on the form any details of her interstitial cystitis and cystocele, and their effects upon her day-to-day activities. She made no further reference to her catheter and if indeed, as she says, she had to go home to attend to it, she did not make this known to Mr Gould. The catheter was related in any event to the surgical event and not the claimant's disability. The claimant did not describe any ongoing bladder issues once the post-operative repair was completed and she had returned to work.

2.14. The claimant was absent from work for the period from 11 June to 15 June 2018 and has to date not provided a sick note in relation to that absence. Mr Gould was led to believe this related to an illness affecting the claimant's grandmother. He telephoned the claimant on numerous occasions but she did not answer or return his calls; it was her father who contacted Mr Gould to say that his mother was dying.

2.15. The claimant returned to work on 18 June 2018 and was dismissed. At the meeting that ended with the claimant's dismissal Mr Gould considered that the claimant looked well and fit to be in work and nothing about her demeanour indicated that she had a continuing health problem. A discussion took place about the events of the previous week during her absence and in relation to conversations Mr Gould had with some of her colleagues. They discussed the BDM role. During the course of that meeting the claimant said nothing to Mr Gould to indicate that she had a physical impairment with a long-term and substantial adverse effect on her day-to-day activities. During cross examination the claimant conceded that she did not give him any details of her underlying condition although she says that she felt she did not need to as Mr Gould was fully aware of it. She said that was a matter of his word versus hers; she said in evidence that she had "made it clear to him with everything over weeks and months" and she therefore assumed that at their final meeting she did not need to rehearse the detail. I have found that she did not in fact make it clear to Mr Gould over the previous weeks and months of employment that she had a disability or any long-term bladder issues, but rather to the contrary she concealed the fact and was content to keep those details private and confidential for her own reasons. During that final meeting Mr Gould commented that she did not seem happy generally and made enquiry of her; she just said that she had not had a good few weeks which indicates to me that she was prepared to let Mr Gould believe that any unhappiness was due to the fact that a routine cystoscopy led to complications and her grandmother was dying; in all probability the claimant would not under any circumstances upon enquiry by the respondent reveal details of her bladder infections, discomfort, pain, urgency and occasional urinary incontinence (by leakage, or threat thereof).

3. The Law:

3.1. The definition of disability is set out in section 6 Equality Act 2010 (EA). A person has a disability if they have a physical or mental impairment having a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

- 3.2. “Substantial” means more than trivial, and “long-term” means lasting or likely to last 12 months or more.
- 3.3. In a 2011 the then Secretary of State published Guidance on Matters to be taken into account in determining Questions relating to the Definition of Disability. This guidance does not impose legal obligations in itself, and is not an authoritative statement of the law; that said I am required to take into account relevant aspects of the guidance in determining issues of “disability”.
- 3.4. I was appropriately referred to two decided cases and their judgments relevant to the issues before me, namely:
- 3.4.1. **N.J. Gallop v Newport City Council [2013] EWCA Civ 1583**, paragraphs 36 - 44. This judgment confirms:
- 3.4.1.1. Before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; for that purpose, the required knowledge, whether actual or constructive, is of the facts constituting the employee’s disability as defined in s.6 EA;
- 3.4.1.2. Provided the employer has actual or constructive knowledge of the facts constituting the employee’s disability, the employer does not also need to know that the consequence of such facts is that the employee is a disabled person;
- 3.4.1.3. This tribunal must ascertain whether, at the material times, the respondent had actual or constructive knowledge of the s6 EA facts (3.1 above) constituting the claimant’s disability, and I must engage in that enquiry, that is as to whether and how the respondent made its judgement as to whether the claimant was a disabled person relying upon appropriate assistance and guidance. [I note that this part of the judgement relates to occupational health advice and assistance that had been given which is different from the situation of the claimant in our case].
- 3.4.2. **A Ltd v Z UKEAT/0273/18/BA** paragraphs 22 – 23. This judgment confirms that in determining whether an employer had the requisite knowledge the following principles apply:
- 3.4.2.1. There need only be actual or constructive knowledge as to the disability and not the causal link between any disability and the effects thereof that may have led to unfavourable treatment;
- 3.4.2.2. An employer need not have constructive knowledge of a diagnosis; it is for the employer to show that it was unreasonable for it to be expected to know of a long-term impediment having a substantial effect;

- 3.4.2.3. The question of reasonableness is one of fact and evaluation where assessments must be adequately and coherently reasoned, taking into account all relevant factors;
- 3.4.2.4. When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance in satisfying the definition of disability (as to substantial adverse effect and the duration of the disabling effect);
- 3.4.2.5. Employers should consider whether a worker has a disability even when one has not been formally disclosed and must do all they can reasonably be expected to do to find out if the worker has a disability, where what is reasonable will depend on the circumstances and the employer must make an objective assessment. Employers are also enjoined to consider issues of dignity and privacy;
- 3.4.2.6. It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so;
- 3.4.2.7. "Reasonableness" must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and respect for the dignity and privacy of the employee.

4. Application of the law to the facts:

- 4.1. In reaching this judgment I have considered the oral and documentary evidence produced at this hearing; I have considered and applied the applicable statutory provisions, the published Guidance referred to above, and the authorities quoted at paragraph 3.4.
- 4.2. For approximately seven years, a long term, the claimant has lived with painful, discomforting, and to her embarrassing, consequences of interstitial cystitis and cystocele. Daily, the claimant has had to manage her dietary and liquid intake and to be mindful of the risk of an urgent need to urinate and the fear of that. At various times over that seven-year period the claimant has taken medication for her symptoms and has frequently visited hospitals for investigation and medical attention. She regularly and habitually wears absorbent pads for fear of leakage. Her sleep pattern is substantially and regularly disrupted when she is awoken by the need to visit the toilet at night; this sleep disturbance leaves her tired. She is self-conscious of the risks staining and odour. I consider those effects, and the essential consequential precautionary and remedial steps, to have a substantial adverse effect on her day-to-day activities. That is not to say that the claimant is unable to have an active professional and a social life but that is not the test with regard to disability. The fact that the claimant is relatively satisfied with her professional and social life has no bearing on the question of disability.
- 4.3. I find that the claimant has truthfully explained her symptoms during the course of the hearing, and that she found doing so to be distressing. I

understand that, and I have taken into account her heightened emotions when considering the credibility of her evidence. All things considered the claimant has satisfied me that she is a disabled person within the definition set out in section 6 EA read with the assistance of the above-mentioned Guidance. Clearly interstitial cystitis and cystocele are physical impairments. The effects of this condition upon the claimant as summarised by me at paragraph 4.2 above are substantial in that they understandably preoccupy the claimant and fundamentally affect her activities, clothing, diet, and movements in that she understandably has to consider the accessibility of toilet facilities; those effects are considerably more than minor or trivial. Regardless of the fact that diagnoses have only been made recently, it is evident that the substantial adverse effects of the claimant's physical impairment have been long-term in that she first sought medical attention about them in 2012 and for approximately seven years has been under investigation.

4.4. The claimant not only did not tell the respondent about her disability but actively concealed it from the respondent. At her induction she completed a personnel form to the effect that she did not have a disability. Even taking into account the claimant's distress when discussing her symptoms, nevertheless her evidence to the effect that the personnel form had been falsified by the respondent, that she had written on the form that she had bladder problems, that she had told her solicitor to raise it but that he had not done so, and that she had been consistent in disclosing a disability was not credible. Similarly, even during her evidence the claimant did not suggest that any of her absences were a direct consequence of her disabling condition. The evidence that she gave eventually under cross-examination that her disability was public knowledge at work, her having made it known to everybody and in detail to Mr Gould, was not credible. I say this because initially the claimant stated very clearly that she had only told one colleague and that she did so whilst travelling with him in a car and in privacy; furthermore she stated on numerous occasions that she did not give Mr Gould details of her urinary tract symptoms and difficulties, that she considered he would have found it difficult to discuss such intimate matters about a woman anyway, and that she assumed that her father and boyfriend would have told him the details when there was no evidence to corroborate that they did. I also took into account that the claimant provided the respondent either directly or through her father and boyfriend with an explanation for each and every absence from work and that none of those explanations for any of the absences alluded to the claimant's disability. The claimant explained one absence to be related to Norovirus and a subsequent absence being due to a routine procedure for removal of an ovarian cyst which was then compounded by bladder perforation during the course of that operation, and subsequently an uncertified absence in relation to her grandmother's illness. Even during her evidence the claimant did not suggest that any of the recorded absences were in consequence of a disabling condition, albeit she referred to the disability as a continuing issue for her and one which she asserts the respondent ought to have known about.

4.5. The respondent had no grounds to suspect, believe, or know that the claimant was disabled. There was no reason for Mr Gould to make enquiry.

One way or another the claimant accounted for each and every absence from work without reference to the disability. For her own perfectly understandable reasons she gave nothing away in relation to her professional or social life that would indicate that she had a disability, or effects that substantially adversely affected her day to day activities. Nothing about her apparent activities, her comments and interactions with colleagues and management would have led them to suspect that she was a disabled person or had a condition with substantial, adverse, long-term effects on her day to day activities. The claimant's made sure that this was the case. It is difficult to imagine a situation where the respondent's managers could have raised the possibility of the claimant living with such matters in the absence of any reason to consider it appropriate. Following the claimant's absences she was appropriately interviewed upon return to work; had the respondent's been left with any ground to suspect that the claimant was disabled or had such a condition with said effects then these opportunities would have arisen for investigation. I find that the respondent did not miss an opportunity to make reasonable investigation because it had absolutely no reason to suspect that further enquiry was necessary. It is important to note that the claimant does not contend that she is disabled by virtue of the perforated bladder which has been repaired; had there been an issue in that regard the respondent would have been on notice to make further enquiry. That was however an entirely separate condition to the disabling condition upon which the claimant relies.

- 4.6. It follows that I find the respondent, through Mr Gould or otherwise, did not have actual or constructive knowledge of the claimant's disability. Not only was the respondent unaware of the claimant's diagnosis with regard to the disabling condition but it did not know of the impediment (or any impediment) having a substantial (or any) long-term (or any) effect. The respondent assessed the claimant in general terms taking into account all relevant known factors regarding her interaction with colleagues and management, her professional performance and what was known of her social life and had no grounds to suspect matters relating to what I find to be her disability. The claimant explained away absences such as they were in terms that did not relate to her disability. In those circumstances it was not incumbent upon the respondent to look beyond the explanations given, which appeared plausible at the time and which according to the claimant's evidence were genuine in any event. It is likely that had the respondent enquired any further into the claimant's general health condition, in the absence of any reason for doing so, to ascertain whether there was some underlying disability they would have overstepped the mark with regard to due respect for dignity and privacy.
- 4.7. To the best of the respondent's knowledge, information, and belief there was no ground to enquire into personal and intimate matters and they had no reason to suspect that they may have had cause to ask questions relating to the claimant's urinary tract. Understandably that never occurred to anyone. I also find on the balance of probability that had the respondent made such further enquiries the claimant would not have disclosed details of her disabling condition; I base this finding on the fact that the claimant withheld information voluntarily from the respondent and was reluctant to give details at the hearing even when it was essential to prove her case, and when she did so she found it understandably distressing and difficult.

4.8. Therefore, notwithstanding my finding that the claimant was a disabled person at all material times, her claims must be dismissed because at no material time did the respondent have actual or constructive knowledge of her disability.

Employment Judge T.V. Ryan

Date: 11.10.19

JUDGMENT SENT TO THE PARTIES ON

12 October 2019

FOR THE TRIBUNAL OFFICE