



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Hannon

**Respondent:** Organic Insurance Limited

**Heard at:** Manchester

**On:** 11 September 2018

**Before:** Employment Judge Feeney

**Representation:**

Claimant: Ms S Martin, Solicitor

Respondent: Ms J Salt, HR Manager

**PRELIMINARY HEARING  
Employment Tribunals Rules of Procedure 2013  
Rule 53(1)(a)**

1. The claimant brings a claim of disability discrimination, the respondents do not concede that the claimant is disabled within the meaning of the Equality Act 2010 and therefore the matter was listed for determination today. I heard evidence from the claimant and there was an agreed bundle.

**The Law**

2. Section 6 of the Equality Act 2010 sets out the basic parameters of the definition of a disabled person for the purposes of the 2010 Act. It says that:-

(i) 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.

3. There is a statutory code of practice to be taken into account in determining questions relating to the definition of disability issued in 2011, the relevant parts of this are as follows:-

A1. A person has a disability for the purpose of the Act if he or she has a physical or mental impairment and the impairment has a substantial or long term adverse effect on his or her ability to carry out normal day to day activities.

A2. This means that in general:-

- The person must have an impairment that is either physical or mental (see paragraphs A3 to A8).
- The impairment must have the adverse effects which are substantial (See Section B).
- The substantial adverse effects must be long term, See Section C; and
- The long term substantial effects must be effects on normal day to day activities, see Section D.

4. Whilst it is not necessary for the cause of the impairment to be established the effects that are experienced must arise from the physical or mental impairment. B1 concerns the substantial adverse effect requirement and defines it as follows “a substantial effect is one which is more than minor or trivial”. The following matters should be taken into account, the time taken to carry out an activity, the way in which the activity is carried out and the cumulative effects of that impairment and how far a person can be reasonably expected to modify his or her behaviour with coping and avoidance strategies to prevent or reduce the effects of an impairment on normal day to day activities. The effects of the environment should be taken into account and in relation to the effects of treatment that should be discounted and includes therapies as well as drugs.

5. Section C. In respect of long term the meaning of long term is set out at C1. The act states:-

“The Act states that for the purposes of deciding whether a person is disabled a long term effect of an impairment is:-

- which has lasted for at least twelve months or
- whether the total period for which it lasts from time from the first onset is likely to be at least twelve months or
- which is likely to last for the rest of the life of the person affected.

6. Section D addresses normal day to day activities. This is no longer defined as is explained in Section D2 but general day to day activities are seen as shopping, reading, writing, having a conversation, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. It can include general work-related activities, study and education related activities, interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, keeping to a timetable or shift pattern. They did not include

activities which are normal for a particular person or a small group of people however it is not necessarily which is carried out by the majority of people.

7. D17 states that some impairments may have an adverse impact on the ability of the person to carry out normal day to day communication activities, for example, they may adversely affect whether a person is able to speak clearly at a normal pace and rhythm and to understand someone else speaking normally in the persons native language. Some impairments could have an adverse effect on a person's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions. Account should be taken of how such factors can have an adverse effect on normal day to day activities. Examples given of a man with Asperger's Syndrome finds it hard to understand non-verbal communication such as facial expressions and non- factual communication such as jokes, he takes everything said very literally.

8. D19 says a person's impairment may adversely affect the ability to carry out normal day to day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking new knowledge and understanding spoken or written information. This includes considering whether the person has cognitive difficulties or learns to do things significantly more slowly than a person who does not have an impairment.

9. In the case of Morgan -v- Staffordshire University 2002 EAT useful guidance was given in respect of mental impairment such as relied on here, even though this was originally in relation to the Disability Discrimination Act 2005 including as follows:-

"Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence, however this does not mean that a full Consultant Psychiatrist's report is needed in every case, there will be many case where the illness is sufficiently marked for the claimant's GP to prove it, whoever deposes it will be proven for the specific requirements of a legislation to be drawn to that person's attention. If it becomes clear that despite a GP's letter or other initially available indication an impairment is to be disputed on technical medical grounds then thought will need to be given to further medical evidence. The EHRC Employment Code makes it clear that the term mental impairment is intended to cover learning disabilities".

10. In Dunham -v- Ashwood Windows 2005 where a claimant claimed a learning disability and this was contested, the evidence before the Tribunal consists of a report compiled by senior psychologists which stated D suffered from generalised borderline moderate learning difficulties.

11. The Tribunal rejected their evidence as they believed a Medical Practitioner's evidence was required, this was overturned but the EAT accepted that a claimant is unlikely to establish a mental impairment solely on the basis of "difficulties in school or because she or he is "not very bright".

12. In respect of Autism Spectrum Disorders generally where an individual has a diagnosis of Asperger's Syndrome or Autism they will be found to be disabled.

## Evidence

13. The evidence in this case comprised as is usual in a disability case of a disability impact statement and medical records or reports included in the evidence of course is cross examination and re-examination. The claimant's evidence in his disability impact statement was that he was aware of having learning difficulties at secondary school, he produced a letter from his Teacher at the time although the teacher did not give evidence this did not however confirm that the claimant received any special needs treatment as it recorded his parents had declined to seek statemented status for the claimant and although moving him out of mainstream education was considered this did not happen. M

14. The claimant however stated that he was in special needs classes during school but accepted that he was not statemented and it was also recorded that he had Epilepsy from around 18 but that he had been free of this for ten years. However, in cross examination he said that he had had a seizure recently and was still on medication for Epilepsy. He said he felt his brain functioning lacked at times and needed information given to him in a clear concise and structured way. He said his brain would not retain information and he had to make notes, however he did not provide any evidence of any notes he had taken for this purpose. He stated that his partner dealt with running the household in terms of bill and finances, whilst he did cleaning, bathing their son, reading to their son, putting out the bins. He said he often forgot whether he had locked doors and windows and had to go back and check. He said he also had difficulties at time working his mobile phones and found it difficult to control his everyday emotions and had many episodes of anger, frustration, sadness and happiness, and that he lost focus easily and struggled to concentrate, particularly if he was in a noisy environment.

15. In cross examination it was put to him several times that the matters he described were not significantly different from difficulties a lot of individuals would have and that in respect of how household tasks were divided up this was simply a matter of division and that the claimant could give no examples of what would happen if he had to take responsibility for these matters, and indeed at some time must have done so himself but he did not refer to what had happened when he had had to cope by himself. Likewise, many people have difficulties with mobile phones, remembering how the computer works and checking whether doors and windows are locked, televisions turned off, irons turned off and cooker turned off.

16. It was the respondent's case there was nothing significantly out of the ordinary in respect of the matters recorded in the claimant's witness statement which was his primary evidence. There was no evidence given regarding the claimant's difficulties interacting with other individuals and I reminded his representative that re-examination was not an opportunity to add more detail into the witness statement and the claimant had had carte blanche in the witness statement to set out in full all the effects of the relied upon impairment.

## Documentary Evidence

17. The claimant relied on an entry in his doctors notes from September 2016 which

stated “says he feel he has ADHD since he was (young) but was never seen by a specialist, has been struggling with jobs as he gets very easily upset and angered, particularly when he is thrown off the rail, finds it difficult to function in wide circles of people as he is often misunderstood and branded stupid and dim, says he struggles with new friendships and inter personal skills, has lost several jobs as a result of this, gets very angry when other people mock him or laugh at him, has also struggled with previous relationships but has been with the same partner now for seven years. The doctor questioned whether it was a behavioural personality disorder and referred him to mental health services.

18. The claimant produced a letter from Lancashire Care NHS Foundation Trust from Mr Malik Heys which was three and a half pages long but was mainly a narrative and recorded that the claimant had insisted on having a ADHD assessment as a friend had told him that it sounded like he had ADHD, the writer of the letter felt there was not sufficient time for him to make progress that day

19. However on 25 October he did set out a summary which stated diagnosis “evidence of patterns of behaviour that deviate from typical range in cognition and affectivity. Traits of personality difficulties comprising of inflated sense of self-importance, lack of empathy, frequent envy of others, liable to outbursts of anger and low tolerance to frustration.” Mr Heys also recorded that the claimant strongly believed he had ADHD and said ‘ he has assertively requested a referral for...a specialist ADHD assessment ...’

20. He was referred for an ADHD assessment, the practitioner Mr Malik Hayes did not arrange any further appointments directly with himself. The ADHD Assessor Miss Kirsty Gorman recorded her findings in a letter of 13 December 2016. This letter which was to Mr Hayes stated:

“Thank you for referring Anthony for consideration for an assessment of ADHD, I have completed the telephone Triage appointment with him today and I have explained to him that a full assessment is not indicated, the reason for this is that in ADHD the difficulties with attention, restlessness and impulsivity are both pervasive and persistent and what Anthony describes are more transient problems.

She went on to say

“I have discussed with him that as an assessment for ADHD it has not indicated we will be discharging him however I have also discussed with him that a level of reaction to change, issues with processing information and feeling that he does this differently to others and possibly over-sensitivity might indicate that a referral for a specialist assessment for Autistic Spectrum Disorder might be indicated and that I would feel this back for your consideration”

21. It appears that the claimant was then recommended to contact a Charity dealing with Autism Spectrum Disorders ‘Action for ASD’, there was an undated letter from them to him which said:-

“I am writing regarding the screening assessment you had recently, I have collated the information and the results do indicate that you fulfil the requirements for a

possible diagnosis of Asperger's Syndrome, I stated at the meeting that the screening assessment is simply a tool we use to give an idea of whether further clinical testing is warranted and does not given an official diagnosis of an Autism Spectrum Condition. In order for you to be assessed in more detail with a view to getting an official diagnosis it is necessary for you to be referred for a full diagnostic assessment. Our appointment system has changed recently and we are allocating appointment in six-week blocks so for your details to be in place on a waiting list, I am unable to give an exact date but the appointment may take up to twenty-four weeks .... Please be assured we are doing all we can to keep our waiting times for appointments to a minimum, a letter will be sent out to you after twelve weeks to update you regarding your appointment".

22. Then details were given where the claimant could find further information.

23. The claimant did not bring any further correspondence from this organisation but said he had rung them and they said he was 40<sup>th</sup> on the list for assessment but in the period from when he had been referred which presumably was sometime early 2017 he had not heard anything from them and as mentioned had no paperwork to suggest an appointment had been arranged.

### **Submissions**

24. The claimant submitted that Mr Hey's comment in his report of 25 November was sufficient to establish that the claimant had an impairment and that the evidence showed that this had a substantial adverse effect. He relied on the fact that he had had difficulties since being at secondary school to establish long term.

### **Respondent's Submission**

25. The respondent submitted that the claimant's oral evidence did not disclose any substantial adverse effects but merely difficulties that many people had in the normal course of events, his domestic arrangements were through choice not necessity and that no evidence had been produced to corroborate any of the contentions in his disability impact statement, nor did the reports establish any diagnosis and, whilst diagnosis was not necessary, in a case as nuanced as this it was required.

### **Conclusions**

26. I find that the claimant was not disabled for the following reasons.

27. Firstly, the matters in the disability impact statement were very limited and very few cogent examples were provided, it was full of generalisations as referred to above for examples, no examples of the notes the claimant has taken in order to remember matters, either at home or at work were provided, there was no corroboration from his partner as to his difficulties, nor was there any reference to difficulties with social interactions with others.

28. In addition, the "medical" evidence produced I find did not include a diagnosis, bearing in mind the case law in a case of this type this was important. There was a

description of the claimant's situation from a mental health practitioner, Mr Heys, with a heading 'diagnosis' but this appeared to me to be simply descriptive. Neither did it support a finding of substantial adverse effect, given that it said merely that he deviated from what was typical. Further the matters referred to in this report were different from those in his disability impact statement as the majority of his time with Mr Heys was spent describing his difficult childhood, his anger issues and his need for attention. These comprised of as described by Mr Malik Heys in that diagnosis section, traits of personality difficulties comprising of inflated sense of self-importance, lack of empathy, frequent envy of others, liability to bouts of anger and a low tolerance to frustration.

29. There was no concrete examples of how these traits translated themselves into substantial adverse effect on day to day activities.

30. Relying on the Dunham case I find that this is insufficient evidence to establish the claimant has an impairment which had substantial and adverse effect on his day to day activities and has done so long term. The claimant may have Asperger's or Autism or he may have a mild Personality Disorder – he does not have a diagnosis at present of any of those

31. However concentrating entirely on the evidence he has provided which has to be viewed in the context of no supporting medical evidence it is simply too vague, lacking in detail and total lacking in the independent corroboration.

32. Accordingly, I find the claimant has not established he is disabled within the meaning of the 2010 Act.

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Employment Judge Feeney

Date: 24<sup>th</sup> September 2018

ORDER SENT TO THE PARTIES ON  
28 September 2018

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FOR THE TRIBUNAL OFFICE

**(1) Any person who without reasonable excuse fails to comply with an Order to**

which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

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