



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MR S FERNS
MS O STENNETT

BETWEEN:

Ms K Kaler Claimant

AND

Insights ESC Ltd Respondent

ON: 8 and 9 July 2019
Appearances:
For the Claimant: In person
For the Respondent: Ms A Macey, counsel

JUDGMENT ON PRELIMINARY ISSUE

The unanimous Judgment of the Tribunal is that the claimant did not meet the definition of disability under section 6 Equality Act 2010 and accordingly the claim for disability discrimination fails.

REASONS

1. This decision was given orally on 9 July 2019. The claimant immediately said that she wished to appeal. This was treated as a request for written reasons and it was explained to the claimant that as a result of this the decision would be posted online as it was a document of public record.
2. By a claim form presented on 30 March 2018 the claimant Ms Kuldeep Kaler claimed automatically unfair dismissal for whistleblowing, disability discrimination and breach of contract. The schedule of loss showed that the claimant was seeking around £4.5 million.

3. The claimant worked for the respondent school as Assistant Vice Principal. Her period of employment was from 1 January 2017 to early January 2018; she did not have two years' service. The respondent is a specialist school providing education for children with social, emotional, behavioural and mental health needs.
4. This hearing was originally listed as a five-day full merits hearing. As set out below, the disability issue was dealt with first. The claimant said she was not able to continue after oral judgment was given on the disability issue. The respondent objected to the remainder of the hearing being further postponed and said only 2 days would be required to complete the hearing. We accepted what the claimant said, that she felt unable to continue and told the parties we would re-list the remaining full merits issues.

The relevant background

5. A preliminary hearing took place on 24 July 2018 before Employment Judge Wade. The claim for automatically unfair dismissal for whistleblowing was dismissed upon withdrawal.
6. The issues were identified as disability discrimination with the claimant relying upon Asperger's Syndrome and depression and anxiety which she said could interconnect with Asperger's.
7. The claim for disability discrimination was for direct discrimination, harassment, discrimination arising from disability, disability harassment and a failure to make reasonable adjustments. There is also a post-termination victimisation claim and a breach of contract claim.
8. Disability remained in issue.
9. This hearing could not go ahead in November 2018 due to lack of judicial resource and was relisted for the present dates.
10. Regional Judge Potter had recommended to the claimant that she have a companion with her at this hearing to help her. The claimant chose not to be accompanied.

Dealing with the disability issue first

11. We checked with the parties at the outset of the hearing and understood that disability remained in issue. The claimant confirmed to us that the disability she relied upon was Asperger's Syndrome. It appeared to us that a large proportion of the claim hinged on a finding of disability, namely the claims for direct disability discrimination, discrimination arising from disability, disability related harassment and the claim for failure to make reasonable adjustments.
12. The claimant said that she would like the disability issue dealt with at the

conclusion of all the evidence because she said that as we saw her during the course of the hearing we would be able to assess her. We reminded the claimant that we are not clinically trained and it is not for the tribunal to assess or make a diagnosis of a person's medical condition. We would apply the law to the relevant facts.

13. We decided that in the interests of proportionate use of tribunal time, we would hear the disability issue first, given that so much of the claim hinged on this issue.
14. The claimant had requested adjustments for the hearing. At the outset we told the claimant that she could have whatever breaks she needed during the hearing. We said it would help us if she could let us know as we went along, what she needed, as we might not be able to tell.
15. Hearing of the disability issue took up day 1 of the hearing. On the evening of day 1 and on the morning of day 2 the claimant sent 7 emails to the tribunal on that issue. She also asked us to consider the following documents which we did. These were:
 1. Her email sent to the tribunal 18:01 8 July 2019
 2. Her email sent to the tribunal 20:02 8 July 2019
 3. Her email sent to the tribunal 20:19 8 July 2019
 4. Her email sent to the tribunal 20:42 8 July 2019
 5. Her email sent to the tribunal at 22:15 8 July 2019
 6. Pages, G1-11, G16-17, which are about the referral to the NCTL.
 7. Pages D44-5, J32 about informing my employer about having Asperger's.
 8. Pages H48-9, H47, D121, D112, H2, about informing my employer of depression symptoms such as not sleeping, crying, anxiety, exhaustion
 9. Page K121-122, chronology.
 10. Pages H39-40, H36, H30, H23, emails about seeking clarification as instructions not clear or not given at all.
 11. Pages D35-40, birthday card with Aspie on it, page D40 picture of cake with Aspie on it, showing they knew I was Asperger's.
16. Even though these documents were sent after the hearing of the evidence and submissions, we read all of these pages before reaching our decision because the claimant is a litigant in person and was finding things difficult.
17. Also, at the claimant's request we read the entirety of her main witness statement even though she had only sworn in evidence her disability impact statement, the supplemental evidence of 5 July 2019 and the paragraphs of her main statement that dealt with disability. We had only sworn this into evidence to avoid the claimant the difficulty of being part heard on the remainder of her evidence pending determination of this issue.

Witnesses and documents

18. We had 1 lever arch bundle of double-sided documents. The claimant submitted 7 emails to the tribunal after the conclusion of the hearing of the disability issue, which we considered together with the documents referred to.
19. We did not accept from the respondent a List of Issues prepared and sent to the tribunal at 09:30 on the first morning of the hearing. Copies had not been provided for the members of the tribunal and a copy had not been given to the claimant. It seemed to us unfair to present this to the claimant at such short notice. We were content to identify the issues from the Case Management Orders and the claimant's schedule of acts of harassment and discrimination and ask questions where necessary.
20. The tribunal heard from the claimant.
21. We had oral submissions only from each party on the issue of disability. Neither side took us to any case law or the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability.

Findings on the disability issue

22. The claimant initially worked for the respondent as a supply teacher in 2013. We saw an email dated 10 June 2013 at page D45 in which the claimant said she was in the process of being diagnosed and believed that she had Asperger's Syndrome. She said she had been advised that she should tell her employer that she had a disability.
23. The claimant has a degree in English and is an English teacher. As a full time student the claimant also ran a property business managing 46 properties. She was the managing director and said that she left the day to day running to two colleagues.
24. The period of employment in question is from 1 January 2017 to early January 2018. The effective date of termination is in dispute, on the respondent's case it is 3 January 2018; on the claimant's case it is 8 January 2018.
25. As the claimant has sent to the tribunal 7 lengthy emails addressed to the Judge (and we reminded the claimant that this is a 3 person tribunal with equal decision making), we clarified for the claimant that the disability issue was not about whether she informed the respondent about the disability she relies upon. It was about whether she met the definition of disability in section 6 of the Equality Act at the material time, which was between 1 January 2017 and early January 2018.
26. It was for the claimant to prove disability and not for the respondent to prove that she was not disabled. What the respondent knew about any disability was not the question at this stage.

27. We saw an Employment Medical Questionnaire (page C41) dated 6 March 2013 in connection with the claimant's first period of work with the respondent, in which she declared "no" to all answers related to medication, time in hospital, illness or medical condition and a declaration that she did not consider herself to have a disability.
28. When the claimant applied for the job which she held at the date of dismissal, that of Assistant Vice Principal, she did not disclose a disability in her application form of 16 June 2017, page C29. She has completed the form and left blank the box asking whether she considered herself disabled and what assistance she would like to receive. The claimant gave the reason for this as the question asking what assistance she would like to receive and not whether she considered herself disabled. She said she takes things very literally.
29. The claimant accepted in evidence that she was very keen to get this job. She decided to pursue this application in preference to another. She said when she filled in that form, it asked her if she needed any adjustments or assistance for the interview. She said she took things literally and it was put to her that if she read that literally she knew she would get an interview.
30. In connection with taking things very literally and in relation to disclosure of documents, the claimant said in evidence that the tribunal had told her that she had disclosed everything that she needed to disclose. We saw a letter from the tribunal dated 3 September 2018 (page A6) saying that she was not obliged to disclose medical records which related to irrelevant medical conditions and if records were illegible she had offered to clarify. It also said that the parties had completed disclosure and must cooperate to agree the bundle. It did not say that the claimant had disclosed everything that she needed to disclose. The tribunal could have no way of knowing this.
31. Given that she was so keen on the job she was asked why she did not complete the disability section of the application form to be guaranteed an interview. She said she filled it in very quickly and that she had been told by Ms Quartey the principal, that she would be guaranteed an interview. The claimant said a job was being created for her. She considered it "*pretty much in the bag*". She was aware that there were two positions being created, one to which Mr Michael Agyapong was appointed on the science side.
32. We did not have any expert evidence. We saw in the Case Management Order of Judge Norris made on 17 September 2018 (paragraph 6.2) that the parties had agreed that no further medical/expert evidence was required and they were both content for the tribunal to determine the question of whether the claimant had a disability at the material time, by reference to the documents she had disclosed and her disability impact statement.

33. The claimant had added to her disability impact statement on the working day before the hearing (5 July 2019) at page 43a and the respondent did not object to this.
34. The claimant had produced in the bundle some material from the internet regarding the condition of Asperger's Syndrome. This was not documentation that was specific to her. It was related to the condition generally.
35. We saw that the claimant had historically not sought a diagnosis. In paragraph 12 of her main witness statement she said that she had always considered herself to have Asperger's but until this year (meaning 2018 when she signed that statement) she had chosen not to get a diagnosis.
36. From the documents we saw, it was clear that in 2018 post-dismissal and in the light of these proceedings, the claimant had sought a diagnosis of this condition. She said that nevertheless she disclosed the condition to her employer and they were aware of it. She submitted that just because she does not have a diagnosis, does not mean that she does not have the condition.
37. In her disability impact statement (third paragraph unnumbered on the first page) the claimant said she found it difficult to separate Asperger's from her other mental health issues such as depression, stress and extreme anxiety.
38. The claimant sought a diagnosis in mid-2018 through the Richmond Wellbeing Service (page D23). In a letter from a CBT therapist, Ms Powell, dated 11 June 2018, the therapist recorded that the claimant said that she believed that she had symptoms of Asperger's. This was not the therapist saying as much.
39. The claimant was booked on to a course on Overcoming Low Mood (page D23 - letter 11 June 2018). On 15 June 2018 she was referred to the Richmond Autism Spectrum Disorder Service for an assessment of "*possible autism spectrum disorder (ASD)*" (page D21). She was asked to fill in some questionnaires. Although we had the questionnaires that she completed for an Asperger's assessment in 2013, we were not provided with the questionnaires that she completed in 2018.
40. About a month later, on 16 July 2018 Dr J Woollatt, a Locum Registered Clinical Psychologist, said that there was "*sufficient evidence to suggest the need for a full autism assessment*" (page D20). We find this was the psychologist recommending a full assessment and not making a diagnosis. The claimant was placed on their waiting list. To date she does not have a diagnosis. The claimant said she was awaiting the final assessment.

41. We saw a letter from a Psychological Wellbeing Practitioner dated 28 January 2017 saying that the claimant had attended an initial assessment with a CBT therapist, presenting with moderate depression and mild anxiety. She had agreed to attend an introductory session and a low mood course starting in February 2017.
42. The letter said she did not attend and she informed the Practitioner that she no longer required support and did not wish to attend any treatment. She reported feeling much better and had secured new employment and asked to be discharged. We find, based on this letter, that the claimant was managing any mental health condition well and it was not having a substantial adverse effect on her ability to carry out normal day to day activities. She declined further treatment. The practitioner said: "*There are no current risk concerns*" (page D49).
43. As mentioned above, the claimant completed some multiple-choice tick box questionnaires in 2013, called an AQ test. She scored 39 (page D48). The documents showed that the official criteria for Asperger's Syndrome is an AQ score greater than 32. The claimant's evidence was that she does not as yet have a diagnosis.
44. The claimant said she had been going to the doctor since 2012 with issues of behaviour and stress. She had not disclosed a large proportion of her GP records. The claimant was sectioned under the Mental Health Act in 2012. We saw the discharge record at page D53.
45. The tribunal asked the claimant about medication. She told the tribunal that there is no medication available for Asperger's Syndrome. She has taken sleeping pills and medication for depression in the past but has not taken anything on a regular basis; she said medication was difficult for her and that "*it didn't work for her*". We find that in relation to considering the effects of any condition without the effect of treatment, there was no medication for us to take into account.
46. The claimant accepted that she had a great deal of experience as a Special Educational Needs (SEN) teacher with children with the condition she relies on and she agreed that communication difficulties is part of the condition. The claimant referred in paragraph 17 of her main witness statement to communication difficulties.
47. We were taken to page J2 of the bundle which was an employment reference provided by Chiswick School on 26 March 2018 in respect of a period of employment of the claimant from March 2015 to December 2016. This came after the termination of her employment with the respondent and was given to an Agency, called NonStop. The Head of English described in the reference her communications skills as "*Outstanding*".
48. The claimant agreed that she could communicate well and lead and run a class. She said she could communicate to do her job and agreed that

anyone who worked as a teacher had to be able to communicate well. She said her social communication was what was difficult, for example the “*office politics*” and if people did not communicate well with her. She agreed she could write emails, make phone calls and interact with children, staff and parents. She said she did have the ability to communicate well, but this did not mean that her body “*was not about to explode*”.

49. We were taken to K109 a reference from Beachcroft School for the claimant from her period of employment from October 2011 to February 2012. She was rated excellent for interpersonal skills and ability to work in a team. She said that she did have excellent interpersonal skills when the person she was working with cared and was not like the respondent. She said communication became difficult when the other person did not want to communicate. She said that it depended on the circumstances. There was no qualification placed on her communication or interpersonal skills in either of the references we saw. She said generally she had excellent interpersonal skills.
50. We saw a further reference on page K110, dated 3 February 2013. The reference said that the claimant had excellent interpersonal skills and that she built strong relationships with challenging students and with staff colleagues.
51. We therefore saw three references showing that she had excellent communication and interpersonal skills. The claimant explained this as her being very “*high functioning*” and when she works in a school that is “*as it is supposed to be*” she does well, but not when there are no systems in place.
52. The claimant said her condition was life-long. She said it was impossible due to her condition for her to lie. She admits that she has a conviction for fraud in 2007 which she blamed on the Benefits Agency and said she would never claim benefits again. She said in evidence that she asked her GP to give her a certificate of unfitness for work in early 2018 after her dismissal (page D103), because she was thinking of claiming benefits. It was hard to reconcile these two statements.
53. The claimant also asked the tribunal to take into account certain personal difficult life circumstances. Whilst we noted these difficult life events and acknowledge that they have the potential to exacerbate a pre-existing condition, this did not assist us in determining whether the claimant met the definition of disability at the relevant time.
54. The claimant had chosen not to disclose her GP medical records prior to 21 December 2017. Her effective date of termination was in dispute but on her case was 8 January 2018. We did not have her GP records for the majority of her period of employment. The only entry during the course of her employment was on 21 December 2017. It was about her leg and not about a mental health condition. We therefore had no GP

records concurrent with her employment with the respondent, dealing with any mental health issues. We also had a letter from a Psychological Wellbeing Practitioner dated 28 January 2017 (D49).

55. Amongst the documents the claimant took us to in submissions and in her emails after submissions, was page D119 and D121 which related to flu and shivering, plus exhaustion. These did not go to Asperger's or, on our finding, a mental health condition. We were taken to H47 which was predominantly a complaint about a colleague. She said she had not slept all night and this happened often. H2 was an email to the respondent 1 December 2017, in which she said she wanted to discuss an exit plan because the role was making her exhausted. D112 was a return to work interview record of 11 December 2017, again for a physical condition. There were a number of references to her being exhausted and having to cover for other staff.
56. The claimant also told the tribunal that her condition caused her to have "meltdowns" and become rude and aggressive. We saw no evidence of the claimant being treated for this.

The law on the disability issue

57. Section 6 of the Equality Act provides that a person has a disability if that person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
58. Under section 212(1) of the Equality Act 2010 "substantial" means more than minor or trivial.
59. We are aware of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued under section 6(5) of the Equality Act. We were not taken to this guidance by either party but checked it prior to making our decision.
60. Paragraph D3 of the Guidance assists us with the meaning of normal day-to-day activities.

In general, day-to-day activities are things people can do on a regular basis, and examples include shopping, reading and 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. Normal day-to-day activities can include general work-related activities, and study in education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Conclusions on the disability issue

61. There is was at the date of this hearing no diagnosis for the claimant of Asperger's Syndrome. We are not qualified to make that diagnosis. We have not been given the benefit of expert medical evidence or a medical

report or a letter, for example from the claimant's GP.

62. The parties agreed before Employment Judge Norris on 17 September 2018 that they did not require this. They were both content for the tribunal to determine the question of whether the claimant was disabled by reference to the documents she had disclosed and her disability impact statement (Case Management Order paragraph 6.2).
63. The claimant had chosen not to disclose her GP medical records prior to 21 December 2017. Her effective date of termination was in dispute but on the claimant's case it was 8 January 2018. We did not have her GP records for the majority of her period of employment. We only had one entry that was during the course of her employment, on 21 December 2017 and this was about her leg and not about a mental health condition.
64. It was therefore necessary for us to make the decision based on the evidence that was before us.
65. There is no diagnosis of Asperger's Syndrome. Pending such a diagnosis we can only regard the condition as self-diagnosed by the claimant. We noted that she was seeking a diagnosis in 2013 as set out in her email of 10 June 2013 (page D45) telling the respondent that she was currently going through the process of being diagnosed. Six years later, she did not have a diagnosis of this condition.
66. There was no medication for us to take into account.
67. We noted and sympathised with the fact that the claimant has had a number of difficult life events to deal with over recent years. This did not assist us with our finding as to whether she met the definition of disability at the material time, predominantly during 2017. We also made clear that this issue of whether she was disabled at the material time, was not a question of whether she informed the respondent of any disability.
68. It was clear from the evidence we saw that the claimant had difficulties with her mental health. Once again, we had no GP records or medical reports to assist us with the extent and timing of this.
69. We cannot and do not diagnose the claimant with Asperger's Syndrome. We have considered whether the claimant has or had at the material time a mental impairment sufficient to meet the definition in section 6 EqA, regardless of the label. We had limited contemporaneous medical evidence to assist us on this, or any medical report covering the relevant time.
70. The claimant has had mental health difficulties including depression and anxiety. We do not have the evidence to assist us in knowing when and to what extent this was the case. She told us she was "*high functioning*". She is an educated and intelligent woman. She has worked in teaching for some time to a high standard. She was in the Leadership Team at

the respondent as at the date of dismissal.

71. We noted that the claimant had 3 employment references referring to her communication and/or interpersonal skills as outstanding. This was not just satisfactory or good, but outstanding.
72. In relation to paragraph D3 of the Guidance, the matters dealt with by the claimant included having a conversation and we have found, based on the references and her description of herself as “*high functioning*”, that her communication skills were very good. The claimant said that the social elements of conversation were difficult, such as office politics and small talk. We do not consider the need to engage in office politics as falling within the category of normal day to day activities. Not everyone enjoys or wishes to take part in small talk. She agreed she could write emails, make phone calls and interact with children, staff and parents. We find that her condition did not have a substantial adverse effect on her ability to carry out this type of activity.
73. The claimant can engage in work related activities and has studied to degree level whilst running a business at the same time, even if she was not the day to day manager of that business.
74. The claimant can use a computer and prepare written documents. She prepares lessons and lesson plans and timetabling.
75. The letter we saw from the Psychological Wellbeing Practitioner in January 2017 led us to find that the claimant was managing any mental health condition well and it was not having a substantial adverse effect on her ability to carry out normal day to day activities. She declined further treatment at that time.
76. We find that the claimant has not discharged the burden of proof in establishing that she met the legal definition of disability during the period 1 January 2017 to early January 2018. In making this finding we do not say that the claimant has had no mental health condition(s), our finding is that she has not proven that she met the definition at the material time.
77. As a result of this finding the claims for disability discrimination fail and are dismissed.

Employment Judge Elliott
Date: 9 July 2019

Judgment sent to the parties and entered in the Register on: 9 July 2019.
_____ for the Tribunals