



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms V Rose

v Metropolitan Housing Trust Limited

Heard at: Watford

On: 29 30 & 31 July 2019

Before: Employment Judge R Lewis
Ms S Hamill
Ms M Harris

Appearances

For the Claimant: In person
For the Respondent: Mr S Butler, Counsel

RESERVED JUDGMENT

1. At the material times the claimant was a person with a disability in accordance with s.6 Equality Act 2010 by virtue of:
 - (a) a condition affecting mobility; and
 - (b) a neuro-diverse condition.
2. At the material times the claimant was not a person with a disability by virtue of impaired eyesight.

REASONS

1. This case was listed for full hearing on these dates at a preliminary hearing before Employment Judge McNeill QC on 25 October 2018. At that hearing the claimant appeared in person although she had previously been represented. The respondent appeared through Mr Butler of counsel.
2. Annexed to Judge McNeill's order was a list of issues which was recorded as an agreed list.

3. The full merits hearing did not proceed as listed. The reasons for adjournment, and case management orders made on 29 July, have been set out in a separate order.
4. This judgment deals only with the issue of disability, which the tribunal agreed to hear and determine as full tribunal on 30 July, which was the second day of the listed hearing. The tribunal met for deliberation on 31 July. The claimant wrote to the tribunal with further observations on 1st August. We disregarded that material in its entirety, as it was received after the end of the hearing, and after the tribunal had concluded its deliberations.
5. In setting out our reasons, we have sought to avoid repeating what is said in the case management orders; and, so far as possible, to avoid any overlap with the matters to be decided by a different tribunal at the re-listed full merits hearing in November 2019.
6. As directed by Judge McNeill, the claimant had prepared an impact statement (59-65). The claimant told this tribunal that she thought that impact meant impact at work. The impact statement contained next to no information about the impact of disability on the claimant's day-to-day activities.
7. The medical material supplied by the claimant was in the bundle at 409-470J: there is considerably more material than those numbers suggest, due to the number of interpolated documents.
8. The claimant gave evidence and was cross-examined. She called one witness, her sister, who also described herself as carer, Ms N Bennett.
9. On behalf of the respondent, Mr T Bunby gave evidence confined to paragraphs 48-50 inclusive of his full witness statement.
10. In preparation for the hearing, Mr Butler had prepared a lengthy submission, of which four pages dealt with the issue of disability.
11. The agreed list of issues annexed to Judge McNeill's order set out four medical conditions relied upon to make good the s.6 definition. That did not include the claimant's visual condition. Mr Butler submitted that that condition was not before the tribunal.
12. The tribunal file showed that on 5 September 2018 the claimant had emailed the tribunal to ask that that condition be taken into account in consideration of disability. She had not copied the email to the respondent, and it appears not to have been taken account of at the preliminary hearing. She had dealt with the issue in her witness statement, and in one page of the medical documents. It seemed to us, despite Mr Butler's submission that it was not before the tribunal, that we should deal with the visual issue as a disability matter.

General approach

13. The tribunal had a number of difficulties and concerns in deciding this issue. We set them out below, not exhaustively or in order of priority.

- 13.1 The claimant's impact statement was inadequate for the purpose for which it was presented. It dealt with the issue of knowledge of disability which was not for this hearing to decide. It reiterated her grievances, which were likewise not for this tribunal. It concentrated on events at work. At times it simply repeated the professional jargon of reports, without explanation or clarification. After the claimant had been sworn, the judge asked to describe the effect of the particular disability on her, day by day or on a typical day.
- 13.2 The mobility condition and the neuro-diverse condition as described by the claimant had intermittent effects. There was therefore scope for evidence about occasions when they affected her and occasions when they did not. We accept therefore that there was in this fact-find scope for inconsistency, a matter to which we attach little value in isolation.
- 13.3 We accept that evidence about the claimant's behaviour at work, which was strongly inconsistent with the claimant's case, should be treated with caution, as the claimant may have part concealed disabilities at work.
- 13.4 The medical material submitted by the claimant was of limited use. Much of it could not be helpful (eg appointment letters). Much of it was material prepared for other, specific purposes (such as benefits or housing), and therefore focused on a specific need or definition, rather than on clinical objectivity. Some of it was repetition of the claimant's own narration.
- 13.5 There were surprising gaps in the medical evidence which would have been of great assistance. It appeared that the claimant had had surgery on her knee. That being so, the discharge letter from the treating hospital to her GP would have been of obvious value.
- 13.6 There was little in the bundle which was a medical or related report with clinical findings, from an appropriate specialist, writing for clinical or professional purposes. We attach weight to the report of Ms Thornton about dyslexia (4 October 2012, 409); of Ms Walker, clinical specialist physiotherapist of 25 October 2017 (464); and to a Vision Express prescription of 19 February 2018 (468).
- 13.7 We noted that at a number of points in this hearing the claimant discounted documents which were plainly contrary to the case which she now wished to advance, even though they came from objective professional sources. That was, we found, one example of the claimant's selectivity. We do not mean by this that she tried to deceive the tribunal. We mean that her presentation of evidence to us, and, it appears, sometimes to others, was selective in her favour.
- 13.8 We were not assisted by some of the claimant's usage of labels. We do not criticise the claimant for the lay person's labels which she has

attached to her own conditions. However, the two labels “cognitive delays” and “complex mobility impairment” did not assist us. We find that the former was a label attached by the claimant to an aspect of what we have called neuro-diversity. The latter was a group of words attached to the claimant’s mobility condition which we describe below.

- 13.9 We found Ms Thornton’s report at times next to incomprehensible. We were not convinced that we were helped by the claimant’s repetition of the jargon of the report. In paragraph 18 of her impact statement for example, the claimant wrote this, from which we struggled to understand what the effect of the impact was:

“I have difficulty with phonological awareness, processing and memory which would have a negative impact on how I perceive and decode sounds and verbal patterns and speech. As a result, I have problems with oral blending, oral segmenting and identifying words.”

- 13.10 We have found it most useful to consider the three conditions separately.

The legal framework

14. The question for the tribunal is whether the claimant met the test of s.6 Equality Act which provides: “A person has a disability if [she] has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on [her] ability to carry out normal day to day activities.”
15. We were grateful to Mr Butler for concise and helpful summary. There was no issue before us in relation to impairment, or in our findings in relation to long term. An impairment is substantial if it is more than minor or trivial, and we accept normal day to day activities are those actually carried out as part of daily life.

Eyesight

16. In her impact statement, the claimant wrote: “I am visually impaired and have almost no sight in my right eye.” The claimant stated in oral evidence that this was a congenital condition.
17. The claimant’s oral evidence was straightforward. As her right eye has almost no function, and never has had, she has no history of being referred to an eye specialist, because there is nothing to be done. We accept the logic and integrity of that evidence.
18. The claimant wears spectacles. She told the tribunal (without being asked although the point had occurred to us) that the right lens is cosmetic only and matches the left lens. We agree that that is how her spectacles look.
19. The one document which assisted was the Vision Express prescription of 17 February 2018, which stated that the claimant’s “aided VA” (which we understand to be visual acuity with spectacles) was 6/6 for her left eye and

6/120 for her right eye. We understand in lay terms that that means that an object visible to the claimant's left eye at 120 metres is visible with her right eye at 6 metres. The claimant stated that she has an annual eye test.

20. When asked by the tribunal in oral evidence what effect this had on her, the claimant gave plain straightforward evidence. She said that unlike a person who has lost vision, she has no basis for comparison between her current eyesight and how it was before visual loss. Her current eyesight is the only eyesight she has ever known.
21. Her answer to the question was that "I find it hard to manoeuvre to the right." We understood that to mean that the claimant has some difficulty with peripheral vision on her right. She gave no specific practical example or instance. She confirmed that she has a driving licence, and that DVLA has been notified about her eyesight.
22. We turn then to Ms Thornton's report on dyslexia, which refers in part to the claimant's eyesight. The report refers at a number of points to (quoting the first reference, 413) the following eyesight issue:

"[She] reports problems with losing her place on the page and that the print blurs and her eyes water when reading. Her reading style also suggests problems associated with "visual stress", or Irlen Syndrome which could be further investigated by an optometrist."
23. In a section of the report headed Background, Ms Thornton recorded the following, evidently on the claimant's reporting:

"She was diagnosed with a strabismus, or a squint in her eye when aged 6 and has worn glasses since."
24. The Conclusion of the report (424) repeats what is said at ???? above verbatim. The claimant confirmed in evidence that she had not had investigations by an optometrist.
25. A section headed Recommended Support reads:

"[She] experiences difficulties associated with visual stress. It is strongly recommended that she undergoes an up to date examination with an optometrist, followed by a screening for visual stress (Irlen Syndrome.)"

The claimant confirmed that this has not happened.
26. We record our surprise that in a professional assessment of visual symptoms, either the claimant omitted to mention that she has only the use of one eye or Ms Thornton thought the point not worth recording in her report.
27. Our conclusions on the claimant's eyesight are:
 1. The claimant has given no evidence that what she has called "visual stress" is related to her impairment of eyesight in her right eye;

2. We read the references to visual stress in the Thornton report as references to a form of neuro-diversity, and therefore not related to the right eye impairment;
3. We find that the only evidence of effect on day to day activities arising out of right eye impairment is what the claimant has described as “hard to manoeuvre to my right” and which we understand to be limitations on right peripheral vision;
4. There was no evidence of a practical effect on day to day activity, of which driving would be the obvious example;
5. While we are alive to the apparent oddity of deciding that almost complete loss of vision in one eye is not a disability, our finding is that in relation to the impairment of reduced vision in the right eye, the claimant has failed to prove the test of disability. In particular, she has failed to prove that the impairment has a substantial adverse effect on day to day activities.
6. We find that the claimant's visual impairment has not been shown to be a disability for the purposes of s.6.

Mobility issues

28. We find the following, much of which was not in dispute.
29. The claimant, who was born in 1984, was the victim of a road accident at around the age of 13. She has suffered knee and hip injury ever since, which has affected her mobility. We find that the injury has also had an effect on the claimant's foot and ankle.
30. The claimant had surgery in 2009 (464). We had her GP's letters 'To whom it may concern' written apparently for DWP purposes on 11 May and 13 July 2015 (434/5). The tribunal would have been assisted by the hospital discharge letter following the surgery. That would usually describe the procedure, its outcome, and the prognosis. We note that the GP wrote,

“She had realignment and repairs of the cruciate ligament in the knee and a number of torn ligaments. Since then her leg has recurrently swollen up and can give way. She has chronic regional pain to the area also. Her mobility is significantly affected by this therefore.”
31. It is impossible to reconcile the GP's comment that 'She can walk short distances WITH pain but if her leg has flared up, walking is quite impossible and she needs to resort to crutches for essential trips' (434) with the agreed evidence that in six months employment with the respondent the claimant made no use of her wheelchair. We of course note the distance in time between the two.

32. We attach weight to the report of Ms Walker referred to above (464), which was written while the claimant was employed by the respondent, and for the purposes of clinical care. While it should be read in full, we note in particular, “a long history of knee pain and giving way .. She has had an ACL reconstruction in 2009 for the recurrent giving way. Since then she has had several courses of physiotherapy for this condition but more recently has had an increased incidence of structural locking.”
33. The claimant gave evidence about her mobility to which we refer below, as did Ms Bennett. We add for completeness that the claimant attended the tribunal on both days using a wheelchair. She accepted that she had never used a wheelchair during the six months of her employment, stating that she had been able to use her blue badge to park close to the respondent’s workplace, and had carried a stick with her in case required (which Mr Bunby denied having seen her carry or use).
34. We accept the claimant’s oral evidence, and the report of Ms Walker, as indicating that the claimant has continuing issues with her right knee and leg. We conclude the following:
- 34.1 That she has occasional swelling of her right ankle, which reduces her mobility until the swelling goes down;
 - 34.2 That she has episodes when her right knee locks rigidly, sometimes for as little as 15 minutes, sometimes for much longer, and needs her massage and rubbing to unlock;
 - 34.3 That there are occasions when her knee gives way without warning, and she falls;
 - 34.4 That she is in frequent pain;
 - 34.5 That Ms Bennett spends 3-4 nights a week at the claimant’s home, to help her if needed; and that when she is not there, a third youngest sister visits in the evenings to check up on the claimant.
35. We accept the claimant’s evidence that the impairment has the following adverse effects on her day to day activities. In so saying we accept the evidence that these are not effects which occur every day, and that they may be affected by other factors, such as weather. We find as follows:
- 35.1 That the claimant is unconfident of leaving her home alone, and rarely socialises alone;
 - 35.2 That the claimant is reluctant or unable at times to do her own shopping, and that Ms Bennett shops for her;
 - 35.3 That there are occasions when Ms Bennett is required to help the claimant because without help she is unable to attend to bathing, personal care and dressing and undressing;

- 35.4 That the claimant's ability to live independently alone is severely reduced;
 - 35.5 That the claimant is capable of using stairs subject to other factors being favourable (we mean by this that the number of stairs is not excessive, that they are not excessively steep; and that her general health is stable);
 - 35.6 That she is at risk of an unpredictable fall, and that even if the falls are not frequent (eg she alleges two occasions during her six months of employment at the respondent) the risk of recurrence has a significant impact on her ability to live independently;
 - 35.7 That in general her self-confidence is affected.
36. We noted reference in the bundle to the claimant receiving support from at least five different sources, all of which we know to be available only after assessment. We understand that the agencies which provide that support apply criteria which are not those of s.6. We understand that when applying for support the claimant will have selected the information given to the agency to achieve the outcome which she desired. (We repeat that that wording does not imply an intention to deceive). We understand that none of the decisions of any of the agencies is binding in us. That said, we cannot fail to attach some weight to the accumulation of assessments of the claimant by all of: the DWP (438); South Bank University; London Borough of Lambeth for Housing and Social Care; the Motability Scheme for a disabled adapted vehicle; and a private, sponsored care provider (433).
37. We find that the claimant has made out that she has a mobility impairment which has a substantial long term adverse effect on, among others, the day to day activities set out above.

Neuro diversity

- 38. The bundle contained at pages 409-432 the dyslexia assessment report of Ms Thornton carried out on 4 October 2012.
- 39. The report was carried out when the claimant was aged 28, and was for the purposes of her BA Degree studies at South Bank University. We accept that at that age the findings have crystallised, and that the conclusions and assessment set out in the report thereafter remained valid.
- 40. We have used the term neuro-diversity quoted by Ms Thornton, to embrace the less helpful labels which she attaches of dyslexia and dyspraxia (and possible visual stress).
- 41. It is a lengthy report and should be read in full. We understand that it is written by a specialist practitioner to be read by other specialists, and that our comments about the difficulty of understanding professional jargon may reflect the tribunal's difficulty and are not to be read as a criticism of Ms Thornton.

42. The most helpful summary is set out in the Conclusion (424), and while the report should be read in full, we attach weight to the following:

“The result of the Matrices sub-test is not within the range expected for her age and suggests spatial ability difficulties. The Verbal Analogies sub-test also highlights word retrieval and expressive language difficulties indicative of a language difficulty.

Oral and silent reading speed ... are below the speed expected for undergraduate level and an analysis of her reading style suggests visual processing difficulties. Her writing speed is also below the average undergraduate speed and the nature of her errors and handwriting style imply difficulties controlling a pen associated with fine motor co-ordination.

The results of the cognitive processing tests highlight relative difficulty in phonological processing, memory and awareness. The results of the SDMT and rapid naming tests demonstrate significant difficulty in information processing. This is a pattern of difficulties associated with dyslexia.

The results of the diagnostic interview, DCD [Developmental Co Ordination Disorder] check list and an analysis of her writing style give evidence to suggest dyspraxia. Dyslexia and dyspraxia are neuro-diverse and often co-occur..”

43. We accept the accuracy and integrity of those findings and we accept that they remain unchanged.
44. We accept the claimant’s evidence that the neuro-diverse condition affects her in the following respects, cumulatively:
- 44.1 Reading, whether on paper or screen, takes her longer than a comparator without the same condition but with the comparable level of intellectual attainment;
 - 44.2 The claimant is slower than the average comparator to assimilate and understand what she has read;
 - 44.3 She may need to read the same item or material more often than the comparable undergraduate to achieve a comparable understanding;
 - 44.4 The same remarks apply to her writing ability.
45. We accept that this is an artificial way of expressing an overarching point. Our finding is that the impairment of neuro diversity has a substantial adverse effect on the day to day activity of reading and writing; and that the adverse effect is that the tasks of effective reading with understanding, and of responding in writing, each take the claimant significantly longer to carry out effectively than would otherwise have been the case.

Employment Judge R Lewis

Date:8 August 2019.....

Sent to the parties on:

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For the Tribunal Office