



EMPLOYMENT TRIBUNALS

Claimant

Dr P Passmore

Respondent

University of Exeter

v

PRELIMINARY HEARING

Heard at: Exeter

On: 29 August 2019

Before: Employment Judge O'Rourke

Representation

For the Claimant: in person

For the Respondent: Mr Jones (Counsel)

JUDGMENT

1. The Claimant is disabled, subject to s.6 of the Equality Act 2010.
2. The Tribunal has jurisdiction to hear the Claimant's claim of disability discrimination, subject to s.123(1) of the Act.
3. The Claim will proceed to hearing, as set out in a Case Management Summary of same date.

REASONS

1. This Hearing was listed following a telephone case management preliminary hearing, on 19 January 2019, to determine the following issues:
 - a. whether or not the Claimant was disabled, subject to the terms of s.6 of the Act.
 - b. whether the claim had been brought within time and if not, whether the Tribunal had jurisdiction to consider the claim nonetheless, applying s.123(1) of the Act.
2. I heard evidence from the Claimant, who had also provided witness statements in respect of each issue. A joint bundle of documents had been agreed.

The Law

3. I referred myself and the parties to the following:
 - a. s.123(1) of the Act.
 - b. **Robertson v Bexley Community Centre [2003] IRLR 434 EWCA**, as to the exercise of discretion to allow an extension of time under the 'just and equitable' test.
 - c. **British Coal Corporation v Keeble [1997] IRLR 336 UKEAT**, as to the factors to be considered in applying that test.
4. Mr Jones referred me to the following authorities:
 - a. **Morris v Royal Bank of Scotland plc [2012] All ER(D) 53 UKEAT**, as to the nature of medical evidence required to make a finding of disability.
 - b. **Apelogun-Gabriels v Lambeth London Borough Council [2001] Civ 1853 EWCA**, as to the weight to be given to the deferring of a tribunal claim while awaiting the outcome of internal proceedings.
 - c. Section B of the Guidance on the definition of Disability.

Consideration

5. **Disability**. I found that the Claimant is disabled, due to his condition of dyslexia, for the following reasons:
 - a. There was no dispute that he had been diagnosed by an educational psychologist, when aged 18 (he is now aged 30), as severely dyslexic [44]. While it was true, as Mr Jones submitted, reliant on **Morris**, that there was no further, more recent medical evidence, I note that that case was focused on likely duration and risk of recurrence, which is not the situation here, where I consider, bearing in mind the nature of the condition that that overall general diagnosis would be extremely unlikely to change. The condition therefore clearly constitutes a mental impairment.
 - b. There was also no dispute that such an impairment, by its very nature, will be long-term/life-long.
 - c. The core area of dispute was whether or not the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities. I considered that it did, for the following reasons:
 - i. While the Claimant had not, in his impact statement, really addressed the 'day to day' nature of his activities, focusing instead on his work-related activities, I accepted that many unrepresented claimants will misunderstand this requirement, as their claim relates to their employment. His oral evidence, however, was compelling and persuasive as to the adverse effect his dyslexia had upon his

day-to-day life. He is forgetful about appointments, for both work and social events, often missing, or being late for meetings, requiring multiple reminders. He forgets people's names, leading to embarrassing situations, both at work and socially. He cannot absorb or follow verbal location directions, losing his way. When cooking, he will fail to follow recipes, excluding ingredients. He misreads written instructions/procedures quite frequently, resulting in errors and delays on his part. At school, he was given 25% extra time in exams, but it wasn't until university that he was offered more comprehensive support. It was undisputed evidence that he also suffers from hyper-mobile joints and lax ligaments, which render him clumsy and prone to falls, a perhaps exacerbating factor in time-keeping. His evidence is borne out in the psychologist's report, where it identifies that the difficulties the Claimant faces include in the areas of '*organisational skills and time management*' and '*working memory*' and it also makes reference to his physical problems. These adverse effects are exacerbated by stress, which is, he stated, inevitable, when appointments are missed, or he is late for them, or he is failing to achieve targets.

- ii. While he accepted that he had implemented 'coping strategies' to attempt to counter these effects, such as multiple digital diary reminders, the use of Google maps and leaving for meetings at least half an hour earlier than he needs to, he stated that these are ineffective when he is placed under stress, which is a common position for him to be in. During the period of his grievance against the Respondent, he attended 'stressbuster' counselling sessions with an appropriate counselling service [117]. Reference was made, in this respect, to paragraph B.10 of the Guidance which states that '*in some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.*' On that basis, therefore, I did not accept Mr Jones' submission, reliant on paragraph B.7, that such coping strategies as the Claimant may employ alter the effects sufficiently to render them no longer 'substantial'.
- iii. 'Substantial' is defined by s.212(1) of the Act as '*more than minor or trivial*'. I consider the above effects to meet that definition. I note also that the Claimant was assessed by the psychologist as having well-above average IQ and having obtained a doctorate in late 2017, in political science, he is clearly a man of intelligence and drive. In that context, I consider that the above-stated effects are magnified, in his case, as he may well perceive them as 'holding him back', or otherwise restricting what should otherwise be a successful career. It is correct that the psychologist assessed his working memory as 'average', at a 61 percentile, but that is in marked contrast to his

much higher scores in other areas, again pointing up the debilitating effect such an impairment would have on a man of the Claimant's intelligence.

6. Limitation/Jurisdiction. There was no dispute that the claim was brought out of time. The accepted last alleged act where the Claimant suffered substantial disadvantage was in attempting to meet a marking and feedback target, in the period 4 to 8 June 2018. Early Conciliation with ACAS commenced on 14 October and he presented his claim to the Tribunal on 11 December. The reasons he gave for this delay were as follows:
 - a. He was unaware of time limits for tribunal claims.
 - b. As he had invested much time and effort in his planned academic career, having gained a PhD in 2017, while working on part-time basis for the University and with the hope of a permanent post, either in Exeter or elsewhere, he wished, if at all possible, to resolve his dispute with the Respondent through their internal procedures. He felt that if he failed to do so and was left with only the option of a tribunal claim that that would, reputationally, result in him becoming unemployable in his chosen career. He therefore consciously decided to wait until the outcome of his grievance, which he had first brought on 22 May 2018 [77], but was obliged to reiterate 'formally', by attaching an email to that effect to his original grievance, on 31 July [92]. That outcome was received on 8 October [103] and he appealed against that decision, receiving the decision on 30 November [114]. It was only then, he said that he felt he had no option but to consider this claim. He considered that the time taken by the Respondent to deal with these processes (approximately six months) had been specifically designed to 'run down the clock' on a potential claim.
 - c. He was under considerable stress over this period, as evidenced by his attendance at appropriate counselling (as referred to above).
7. The Claimant's reasons were challenged, as follows:
 - a. He cannot have been under the degree of stress he claimed, as during the same period he had started new employment and also set up his business. While there was some evidence of counselling, he had not gone to his GP or being prescribed medication. He said that the setting up of his business took minimal effort (*'the filling in of a few forms'*) and that he had no choice but to find other employment. He didn't approach his GP, as his doctor didn't support the use of medication in such cases and he himself didn't consider that it would be helpful. He said he felt close to a breakdown, due to the potential loss of his hoped-for academic career.
 - b. That his rationale for holding off bringing a tribunal claim was flawed, as, once he had brought a grievance, relations will have already broken down with the Respondent. He disagreed, stating that he felt that the Respondent had not been listening to his concerns, but that he genuinely

hoped that by bringing the grievance, he could resolve the matter amicably and continue in his chosen career. He said that his text of 4 July, in which he said that he '*no longer worked for the university*' was an '*emotive response to the situation I found myself in*' [88a] and that he still, nonetheless, hoped that the dispute could be resolved.

8. Conclusion on Limitation. I find that while the claim is out of time, it would, applying s.123(1), be just and equitable to extend time, for the following reasons:
 - a. The discretion granted to a tribunal to do so is a wide one.
 - b. I consider, in the particular circumstances of the Claimant's planned career that it was entirely legitimate of him to attempt to exhaust the Respondent's internal procedure, before embarking on a tribunal claim. I accept that rightly or wrongly, he perceived that by bringing such a claim, his reputation would be adversely affected within the academic community, thus greatly limiting his future career opportunities. I don't consider that the judgment in **Apelogun-Gabriels** prevents me from coming to that conclusion. While that judgment indicated that such delay would not, of itself, justify, extending time (as perhaps suggested by previous authorities), it was, nonetheless, a factor to be taken into account in the overall assessment. I note also that the appellant in that case had held the role of an accounting assistant, which I find a distinguishing feature from the circumstances of the Claimant and his fears as to his 'card being marked' in the wider academic community.
 - c. Once he knew for certain that his concerns were not going to be addressed, at least to his satisfaction, he very promptly brought this claim.
 - d. The balance of prejudice falls firmly, in my view, against the Claimant, as he would be debarred from seeking recourse for his complaint of disability discrimination, whereas the Respondent will have the resources necessary to meet such a claim, without undue prejudice to it.
9. Conclusion. For these reasons, therefore, the claim will proceed to hearing, as set out in the Case Management Summary of same date.

Employment Judge O'Rourke

Exeter

Dated 30 August 2019

Sent to the parties on 9 September 2019

For the Tribunal Office