



EMPLOYMENT TRIBUNALS

Claimant: Ms F Hyland
Respondent: Aspiedent CIC
Heard at: Bradford **On:** 9 August 2019
Before: Employment Judge Davies
Representation
Claimant: Mr J Crozier (counsel)
Respondent: Dr E Guest (director)

RESERVED JUDGMENT

1. At the time of her employment by Aspiedent, Ms Hyland was disabled as a result of Asperger's Syndrome.

REASONS

Introduction

- 1.1 This was a preliminary hearing in public to decide whether Ms Hyland was disabled as defined in the Equality Act 2010 when she was employed by Aspiedent. The questions to be answered were:
 - 1.1.1 Did Ms Hyland have the mental impairment of Asperger's Syndrome?
 - 1.1.2 Did it have an adverse impact on her ability to carry out normal day-to-day activities?
 - 1.1.3 Was that adverse impact more than minor or trivial?
 - 1.1.4 Had the adverse impact lasted more than 12 months?
 - 1.1.5 If Ms Hyland was disabled, what were the effects of Asperger's Syndrome on her?
- 1.2 At the hearing, Ms Hyland was represented by Mr Crozier (counsel). Dr Guest represented the Respondent, with support from Ms Blacow.
- 1.3 The preliminary hearing was to decide whether Ms Hyland has Asperger's Syndrome. Dr Guest, the Respondent's sole Director, has autism. Adjustments were made in the preparation for the preliminary hearing and the conduct of that hearing to enable all parties to participate as effectively as possible. The adjustments were dealt with in case management orders before the hearing. Anybody wishing to give evidence at the preliminary hearing had the opportunity to provide an initial witness statement and then a second witness statement responding to anything said by anybody else. Only Ms Hyland did so at that stage. The parties then had to send each other any questions they wanted to ask a witness. Those questions were to be answered by the witness in a third witness

statement. This was instead of live cross-examination at the preliminary hearing. Dr Guest did not send any questions to Ms Hyland. The parties then prepared written arguments and had the opportunity to respond to each other's arguments in writing. Both parties produced detailed written documents. Dr Guest and Ms Blacow also produced witness statements at this stage. I explained in case management orders that they would not be allowed to give evidence at the preliminary hearing. I confirmed that I would consider the statements when deciding what questions to ask at the preliminary hearing.

- 1.4 Two rooms were used for the preliminary hearing. Dr Guest, Ms Blacow and a supportive companion were in one room, which was connected to the other by live video link. There was a Tribunal clerk in each room. Ms Hyland gave evidence. The only person to ask questions was EJ Davies. Some of those questions were based on points made by Dr Guest in her written arguments. We had a break every thirty minutes. Dr Guest was allowed to record the preliminary hearing. After the hearing, the parties had the chance to make any corrections or additional comments in writing. They could then respond in writing to anything said by the other party. Again, both parties did so. Dr Guest's documents include some matters of new evidence. It is now too late to introduce new evidence and I have not taken it into account. I have, of course, considered her detailed arguments with great care.

The Facts

- 3.1 I have read all the written arguments and evidence, as well as considering the oral evidence Ms Hyland gave.
- 3.2 Dr Guest says that Ms Hyland's evidence was fundamentally dishonest and should not be believed. I do not agree. There were matters on which Ms Hyland's evidence was inconsistent and there were matters where she accepted she had not been truthful in the past. I deal with some of them below. However, those matters did not cause me to disbelieve Ms Hyland generally. I found that she was doing her best to give honest and accurate oral evidence.
- 3.3 Dr Guest also makes a number of points based on her knowledge and understanding of autism. However, as I made clear in my case management order on 17 May 2019, Dr Guest cannot act as an expert witness in this case. Expert witnesses must be independent and objective. The Respondent is Dr Guest's company. She is not independent and objective. I have based my findings of fact on the written and oral evidence before me.
- 3.4 Asperger's Syndrome
I start with the question whether Ms Hyland has (and had) the mental impairment of Asperger's Syndrome. I find that she does and did.
- 3.5 Ms Hyland is currently 25 years old. She attended mainstream primary school and secondary school. Part way through her schooling she was given a Statement of Special Educational Needs. After her GCSEs she went to College and then did a degree at Leeds Beckett University.
- 3.6 The evidence before me includes the following:

- 3.6.1 Ms Hyland was assessed by the Special Assessment Team for children with Complex Communication Difficulties in 2001 when she was 8 years old. The Team consisted of Dr Parry, Consultant Community Paediatrician, Ms Westeman, Consultant Clinical Psychologist, and Ms Falkingham, Senior Speech and Language Therapist. Ms Hyland was assessed at Glen Acre House in September 2001 and the assessors carried out a school visit in October 2001. Ms Hyland's developmental history and communication skills were discussed with her parents. Ms Hyland was observed in class. The assessors also spoke to her class teacher.
- 3.6.2 Ms Westeman assessed Ms Hyland using the Wechsler Intelligence Scale. She reported a highly significant discrepancy between Ms Hyland's verbal and performance IQs. She said that, in contrast to her non-verbal skills, Ms Hyland had difficulties with most aspects of language use, particularly understanding and verbal reasoning. Ms Westeman reported that, although Ms Hyland performed within the range expected for her age on the verbal tests, the quality of her language was different from that of other children.
- 3.6.3 Ms Falkingham produced a report in May 2002. She described difficulties experienced by Ms Hyland in the areas of comprehension, expressive language and communication skills. She reported that in the opinion of the Special Assessment Team Ms Hyland's difficulties with language, communication and social understanding were consistent with a diagnosis of autistic spectrum disorder. She recommended that Ms Hyland have extra help and support in school.
- 3.6.4 Dr Parry also prepared a written report, which was dated July 2002. She discussed a range of skills and milestones. Among other things, Dr Parry said that Ms Hyland tended to be isolated, struggled to understand appropriate interaction and had to be warned of changes around the house. In school she was frequently not on task and achieved very little work. If she did not get her own way she might trip or hit other children. Dr Parry concluded that Ms Hyland had the impairments of social interaction, communication and imagination, together with somewhat rigid repetitive patterns of behaviour that were diagnostic of a disorder in the autism spectrum. She reported that the Special Assessment Team agreed that Ms Hyland's difficulties met the diagnostic criteria for Asperger's syndrome.
- 3.6.5 Mr Vegeris, Senior Educational Psychologist, assessed Ms Hyland in school in June 2002. He spoke to her parents and teachers, reviewed the other assessment information and provided written advice in July 2002. He also assessed Ms Hyland using the Wechsler Intelligence Scale. Her scores were different from those recorded by Ms Westeman the previous year. Mr Vegeris did not find a significant discrepancy between Ms Hyland's verbal and performance scores. However, that did not lead him to question the diagnosis of Asperger's Syndrome. Mr Vegeris advised that Ms Hyland had high levels of verbal and practical intelligence but was not able to achieve her full potential in school because of her difficulties with social interaction, attentional focus and independent writing and spelling skills. Her diagnosis of Asperger's Syndrome meant that those difficulties would require a programme of intervention to support her learning and social skills and to help her achieve a sense of belonging within her peer group. In addition, he reported that Ms Hyland's preference for routines and her resistance to change made it difficult for her to cope with unexpected events in school and that time would be needed to help her prepare for changes within the

school day. Mr Vegeris advised that Ms Hyland met the criteria that would in practice lead to a Statement of Special Educational Needs being made by the local authority. That appears then to have taken place.

3.6.6 The written evidence indicates that Ms Hyland had input from Mr Ling of the Autism Outreach Team after this.

3.6.7 Reports from a review in March 2005 refer to a range of issues. Ms Hyland was experiencing depression. She was having particular problems with social interactions and changing classrooms. She was very tired. She was having difficulty with support staff whom she felt treated her like a baby. She was reluctant to accept advice of others and would become rude if they made suggestions. She had lashed out on a couple of occasions. The Autism Outreach Team advised requesting more support for her.

3.6.8 Ms Hyland's Individual Education Plan from December 2008 referred to her diagnosis of Asperger's Syndrome, and difficulties with social interaction, independent writing and spelling. It set out the following information from Part 2 of her Statement of Special Educational Needs:

Faye has Asperger's syndrome. She is a pupil with high levels of verbal and practical intelligence. However, she is unable to achieve her full potential in school because of her difficulties with social interaction, attentional focus and independent writing and spelling skills.

Faye prefers routines and is resistant to change, this makes it difficult for her to cope with unexpected events in school. She finds it difficult to remain on task and in working and playing cooperatively with other children her own age. She will interact with others but prefers to play with younger children.

Faye has significant difficulties with the comprehension of abstract language, she interprets things literally. She has difficulty understanding verbal language and has marked impairment of her ability to interpret facial expressions and body language. She frequently misinterprets things that people have said or done and is left feeling bewildered and frustrated. Faye has temper tantrums and is teased because of this, she feels that she does not "fit in" with other children and tends to be isolated, her self-esteem is affected by this. She has an extensive vocabulary and excellent memory which gives her the ability to talk at length about topics of interest to her. She has problems in communicating her own feelings and recognising the feelings and needs of others.

Faye's attention span is short for activities she has not chosen. She finds it difficult to remain on task at school. She is unable to organise herself or her work. She has a specific difficulty with written work and her spelling and handwriting are inconsistent and below the level which would be expected on the basis of her spoken language.

3.6.9 After taking her GCSEs Ms Hyland went to College to do a BTEC course. A transition assessment again referred to her diagnosis of Asperger's Syndrome and difficulty with social interaction. It said that the Autism Outreach worker would work with her to support her transition to College.

3.6.10 After College Ms Hyland studied Product Design at University. She received support through the Disabled Students Service. She continued to experience difficulties with depression and anxiety at that time.

3.6.11 The evidence before me included a letter written by Mr Vegeris in December 2017. Ms Hyland's mother had contacted him by telephone about the Advice he had written in 2002, no doubt in the context of this Tribunal claim. Mr Vegeris did not carry out any further assessment of Ms Hyland. He wrote that, on reflection, he felt the reference to "temper tantrums" in Ms Hyland's Statement should have been amended in the light of her emerging pattern

of autism. He said that it would have been more accurate and appropriate to describe her as having “a pattern of social and communication difficulties which were consistent with a diagnosis of autism, including finding it difficult to communicate emotions in large groups and classes.” Mr Vegeris made some remarks about Ms Hyland’s experience at University. However, that was evidently based on what he was told rather than on any further assessment. I have not placed weight on it. I do note, however, that he refers to ASD as a “lifelong condition.”

3.6.12 Finally, and again in the context of these proceedings, Ms Hyland referred herself to the Leeds Autism Diagnostic Service in March 2018. Among other things, she wanted to confirm her autism diagnosis. Ms Hyland was seen by Dr Davidson, Consultant Psychiatrist, and Ms Straker, Autism Nurse. Dr Davidson wrote a report. He had reviewed paperwork provided by Ms Hyland from the various educational and health professionals who had assessed her during her childhood. He wrote that this evidence clearly showed that she had autism, which was verified by several different professionals. Dr Davidson said that he and Ms Straker had noted a number of factors consistent with autism during their appointment with Ms Hyland. These included: variable eye contact, reduced facial expressiveness, minimal use of gesture, a tendency to talk at greater length than necessary, literalness, and cognitive rigidity. Dr Davidson and Ms Straker agreed that Ms Hyland had an autism spectrum disorder. This was based on past history, presenting complaint and mental state examination. At the end of his report Dr Davidson said that Ms Hyland had told him that she thought she had largely “overcome” her autism in her early 20s, only for many of the autistic traits to become more prominent again this year. Dr Davidson said that sometimes autistic people (particularly females) can learn coping or “camouflaging” strategies as they get older, but at times of stress/transition/sensory overload it is more difficult to apply these strategies, and the autism appears to become more prominent.

3.7 The evidence before me therefore shows that Ms Hyland was diagnosed with Asperger’s Syndrome at about aged 8 following an assessment by suitably qualified experts. She had a Statement of Special Educational Needs after that. She had regular input from the Autism Outreach Service and a range of other support throughout her education. The diagnosis of Asperger’s Syndrome was not subsequently questioned or changed. That diagnosis has recently been confirmed by Dr Davidson and Ms Straker. I accept, of course, that their report was obtained at least partly for the purpose of these proceedings. Nonetheless, they too are experts in the field and their view was based on their observations and the previous assessments. All of that evidence satisfies me that Ms Hyland has the mental impairment of Asperger’s syndrome.

3.8 Dr Guest argues that Ms Hyland has been misdiagnosed. Her argument is principally based on reviewing the material from the time in the light of her own experience of Ms Hyland. She concludes that there was a different explanation for Ms Hyland’s behaviour and presentation. Dr Guest selects particular aspects of the contemporaneous reports to support her conclusions. For example, she refers to a part of Ms Falkingham’s report where she described Ms Hyland using language with her peers in a rather controlling way, telling them what to do and becoming distressed when they failed to respond in the way that she wanted; and

to another part where Ms Falkingham said that Ms Hyland was going through a phase of referring to other children as “enemies.” Dr Guest also refers to a part of Dr Parry’s report where she referred to Ms Hyland being teased and laughed at for “her temper tantrums.” Dr Guest suggests that this type of comment shows that Ms Hyland’s difficulties with social interaction were caused by her wanting to control people and have her own way and not by autism. However, Dr Guest is not medically qualified. She has not examined Ms Hyland and she was not involved at the times Ms Hyland was examined and diagnosed. She has identified particular parts of the reports and reached a conclusion based on those. The experts at the time reached different conclusions, taking those matters into account. Dr Davidson appears to have seen the same information and he did not question the diagnosis either. Nothing in the evidence or arguments persuades me that it is appropriate to go behind the diagnoses that were made by suitably qualified experts who examined Ms Hyland at the time. I find that she had and has Asperger’s Syndrome.

Effects and Impacts

- 3.9 That brings me to the evidence about the effects of Asperger’s Syndrome on Ms Hyland.
- 3.10 As mentioned above, Dr Guest says that there is evidence of Ms Hyland being dishonest on more than one occasion and argues that this means that her evidence generally should not be believed. When she gave her evidence, I asked Ms Hyland about some specific examples:
- 3.10.1 Dr Guest said that she spoke to Ms Hyland about her PIP application in January 2017. During that discussion, she expressed concern that Ms Hyland would not qualify for PIP because her social skills were so good. Ms Hyland responded along the lines, “Don’t worry. I know how to act autistic.” When she gave her evidence Ms Hyland agreed that she had said this to Dr Guest. I asked what she meant by it. She explained that she had spent time and effort overcoming her autism because she needed to fit into the world. She said that she put all her effort into the goal of functioning as a “normal” (i.e. neurotypical) person. She hoped that people could not tell she was autistic. That was her “acting normal.” One of the downsides was that people could not tell she was autistic. When it came to something like PIP she did not want the assessors to see how well she could cope, because most of the time she could not. Otherwise she would not get the support she needed. “Acting autistic” meant that she was trying *not* to act normal. I accepted Ms Hyland’s explanation of what she meant.
- 3.10.2 Dr Guest said that when Ms Hyland applied to Access To Work for support she had to tell them when she had started work at the Respondent. This caused her anxiety because when she had got her job and signed off benefits she had told DWP a later start date. She was worried that the DWP benefits department would find out she had lied. She asked Ms Blacow to lie for her. Ms Hyland said that this was “kind of” what happened. She said she had volunteered with the Respondent for a week or two before they decided to pay her. There was to be a month between starting and getting paid. She (wrongly) thought that if she told the Job Centre that, they would stop paying her and she would have no money for a month. Therefore, she told them that her start date was the date she got her first payment from the Respondent. She acknowledged that this was “not the best thing” she had done but said that she was panicking that she would

not be able to live without money. She said that when she made her Access to Work application she gave, "Pretty much" that explanation to Ms Blacow. She did not want her to do anything or lie, she just wanted her to be informed.

3.10.3 Dr Guest also said that when Ms Hyland missed the deadline for submitting her PIP form she phoned up and said that she had not received the form. When I asked Ms Hyland about this she said that she could not really remember but she did apply late. She said that it did sound like something she might have done. She said that it was probably "not the best way to paint me" but she did not think it was something the average person would not do on occasion if they had struggled to meet a deadline.

3.11 I asked Ms Hyland about Dr Guest's argument that these examples showed that her evidence should not be believed. She said that everybody lied and fudged the truth. She was not trying to rip someone off or cause harm or distress. She did not go outside the realms of what people would reasonably do.

3.12 The question for me is whether these examples of occasions when Ms Hyland was less than straightforward mean that I should disbelieve her evidence generally. I find that they do not. People do sometimes lie or fudge the truth for all sorts of reasons. That does not necessarily mean that nothing they say can be believed. In this case, Ms Hyland has accepted that she was less than straightforward on certain occasions. She has explained why. Her admissions about these matters indicated that she was prepared to give truthful evidence even where that was not in her interest. She gave evidence about a range of matters for more than an hour and a half. I found that she was generally doing her best to give accurate evidence. There were some mistakes, inaccuracies and inconsistencies. That is common when people are trying to remember events. I did not find that as a result her evidence *generally* lacked credibility or that she should not be believed at all. Instead, it was necessary to consider the evidence relating to particular matters as it arose. I therefore turn to the evidence about particular effects of Asperger's Syndrome on Ms Hyland.

3.13 In her witness statement, Ms Hyland said that her autism gave rise to five main challenges: difficulty with/resistance to change; rigid thinking/resistance to new ideas; relating to others; sensory sensitivity; and communication. When dealing with those challenges, she gave examples of how every day activities were affected. There was overlap between the different challenges, particularly "relating to others" and "communication". Also, some every day activities were affected by more than one challenge. I therefore summarise below the key evidence in the order it was given, before setting out my conclusions on the challenges faced by Ms Hyland and the impact on day to day activities arising from her autism.

Change

3.14 Ms Hyland said in her witness statement that she finds it difficult to process change. Sudden or unexpected change to her routine, established rules or the environment without prior notification or planning can be overwhelming and lead to feelings of anxiety. She said that this was one of the reasons why she could not use public transport. She described difficulty in using buses and, to a lesser degree, when driving.

- 3.15 I asked her to explain how she experienced that difficulty. She described a time when she worked for the Respondent and somebody had made changes to a document she had created. She said that when she saw it she “freaked out.” It was like a very acute onset anxiety. She felt like she had a big, heavy lump in her throat, very anxious and wound up. It made her brain freeze. She flung the papers onto the table and walked off. She thought she hid in the elevator and calmed down after about 15 minutes.
- 3.16 I asked her whether she travelled by train. She said that she did not, because she had never lived in a place where that was easy access to the train so it was not really an option. I asked her about messages she had sent Ms Blacow in January 2017. In those messages she said that she was having car trouble and, later, that she had had to catch a train. She agreed that she had used the train on that occasion. Her mother had driven her to the station. She agreed that this was an unexpected change of routine. She said that she was with her mother who suggested catching the train and helped her to work out that she could do that. It was a very stressful situation. She agreed that she had caught the train on the odd other occasion. She did not think she had done it on her own. She had caught the train with Ms Blacow once, which was planned in advance. Some messages in the file indicated that Ms Hyland had caught the train on her own on at least one other occasion. I asked her whether the reasons she said made it difficult to catch a bus also applied to catching trains. She explained that on a bus there was more going on. Buses were very “juddery”, they vibrated and rattled. You were swinging about and did not feel physically secure. Trains tended to be more enclosed. She would have her own space and could control her own area. It was a lot easier to move around if she wanted to. Ms Hyland’s social media pages showed that she has travelled abroad and successfully coped with delayed journeys.
- 3.17 In her claim form Ms Hyland said that she had moved house in 2017 and had coped well with that. In other documents she had indicated that the move of house was more difficult. I asked her about this. She said that she did cope well because a lot of effort went into the move. She knew the street because family friends lived on it. It was an easy distance to her parents’ houses. She spent time planning and coordinated with the landlord. In her written arguments, Dr Guest disputed that version of events.
- 3.18 Ms Hyland also gave evidence that she had worked in a wine bar. She started in August 2010 as a weekend job for 4 or 6 hours. When she was at University she came back sometimes. She was a glass collector: she would walk round, pick up glasses, put them into the machine and take them back. The woman who ran the bar was a family friend. Over time Ms Hyland started re-stocking the bar and cleaning. She never served behind the bar. She helped with some jobs in the kitchen sometimes. I asked her what would happen if there was a change at the bar. She said she knew the staff. When new staff members started she already knew them in passing. If she knew she was going into a situation she could get her mind ready to deal with it. If there was something that threw her, for example the staff having an argument, she went into the kitchen and called her mum who calmed her down.

Rigid thinking/resistance to new ideas

- 3.19 The next challenge Ms Hyland described in her witness statement was difficulty with accepting new ideas that conflict with or challenge an existing idea. She said that once she has been taught a method or particular way of doing something, she sees it as the right or only way to do something and finds it nearly impossible to consider alternatives. She has a car and is able to drive in a familiar area along a route she knows well with little issue. If she needs to drive somewhere new she becomes stressed and anxious. The more time she has to prepare the better. For a particularly important journey like a job interview she will rehearse the trip.
- 3.20 I asked her how she experienced this difficulty with accepting new ideas. She said that if she was used to working with something and it updated or changed it was “jolting.” It made her have to freeze, to stop and stare at it. If her mother changed a paragraph in a document she would not be able to read it and understand what her mother was saying because it was not written in the way she understood. She would have to calm down from that, pick apart what had been put and rearrange it into a way she could work with it before she could deal with it.
- 3.21 Ms Hyland said that she could be creative and come up with creative ideas. The trouble she had was with changing an idea once she had got to it. On her degree course she had to make a scale model of an aluminium chair. She took that to mean that the chair had to be aluminium. Her tutor tried to persuade her to make a model out of wood but she could not get her head around that. She fell behind because it took her a long time to make a model out of aluminium.
- 3.22 I asked Ms Hyland about her LinkedIn profile. In that, she says that her most valuable ability is to be able to deal with challenges with calm, persistence, logic and a little creativity. Her willingness and enthusiasm to learn is described as her greatest attribute. She told me that this was an exaggerated view. LinkedIn was an online CV and she was trying to promote herself. She was talking about her strengths on a day when she was very much on form. She did not accept that this showed she had no difficulty with new ideas or change. She said that she did find it difficult but still wanted to learn, which was a challenge. It was easier to deal with changes that were planned and expected. Sometimes she would be good with change because she had spent a long time learning how to be. The LinkedIn description was what she was sometimes, not what she was every day.
- 3.23 Dr Guest had said that Ms Hyland showed little interest in the online diary at Aspiacent. Ms Hyland said that a change in a diary was not too difficult for her: “You have a calendar and you change it.” It was a change that was more personal or invested that she found difficult.
- 3.24 I asked Ms Hyland about an occasion when Dr Guest said that she drove to an autism fair without difficulty. Ms Hyland said that she did drive to the show but that it was a “nightmare.” She explained that she would not normally tell Dr Guest about all the planning she had done. She said that the plans for the fair kept changing. On the Sunday a colleague who was supposed to go with her pulled out. She called Ms Blacow that day. It was in the early days and this was her first proper job. She decided she would drive down on her own. It was not the best of experiences. She was tired, stressed and wound up. She did not take in much. She did force herself to do it with a lot of help from her mother as well.

3.25 The written evidence included texts between Ms Hyland and Ms Blacow from days when Ms Hyland was late for work. I asked how she coped on those occasions. She said that one of the ways was sending a message to Ms Blacow. She agreed with Ms Blacow's description, that she would come in and bang around and flop on the desk. She said that she would take some time to recover and get her "work head" on.

Relating to others and Communication

3.26 Ms Hyland also gave evidence about what seemed to be related areas of challenge. First, she said in her witness statement that she had difficulty interpreting and understanding people's body language and the meaning behind what they say. She has worked hard to try to lessen the impact of this difficulty but it takes extreme effort to do so. In a stressful or emotive situation it is more difficult to use her coping strategies. Secondly, Ms Hyland said that it takes her much longer than others to understand new subject matters. She said that she needed more time to process information. She struggled with the subtleties of language. As a child this meant she was very literal in her understanding of others. Because of all she has learnt, as an adult she can communicate more fluently. On a good day the average person may struggle to tell that she is autistic. That takes a significant amount of concentration and energy. She can deliver sarcasm, metaphors and jokes but occasionally still misses these coming from others. The more frustrated, anxious or stressed she becomes the less able she is to keep up her "normal act" and the more obviously autistic she becomes. That is because the concentration and energy she uses is redirected to deal with her stress. Ms Hyland's social media pages show her engaging in humorous exchanges with friends.

3.27 I asked Ms Hyland to give me an example. She said that job application forms ask questions to which they do not really want to know the answer. If they ask how you would work in a team, her instinct is to say that one person does one part one does another and they then come together. However, she now knows that what the authors really want to know about is things like team dynamics. This is hard in writing but harder still in an actual interview. She had been in an interview where somebody asked her a question. After she had answered the interviewer told her that this was not what they meant. She has bought books about how to do interviews and has learnt techniques. It is a memory thing. However, if she is stressed she cannot do it. Ms Hyland explained that if she is in a conversation with somebody she is considering a lot of things: is she looking at them, their tone of voice, body language, eye contact, is she being relevant, is she pulling weird faces? On top of that she has to start working through answers to questions. She might have to re-word a question to confirm she is answering the right one. It is a lot to do at once. She does miss things and she falls apart sometimes.

Sensory sensitivity

3.28 Ms Hyland also said in her witness statement that she is sensitive to emotional behaviours emanating from others. If someone is angry, upset or irritated she becomes unnerved by it. She also struggles with noises involving the mouth and nose, for example sounds of chewing, heavy breathing or blowing the nose. This was part of the reason she had difficulty using public transport. She also had sensory issues that related to touch, the sensation from showers, brushing her teeth, certain fabrics and the textures of some foods for example. She enjoyed

heavy rock music and attended concerts with her father. She said that she found the loud music helped to mask the sounds of bodily functions from others around her. She said that throughout her life she had developed numerous adjustments and coping strategies to deal with these matters without becoming overwhelmed. However, if her adjustments or strategies failed, or too many issues presented themselves at once she would become overwhelmed and evolve into a shutdown.

- 3.29 I asked Ms Hyland about a time Dr Guest said that an autistic colleague had a meltdown. Ms Hyland said that the colleague was not angry or upset. It was not that emotional. It was like a “brain crash” where you have to “stop and reboot.” She tried to give the colleague the advice she would give herself, suggesting he take a break and have a cigarette.
- 3.30 I asked Ms Hyland whether mouth noises were an issue when she worked in the wine bar. She said that the music pretty much covered it up. If it was quiet and empty and someone was eating crisps for example she would go into the next section.
- 3.31 I asked her about going to rock concerts. I asked whether a lot of the challenges she describes would be present at a rock concert. She described compellingly her enjoyment of rock concerts. She said that you could not hear noises from the mouth at a concert. The music was so loud and she could feel the beat vibrating in her body. She knew how people were going to behave and she tended to stay near the back or at the sound desk. She would look straight forward at the stage. She would go with her father or her two good friends.
- 3.32 I asked Ms Hyland about what she said to Dr Davidson about feeling that she had largely overcome her autism in her early 20s. I asked how she had experienced that. Was it that the challenges were no longer present, that she was coping better or something else? She said that it was a bit of both. She was in a good routine, which reduced the challenges. She had more support and had less to contend with. There were still difficulties but she felt more secure in what she was doing.
- 3.33 I have taken into account Ms Hyland’s written and oral evidence, the file of documents, including the medical evidence, and all of Aspiement’s written arguments about the evidence. Drawing all those matters together, my findings are as follows.
- 3.34 I do think Ms Hyland has overstated some of the challenges or difficulties, particularly in her written evidence. One example is the statement in her witness statement that she “cannot use public transportation.” But I did not find that she was making her whole account up. It seemed to me that she had written a statement that included every conceivable issue and sometimes exaggerated the position. However, when she was asked about it in her oral evidence, she accepted the points that were made. I found her oral evidence unrehearsed. When I asked for particular examples, the answers she gave were vivid and convincing descriptions of her experiences in her own words. Just as she described for her PIP application, it seemed to me that in her written statement she was keen to ensure that the picture that was presented showed the worst of what she can be like. I also noted that the reports prepared when Ms Hyland was first diagnosed

with autism and subsequently supported her account of particular challenges arising from her autism.

- 3.35 I find that Ms Hyland can have difficulty with change to her routine, established rules or the environment. That does not mean that every change causes her difficulty but some do. She minimises the impact of that difficulty by planning for change where possible. Unexpected changes can make her feel very stressed and can make her feel very anxious and wound up. She may need to take time out to calm down. She may “freak out”, for example flinging papers down and walking off. She may be able to continue with the changed approach, but that might be stressful and difficult for her. The medical and other reports indicate that Ms Hyland experienced difficulty with change during childhood, and I accept that she still does, in the way I have described.
- 3.36 Ms Hyland can also experience difficulty with accepting new ideas or ways of doing things. This seemed to me to overlap with her difficulty with change. Again, that is not with every new idea. It is more likely to be something personal or something that she is personally invested in. She may resist making a change (for example pressing on with the aluminium model chair). She may find the new approach “jolting” and may “freeze” and need to take time to calm down before she can deal with the issue. She will often seek help from her mother to deal with such a situation. The content of her LinkedIn profile does not cause me to reject her evidence about this. I accept that it is a marketing tool in which Ms Hyland seeks to promote herself, painting a positive picture of her at her best.
- 3.37 Ms Hyland can experience difficulty relating to others and communicating. She finds it more difficult than a neurotypical person to interpret and understand people’s body language and the meaning behind what they say. She has learnt how to do so to a significant extent, but it does not come naturally to her. That means it takes effort. When she is stressed or anxious, she is less able to sustain that effort and therefore less able to understand and interpret.
- 3.38 Ms Hyland does experience some sensory sensitivity. Although her witness statement referred to a number of issues, it was clear that the main one was sensitivity to other people’s mouth and nose noises. She does not have a sensitivity to noise generally, and indeed enjoys the sensory experience of being at a loud rock concert. That loud noise masks other people’s mouth and nose noises. Ms Hyland will go somewhere else if someone is making mouth or nose noises.
- 3.39 Overall, Ms Hyland has a range of strategies to assist her in meeting the challenges posed by her autism. Sometimes, with the assistance of those strategies, she is able to function well. That still takes planning and effort. At other times, for example when she is more stressed or anxious, or where too many issues present themselves at the same time, she functions less well. At the extreme, this can be overwhelming and lead to a shutdown. This has happened much more frequently since the end of Ms Hyland’s employment. At the time of her employment I find that a shutdown was a rare occurrence for her.
- 3.40 The combined effect of the above challenges is always present and affects Ms Hyland as she navigates each day. The evidence dealt with some specific day to

day activities that it affects. I accept that Ms Hyland is unable to travel by bus. Her evidence about that was compelling. It is not just that she has trouble with change, but also that she does not feel secure, the sensory experience is uncomfortable and she is unable to move around or control her space. Ms Hyland is able to travel by train, but that causes her stress and anxiety. She needs to plan such journeys in advance if possible. Ms Hyland can drive, but she needs to plan or rehearse journeys where possible. Travelling by train or car are more difficult for her than a neurotypical person.

- 3.41 Ms Hyland's communication difficulties affect her ability to have a conversation and to interact with colleagues. She finds it difficult to fill in application forms and take part in interviews. Her difficulty with change and resistance to new ideas also affect her ability to interact with colleagues and to follow instructions. Sometimes she finds those things more difficult than others. I have described Ms Hyland's difficulties in the present tense. However, apart from the fact that she has more frequent shutdowns now than she used to, all of these difficulties were present at the time of Ms Hyland's employment by Aspident.

Legal Principles

- 4.1 Claims of **discrimination** are governed by the Equality Act 2010. By virtue of section 6, a person has a **disability** if she has a physical or mental impairment that has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Section 6 is supplemented by schedule 1 of the Equality Act 2010, and by Guidance made by the Secretary of State called "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" ("the Guidance"). The Tribunal is obliged to take the Guidance into account.
- 4.2 The Tribunal should ask:
- 4.2.1 Did the person have a mental impairment?
 - 4.2.2 Did it affect her ability to carry out normal day-to-day activities?
 - 4.2.3 Was the effect substantial?
 - 4.2.4 Was it long-term?
- 4.3 The Tribunal must consider the position at the time of the alleged discrimination.
- 4.4 The Guidance advises that "mental impairment" can include autistic spectrum disorders.
- 4.5 The Guidance gives examples of normal day-to-day activities. They are things people do on a regular or daily basis. They include having a conversation; travelling by various forms of transport; and general work-related activities, such as interacting with colleagues, following instructions, and driving. The Tribunal should focus on what the person cannot do, or can only do with difficulty, and not on what they can do. There is more detailed advice in section D of the Guidance.
- 4.6 A substantial adverse effect is one that is "more than minor or trivial." It is one that goes beyond the normal differences in ability that may exist among people. There is more detailed advice in section B of the Guidance.
- 4.7 An adverse effect is long-term if it has lasted more than twelve months.

Application of the law to the facts

- 5.1 Applying those principles to the findings of fact above, I deal with the issues in turn.
- 5.2 For the reasons set out above, I have found that Ms Hyland did have the mental impairment of Asperger's Syndrome.
- 5.3 For the reasons set out above, I have found that Asperger's Syndrome did have an adverse effect on Ms Hyland's ability to carry out normal day-to-day activities when she was employed by Aspient. The adverse effects are described more fully in the findings of fact. The effects of her Asperger's Syndrome were present as she navigated each day. They particularly affected her ability to travel by bus, train and car and her ability to communicate and interact with others. She could not travel by bus. She travelled by train only with difficulty and she travelled by car with greater difficulty than a neurotypical person. She found it more difficult than a neurotypical person to have a conversation, fill in a form or be interviewed. She found it difficult to deal with some change or new ideas.
- 5.4 I find that the adverse effect of Ms Hyland's Asperger's Syndrome was substantial. That means it was more than minor or trivial. I have taken into account the cumulative effect of the difficulties. As I have explained, sometimes Ms Hyland coped better than others. However, even when she coped better, the difficulties were still present. It was taking effort and energy from her to manage. Her difficulties went beyond the differences that exist between people. She did not travel by bus. If she travelled by train, that needed preparation, planning and/or reassurance. If she travelled by car, that needed planning and preparation and sometimes rehearsal. Holding a conversation required constant ticking off of a mental checklist. Interacting with colleagues might require her to respond to change or a different way of doing things. Sometimes Ms Hyland coped less well, and the adverse effect was more significant. Overall, I have no doubt that at all times it met the threshold of being "substantial."
- 5.5 The adverse effect of Ms Hyland's Asperger's Syndrome had clearly lasted more than 12 months.
- 5.6 The effects of Asperger's Syndrome on Ms Hyland are set out in the findings of fact above.

Conclusion

- 6.1 Ms Hyland met the definition of disability in the Equality Act when she was employed by Aspient. That means she can bring her claims of disability discrimination in the Tribunal. The parties will need time to process this judgment. I will therefore wait two weeks and then write to the parties to outline the next steps.

Employment Judge Davies

Date: 26 September 2019

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