



EMPLOYMENT TRIBUNALS

Claimant: Mr T Gibbs

Respondent: Simply Serve Ltd

Heard at: Bristol **On:** 24 October 2019

Before: Employment Judge Oliver

Representation

Claimant: Ms A Johns, Counsel

Respondent: Miss R Azib, Counsel

JUDGMENT having been sent to the parties on 29 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. I find that the claimant was disabled by virtue of a speech and language disorder at the material time which affected verbal and written communication including reading and writing.
2. The claimant has brought claims for disability discrimination. There was a Preliminary Hearing on 16 July 2019 that set out a list of issues, and this hearing was listed to determine disability. The respondent has admitted the claimant was disabled at the material time by virtue of chronic fatigue and tinnitus. The issue for the hearing was whether the claimant was disabled by virtue of dyslexia and/or speech and language disorder at the material time.
3. I had a bundle of documents, and I have read all of those except for the detailed medical reports relating to the claimant. Witness statements were taken as read. I had two statements from the claimant and heard evidence from him. I also had one statement from his mother, Mrs Shirley Gibbs and I heard evidence from her as well.

Facts

4. The claimant says that he has always had speech and language difficulties. He went to mainstream school, although it was discussed whether that was appropriate when he was four. He had a statement of special needs based on him being identified as having a language disorder - I have seen this in various documents provided by the claimant. He had a support worker and one-to-one assistance. In secondary school he also had a total of four hours a week of speech language therapy and specialist teaching. He was disapplied from key stage 2 SATs and was not entered for English GCSE. He did sit and pass a number of GCSEs including ICT, but he had some extra time for his exams and in some cases a scribe as well.
5. The claimant says that both written and spoken communication are difficult for him. He asks his mother to assist with many types of communication including job application, medical appointments and dealing with bills. He finds lengthy letters, emails and text confusing, he finds it difficult to understand dense text, and he has not read a book since he left school at 16.
6. Some specific examples were given in his impact statement. He struggles with basic tasks like telephone banking and tasks on the internet. He says he often can't understand what is said on the phone. For example, if he has to telephone about insurance renewal, he can't always understand, especially if the person is speaking quickly. He asks his mother to help or provide prompts. He uses the dictation function on his devices and spell check. He also struggles with conversation, especially in noisy environments. The claimant has tinnitus, and his oral evidence was that it was the combination with the tinnitus that makes noisy conversation particularly difficult. He also said he particularly struggles on the telephone if someone has a different accent or it is a bad line.
7. The claimant did confirm in oral evidence that he was fast at typing, and he has a hobby of computer gaming which includes speaking to others on a headset while he is playing a game. He liked his job as a porter which did involve following instructions, collecting and delivering items, and meeting and talking to different people. He dealt with angry people while he was a groundsman by remaining calm in various situations. He has also taken a first aid qualification twice, which did involve reading and a written test - but he says he was the last to finish the reading and writing tasks.
8. Mrs Gibbs also gave evidence about what she does day-to-day to help the claimant. She says he tends to misinterpret conversations, he finds it difficult to produce the words he needs, and he gets words wrong. He also finds it difficult to understand, follow and remember lots of instructions. With telephone calls he needs time to listen and process. She assists him with a script for calls, for example if he is calling an insurance company, and she will also take over if the person on the other end is speaking too fast or has an accent. Mrs Gibbs has access to the claimant's email account and she sends and receives emails on his behalf. She writes job applications for him and she will read more complicated things out to him. She gave the example of reading and explaining an advertising letter from a credit card company. She also attends and helps at hospital appointments and medical

appointments, including sessions with a counsellor after the claimant had been so quiet in the first three sessions and that he needed assistance. She has also assisted with these proceedings by reading out the witness statements to the claimant.

9. In relation to the job that is the subject of this case, the Facilities Assistant role, the job application form was completed by Mrs Gibbs. She said she went through the job description and the person specification. She discussed it with the claimant and thought he could do it. The job requirements included good communication skills, IT literacy, excellent keyboard skills and experience of Microsoft Office. Mrs Gibbs was asked about this. She explained that she would look at what the job actually involved, and she thought this one was effectively a “shifter, mover, cleaner” - it was not working in an office at a computer with lots of writing and talking to lots of people. She confirmed that the claimant was fast at typing and did have some computer skills.
10. The claimant did not mention speech and language disorder on his application form and he also did not ask for any adjustments. The claimant was not sure why, and he wasn't sure about the meaning of “impairment” on the form. He had included this information when he had applied for an earlier volunteer role. Mrs Gibbs' explanation is that she thought the claimant's speech and language problems would not fall within this, because what the form was asking about an illness impairment, and so a physical or psychological disability. The claimant saw the occupational health advisor about this role on his own. He said that this discussion was about his tinnitus, and they did not talk about his speech and language difficulties.
11. In relation to the facilities job itself, the claimant's evidence is that his workload increased in this role and there were an increasing number of emails asking lots of different things. He said that his difficulties in handling this were caused by having too much work, and also that it was hard for him to understand different instructions. In his own words he said that with dyslexia he could get into a “pickle”.

Applicable law

12. Under the Equality Act 2010, section 6(1), a person has a disability if they have a physical or mental impairment, and that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. The focus is on what a claimant cannot do rather than what they can do. A mental impairment includes learning disabilities, and there is no need for a medically diagnosed cause of the impairment.
13. In relation to an adverse effect on the ability to carry out normal day-to-day activities, the Equality Act guidance on matters to be taken into account in determining questions relating to the definition of disability (paragraph D3) refers to things that people do on a regular or daily basis. Examples given in the guidance include reading and writing, having a conversation or using the telephone. Where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people (paragraph D8).

14. In relation to whether an adverse effect is substantial, this means more than minor or trivial (section 212). This must go beyond the normal differences in ability which might exist among people, as set out in appendix 1 (the meaning of disability) of the Equality and Human Rights Commission Employment Statutory Code of Practice.
15. I have also considered *Paterson v Commission of the Police of Metropolis* [2007] IRLR 763 (EAT). This case concerned an employee with dyslexia. The test involves comparing the difference between the way in which the individual in fact carries out the activity in question, and how he would carry it out if he didn't have the impairment. Coping strategies will prevent the impairment from having an adverse effect in some cases, but only if they can be relied on in all circumstances
16. Account can be taken of how a person can reasonably be expected to modify their behaviour to avoid the effects of the impairment, looking at paragraph B7 of the Equality Act guidance. Examples given include somebody with chronic back pain avoiding skiing, and somebody with an extreme fear of heights avoiding extremely tall buildings.
17. The final part of the test of disability is whether the effect is long-term, meaning likely to last for twelve months or longer.

Conclusions

18. I discussed the issue of dyslexia with the parties at the end of the evidence. In the absence of any professional opinion involving a diagnosis of dyslexia, I find it is not appropriate for the Tribunal to put this medical label on the impairments being described by the claimant. There are impairments which may be attributed to dyslexia, including difficulty in reading and writing. This forms part of the concept of speech and language disorder, and I am not going to make a separate finding in relation to whether or not the claimant has dyslexia.
19. The first issue is whether there is a physical or mental impairment. I find there is an impairment, namely a speech and language disorder which includes difficulties with both written and verbal language.
20. The respondent argued the evidence didn't actually show an impairment. There is no recent professional diagnosis. This is correct, but I do have clear records from school including a report from an educational psychologist. There is a statement of special educational needs. The claimant had substantial additional help with speech and language throughout school. He was not put forward for SATs and English GCSE, and he had extra time and help for the exam for the exams he did take. I also accept the evidence of Mrs Gibbs that the claimant's abilities have not improved since he left school at the age of 16.
21. The next issue is whether there is an adverse effect on the ability to carry out normal day-to-day activities. It is clear from the evidence the impairment does have some adverse effect on the ability to carry out normal day-to-day

activities. There is difficulty in understanding more complex reading and verbal communication. More complex telephone communication is difficult. The claimant is slow at writing and has difficulties in spelling. This is shown by matters such as needing a script for telephone calls and assistance with writing job applications. Reading, writing, having conversations and using the telephone are all examples of normal day-to-day activities.

22. The respondent submitted that higher level skills would not fall within these day-to-day activities. The claimant communicates socially and at work, and issues such as needing help on the telephone dealing with insurance renewal was not a day-to-day activity. I disagree with this submission. The concept of day-to-day activity does not cover specialist skills such as playing a musical instrument to a high standard. However, tasks such as dealing with insurers on the phone and writing job applications are verbal and written tasks which the majority of adults carry out regularly, and I do find that these fall within the concept of day-to-day activities.
23. The key question in this case is whether that adverse effect is substantial, which means more than minor or trivial. I found this the most difficult issue. On the written statements alone, the extent of the difficulties described by the claimant do appear to meet this test. The claimant certainly submits that he has given many clear examples of substantial effect on normal day-to-day activities. The respondent submits that this was undermined by evidence in documents and oral evidence, and reminded me the burden of proof is on the claimant.
24. Firstly, the respondent says the effect is not substantial because the claimant is able to modify his behaviour to deal with any impairment. Examples would include using spell check, asking for long text to be broken down, and asking for instructions to be repeated. I do not agree that all of these modifications would prevent the effect from being substantial. Leaving aside the spell check (which I accept many people use), I do not find that these are the same as the examples in the guidance because they involve the claimant asking other people to change their behaviour as well. Effectively the claimant needs to ask others to assist him, and that can still potentially be a substantial effect. In some cases, it may not be possible to ask the third party to assist. If the claimant receives a long or complicated email or letter from a third party, such a bank or insurance company, he cannot simply ask for that to be broken down into shorter communications. These are not coping strategies that can be relied on in all circumstances.
25. The respondent also says that the impairments do not go beyond the normal differences and ability between people, and that many people are slower at reading and writing, or cannot understand if someone talks quickly or with an accent. It is right that there is a range of abilities in reading, writing and communication, and the claimant does need to show that the effects of the impairment go beyond this to meet the test.
26. The respondent says that the evidence shows various things the claimant is able to do that he had actually said he couldn't do. For example, attending the Occupational Health appointment alone, not mentioning communication problems in two versions of the application form, and the claimant agreeing

that he could use the internet, and multitasking during gaming. He obtained a first aid qualification. He was able to do the job as a porter and communicate with angry people, and he was also able to interview for the facilities job on his own.

27. My focus has to be on what the claimant cannot do. I agree with the respondent that some of the evidence at the hearing undermined some of the impression that was given in parts of the witness statements about the extent of the claimant's difficulties. However, I also find that the fact that an individual is able to function in their home life and workplace does not prevent there being some substantial adverse effect on normal day-to-day activities. That is the case for most disabled people. They are not incapable of doing anything, but they do find that some things are more difficult due to a particular impairment. The fact the claimant could interview for and carry out various jobs involving communication with others, and had obtained extra qualifications such as in first aid, does not prevent there still being a substantial adverse effect on his ability to carry out more complex day-to-day written and verbal communication. I have also accepted Mrs Gibbs' evidence about why this information was not included in the application form, and I note that it was included in an earlier volunteer form.
28. I am satisfied on the evidence overall that the claimant does have a genuine and significant difficulty in dealing with more complex (but still day-to-day) written information, and more complex (and also still day-to-day) verbal instructions. These difficulties are such that his mother needs to provide him with a lot of day-to-day administrative assistance.
29. I have noted the claimant's comment that he made during his evidence that he is 31 years old and he can do things on his own, but nevertheless he still has to have help from his mother. As the respondent rightly pointed out a couple of times during the hearing, nobody is saying that the claimant is stupid. I have looked at the test in **Paterson**. The issue is - how would the claimant carry out these activities if he wasn't impaired? Undoubtedly, he would deal with correspondence, telephone calls and medical appointments without needing to ask for help from his mother.
30. The respondent also says that it is necessary to distinguish the effects caused by the speech and language disorder from other conditions, and tinnitus in particular. Multiple impairments can be relied on to create one substantial adverse effect, but in this case, tinnitus is not being relied on at all for the purposes of the claim. I agree on the evidence that causes difficulty with the issue of dealing with noisy communication, because the claimant says that was partly attributable to tinnitus. I do not find that this is a substantial adverse effect caused by speech or language disorder alone. However, there are sufficient other substantial effects caused by the speech and language disorder. In particular, the claimant's ability to deal with: long or dense written communication; lots of written or verbal instructions at once; more complex telephone conversations; and meetings with medical professionals.
31. I have considered this carefully, and I do find that the claimant's impairment of speech and language disorder does have a substantial adverse effect on

his ability to carry out normal day-to-day activities. This finding is made based on the test of the effect being more than minor or trivial but nevertheless outside the normal differences in ability between people. I find that the claimant's issues with written and verbal communication do fall outside that normal range, and so the effect is substantial based on the evidence about how he requires assistance with much day-to-day communication.

32. The final issue is whether that effect is long-term. That is not disputed by the respondent, and it is clear from the evidence that the speech and language disorder is something that the claimant has been dealing with since he was at school.

Employment Judge Oliver

Dated: 1 December 2019

Reasons sent to parties: 3 December 2019

FOR THE TRIBUNAL OFFICE