EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms AG Bland	Ashville College

Heard at: **Leeds** **On: 13 January 2020**

Before: **Employment Judge Davies**

Appearances
For the Claimant: **Ms Brooke-Ward (counsel)**
For the Respondent: **Mr Wilkinson (counsel)**

JUDGMENT

1. The Claimant had a disability as defined in the Equality Act 2010 by virtue of dyslexia throughout her employment with the Respondent.

2. The Claimant had a disability as defined in the Equality Act 2020 by virtue of a mental health impairment from 1 February 2019.

3. It is not possible to determine without hearing evidence whether there was conduct over a period that included the Claimant's complaints about events up to and including May 2018 and her complaints about Mr Asker. The question whether those complaints were brought within the time limit in s 123 Equality Act 2010 and, if not, whether time should be extended, will be determined at the final hearing.

REASONS

Introduction

1.1 This was a preliminary hearing in public to decide:

1.1.1 Was the Claimant disabled as defined in the Equality Act 2010 when she was employed by Ashville College. The questions to be answered were:

1.1.2 Did the Claimant have the mental impairments of dyslexia and/or anxiety disorder?

1.1.3 Did they have an adverse impact on her ability to carry out normal day-to-day activities?

1.1.4 Was that adverse impact more than minor or trivial?

1.1.5 Had the adverse impact lasted more than 12 months?

1.1.6 Were the Claimant's Tribunal claims about events up to and including May 2018 brought within the time limit in s 123 Equality Act 2010 and, if not, should time be extended? The questions to be answered were:

1.1.7 Was there conduct extending over a period that included the Claimant's complaints about events up to and including May 2018?

1.1.8 Were the Tribunal claims brought within three months (plus early conciliation extension) of the end of that period?

1.1.9 If not, were they brought within such further period as the Tribunal considers just and equitable?

1.2 At the hearing, the Claimant was represented by Ms Brooke-Ward (counsel) and the Respondent by Mr Wilkinson (counsel). I was provided with an agreed file of documents and I considered those to which the parties drew my attention. The Claimant gave evidence.

Legal Principles

Disability

2.1 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.

2.2 The Tribunal should ask:

2.1.1 Did the person have a mental impairment?

2.1.2 Did it affect her ability to carry out normal day-to-day activities?

2.1.3 Was the effect substantial?

2.1.4 Was it long-term?

2.3 The Tribunal must consider the position at the time of the alleged discrimination.

2.4 The Guidance gives examples of normal day-to-day activities. They are things people do on a regular or daily basis. They include reading and writing; and general work-related activities, such preparing written documents. The Tribunal should focus on what the person cannot do, or can only do with difficulty, and not on what they can do.

2.5 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.

2.6 An adverse effect is long-term if it has lasted more than twelve months, is likely to last more than twelve months or is likely to recur. Likely means it "could well happen."

2.7 The Respondent relied on cases in which a distinction has been drawn between "clinical depression" and reactions to stress or other "adverse life events" that can produce similar symptoms: see in particular *J v DLA Piper UK LLP* [2010] ICR 1052; *Herry v Dudley MBC* [2017] ICR 610; *Igweike v TSB Bank PLC* UKEAT/0119/19/BA. However, those cases do not establish that where a condition is caused by work related issues it cannot amount to a disability. For example, in *Herry* at paragraph 55 the EAT said that it did not underestimate the extent to which work-related issues can result in real mental impairment for many individuals. The *Herry* line of authority is not concerned with those situations. It is concerned with situations for example where employees are unhappy with a decision or a colleague, have a tendency to nurse grievances, or refuse to compromise. The cases establish that such traits are not of themselves mental impairments: they may simply reflect a person's character or personality. The cases also point out that medical practitioners may refer to the presentation of such an entrenched position as stress or anxiety. Ultimately, it is for the tribunal to assess on all the evidence whether there is a mental impairment or not.

Time limits

2.8 The time limits for bringing claims of discrimination in the employment tribunal are governed by s 123 Equality Act 2010. Under s 123(3)(a), conduct extending over a period is treated as being done at the end of the period. The focus of the inquiry is on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the claimant, was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA.

2.9 There is some doubt as to whether a Tribunal should treat different types of discrimination (harassment, direct discrimination etc.) separately when considering whether there was conduct extending over a period or whether it should treat them comprehensively (discrimination). In *Robinson v Royal Surrey County Hospital NHS Foundation Trust* [2015] UKEAT 0311_14_3007, the EAT expressed the view that this was fact and case specific, but that arguably on the facts of that case the comprehensive approach should have been taken. Although informative, that finding was "obiter", i.e. it was not essential to the outcome and is not strictly binding on a Tribunal.

The Facts and Reasons

Dyslexia

3.1 The claimant has not been formally diagnosed with dyslexia by an educational psychologist. However, I am satisfied on the balance of probabilities that she has dyslexia and that it affects her as set out in her witness statement. Although she has not been diagnosed by an educational psychologist, she was assessed by a specialist at Harrogate College in 2006. The specialist administered WRA and DAST tests. The results showed that the claimant scored positively as being dyslexic in the one-minute reading test. She had a "severely at risk quotient" on the "at risk of dyslexia" scale. The specialist noted that the claimant appeared to have difficulties associated with the speed at which she decoded print, which could affect her understanding of the material she was reading. The claimant was awarded 25% extra time in her exams, and was given a dyslexia tutor and other support.

3.2 When she was interviewed by the respondent, the claimant told them that she had dyslexia.

3.3 More recently, the claimant has again been assessed at Harrogate College. A range of tests was administered by a dyslexia specialist. She recorded that the claimant had difficulties affecting her reading, writing, spelling and processing speed. She noted that a more detailed assessment administered by an appropriately qualified psychologist would be needed to determine a diagnosis of dyslexia. In tests assessing word reading and spelling, the claimant scored at the 5th and 6th percentile levels. In handwriting speed she scored at the 1st percentile. In reading efficiency and processing efficiency she scored below the 1st percentile. Her general IQ was at the 84th percentile, with her visual ability significantly exceeding her verbal ability. That is a pattern experienced by only 1% of people of her age. Again, special measures for exams and other support were recommended.

3.4 The claimant told me that she had been informed that she could not be assessed by an educational psychologist for at least 12 months after these tests were administered, to ensure accurate results.

3.5 The assessment results were consistent with the claimant's own witness statement, in which she described the difficulties she experiences because of dyslexia. She said that

she reads three times more slowly than average for her age and that words in a text do not follow as she reads them. She regularly reverses letter order, which causes her to struggle to read out loud and means that she cannot take notes while listening and often loses concentration. She cannot spell proficiently and her brain thinks faster than she can write, which leads to her missing words and sentences. She uses a range of strategies to minimise the impact of her dyslexic traits. Having extra time to read, working in a quieter environment, and taking more breaks all help.

3.6 In her oral evidence the Claimant explained that she needed two or three times longer to read things and her colleagues and had to do it somewhere quiet. When she had to write observations of children she needed somewhere quiet to produce them. She could not do it in the classroom as others did.

3.7 Although she has not been formally diagnosed with dyslexia by an educational psychologist, this evidence satisfied me on a balance of probabilities that the claimant has dyslexia and that it affects her as described. Her account was not challenged in any detail in cross-examination. She was asked about something she had written in an application form for a job within the Respondent. She wrote in that form that her dyslexia did not now hinder her. She explained that she was not saying that her dyslexia did not adversely affect her on a day-to-day basis: she had to have all the strategies in place. It still took her two or three times longer to do tasks that involved reading or writing or number work. I found that the positive spin the claimant was evidently seeking to put on her dyslexia in the application form did not mean that her dyslexia does not adversely affect her on a day-to-day basis.

3.8 Applying those facts to the legal principles summarised above, I find that the claimant's dyslexia was and is a disability as defined in the Equality Act 2010. The real issue in this case is whether it has a more than minor or trivial adverse impact on the claimant's ability to do normal day-to-day activities. Normal day-to-day activities include reading and writing. They can include general work-related activities, such as preparing written documents: see the Guidance, paragraph D3. It takes the claimant two or three times more than others to do tasks that involve reading or writing. She cannot prepare lesson observations in the classroom but has to do so in a quiet place. She cannot take notes while listening. These are more than minor or trivial effects on her ability to read and write and to prepare written documents. Those effects are plainly long-term and the Claimant's dyslexia therefore met the definition of disability in the Equality Act 2010 at the material time.

Mental ill-health

3.9 The claimant developed mental ill-health while working at the respondent. She described that in her witness statement and she said that this had "now" become a long-term disability. She described a range of issues from early 2018, culminating in a panic attack on 16 May 2018. I was not provided with any medical records from before that date. There was no suggestion of any previous mental ill-health. In her witness statement she described a range of physical and mental symptoms that she said were associated with her anxiety over the months that followed.

3.10 Following the panic attack in May 2018, the claimant was prescribed amitriptyline and signed off work with work related stress. She saw the GP again in June 2018. The amitriptyline was causing side effects so she was prescribed sertraline. She was diagnosed with anxiety disorder and work stress. She was feeling calmer and sleeping better but was not back at work. On 22 June 2018 the sertraline was changed to propranolol and in July 2018 she was also prescribed citalopram and referred to the community mental health team for CBT. She continued on citalopram and propranolol.

3.11 On 7 September 2018 she saw the doctor again. The doctor recorded that she was still suffering with poor sleep and physical pain. She had been doing better but then a meeting with work had set her back. Her medication dose was increased. At that stage her sicknote was changed from work-related stress to work-related stress and anxiety.

3.12 On 12 October 2018 the doctor recorded that the claimant was doing better on citalopram and propranolol. She was seeing an osteopath who felt that her pain was caused by stress was planning some cranial osteopathy. The Claimant was attending CBT by that stage. She referred to ongoing stress from work and indicated that she would like to be able to attend work to listen to readers for two hours a week. She continued on citalopram and propranolol.

3.13 The claimant's GP notes for 23 November 2018 refer to an ongoing episode of generalised anxiety disorder. The doctor recorded that her issues with work continued. Her CBT course had recommended ongoing counselling to help her talk through her current difficulties. The claimant was referred back to the community mental health team. They reported that she presented with anxiety, low mood and self-esteem. She had referred to a number of physical symptoms related to her anxiety including chest pain, a lump in her throat, poor sleep pattern and pain in her left arm. She had become panicky about her work situation having been on sick leave since May 2018. The mental health practitioner recorded the claimant's account that she tended to nibble rather than have full meals because her anxiety was causing her to feel that she had a lump in her throat. She managed to maintain her own independence, but her husband helped with everyday tasks. She could become tired and anxious. The mental health practitioner suggested that the claimant see a link worker for brief interventions to help develop ways of managing her levels of anxiety. Her PHQ-9 score was 19, indicating moderately severe depression and her GAD-7 score was 17, indicating severe anxiety. The mental health practitioner gave a diagnosis of moderate depressive episode.

3.14 By January 2019 the claimant remained on the same medication. She was issued with a fit note indicating that she might be fit for work with amended duties. She suggested she would be able to listen to readers for two hours a week. I was not provided with copies of the claimant's GP records after January 2019. However, she was attending sessions at the Briary and the mental health practitioner there recorded improvements in her symptoms and mood during February, March and April. She remained on citalopram and propranolol. I have seen a letter from the senior mental health practitioner dated 19 May 2019 summarising her history and current position at that time.

3.15 The claimant's own evidence, which was not challenged substantively in cross-examination, taken with those undisputed medical records, indicates that she was experiencing mental ill-health from May 2018 onwards. That took the form of anxiety and, certainly at some points, depression. She was on medication from May 2018 onwards. Even with that medication, she continued to experience physical and mental symptoms. Her account is not clear about dates, but it is clear that at times she was sitting at home unable to do the simplest of tasks. Her poor sleep was leading her to nap on the sofa during the day. During the summer she was unable to socialise or go out or interact with friends. She was struggling to eat or drink. By late 2018 she was finding daily life skills incredibly difficult and was going for long periods without being able to eat or sleep. On one occasion she broke down in tears in the supermarket and had to go home. She accepted in cross-examination that her symptoms were improving in February, March and April and explained that her husband was taking time off to be with her at home.

3.16 Applying the legal principles summarised above, In the light of that evidence, I find that from May 2018 onwards the claimant had a mental impairment that had a substantial adverse effect on her ability to do normal day-to-day activities. It does not matter

precisely what label or labels are given to the mental impairment. It is referred to as generalised anxiety disorder, anxiety, moderate depressive episode and by other labels. I have no doubt that this amounted to a mental impairment.

3.17 I have no hesitation in finding that this does not fall within the category of an adverse reaction to life events as opposed to a mental impairment. Plainly, the mere fact that a condition is caused solely by events at work does not mean it cannot be a mental impairment for the purposes of the Equality Act. That is not the effect of the cases relied on by the Respondent. The clear import of the medical evidence, and the claimant's own account, is that this was not an entrenched reaction to an issue at work. The Claimant was not refusing to compromise or return to work, while suffering little or no apparent adverse effect in other respects on normal day-to-day activities. She was not simply unhappy with a decision or a colleague or her employer in general. She was experiencing a mental impairment in the form of anxiety and/or depression that was having a substantial adverse effect on her overall day-to-day activities and required treatment with anti-depressant medication, CBT and other therapies.

3.18 The respondent places great emphasis on two occupational health reports. In July 2018 its occupational health advisor had a telephone consultation with the claimant. She recorded the claimant's symptoms and said that there was no current diagnosis of a significant underlying recognised mental health disorder. The occupational health advisor had not seen the claimant's medical records. Her opinion was that the claimant was unlikely to see a significant improvement or return to work until there was progress in addressing the perceived workplace issues. The claimant accepted in cross-examination that she agreed the report could be released at the time did not express any disagreement with its content. However, she pointed out that the adviser had not accessed any of her medical records.

3.19 The second report was provided on 15 October 2018. Again, it was based on a telephone consultation and the adviser had not seen the claimant's medical records. The adviser again expressed the view that the claimant's issues were primarily related to her ongoing perceived work situation and that there was no medical solution. She recorded that the claimant was on medication and physiotherapy but said that this was not a long-term solution. She said that the claimant was unlikely to return to work until there was agreement on a solution between her and management. In cross-examination, the claimant accepted that her symptoms were a response to a work situation. She said that that was when she became ill. She disagreed that there was no underlying medical condition. She said that she had been diagnosed with stress and anxiety because of a work situation. She said that she would like to think that if the work situation had been resolved her symptoms would have improved over time.

3.20 I considered that evidence carefully, but I was quite satisfied that in this case the claimant's condition was a mental impairment that had a substantial adverse impact on her normal day-to-day activities. The cause of that impairment was her perception of events at work, but that did not prevent it from being an impairment. The fact that a resolution of the work events would hopefully lead over time to a resolution of her mental health symptoms did not prevent it from being an impairment. I did not find the view of the occupational health advisor that there was no underlying medical condition persuasive, given that she had neither seen and examined the claimant nor seen her medical records. The medical records, made by doctors and mental health practitioners who had seen and treated the Claimant, recorded an underlying medical condition.

3.21 From May 2018 onwards, the claimant therefore had a mental impairment that had a substantial adverse effect on her ability to do normal day-to-day activities. For that impairment to be a disability as defined in the Equality Act 2010, the effects needed to

be long-term. An effect is long-term if it has lasted or is likely to last 12 months, or is likely to recur.

3.22 By the time of the claimant's dismissal, the effects had not lasted 12 months. There was no evidence before me about whether they were likely to recur. I had no evidence that the claimant had ever suffered from mental ill-health previously. In those circumstances, the evidence does not demonstrate that her condition was likely to recur. The question is therefore whether there came a point when the effects of her impairment were likely to last 12 months. Likely means it "could well happen." No medical or other expert evidence about this was provided. The unsourced NHS definition provided by the claimant's counsel did not assist. Bearing in mind that the burden of proof is on the claimant, I have to do my best on the balance of probabilities on the evidence before me. The claimant was dismissed on 27 March 2019. By that stage her condition had lasted more than 10 months. There was evidence of some improvement in February and March, but the claimant remained off work and on medication. I have to consider what the position would have been without that medication. Given how long the substantial adverse effects had lasted by 27 March 2019, and given that the claimant was still on medication and receiving treatment at the Briary at that time, I find that at the time of her dismissal those effects were likely to last 12 months. That means she met the definition of disability at that time.

3.23 Equally, the definition was not met in May 2018, as the claimant herself appears to accept. I therefore have to decide on what date between May 2018 and 27 March 2019 the point was reached where it was likely that the substantial adverse effects would last 12 months. Doing my best, I find that this was the case once those effects had lasted nine months. At that stage, the question was whether those effects "could well" last another three months, given they had lasted nine months, during which the claimant was on medication and in receipt of treatment. I consider that the effects "could well" have lasted another three months at that stage. I do not consider that the same could be said after eight months. In the absence of any evidence of past episodes of mental ill-health, and given the claimant's treatment history, I am unable to say that the substantial adverse effects could well have lasted another four months at that stage. Although the claimant first went to her doctor on 16 May 2018, she had been experiencing some symptoms prior to that date. In the absence of medical evidence, I find that the substantial adverse effects started on 1 May 2018. Therefore, the claimant met the definition of disability by virtue of anxiety/depression from 1 January 2019.

Time limits

3.24 The respondent applies for the allegations of harassment by the claimant's manager up to May 2018 to be struck out, on the basis that they are out of time. It also asks for discrete allegations against Mr Asker relating to April 2018 and November 2018 to be struck out on the same basis. Its position is that these complaints cannot form part of a course of conduct extending over a period because the claimant went off sick in May 2018 and did not return. The fact that the issues prior to May 2018 were the subject of a grievance that itself gives rise to complaints of discrimination is not enough to give rise to conduct extending over a period. As regards Mr Asker, it argues that his two decisions are distinct and separate and again cannot form part of a course of conduct extending over a period. The respondent refers in support of this position to the fact that the grievance was not submitted until November 2018.

3.25 I accept that it is possible that a tribunal will find that there was no conduct extending over a period that included the allegations up to May 2018 and the allegations against Mr Asker. However, I did not hear any evidence and am not in a position to make any findings. It seems to me possible that the evidence might disclose a course of conduct extending over a period, if a tribunal found that the allegations prior to May 2018 were made out and that the consideration of the grievance about those matters was itself

conducted in a similarly discriminatory way. I am simply not in a position to make a finding either way about time limits on the material before me. It would not be in the interests of justice to determine it in favour of either party in those circumstances, and I leave it for consideration at the final hearing.

Employment Judge Davies
17 January 2020