



EMPLOYMENT TRIBUNALS

Claimant: Mr. D. Wilkinson

Respondent: Liverpool University NHS Foundation Trust

HELD AT: Liverpool

ON: 9 December 2019

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr Tetley, Counsel

Respondent: Mr Loftus, Solicitor

PRELIMINARY HEARING JUDGMENT

JUDGMENT having been sent to the parties on 6th January 2020 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. Issue: I had to decide whether, at the material time, the claimant had a mental impairment amounting to a disabling condition in accordance with the Equality Act 2010.

2. The Facts:

2.1 Since childhood the claimant has seemed, in his mother's evidence and words, to have been "different" to other children. He described himself as "slower than other kids" and he required additional time to finish school work in his junior education. He was impulsive, restless and hyperactive as a teenager with a short attention span. Lack of concentration was a feature of those years.

- 2.2 The claimant has been aware throughout his life that he has a poor short-term memory, although he describes his long-term memory as being “strong”. His poor short-term memory is a major adverse aspect of his impairment. Such is this aspect of the claimant’s constitution that he relies on numerous coping methods including the use of post-it note reminders, notifications set on his phone and a diary; notwithstanding these aids (and the claimant’s appreciation that many people feel they have poor memories and use such aide memoires), the claimant has on occasion left his car at the railway station and gone home without it and is the object of teasing in his local shops and sports centre because of his propensity to forget items. He is more than typically forgetful. This embarrasses the claimant and can cause isolation akin to the claimant’s own perception of being different from other children when he was at school.
- 2.3 The claimant displays traits of OCD which he describes in terms of “perfectionism” in the areas of cleaning, orderliness and organisational based tasks; this was pointed out to him by a marriage counsellor in 2010.
- 2.4 These issues feed his anxiety which in turn make him impulsive and hyperactive, which he describes as ADHD.
- 2.5 Those symptoms or traits have been continuous to date. At University it was recognised that the claimant required support with his academic work and additional time to complete assignments and exams. He qualified for additional funding for purchasing a particular lap-top an adapted software; the laptop was adjusted by a purple filter on the screen and autocorrect. In his new job, since leaving the respondent, Access to Work has provided similar IT equipment and software. He also finds CBD Oil assists him generally by ameliorating his anxiety, compulsive behaviour, forgetfulness and poor concentration; he uses it regularly; there is no record available to me of CBD Oil being prescribed by his GP.
- 2.6 The claimant has never been formally diagnosed as living with ADHD. He has been assessed by an Educational Psychologist. He is considered to have Specific Learning Difficulties, and the above described features of it and his observed test results are said to be significant indicators of ADHD, albeit further testing is required for a firm diagnosis. The report is at pp 55 – 78. Significantly the claimant confirms that it describes his condition adequately, at least for him to understand himself better and in that sense he considers it to be accurate. His GP records do not refer to ADHD.
- 2.7 The claimant can function intellectually to a satisfactory functional level but only with reliance on his said coping mechanisms. Without those mechanisms he would struggle to be at his best and his “difference” (as described in witness evidence) would incapacitate him from functioning satisfactorily and, it may be assumed, increase his social isolation (assumed on the basis that he felt embarrassed and reluctant to

socialise before realising, or being able to incorporate, effective coping mechanisms when at school). It appears that the effects of the claimant's mental impairment described above are permanent features of who he is and have been present throughout his life.

3. The Law:

3.1 Section 6 Equality Act 2010 defines disability as a mental or physical impairment having a substantial adverse long-term effect on a person's day to day activities. There is also published Guidance on the definition of Disability.

3.2 The question of whether someone is a disabled person is to be determined as at the time of the alleged discrimination.

3.3 The impairment in question does not have to be specifically diagnosed or labelled according to any recognised directory of medical conditions. That said, there is authority for the proposition that where a mental impairment is alleged the absence of clear expert medical evidence may be significant. I must consider all of the available evidence including the claimant's evidence given under oath and cross-examination, and take account that in such cases as this many of the symptoms and effects of the alleged impairment are self-reported by the claimant; there are therefore considerations of credibility, plausibility and reliability of the evidence given.

3.4 Resolution of the issue does not involve me attempting a medical diagnosis; this is a question of law and satisfaction of a legal test.

3.5A "substantial" adverse effect is one that is more than trivial and "long-term" means that the condition has prevailed for at least twelve months at the material time, is likely to last twelve months, or is likely to be life-long. "Day to day activities" relate to a typical regime rather than, for example, fine motor or intellectual ability in esoteric aspects of the person's job, although being able to travel to and operate at work may be "day to day activities".

3.6 I have to consider coping mechanisms and/or the effect of medication and treatment and whether it is 'likely' that, if the treatment were stopped and/or the corrective measure were taken away, the impairment would have a substantial adverse effect (the 'deduced effect') on the ability of the person concerned to carry out normal day-to-day activities.

3.7 To resolve the issue of disability I have to consider the effects of the putative impairment on the claimant's daily activities in fact, taking due account the deduced effect.

4. Application of law to facts:

4.1 The claimant describes himself living with a mental impairment; lack of concentration, poor short-term memory, impulsive-, and hyper-, activity

with anxiety and perfectionism are mental traits. He lives with Specific Learning Difficulties.

- 4.2 The claimant's condition has been life-long with every expectation that it is permanent. All of those described aspects of his impairment affected him for more than 12 months by the date of the commencement of his employment.
- 4.3 The claimant can function satisfactorily, if not necessarily always to his best potential, in his day to day activities using his coping methods including aide memoires, CBD Oil, and IT adjustments, albeit they ameliorate rather than remove the adverse effects of his impairment. Without them the adverse effects would be substantial as his forgetfulness, hyper-activity, lack of concentration whilst living with OCD would more likely than not exacerbate his anxiety. On balance it can be inferred from this that the claimant would again feel more embarrassed, and less likely to socialise whilst being incapable of recalling important matters, lacking concentration and being hyper-active; he would need longer to complete tasks than people not living with his mental impairment. These effects are more than trivial; they affect all of his activities and require constant self-monitoring and deployment of coping strategies. The claimant's mental impairment has a substantial adverse effect on his day to day activities.
- 4.4 It is not for me to speculate on a formal diagnosis. I have no reason to doubt that what is described above amounts to Specific Learning Difficulties (as it sounds as such in common parlance) with traits at least indicative of ADHD as suggested by an Educational Psychologist. Whether or not such a formal diagnosis, as ADHD, would follow from further testing is not the issue for me to resolve. The respondent says that it is significant that there is no clear medical evidence and the claimant says that the lack of a definitive diagnosis of ADHD is not insuperable for the claimant in the context of this hearing. Both are correct. I am however satisfied on the balance of probabilities that the claimant has established that he is a disabled person. I found his evidence to be clear, cogent and credible; I believed what he told me.

Employment Judge T.V. Ryan

Date: 11.02.20

JUDGMENT SENT TO THE PARTIES ON

12 February 2020

FOR THE TRIBUNAL OFFICE