



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121485/2018

5

Held in Glasgow on 12 February 2020

Employment Judge R Gall

10 **Miss F Greasley**

**Claimant
In Person**

Common Thread Limited

**Respondent
Represented by:
Mr C Edward -
Advocate**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant had, at the relevant time, a
20 disability in terms of Section 6 of the Equality Act 2010 in that she had, at the relevant
time, a mental impairment which had a substantial and long-term adverse effect on
her ability to carry out normal day-to day activities. The case will therefore be set
down for a case management Preliminary Hearing in order to make arrangements
for the hearing itself.

25

REASONS

1. This case called for a Preliminary Hearing (“PH”) at Glasgow on 12 February
2020. The claimant appeared in person. She gave evidence as did her father,
Mr Greasley. The respondents were represented by Mr Edward, advocate.
They led no witnesses. A joint bundle of productions was available and
30 spoken to at the PH. Four further productions were added by the claimant,
without objection from the respondents, prior to commencement of the PH.

2. The claim brought is one of discrimination, the protected characteristics being
race and disability. The respondents did not accept, on the information which
they had, that the claimant was disabled at the relevant time. The issue for

E.T. Z4 (WR)

determination at the PH was whether the claimant was, at the relevant time, disabled as that term is defined in the Equality Act 2010 (“the 2010 Act”). The relevant time was in June 2018.

3. This PH therefore did not consider the merits of the case. It was not concerned with the question of whether there had or had not been discrimination. It was not concerned with any issue of race. The focus of the PH was upon the medical position of the claimant and whether, on the evidence, the Tribunal was persuaded that the claimant was at the relevant time a disabled person. The respondents also dispute that they knew or ought to have known of the disability of the claimant. That was not a matter for consideration at this PH.
4. In the claim form, the claimant states in paragraph 14 that an employee of the respondents *“didn’t appear to bring my dyslexia into consideration when he was discussing the paperwork, how having 2 brain surgeries affected my reading and writing. It can also affect my focus and sometimes I find getting a heavy load of paperwork challenging.”* In the agenda return, when asked what physical or mental impairment the claimant considered affected her, she stated *“dyslexia”*.

Facts

5. The following were found to be the relevant and essential facts as admitted or as established on the evidence.

Background.

6. The claimant is currently 27 years old having been born on 25 November 1992. She came to Scotland when she was 9 years old. When she was 10 she was unfortunately diagnosed as being affected by an abscess on her brain. She had taken seizures. She had an operation to remove a cyst from her brain.
7. Medical records confirming this history to the claimant’s health appeared at pages 141 to 144 of the bundle. They included a letter dated 23 September 2010 from Doctor Chris Mair. That letter states:-

8. *"I understand that this patient of mine is entering further education and you require confirmation of significant neurological injury in 2003 when she required drainage of cerebral abscesses.*

5 *She made a good recovery from this but I understand that there are learning issues for which she may benefit from additional input."*

9. After the operation, the claimant has experienced significant difficulty in several areas. There was no sign of any such difficulty prior to the operation. She has difficulty with concentration, reading and in particular reading lengthy documents, and also in writing. Her time management is poor. She finds it
10 difficult to organise herself to arrive somewhere on time, notwithstanding allowing extra time for the journey. She will get lost en-route. Her sense of direction is poor. She avoids public transport due to this lack of self-organisation. She is forgetful. She finds multitasking extremely difficult as she becomes distracted easily if, for example, someone speaks to her while she
15 is attempting to carry out a different task. Her ability to communicate is also affected. If asked a question, the claimant will address that question. She struggles to provide information beyond a direct answer to the question which is being asked.

10. Whilst at school, the claimant required and was given extra time for exams. A
20 reader and scribe was provided for her. A letter confirming that continuous support was given in class and some individual support, together with support for all class tests, by way of extra time, reader, reader and scribe plus comparison tests with no support, appeared at page 121 of the bundle, the report carrying over to page 123 of the bundle. That report confirms that the
25 claimant was tested aged 13 years and 10 months. Her reading age was found to be 9 years and her comprehension age 7 years 10 months. That report confirms that the claimant *"would qualify for support reader, extra time and scribe for the SQA subjects she was taking"*.

11. At page 122, a summary is provided. It states: –

“Fifi had an operation which set her back following great strides in her first 1½ years in Lairg. Tables and number bands are not as good as they were before operation.”

5 12. The claimant was recommended for dyslexia screening testing whilst at school. This was on the basis that she might have dyslexia or other learning difficulties. That testing did not however take place due, it is understood, to a lack of resource on the part of the local authority. A report recommending that testing, the report being from a secondary outreach visit of 20 June 2006, appeared at pages 88 to 90 of the bundle.

10 13. The claimant’s difficulties have not altered since that time. She now uses a laptop. She has a computer program on that laptop which she uses. That converts speech to text. It reads text from documents back to her. She also has coloured screens which assist with her reading of any documents on the computer.

15 14. The claimant attended Perth College UHI. Whilst there, she contacted the additional support team to request a Specific Learning Difficulties Assessment as to possible diagnosis of dyslexia. That was undertaken in 2011/2012. The results have not been retained by the college. A letter at page 116 of the bundle from the Additional Support Team Leader, Mr McLaughlin, contained
20 the following sentence: –

“As the identified support worker for Fifi at the time, I can advise that I remember that Fifi was forwarded for an SpLD assessment and that a diagnosis of dyslexia was provided. Support was consequently put in place.”

25 15. A Study Aids and Study Strategies Assessment Report by North Highland College appeared at pages 41 to 53 of the bundle. It detailed the history of the claimant’s health as reported by her. It recorded difficulties which the claimant set out with her concentration and memory, reading blocks of text, written work, remembering names and speaking on a one-to-one basis with a stranger for any length of time, this being an issue, in the view of the claimant,
30 due to higher level of concentration being required. Recommendations were made as to use of a digital recorder by the claimant and software known as

Read & Write Gold. A recommendation was made that the claimant be provided with a separate room, 25% extra time and use of a reader/scribe for examination.

- 5 16. The claimant finds difficulty in organising herself and carrying out of household chores such as cleaning and organising a cupboard. If she is to organise the clothes in her wardrobe, for example, this is a major task for her.
- 10 17. The claimant cannot tell the time through an analogue clock. Even with the use of digital clocks she finds it hard to organise herself to be able to leave at the time which has been scheduled. She will, as mentioned, get lost en-route despite having planned her journey. She will often lose items such as keys, forgetting where she has placed them. The claimant has often locked herself out of the house requiring to replace locks on the house. The claimant regularly requires to renew her bank card having lost a card or forgotten where she has placed it. She had 7 replacement bank cards within the last 12 months. She requires to set timers on her phone if, for example, she is cooking as any time for cooking will elapse without the claimant noticing it if she becomes involved in any other task. She will not remember when it is appropriate to check what is being cooked as the cooking time has expired. The fire alarm in her property has been triggered on various occasions due to
20 “*forgotten*” cooking. This is an example of difficulty in multitasking and of the claimant’s inability to focus and recall any requirement to do something by a particular time.
- 25 18. The claimant is married. She has received a lot of support from her husband in trying to ensure that she remembers particular things or names of people. Her husband will try to assist her to find her keys or other items. If he is not present to keep the claimant “*on track*” the claimant’s day does not go as she has planned it.
- 30 19. The claimant’s father also provides assistance to her and has done since the issues she has experienced commenced. The claimant speaks to him at least once per day. She returns home to visit him on average once per month. He

will look over emails or documents for the claimant, correcting any mistakes and making suggestions as to alterations or improvements as he sees them.

20. The issues which the claimant has had since the operation on her brain have not improved over the time between the operation in 2002 and the relevant date, June 2018.
21. The claimant completed an application form prior to obtaining employment with the respondents. Her father helped her with this application form. A copy of the form appeared at pages 69 to 76.
22. In that document, the claimant sets out, cogently, her background employment and why, in her view, the job for which she is applying is one which she is capable of performing. She declared that the information was accurate and she that she wrote it herself. That declaration appears at page 76 of the bundle. In fact, the application was prepared by the claimant but “filtered and revised” by her father.
23. In the application form the claimant refers to her wish in the future to learn French, Spanish and to learn yoga. In fact, she has not undertaken any of those learning experiences. Her intention was however so to do. She also states that she learns “*better on my own or on a one-to-one basis and through demonstrations where I get to copy the person who is showing me something and set myself personal goals.*” The claimant has used a template since the age of 16 so that she can initially complete job applications. Her father will help her refine that for any particular job for which she wishes to apply.
24. As part of the process of seeking to obtain the post with the respondents, the claimant was asked to attend for an all-day interview, comprising an all-day assessment programme incorporating group discussions, group tasks and group presentations. She attended that and did not request any adjustments. She participated in group discussions which comprised, for example, one-to-one with a fellow member of a group where one person would talk with the other person being asked not to listen or vice versa.

25. During her probation review meeting and also an appeal meeting, minutes of which appeared at pages 133-140, the claimant did not mention that she was affected by dyslexia or any other learning difficulty. She was not asked that specific question and took the view that she was answering the questions which she was asked.

The issue

26. The issue for determination by the Tribunal was whether the claimant had a disability, in this case being a mental impairment, in terms of Section 6 of the 2010 Act at the relevant time, being June 2018.

Applicable law

27. Section 6 of the 2010 Act states that a person has a disability if they have (relevant in this case) a mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. The onus is on the claimant to establish that this is so to the satisfaction of the Tribunal.

28. In considering whether a person has a disability, the Tribunal must first look at the information as stated in the claim form. A purposive approach to the interpretation of the legislation is to be taken. Schedule 1, paragraph 12 of the 2010 Act requires the Tribunal in its determination of whether any person is a disabled person, to take account of any aspect of the Guidance on Matters to be taken into Account Determining Questions relating to the Definition of Disability 2011, insofar as that appears to be relevant. The Tribunal must take into account any part of the Equality and Human Rights Commission Code of Practice on Employment (2011) which appears to it to be relevant to any questions arising in proceedings. Appendix 1 of that Code provides guidance in relation to the meaning of disability.

29. An important part of the question for the Tribunal is, in this case, whether a mental impairment exists. The “*label*” which a claimant has placed on a specific impairment can be considered against the evidence presented to the Tribunal and the facts, in particular, found by that Tribunal.

30. “*Substantial*” is defined as “*more than minor or trivial*”. This is in terms of Section 212 (1) of the 2010 Act. The case of *Anwar v Tower Hamlets College* EAT 0091/10 (“*Anwar*”) found that an impairment could be more than trivial but in the category of being minor rather than substantial. That case found that the medical condition involved, although “*by no means negligible, did not give rise to a substantial adverse effect*”. The conclusion of the EAT in that case was that an impairment being found to be more than trivial did not meet the test as it could be minor, even if it was more than trivial.
31. In *Aderemi v London and South Eastern Railway Ltd* 2013 ICR 591 (“”) the EAT took a view different to that in the *Anwar*. It said that the 2010 Act “*Aderemi does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other*”.
32. Appendix 1 to the EHRC Employment Code states that normal day-to-day activities are activities carried out by most men and women on a fairly regular and frequent basis. It states that this includes but is not limited to activities such as walking, driving, using public transport, cooking, eating, lifting and carrying every day objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations on music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for oneself. It also states that normal day-to-day activities also encompass the activities which are relevant to working life.
33. Paragraph D3 of the Guidance on the definition of disability states: –
- “In general, day-to-day activities are things people do on a regular daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities and*

study and education-related activities such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”

- 5 34. A Tribunal must be alert to the fact that the claimant may have developed avoidance or coping strategies and may underplay or play down the effect of a disability. It must have regard to medical evidence and all information before it in assessing the question of whether the claimant is disabled in terms of the 2010 Act.
- 10 35. The focus of consideration of a Tribunal should be on what the claimant cannot do or can only do with difficulty rather than considering what the claimant can do. This is confirmed in the Guidance on Definition of Disability issued in 2011 and referred to above.

Submissions

Submissions for the claimant

- 15 36. I was urged by the claimant to look through the notes of evidence and the documents she produced, including in particular the reports from her school and Doctor, and to find that she was disabled. In response to the submissions for the respondents, the claimant stated that she had had a brain injury. Dyslexia had impacted upon her. The surgery was why she had the difficulties she had.
- 20 37. Insofar as it was said that she had not mentioned those difficulties at appeal, her cognitive impairment was such that she answered questions as asked. It was easy for someone to say that she should have said something in particular at time of appeal.
- 25 38. In summary, the claimant said that she had produced evidence in her view establishing that she had learning difficulties for over 17 years and that they would not go away. She urged that I found her to have been disabled at the relevant time.

Submissions for the respondents

39. Mr Edward reminded the Tribunal that the onus was on the claimant to persuade the Tribunal that she was disabled. Dyslexia had been referred to. He wished to address the diagnosis and existence of dyslexia and then the effects of dyslexia.
40. The Tribunal had not been presented, in the case of the claimant, with any diagnosis of dyslexia by anyone who was qualified to make that diagnosis. The email at page 116 saw someone in Perth College recall a diagnosis of dyslexia. There was no information however as to who had made that diagnosis, what their qualifications were, how they had diagnosed it and what the details of that diagnosis were.
41. Dyslexia was not a condition which was automatically a disability.
42. In those circumstances there had been, Mr Edward submitted, practically no evidence of dyslexia. The terms of Section 6 of the 2010 Act had not been met. In the next part of his submission Mr Edward proceeded on the assumption that the claimant was affected by a mental impairment of dyslexia. He turned to the test as to whether there was a long term substantial adverse effect on the claimant's ability to do normal day-to-day activities.
43. The key element from the respondents' perspective was their submission that there was not a substantial adverse effect. Substantial meant more than minor or trivial. The respondents' position on the evidence was that whilst what had been spoken about was not trivial, it was not more than minor. It was therefore not substantial.
44. In advancing this argument, Mr Edward referred the Tribunal to the claimant's evidence and her description of the impact of the impairment. She talked of concentration and organisation. What she had said however was no more than a minor impact. She said she could not multitask such as cook and speak to someone. She became tongue-tied and required extra time to get somewhere. She had a tendency to be late. All of these were not more than minor effects, said Mr Edward. Most of the impact seemed to be that things

took longer for the claimant than they might otherwise. There was no evidence of substantive things which the claimant could not do.

5 45. The claimant said that she was able to write reports with help in some instances but sometimes by herself in her previous employment. Mr Edward highlighted the application form completed by the claimant relative to her job with the respondents. She had not mentioned disability at that point or any difficulty in doing anything. She had said nothing as to obtaining assistance in completion of the form.

10 46. Importantly, said Mr Edward, at the probation review meeting, and at the appeal meeting in particular, there had been no mention by the claimant of this health issue. She had not sought extra time to write reports nor had she explained that her impairment was a reason for being late. It would be natural to have raised this, especially at an appeal when she knew that she had been dismissed. If her impairment was more than minor she would certainly have
15 mentioned it to the respondents, he said.

47. Whilst the claimant said she had not mentioned this as the respondents had not asked a question about it, Mr Edward said that the Tribunal should keep in mind that it was the claimant's appeal. She had instigated it. She had the ability to bring up issues and to explain them, as she had done to the Tribunal.

20 48. In short, submitted Mr Edward, the claimant had failed to prove that she was disabled in terms of Section 6 of the 2010 Act.

25 49. Mr Edward referred to the case of *Anwar*. "Substantial" meant something more than minor or trivial. He referred to paragraph 9 in that case in particular and to paragraph 21. He urged that I regard the effect on the claimant's day-to-day activities as being more than trivial but not more than minor. On that basis the claimant should be found not to have been disabled in terms of the 2010 Act at the relevant time.

Discussion and decision

50. It seems to me it is appropriate to look at the different elements of the requirements of Section 6 of the 2010 Act, always remembering to look at the evidence in the round as well as on specific points.

5 *Mental Impairment*

51. The claimant refers to mental impairment, mainly attaching the label of dyslexia to it. She also refers in the claim form to having had 2 brain surgeries which affected her reading and writing, her focus and her ability to deal with a heavy load of paperwork.

10 52. It seems to me that it is right not to be particularly concerned as to whether the claimant has been affected by dyslexia since birth, or even by dyslexia and nothing beyond that since the operations she underwent as a 10 year old. Dyslexia is not a mental health issue which has symptoms all of which are always present in every case or all of which are always present to the same
15 extent in every case. There are certain features which would regularly be part of a diagnosis of dyslexia and commonly understood to be in that category. Those would be difficulty with reading and writing and often with numbers. Many of the symptoms of the claimant as she described them in evidence were consistent with that.

20 53. The claimant's father used an interesting and potentially apposite phrase whilst giving evidence. He referred to the claimant being affected by "*acquired dyslexia*". This was on the basis that she had shown no signs prior to the operations of the difficulties she experienced, and continues to experience, after the operation. I recognise that the claimant's father is not medically
25 qualified. I took the phrase he used as descriptive or explanatory rather than as a medical diagnosis.

54. It is true that the claimant has not produced a medical report or medical evidence in person confirming that she is affected by dyslexia. What she has talked about herself are symptoms experienced by her which are consistent
30 with dyslexia existing. That clearly was the view of the school and college

which she attended. The school did not refer her for an assessment in relation to dyslexia. That was recommended. The test was not carried out due, as I understood it, to lack of resources. The letter from Mr McLaughlin of Perth College, page 116 of the bundle, details his recollection that a diagnosis of dyslexia was provided.

5

55. The test under Section 6 is whether a mental impairment affects the claimant, which mental impairment has the effect detailed in Section 6.

10

56. Given the reference in the claim form and indeed in evidence to the brain operations and to the impact of those, I was satisfied that there was a mental impairment affecting the claimant. It does not seem necessary to me for the evidence to establish whether the “*label*” of dyslexia was properly attached to it or not. If not dyslexia, the mental impairment which affects the claimant has several of the characteristic aspects of dyslexia.

15

57. Those are, most obviously, difficulties with reading and writing. Those difficulties are confirmed by the steps which were taken both at school and at college to assist the claimant by way of extra time being given to her at times of test, a reader and scribe being provided for exams, a quiet room being provided and suitable computer software being given to her to assist with speech to text and text to speech occurring.

20

58. I regarded the claimant’s evidence on this, and indeed and all other matters, as entirely credible. I was satisfied that she did indeed experience these difficulties and had since time of the operation. Her father was quite clear that that was the position. She gave her answers to questions, both during evidence in chief and in cross examination, in a clear and straightforward manner. I regarded her as being open and honest in that evidence. Similarly, I accepted her father’s evidence as to the difficulties from which she suffered and indeed as to the role which he had played and continues to play in providing assistance to her with written work in particular.

25

30

59. Having concluded that the claimant was affected by mental impairment, I then came to look at the other elements in Section 6.

60. I considered whether the impairment has a substantial and long-term adverse effect on the claimant's ability to carry out activities, then turning to whether what had been described to me in evidence was an inability to carry out normal day-to-day activities.

5 *Substantial and long-term adverse effect*

61. I recognise the argument advanced by Mr Edward that whilst not trivial, the effect of the mental impairment in relation to the claimant's ability to carry out normal day-to-day activities was minor as opposed to substantial. The potential for there to be such a finding exists given *Anwar*, notwithstanding
10 *Aderemi*.

62. My view is that the position detailed in *Aderemi* is a more appropriate interpretation of the legal provisions. In this case however the facts were such that I was not, as I saw it, troubled with consideration of this point and the differences between those cases.

15 63. As at June 2018, the effects of the mental impairment were, on the evidence I accepted, substantial whether that is as interpreted in terms of *Anwar* or *Aderemi*. I did not see a basis on which they could properly be regarded as minor.

20 64. I came to this view given accepted evidence of the inability of the claimant to deal with exam papers within the time given as a matter of standard to students whether at school or college. The difficulty in sitting exams other than with a scribe added to this picture. The need for relevant computer software in relation to text to speak and speak to text activities further illustrated the extent of the adverse effect of the mental impairment. The claimant's ability
25 to time keep, potentially influenced by her inability to read an analogue clock, her inability to organise herself and to multitask to the extent of doing two tasks rather than one also supported the adverse effect of the mental impairment as being substantial, in the sense of more than minor or trivial. Issues with the claimant's sense of direction and her forgetfulness also
30 assisted with my conclusion that the adverse effect was substantial as that term is defined in the 2010 Act. The frequency of keys and bank cards being

lost, with consequent need to change locks and order replacement bank cards also illustrated the extent of the difficulty caused by the mental impairment.

Long term

5 65. The claimant had experienced all of these problems, apart no doubt from loss of keys, bank cards and the need for computer programs, all of which would be more relevant to the last few years, since time of operations i.e. over a period of 17 years. That was borne out by her own evidence, her father's evidence and paperwork from school and college.

Adverse effect on the claimant's ability to carry out normal day-to-day activities.

10 66. There is no definition in the 2010 Act of what are normal day-to-day activities. The Guidance on the definition of Disability in 2011 referred to above and that within the EHRC Employment Guide, again mentioned above, are both of assistance.

15 67. Several of the elements mentioned as potentially being day-to-day activities were ones which had been adversely affected by the mental impairment of the claimant. The impact of the mental impairment was such that the claimant was, at the relevant time, affected in an adverse, substantial way over the long-term. She was unable to keep to time. She struggled to travel. She avoids travel by public transport. Travel driving a car was and is difficult for
20 her. This is as she often loses her way as she tries to get somewhere. The claimant had difficulty reading and writing and required significant help with both. That extended both to job applications, correspondence by way of email, in reading anything beyond approximate two paragraphs long and in sitting exams, where a reader and scribe were necessary. Operation of computers
25 was difficult unless appropriate text/speech software had been installed.

68. The facts led me clearly to the view that the test of the claimant's having a mental impairment which had a substantial, long-term adverse effect on her normal day to day activities had been met.

30 69. On the basis of the foregoing, the claimant was, the relevant time, a disabled person in terms of Section 6 of the 2010 Act.

70. The case should now be set down for a case management PH so that the issues can be agreed, practical arrangements made in respect of papers included within the bundle for the hearing and dates of the hearing can be set down. The Clerk to the Tribunals is requested to make contact with parties to
5 arrange such a case management PH.

Employment Judge:

R Gall

Date of Judgement:

19 February 2020

10 Entered in Register,

Copied to Parties:

24 February 2020