



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr A Dyson

AND

Respondent

ATOS IT Services UK Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by Cloud Video Platform)

ON 8 and 9 February 2021

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Ms M McGee (Counsel)

For the Respondent: Mr P Lockley (Counsel)

JUDGMENT

At all times material to this claim, the Claimant was disabled by reason of a mental impairment, namely dyslexia.

REASONS

1. The Claimant presented his claim of direct disability discrimination and a failure to make reasonable adjustments on 19 March 2019. The claim for also included claims of constructive unfair dismissal, unlawful deductions from wages/breach of contract and for accrued but unpaid holiday.

Background

2. On 25 November 2019, the Claimant notified ACAS of the dispute and the Early Conciliation Certificate was issued on 25 December 2019. The Claimant's employment ended on 24 November 2019. The Claimant says that he was constructively dismissed, and that the dismissal was discriminatory.
3. The Claimant says that he was disabled by reason of depression, anxiety and dyslexia. The Respondent accepts that he was disabled at the material times by reason of anxiety and depression, but disputes that he was disabled by reason of dyslexia.
4. It was agreed by the parties that the only claim for which disability by reason of dyslexia was relevant related to the Respondent's refusal to fund the dyslexia support programme. It was common ground that the refusal occurred on 30 August 2019 and therefore I was required to determine whether the Claimant was disabled by reason of dyslexia at that date.

The evidence

5. I was provided with a joint bundle of documents of 214 pages, much of which related to other issues, but it also included the Claimant's disability impact statement. Any reference in square brackets, within these reasons, is a reference to a page in the bundle.
6. The Claimant gave oral evidence. I also heard from Ms Brown, on behalf of the Respondent.

The facts

7. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
8. The Claimant, who was born on 24 June 1965, was diagnosed as dyslexic in his late teens. I accepted that he and his parents had been unable to locate the original report identifying that he had been diagnosed. The Respondent did not challenge the diagnosis.
9. At that time the Claimant had difficulty reading documents and novels and following recipes. He was assigned a tutor at college, who introduced him to coping techniques. The Claimant would use a mind map, effectively a

spider graph or chart so that issues could take a structure or shape, and this was a strategy he was taught as a way of assisting him to take notes. He also developed other coping mechanisms, such as proof-reading a document or to leave sending the document for a few hours or until the next day so that he could check it. The Claimant would often find that what he had thought he had written would not necessarily be what he had in fact written. He also discovered that a pale yellow background would help him focus on text. The Claimant would also use the 'Comic Sans' font and type in the colour maroon because they helped him to focus on what he was doing.

10. The Claimant accepted that some of the strategies were commonly used by people to a degree, but not using the mind map or alternative fonts and/or colours.
11. The Claimant accepted that he had pursued a successful career up to 2018. I accepted the Claimant's evidence that many presentations he produced, whilst he was performing well, were structured and followed a template and that the design meant that he could fill in the blanks rather than draft freehand. At this stage there was nothing that would suggest to Ms Brown, the Claimant's line manager in March and April 2018, that he had a particular difficulty.
12. On 30 August 2017, the Claimant received a professional assessment by Mr Williams, in which he was criticised and downgraded. The Claimant started to experience panic attacks, loss of confidence and disrupted sleep. Those symptoms progressively increased.
13. On 11 April 2018, the Claimant described to his GP that he was unable to focus on his work properly, was pacing the house in the early hours and had lost weight. He also specifically referred to struggling with his dyslexia and was losing the thread of conversations. The Claimant was signed off work for 2 weeks [p179]. I accepted the Claimant's evidence that prior to being signed off work that his coping mechanisms for his dyslexia were no longer working.
14. On 26 April 2018, the Claimant was assessed by a Psychological Needs Practitioner. It was recorded that the dyslexia was causing problems at that time, but "when not anxious he deals with dyslexia fine" [p143]. The Claimant had said that he had been diagnosed as dyslexic when 17 and had "difficulties organising, reading and careless" (sic). I accepted that prior to the onset of the depression and anxiety symptoms that the Claimant's coping strategies worked well, and his dyslexia had a minimal impact on his ability to carry out normal activities, including reading and following recipes.

15. On 30 April 2018, the Claimant saw his GP. The Claimant was not sleeping, had poor concentration, was tearful, no interest or energy. He had physical symptoms of anxiety with stomach churning and palpitations. It was considered he was clinically depressed, and the Claimant was prescribed with Citalopram and remained signed off work [p158].
16. At about this time the Claimant was referred for Cognitive Behavioural Therapy with a psychologist, Professor Davis, who had an understanding of dyslexia [p155]. The Claimant attended on 13 occasions between May 2018 and 21 December 2018.
17. As 2018 progressed the Claimant became increasingly disorientated and the disorientation was an effect of the dyslexia. The Claimant was unable to fully separate the depression and anxiety symptoms from those of dyslexia and I accepted that as his stress levels increased the level of disorientation increased, which then increased his stress levels. This had the effect of knocking the Claimant off his 'comfort zone' and his coping mechanisms no longer assisted him with controlling the disorientation he felt with his dyslexia. The Claimant became reliant on other people proof reading things he had written, because he could not trust himself to set out what he intended, they included his wife and a solicitor, Mr Hollebon
18. In an occupational health meeting on 11 July 2018, the Claimant said that his dyslexia was worsening but he thought it was stress related.
19. On 26 September 2018, the Claimant raised three grievances [p70-77]. The grievances appeared to be coherently written. However, I accepted the Claimant's evidence that the end products were the result of several iterations and that he needed them to be proof-read by someone else before he was able to send them.
20. The Claimant attempted to return to work at the beginning of October 2018, but after about two weeks, he was signed off as sick again by his GP and he remained on sick leave until his resignation.
21. At the grievance meeting on 15 November 2018, the Claimant said that at the time he perceived that the aim of the Performance Improvement Notice was to address the challenges he was having related to his dyslexia, but at that point he realised that they were symptoms of his mental health challenges. [p82] The notes were not easy to understand. The Claimant explained in evidence, which I accepted, that he saw that the dyslexia was getting out of control and it was part of the mental health challenges he was facing.
22. On 22 November 2018, the Claimant attended an occupational health meeting [p146]. The Claimant reported a worsening of his psychological

- symptoms, involving reduced motivation, concentration and confidence, disturbed sleep and anxiety. His medication had been modified. He said the Respondent was aware of his dyslexia and on his return to work he would need support. It was considered that he had moderately severe depressive symptoms and severe anxiety symptoms. The notes taken at the meeting [p148] said that the Claimant thought his dyslexia symptoms had worsened and that he was having difficulty in finding the correct words and had asked for help via Davies technique for dyslexia.
23. On 6 December 2018, the Claimant e-mailed the Respondent and said that his current dyslexia coping mechanisms were severely impaired when combined with his current levels of anxiety and depression [p150]. The Claimant accepted, in cross-examination, that the e-mail was clear and did not have many errors. I accepted the Claimant's evidence that he got Mr Hollebbon to help him with the creation of the e-mail to make sure it was clear and that he had helped him by shaping the words and proof-reading it before it was sent. I accepted the Claimant's evidence that he would not have been able to send the e-mail at that time without help. In the e-mail, the Claimant said that he did not trust his current reading and interpretation abilities and had retained Mr Hollebbon to read documents and to advise on how to respond [p153].
24. The Claimant started to experience suicidal thoughts and the Claimant's GP wrote on 24 December 2018 that the Claimant had been signed off work with a quite a severe depression and anxiety state.
25. In March 2019, Dr Roberts (appointed by the Respondent's income protection provider) recommended a change of medication to Mirtazapine. The Claimant was prescribed sleeping tablets in addition. In his report, Dr Roberts said that the Claimant had reported that he always had difficulty with dyslexia but that it had become increasingly prominent since he had been down in mood. Dr Roberts believed that the Claimant had a moderate depressive disorder with associated generalised anxiety [p160].
26. At about the end of July 2019, the Claimant had an overnight stay at which Jane Hayward, who would later treat the Claimant on the Davis Dyslexia Correction Programme, explained what would occur on the Davis course and gave him a NOIT device to help orientate himself. I accepted the Claimant's evidence that he could not control the disorientation at that stage. He was given an insight into the course and that gave him access to a positive route, in his mind, through which he could tackle the problems with his dyslexia.
27. At this stage the Claimant was struggling to read anything, other than things from the Respondent. He was not able to engage with television programmes and was not engaging with his family. He had to keep track of

a sequence when he was following basic instructions and his wife had to double check everything he did because he might forget both important and mundane things. He was unable to plan a day's activities or follow through tasks and would get locked onto a single train of thought. I also accepted his evidence that driving was problematic, particularly at junctions and roundabouts because on his arrival he would not be sure as to which junction or roundabout he was at and he would lose track of what he was doing. The worst situations on the road were those involving roadworks, because he would lose track of what he was doing and was disorientated as to what he should do next.

28. The Claimant went on holiday with his family for the first 2 weeks of August 2019. It was a familiar place and he found it easier to communicate with his family from that stage.
29. On 12 August 2019, the Claimant sent an e-mail to Mr Fairall [p131-132] about the recommendations of the grievance appeal and asked for funding for the Davis Dyslexia programme. The e-mail was clear and coherent. The Claimant's wife proof-read the e-mail before he sent it because the Claimant did not trust himself as to what he had written. This was notwithstanding that he had cut and paste parts of that e-mail from previous correspondence.
30. On 15 August 2019, the Claimant's GP notes, for a depression review [p177], recorded that the Claimant's dose of Mirtazapine had been reduced. He was keen to stop the Mirtazapine so that he could commence the Davis Dyslexia course. It was noted that he seemed calmer and happier than the last time. I accepted the Claimant's evidence that he was calmer and happier because Jane Haywood had told him that she could get him calmer and he had a positive boost from that. The Claimant was happy because he could see a positive route for dealing with his dyslexia. However, at this time the Claimant's wife was still not happy with the Claimant driving and he was still disorientated. I also accepted that the Claimant's wife would still have double check everything for him. The Claimant still had difficulty with reading and following recipes. This continued until 30 August 2019.
31. The Claimant did not accept in cross-examination, that when the depressive symptoms subsided that the impact of his dyslexia was less severe. I accepted the Claimant's evidence that nothing made sense to him and he could not picture his place in the world and that his dyslexia symptoms did not directly correlate with his depression.
32. On 30 August 2019, the Claimant was informed that the Respondent would not fund the Davis course. On receipt of the e-mail the Claimant's condition deteriorated and he retook mirtazapine for a short period.

33. On 9 September 2019, the Claimant commenced the Davis Dyslexia Correction Programme. When he started the course, he was still not in a good place and could not focus and was disorientated.
34. On 13 September 2019, the Claimant's GP notes recorded, in relation to the depression review [p176], that he was happy and smiley and the best his GP had seen him.

The Law

35. Section 6 and Schedule 1 of the Equality Act 2010 define disability for the purposes of the Act. A person has a disability if he or she has a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person, or if it has ceased to have a substantial adverse effect it is to be treated as continuing to have that effect if it is likely to recur.
36. In addition, I considered the 'Guidance on the Definition of Disability' as required under Schedule 1, Part 1, paragraph 12.
37. The time at which to assess the disability is the date of the alleged discriminatory act (Richmond Adult Community College v McDougall [2008] ICR 431 (para 24) and Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT).
38. In Goodwin-v-Patent Office [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the Claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.
39. The step approach in Goodwin was approved in J v DLA Piper UK LLP [2010] ICR 1052 (paragraph 40). It was said at paragraph 38,

"There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases

follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an “impairment”. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred.”

40. In cases involving mental impairments, it has been held that the use of terms such as ‘anxiety’, ‘stress’ or ‘depression’, even by GPs, would not necessarily amount to proof of an impairment, even if such terms, or similar, had been referred to as part of one of the World Health Organisation International Classification of Diseases (Morgan-v-Staffordshire University [2002] IRLR 190 and J-v-DLA Piper UK LLP [2010] IRLR 936). The EAT in Morgan underlined the need for a Claimant to prove his or her case on disability; tribunals were not expected to have anything more than a layman's rudimentary familiarity with mental impairments or psychiatric classifications. The use of labels such as ‘anxiety’, ‘stress’ or ‘depression’ would not normally suffice unless there was credible and informed evidence that, in the particular circumstances, so loose a description nevertheless identified an illness or condition which caused the substantial impairment required under the statute. The EAT recognised that there were significant dangers of a tribunal forming a view on the presence of a mental impairment solely from the manner in which a Claimant gives evidence on the day of the hearing.
41. Nevertheless, it is not always possible or necessary to label a condition, or collection of conditions. The statutory language always had to be borne in mind; if the condition caused an impairment which was more than minor or trivial, however it had been labelled, that would ordinarily suffice. In the case of mental impairments, however, the value of informed medical evidence should not be underestimated.
42. In Dunham v Ashford Windows [2005] ICR 1584 the EAT said, in cases involving learning disabilities, “... *it is unlikely to be sufficient for a claimant to put his case only on the basis that he had difficulties at school or is “not very bright”. Tribunals are likely to look for expert evidence as to the nature and degree of the impairment from which a claimant claims to suffer (although questions of degree will principally fall to be considered in the context of whether the impairment has a substantial and long term adverse effect upon the ability of the claimant to carry out normal day-to-day activities, some evidence as to the degree of handicap will be necessary to demonstrate that there is an impairment at all) and for evidence of a particular condition from which the claimant suffers (which may have a specific or a generalised effect on function).*” It was also considered that in a case of learning difficulties the essential evidence establishing the condition could come from a suitably qualified psychologist.

43. Appendix 1 to the EHRC Code of Practice of Employment states that there is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment and not the cause. This endorsed the decision in Ministry of Defence v Hay [2008] ICR 1247. It also says at paragraph 6 that mental impairment is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities.
44. Normal day-to-day activities included those which were normal for the particular Claimant as long as they were not specialised activities, as defined in paragraphs D8 and 9 of the *Guidance*. The correct approach involved a consideration of all matters, but particular attention had to be paid to those activities that the Claimant could not do (Leonard-v-Southern Derbyshire Chamber of Commerce [2000] All ER (D) 1327). This was reaffirmed by the EAT in Ahmed v Metroline Travel Limited UKEAT/0400/10 when it stated that the Tribunal must focus on what the Claimant cannot do and it was impermissible to weigh what a Claimant can do against what they cannot and then determine disability by weighing those matters in the balance.
45. *Substantial* is defined in S.212(1) EqA as meaning ‘more than minor or trivial’.
46. For a person with dyslexia the comparison is between what the individual can do and would be able to do without the impairment (Paterson v Commissioner of the Police of the Metropolis UKEAT/0635/06). This involves considering how in fact he carries out the activity compared with how he would do if not suffering from the impairment. If that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial.
47. In Anwar v Tower Hamlets College UKEAT/0091/10, the Employment Judge found that the headaches were more than trivial but had a minor effect and concluded that there was not a substantial adverse effect. The EAT said that there was no necessary error of law in describing it as more than trivial and also describing it as minor. However, in Aderemi v London and South Eastern Railway Limited [2013] ICR 591, the EAT held that the Tribunal “*has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself 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 a 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.*”

48. S. 212 EqA refers to “minor or trivial” and the interpretation of the EAT in Aderemi is more in keeping with the language of the section and I prefer that approach.

49. In Goodwin v Patent Office [1999] ICR 302, the EAT set out its explanation of the requirement of substantial adverse effect as follows:

“What the Act of 1995 is concerned with is an impairment on the person’s ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus, a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be “yes”, yet their ability to lead a “normal” life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be “no”. Those might be regarded as day-to-day activities contemplated by the legislation, and that person’s ability to carry them out would clearly be regarded as adversely affected.”

50. This approach reflects the advice in para 9 of Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that ‘a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation’

51. I also took into account the Statutory Guidance at B6, that a person might have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person’s ability to carry out normal day to day activities. The guidance at B10 provided that “In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person’s ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.”

52. It was clear from paragraph 2 of Schedule 1 of the Act that an impairment was long term if it had lasted for 12 months or more, or was likely to have lasted that long of the rest of the life of the Claimant. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as having that effect if it is likely to recur. As to the question of likelihood, I had to ask whether it could well happen (*Guidance*, paragraph C3 and SCA Packaging Ltd v Boyle [2009] IRLR 746). In terms of likelihood of reoccurrence all of the circumstances of the case should be taken into account and this should include what the person could reasonably be expected to do to prevent the recurrence. It is also possible that the way in which a person can control or cope with the effects of an impairment may not always be successful (*Guidance* C9 and C10).

Conclusions

Does the Claimant have an impairment which is either physical or mental?

53. It was not in dispute that the Claimant had an impairment, namely dyslexia, however, what was in dispute was whether the effects of the dyslexia were substantial at the time of the alleged discrimination.

Was there an effect on the Claimant's ability to carry out normal day to day activities?

54. Before the onset of the Claimant's depression and anxiety, he had difficulty with reading documents and novels and following recipes. The Claimant had developed coping strategies for his difficulties with focus and disorientation. He used specific fonts and inks and proof-read documents before he sent them, or he would leave them for a few hours and then check them before sending. He would also use a mind map. With the onset of the depression and anxiety the Claimant's coping strategies for his dyslexia started to break down. The Claimant became disorientated and from April 2018 his coping mechanisms no longer worked, and he could not trust himself to write documents and his wife needed to double check everything with him. Documents sent to the Respondent were drafted many times, with assistance, and were then proof-read by others so that the Claimant could be sure that he had stated what he intended to write. This was an adverse effect on a normal day to day activity namely writing and composing correspondence. Further the Claimant's ability to drive was affected in that he would get disorientated, particularly at junctions and roundabouts and he would lose track of what he was doing. He was also struggling to read from April 2018 and was not able to engage with the television. These were all matters which are normal day to day activities, and they were adversely affected.

Were such effects substantial as of 30 August 2019?

55. Substantial means, more than minor or trivial. The Respondent submitted that the matters the Claimant described as impacting on day to day activities by reason of dyslexia were the same as those by reason of depression and that as a matter of fact that they were due to depression. The Respondent also submitted that it should be inferred that as the depressive symptoms improved, the effects of the Claimant's dyslexia improved. I rejected those submissions. I took into account paragraph B6 of the ACAS guidance that if there are two impairments, the cumulative effect should be taken into account. The Claimant's evidence, which I accepted, was that there was not an improvement in his dyslexia as his mood improved. His mood was improving because he could see that there was a path that he could follow which would help resolve the effects of the dyslexia, but those effects were ongoing. The e-mail sent to the Respondent on 12 August 2019 was coherent as were his grievances and the e-mail sent in December 2018, however that was because his wife or Mr Hollebbon had been involved in the crafting of them and had proof-read them for the Claimant to ensure that he was setting out what he intended. This was due to the Claimant not being able to trust himself to express things correctly. The need to proof-read one's own document is something that could be considered as a minor or trivial and is something that a large cross section of the population would do. However, the need for someone else to help craft a document and/or proof-read it before the Claimant was able to send the correspondence is something that shows that the effect of being unable to express himself was something that was more than minor or trivial. The general population would not require someone else to read correspondence to ensure that it has the intended meaning before being able to send it. As of 30 August 2019, the Claimant's wife would also have to double check with the Claimant to ensure that he did not forget things and also to ensure that he followed basic instructions. The Claimant's need to keep track of a sequence and to have someone doublecheck for him, shows that he was struggling with general activities and that without such assistance they would not have been completed properly or at all. It was also notable that the Claimant's ability to navigate when driving was still impaired as of 30 August 2019. Getting lost is something that can happen to a general cross-section of the population, however it was junctions and roundabouts that caused the Claimant to become disorientated. This was also something which was more than minor or trivial and not something that was likely to affect the general population. I was reinforced in this conclusion by the difficulties the Claimant faced when he started the Davis Course 9 days later. The assistance the Claimant received from his wife and Mr Hollebbon should be disregarded when considering the effect. If the Claimant did not have such assistance it is unlikely that he would have adequately expressed himself in correspondence or have been able to complete general activities. I

accepted that these were matters that arose in both the context of depression and dyslexia however it was not possible to distinguish between them, save that they were still continuing when the depression became less severe, meaning they were more likely than not to have related to dyslexia at least in part. The Claimant had lost his coping mechanisms for his dyslexia and the effects on normal day to day activities were still substantial as of 30 August 2019.

Are such effects long term/did they cease to have effect?

56. The substantial effects of the Claimant's dyslexia had started in April 2018 and were continuing at 30 August 2019. They had occurred for more than 12 months and therefore they were long term.

57. Accordingly, at the material time, the Claimant was disabled by reason of dyslexia.

Employment Judge J Bax

Date: 11 February 2021

Judgment sent to Parties: 05 March 2021

FOR THE TRIBUNAL OFFICE