



EMPLOYMENT TRIBUNALS

Claimant: Mr C Lopez Moreno

Respondent: Wharfedale Facilities Management Limited

Heard at: Leeds (fully remote) **On:** 15 June 2021

Before: Employment Judge Knowles

Representation

Claimant: In person

Respondent: Mr Hine, Solicitor

RESERVED JUDGMENT ON HEARING A PRELIMINARY POINT

The Judgment of the tribunal is that the Claimant was, at the relevant time, a disabled person for the purposes of Section 6 of the Equality Act 2010 by reason of his dyslexia.

RESERVED REASONS

Issues

1. This preliminary hearing was arranged following a preliminary hearing for case management heard by EJ Wedderspoon 26 March 2021.
2. The Claimant has claimed that he is a disabled person by reason of dyslexia and auditory reduction.
3. The Respondent has already conceded that the Claimant is a disabled person by reason of his auditory reduction.
4. The purpose of the hearing is to consider whether or not he has disability status as defined by the Equality Act 2010 by reason of his dyslexia.
5. The question is important because the Claimant's claims of discrimination are in many cases underpinned by his condition of dyslexia rather than in his auditory reduction.

6. The issues for the tribunal to consider are as follows:
- a. Did he have a physical or mental impairment: dyslexia? This issue has been conceded by the Respondent (see their email to the tribunal 31 March 2021).
 - b. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
 - c. If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - d. Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
 - e. Were the effects of the impairment long-term? The Tribunal will decide:
 - i. did they last at least 12 months, or were they likely to last at least 12 months?
 - ii. if not, were they likely to recur?

Evidence

7. This preliminary hearing was a fully remote hearing undertaken through HMCTS's Cloud Video Platform. No connection issues were noted during the hearing by anyone participating in the hearing.

8. The Claimant attended the hearing and acted in person. He was supported by his wife in accessing and reading documents during the hearing.

9. The Claimant served a witness statement and a bundle of documents. The bundle of documents is 169 pages. The bundle of documents also contains an impact statement from the Claimant.

10. The Respondent had received a copy of the Claimant's witness statement by email on 17 May 2021 but had overlooked that email. The Respondent had made an assumption that the impact statement in the bundle was the Claimant's evidence for today.

11. The hearing was adjourned for 35 minutes at 10:25 for the Respondent's representative to consider the statement and to determine from it whether or not they would need more time or would be ready to proceed.

12. After that adjournment the Respondent's representative confirmed that they were ready to proceed.

13. The Respondent's representative did note that in the Claimant witness statement the Claimant referred to notifying the Respondent of certain matters in paragraph 35. We all agreed that such comments may go to knowledge of disability but that was not an issue for determination today and will be considered at the full hearing. We also agreed that it was not necessary to ignore all of paragraph 35 in the Claimant's witness statement as some of the content could clearly be relevant to the issues set out above.

14. The Claimant stated that he would not require any adjustments during the hearing other than time to read and consider documents, which he was granted, and for his wife to support him during the hearing, also allowed.

15. We took a second break at the close of cross examination of the Claimant at 11:52 at the Claimant's request for him to take stock and think about my question of whether or

not he had anything to add. His request for a 15-minute adjournment was granted. When we resumed at 12:10 the Claimant confirmed that he had nothing further to add.

16. Numbers in brackets below are references to page numbers in the bundle of documents.

Findings of fact

17. I make the following findings of fact on the balance of probabilities. These findings are not intended to cover all of the Claimant's evidence. I took into account all of his evidence but it would not be appropriate to repeat it all here. These are the core findings for the purposes of my conclusions.

18. The Claimant produced a witness statement (10 pages).

19. The Claimant states that his condition is lifelong, that he has had it as long as he can remember and that he expects it to be lifelong. He states it is a permanent and constant. He states that strategies he has adopted throughout his life do help him to manage the effects to a limited degree but they never remove them.

20. The Claimant states that his dyslexia was diagnosed at school, aged 6. He produces a letter from his teacher at the time (12) dated 16 November 2020. This states:

“Concerns had been raised about Christopher with the Special Needs Coordinator at school as he had difficulties with reading and writing and was showing classic signs of dyslexia. He was put in my class I was able to give additional support to his learning, as I had a Special Needs Assistant who worked with another child in the class, and where possible Christopher worked with her in a small group. This support helped him with his learning as any issues he had could quickly be dealt with.

Christopher made progress during the year her was with me, however he was below his age appropriate level of learning when he left our school and moved onto Middle School. They were made aware of the level of support that Christopher received at First School to enable him to access the curriculum fully.”

21. The Claimant is now age 33 years.

22. The Claimant states he received the support of a Special Needs Assistant throughout primary school. In middle school he struggled with all academic classes and was always placed in the lower ability classes. He struggled to focus, read and write and struggled with time limits, having to take time to spell things out in his head. He made mistakes and misinterpreted questions. He struggled with his speech and said the wrong words. He struggled to process information which affected his working memory. He quickly forgot information. He had not developed coping strategies and would get into trouble because he had not processed requests. He left school with two GCSE, one in art and one in PE. He had private tutoring from Keda Cowling from 1995-1997 using the Toe-to-Toe reading system which he states Ms Cowling founded. He produces an email dated 7 October 2020 (11) from Ms Cowling's son confirming his attendance as a pupil. He states Ms Cowling has now passed away. The email states:

“This is to confirm that Keda Cowling (the creator of the Toe by Toe reading system) assessed [the Claimant] 1995 and concluded that he was dyslexic. She taught him with the Toe by Toe reading manual between 1995-1997. Yours faithfully, Kelsey Cowling (Director – Toe to Toe Ltd).”

23. The Claimant makes the point that he faces similar challenges now, but has developed coping strategies.

24. The Claimant states that in his adult life he cannot read at what is considered to be

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a normal level. He avoids reading correspondence if he can leave it to his wife, when he has to read it takes him double or triple the time compared to people around him. He gives examples of phone messages, emails and letters from the children's' school, the bank etc.

25. The Claimant states that he cannot cope with receiving and responding to emails without help with reading, understanding and writing which he states was particularly prevalent during my time with the Respondent because email is the primary way of communicating within the business. He states that he made people around him aware of his condition.

26. He states that he was assessed for dyslexia in 2010 when he joined the Army. He produces a Student Assessment Report dated 23 February 2010 (13). This states:

“Wide Range Achievement Test (Confidence Interval 8 90%)

Revision 4 (WRAT 4)

Reading - Standard Score 85 (79 - 93) 16%ile (Low Average)

Sentence Comprehension - Standard Score 89 (83 - 96) 23%ile (Low Average)

Reading Composite - Standard Score 85 (80 90) 16%ile (Low Average)

Towre Test of Reading Efficiency - Standard Score/Percentile

Sight Word Efficiency - Standard Score 82/12%ile

Phonemic Decoding Efficiency - Standard Score 93/32%ile

Total Word Reading Efficiency - Standard Score 85/16%ile;

Adult Reading Tests (ART) - Test 1, Test 2 and Test 3

Reading Accuracy - 4%ile

Reading Comprehension - 20%ile

Average speed of reading - 119 words per minute (18%ile)

Wide Range Achievement Test (Confidence Interval t 90%)

Revision 4 (WRAT 4)

Spelling - Standard Score 74 (68 - 83) 4%ile (below average)

Symbol Digit Modalities Test - 65/65 at 90 seconds (1st Trial - Above Average)

- 45/45 at 2 minutes 38 seconds (2nd Trial - Above

Average)

Writing Speed (free writing) - 23 words per minute”

27. The Claimant also produces a report dated 3 February 2021 (i.e. after his employment with the Respondent ended on 21 January 2020). This is significantly after the Claimant's employment ended. It appears to assume that the Claimant is still employed by the Respondent and makes recommendations for adjustments to his role. It reflects on an assessment on 3 February 2021 but gives no clear opinion as to the Claimant's condition or its impact during the relevant time. I attach no weight to it because of those issues.

28. The Claimant states that the effect on his normal day to day activities is substantial. He refers to coping mechanisms, asking for help, using spell check on his phone and trying to focus and remember one thing at a time and avoiding situations where he will not have support to read and write.

29. He states that he has to avoid some daily tasks unless he is able to be supported in them which include reading books, writing emails, reading letters, using computers, reading out loud, reading at all, saying hello to people he thinks he knows but has forgotten their name. He states that many of his coping strategies stop working for him when he is placed in certain situations such as stressful ones or when tired. He states that often his ability to manage the effects of his impairment will break down in those sorts of situations.

30. He states that where there is a lot of pressure on him, or he is not getting the support he needs, he can become completely overwhelmed by tasks that involve reading and writing or quickly processing complex instructions. He states that often the information he needs is simply not there in his head and there is nothing he can do except ask someone else or put in place his mitigation strategies. He states that if he does not know how to spell a word, or can't read a word, then it will not come to him over time no matter how hard he tries.

31. He states that there are some situations where his dyslexia is easier for him to manage but this is not because his dyslexia improves or worsens - it can just be made easier to cope with in certain situations. He states that these sorts of situations include: earlier in the day; quiet environments; if he is not under pressure and the environment is calm and if he is around people who are understanding of his extra needs. He states that if he receives a written message on his phone he has to sound out the words phonetically and it takes him longer than average to read.

32. He states that he cannot process anything around him at the same time because all his focus goes onto the reading so he can miss things happening around me or people speaking to him. He states that a short message could take him a few minutes to read, where it might take others seconds. He states that when he has to write a message on his phone he has to ask for help or use spell check and again cannot hear or process anything around him at the time he is writing.

33. He states that some examples of mistakes he makes include mistaking the letter B for a D, mixing up words such as where, were, which, witch. He states that as he has not been able to learn how to read or write well, he makes the same mistakes over and over again so he doesn't get quicker at writing over time. He states that if he sees someone he knows he has met before, until he knows them very well he will not know their name. He states that he tries to avoid these situations or remind himself of the name immediately before speaking to them.

34. He states that this is something that is very difficult and he worries people think he is being ignorant or rude. He states that if asked to drive to a certain address that he does not know he will have to check the information multiple times before getting to the location because he cannot retain numbers and street names. He states that he has to factor in

additional time in his days to make sure he checks information and that he often has to be more creative and remember physical features of the places to remind him of them as he will not remember the names.

35. He states that he will often get things wrong when filling out forms, he struggles with both reading the question and writing his answers so he tries to avoid this as much as possible. He states that he will get his wife to do this for him or ask for help from another person. He states that he will also use his phone for spelling. He states that his wife organises things for him such as his vehicle insurance, doctor's forms, voting registration, utility bills etc. He states that he has never had a CV. He states that he would make basic errors if he was to do these things.

36. He states that any letters he receives he passes to his wife to read and she will pick out key information he needs to know. He states that she will respond on his behalf. He states that he tends not to use email but if he does need to write an email, his wife will do this for him.

37. He states that dyslexia affects his self-esteem on a daily basis, as he knows he will struggle with basic tasks and have to prepare for that in advance. He states that he often comes across words and basic information he feels he should know but he simply doesn't. He states that he has to ensure he doesn't put himself in situations where he has to read or write without being in a supportive environment.

38. The Claimant's dyslexia impact statement is within the bundle (1-10). This covers both his dyslexia and his hearing loss. The impact statement does not add anything to the Claimant's evidence set out above.

39. The Claimant was cross examined during this hearing. He accepted that the 1995 diagnosis letter does not indicate the degree of dyslexia or impact it had. He denied having an assessment on discharge from the Army, or any Pulhheems report, stating none was done. He states he has not asked the Army for his Pulhheems report because he is not aware that any was done. He was questioned about the 3 February 2021 expert report, but I do not repeat his answers here because I attach no weight to that report.

40. The Claimant refers me to statements from his wife and colleagues which are to be produced at the full hearing in the main bundle (46-113) which he states set out how others help him to manage his dyslexia. I have not read those, nor will I take them into account. Those people are not witnesses before me at this hearing.

41. I found that the Claimant has established credibility upon the issue of his condition. It was not suggested that anything that he said was untrue. I found his evidence unexaggerated and qualified in a balanced manner, e.g. paragraph 31 above. He was not challenged on any of the evidence that he set out in his witness statement, nor in his impact statement. I found that the evidence given by the Claimant in this hearing was more likely than not to be the truth.

Submissions

42. The Respondent submitted that some of the Claimant's evidence was not helpful because it was produced a long time ago, such as the email on page 11 or the letter on page 12.

43. The Respondent urged caution in placing weight upon the 2021 expert report because it was clear that the author believed that she was addressing a continuing mischief and that the Claimant was still employed. It was therefore misconceived and starts from a false premise. The report refers to the impact of the pandemic whereas the pandemic post-dates the Claimant's employment. She refers to an aggravating condition of tinnitus whereas the Claimant's stated condition is hearing loss; they are distinct conditions. Tinnitus has not formed part of the Respondent's concession of disability

status.

44. The Claimant was told in the Respondent's email 31 March 2021 conceding disability status on the grounds of hearing loss that the Respondent reserves the right to reconsider its position on the question of conceding disability subject to sight of the Claimant's Pulhheems assessment on exit from the British Army. The Respondent invites me to draw adverse inference from the Claimant's failure to contact the Army to obtain a copy of the report. The Respondent stated that it was a matter of public record that any person being discharged from the Army would be subject to an assessment.

45. The Respondent suggested that the impact of the above is that we are left with nothing other than assertions from the Claimant concerning his condition.

46. The Claimant submitted that he had tried to provide evidence from as early as possible and evidence which is more up to date. He was simply trying to be as fair as possible.

The Law

47. The Equality Act 2010 contains the definition of disability and provides:

6. **Disability**

- (1) *A person (P) has a disability if—*
 - (a) *P has a physical or mental impairment, and*
 - (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
- (2) *A reference to a disabled person is a reference to a person who has a disability.*
- (3) *In relation to the protected characteristic of disability—*
 - (a) *a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
 - (b) *a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*
- (4) *This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
 - (a) *a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
 - (b) *a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*
- (5) *A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*
- (6) *Schedule 1 (disability: supplementary provision) has effect.*

48. Section 212(1) of the 2010 Act (General Interpretation) provides that "Substantial" means more than minor or trivial.

49. Schedule 1 sets out supplementary provisions including:

Paragraph 2

- (1) *The effect of an impairment is long-term if—*
 - (a) *it has lasted for at least 12 months,*
 - (b) *it is likely to last for at least 12 months, or*
 - (c) *it is likely to last for the rest of the life of the person affected.*
 - (2) *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 continuing to have that effect if that effect is likely to recur.*
 - (3) *For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.*
 - (4) *Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.*
50. The burden of proof is on the Claimant to show that he or she satisfies this definition. The standard of proof is on the balance of probabilities.

51. The Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) under S.6(5).

52. The guidance states:

Section A – Definition of disability

A5. *A disability can arise from a wide range of impairments which can be:*

...impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy; developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia; learning disabilities; mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post traumatic stress disorder, and some self-harming behaviour; mental illnesses, such as depression and schizophrenia;

A6. *It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa.*

A7. *It is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. For example, liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act. What it is important to consider is the effect of an impairment, not its cause - provided that it is not an excluded condition.*

A8. *It is important to remember that not all impairments are readily identifiable. While*

some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious, for example some mental health conditions and learning disabilities.

53. Section B - Meaning of 'substantial adverse effect'

B1. The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at S212(1).

The time taken to carry out an activity

B2. The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

The way in which an activity is carried out

B3. Another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.

Cumulative effects of an impairment

B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

B6. A person may 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.

Example - A person has mild learning disability. This means that his assimilation of information is slightly slower than that of somebody without the impairment. He also has a mild speech impairment that slightly affects his ability to form certain words. Neither impairment on its own has a substantial adverse effect, but the effects of the impairments taken together have a substantial adverse effect on his ability to converse.

Effects of behaviour

B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.

...

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty.

B10. 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.

B11. Environmental conditions may exacerbate or lessen the effect of an impairment. Factors such as temperature, humidity, lighting, the time of day or night, how tired the person is, or how much stress he or she is under, may have an impact on the effects. When assessing whether adverse effects of an impairment are substantial, the extent to which such environmental factors, individually or cumulatively, are likely to have an impact on the effects should, therefore, also be considered. The fact that an impairment may have a less substantial effect in certain environments does not necessarily prevent it having an overall substantial adverse effect on day-to-day activities.

Section C – Meaning of 'long-term'

C3. The meaning of 'likely' is relevant when determining:

- whether an impairment has a long-term effect;*
- whether an impairment has a recurring effect;*
- whether adverse effects of a progressive condition will become substantial; or*
- how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour.*

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

Section D – meaning of 'day-to day activities'

...

D3. In general, day-to-day activities are things people do on a regular or 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.

...

D10. ... many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving; using everyday objects such as

a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner.

...

D17. Some impairments may have an adverse impact on the ability of a person to carry out normal day-to-day communication activities. For example, they may adversely affect whether a person is able to speak clearly at a normal pace and rhythm and to understand someone else speaking normally in the person's native language. Some impairments can have an adverse effect on a person's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions. Account should be taken of how such factors can have an adverse effect on normal day-to-day activities.

D18. A person's impairment may have an adverse effect on day-to-day activities that require an ability to co-ordinate their movements, to carry everyday objects such as a kettle of water, a bag of shopping, a briefcase, or an overnight bag, or to use standard items of equipment.

...

Example - A young man who has dyspraxia experiences a range of effects which include difficulty co-ordinating physical movements. He is frequently knocking over cups and bottles of drink and cannot combine two activities at the same time, such as walking while holding a plate of food upright, without spilling the food. This has a substantial adverse effect on his ability to carry out normal day-to-day activities such as making a drink and eating.

D19. A person's impairment may adversely affect the ability to carry out normal day-to-day activities that involve aspects such as remembering to do things, organising their thoughts, planning a course of action and carrying it out, taking in new knowledge, and understanding spoken or written information. This includes considering whether the person has cognitive difficulties or learns to do things significantly more slowly than a person who does not have an impairment.

54. The time at which to assess the disability is the date of the alleged discriminatory act (*Cruickshank v VAW Motorcast Ltd* 2002 ICR 729 EAT).

55. The words used to define disability require a tribunal to look at the evidence by reference to four different questions (or 'conditions', as the EAT termed them):

- a. did the Claimant have a mental and/or physical impairment? (the 'impairment condition')
- b. did the impairment affect the Claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
- c. was the adverse condition substantial? (the 'substantial condition'), and
- d. was the adverse condition long term? (the 'long-term condition').

(*Goodwin v Patent Office* 1999 ICR 302 EAT).

56. There should be a causative link between the condition or conditions, where they are identified, and symptoms that the condition or conditions produce (*Morgan Stanley International v Posavec* EAT 0209/13). It need not be a direct link (*Sussex Partnership NHS Foundation Trust v Norris* EAT 0031/12).

57. The term 'mental impairment' covers learning disabilities.

58. In *Dunham v Ashford Windows* 2005 ICR 1584 EAT, a case involving the condition of dyslexia, the EAT accepted that a Claimant is unlikely to establish a mental impairment solely on the basis of 'difficulties at school' or because he or she 'is not very bright'. Expert evidence as to the nature and degree of the impairment is required, although in a case involving learning difficulties, evidence from a doctor is not essential. Medical evidence is not required in every case, especially where there is appropriate expert evidence as to the type and nature of impairment.

59. If the impairment is not long-term, the next test is whether it is likely to be long-term. The relevant test then whether or not it "could well happen" (*SCA Packaging Limited (Appellants) v Boyle (Respondent) (Northern Ireland)* [2009] UKHL 37). The IDS Handbook on Discrimination states that "*establishing that the effect of dyslexia is long term will not normally be a contentious issue, since it will generally have been present from an early age, even if undiagnosed until later in life*".

60. In *Goodwin v Patent Office* 1999 ICR 302, EAT, concerning 'substantial' the EAT said '*What the Act 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.*'

61. "Substantial" is defined in S.212(1) EqA as meaning 'more than minor or trivial' and unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial (*Aderemi v London and South Eastern Railway Ltd* 2013 ICR 591).

62. In *Paterson v Commissioner of Police of the Metropolis* 2007 ICR 1522 the EAT held that in order to be substantial '*the effect must fall outwith the normal range of effects that one might expect from a cross section of the population*', but '*when assessing the effect, the comparison is not with the population at large... what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired* although in *PP and anor v Trustees of Leicester Grammar School* 2014 UKUT 520, Upper Tribunal (Administrative Appeals Chamber the Upper Tribunal's held that the statutory definition of 'substantial' in S.212(1) should be applied without any additional gloss.

63. All of the above principles were carefully set out and analysed in the case of *Elliot v Dorest County Council* UKEAT/0197/20 which provides a helpful reminder to any practitioner.

Conclusions

64. Reference to the relevant time below are to the period 26 October 2018 to 21 January 2020 i.e. the period of the Claimant's employment with the Respondent. This was agreed between the parties at the outset of their submissions. The Claimant's complaints of discrimination cover his period of employment with the Respondent.

Did the Claimant have a mental impairment?

65. The Respondent concedes the impairment condition.

Did the impairment affect the Claimant's ability to carry out normal day-to-day activities?

66. The Claimant has articulated clear affect upon his abilities to read, write, complete activities, comprehend instructions, general work activities such as learning, interacting with colleagues and preparing written documents.

67. His evidence concerning the affect at the relevant time is consistent with his presentation when the expert report was prepared when he entered the Army in 2010. His evidence is consistent with known core challenges of rapid processing of language based information and weaknesses in the short-term and working memory (See Equal Treatment Benchbook May 2021, page 400).

68. His evidence is not challenged by the Respondent.

69. The Claimant has described the affects as being permanent features of his life. It is more likely than not that the assessment carried out in 2010 was representative of his condition and its affect at the relevant time.

70. The Respondent has suggested that the report conducted in 2010 is aged but has not produced any evidence to suggest that the Claimant's condition may have improved.

71. In my conclusion on the balance of probabilities the Claimant meets the adverse effect condition at the relevant time.

Was the adverse effect substantial?

72. I remind myself that substantial means more than minor or trivial and that unless the matter can be classified as trivial or insubstantial the impairment must be treated as substantial (Adermi). I remind myself that I must consider the impairment at the relevant time taking account both of the coping strategies deployed and the fact that those may, at times, break down.

73. The Claimant's capacity to read, write, complete activities, comprehend instructions, and to complete general work activities such as learning, interacting with colleagues and preparing written documents appear to me to be matters which are essential to everyday activities.

74. The degree of impact explained in evidence to me by the Claimant, in completing these essential everyday activities, appears to me to readily exceed the threshold of minor or trivial. They including avoiding everyday situations where he will need to use a computer, read or write; having to seek help to write, read or understand everyday communications; needing additional time to digest information, mixing up letters and making mistakes; fearing appearing being rude and lacking self-esteem.

75. In my conclusion, looking at the impact of dyslexia upon the Claimant's normal day-to-day activities in round, the substantial condition is on the balance or probabilities met.

Was the adverse condition long term?

76. Dyslexia is a recognised life-long condition. It appears to me that the condition was apparent in the Claimant aged 6, in primary school, and continued throughout his life as is evidenced by his assessment for the Army in 2010 and through the Claimant's unchallenged evidence of its impact throughout his life.

77. In my conclusion on the balance of probabilities, at the relevant time, the adverse condition had lasted for at least 12 months and for the purposes of Schedule 1, Paragraph 2 of the 2010 Act is “long-term”.

Conclusion on disability status

78. The Claimant was, at the relevant time, a disabled person for the purposes of Section 6 of the Equality Act 2010 by reason of his dyslexia.

Employment Judge Knowles

13 July 2021