



EMPLOYMENT TRIBUNALS

Claimant: Mr R Pearce Thomas

Respondent: Pembrokeshire County Council

Heard at: Cardiff (by CVP)

On: 5 February 2021

Before: Employment Judge **R Brace**

Appearances

For the Claimant: Ms E Gunning (Solicitor)

For the Respondent: Mr L Garrett (Counsel)

JUDGMENT

It is the decision of the Employment Judge sitting alone that the Claimant was a disabled person by reason of his developmental co-ordination disorder/dyspraxia and autism spectrum condition at the material time.

It is also the decision of the Employment Judge that the Claimant was not at the material time a disabled person by reason of his stress induced anxiety or depression.

Written Reasons

Introduction and Background

1. On 5 May 2020, at a case management preliminary hearing, Employment Judge Moore made standard orders for the parties to serve on each other copies of any medical notes, reports, occupational health assessments and other evidence in their possession and/or control relevant to the issue of whether the Claimant was at all times a person with a disability under s.6 Equality Act 2010, in addition to the Claimant providing a disability impact statement.

2. The preliminary hearing on 21 October 2010, listed as a public preliminary hearing on the issue of whether the Claimant was a disabled person by reason of impairments relied on of Dyspraxia/ Developmental Co-ordination Disorder, Autism Spectrum Disorder (“ASD”), stress induced anxiety and/or depression, was vacated as the Claimant had not prepared a statement setting out the impact of the impairments on his day to day activities.
3. Included in the bundle for that October 2020 hearing, was a report dated 5 October 2020 from a Dr Nigel Tunstall, Consultant Psychiatrist, diagnosing the Claimant with ASD, following an assessment on 4 October 2020.
4. Mr Garrett had, at the October hearing, accepted that the report and diagnosis contained was difficult to go behind, but asked me to be cautious where a number of professionals have not come to conclusion of ASD, yet this one did. He expressed concern that whilst, on the document face, there appeared a diagnosis, there was no reference to the context of diagnosis and no medical history or indeed the basis on which the instruction was made. He also noted that the Claimant had not engaged the Respondent at all with regard the assessment, which was not a joint instruction.
5. The Claimant submitted that the report wasn’t obtained specifically for evidence for this hearing, but because of the difficulty the Claimant had in the long delay have a proper diagnosis through the NHS process and that it was the only way that he could have a definitive conclusion on whether he was on the ASD spectrum.
6. Clarification was sought from the Claimant in relation to whether the Claimant had obtained that report for the purposes of this litigation by way of further disclosure and the report was discussed at the outset of this hearing.
7. The parties have prepared an agreed bundle of documents (the ‘Bundle’), which had been sent in electronically to the Tribunal in advance of the CVP preliminary hearing [1-256]. The Bundle contained a copy of the Claimant’s second Impact Statement [114] in addition to the previous statement that the Claimant had been prepared, and a copy of Dr Tunstall’s Report containing his diagnosis of ASD [256].
8. Expert evidence is given to assist the tribunal. The tribunal is not bound to accept the evidence of an expert but should explain its decision if it is rejected. The role of the expert is not to determine legal issues such as whether a person has a disability, whether something arises in consequence of disability or whether an adjustment is reasonable; but to provide evidence that can assist the tribunal making these determinations.
9. There is no rule dealing with the use of expert evidence in the Employment Tribunal Rules 2013. Guidance on the use of expert evidence in the Employment Tribunal was given by the Employment Appeal Tribunal in De Keyser Ltd v Wilson [2001] IRLR 324 at 330 that

“(i) Careful thought needs to be given before any party embarks upon instructions for expert evidence. It by no means follows that because a party wishes such evidence to be admitted that it will be.[Although the procedures of employment tribunals differ from those in the civil courts, guidance may be found by way of analogy from the provisions of CPR rr 35.1–35.14 and 35PD.] A prudent party will first explore with the employment tribunal at a directions hearing or in correspondence whether, in principle, expert evidence is likely to be acceptable.

(ii) Save where one side or the other has already committed itself to the use of its own expert (which is to be avoided in the absence of special circumstances) the joint instruction of a single expert is the preferred course

10. I was satisfied that the Claimant had sought a private assessment for a diagnosis only, as a result of the delay in NHS referrals and assessments and the report was limited to a diagnosis. However, as a result of concerns expressed regarding the context of the diagnosis at the last hearing, which appeared not to have been fully clarified by the disclosure by the Claimant of the instruction to Dr Tunstall, I asked the Respondent for their views on whether an independent and joint expert report should be obtained on the diagnosis of ASD.
11. After taking instructions, the Respondent confirmed that it did not dispute the diagnosis and conceded that the Claimant did have the impairment of ASD, and that the impairment was a lifelong condition. The Respondent had also conceded that the Claimant had been diagnosed with, and had a diagnosis of Dyspraxia/Developmental Co-Ordination Disorder and that this too was a lifelong condition.
12. The Respondent however continues to dispute that the Claimant has anxiety and depression and/or that any impact was long term in respect of those impairments.
13. In all cases, the Respondent disputed that the impairments relied on had a substantial adverse impact on the Claimant's normal day to day activities.

Disability - Law

14. The Equality Act 2010 (“EqA”) provides that a person has a disability if he or she has a ‘physical or mental impairment’ which has a ‘substantial and long term adverse effect’ on his or her ‘ability to carry out normal day to day activities’.
15. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:
 - a. Does the person have a physical or mental impairment?
 - b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?

- c. Is that effect substantial?
- d. Is that effect long term?

16. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (Goodwin v Patent Office [1999] IRLR (EAT)).

17. In Goodwin Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal's approach with regard to the determination of the issue of disability. At paragraph 22 he said:

“The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question.”

18. The EqA 2010 Guidance states;

‘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’ (D3).

19. The EqA 2010 Guidance (D3) indicates that normal day-to-day activities can include ‘general work. The EAT in Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763 concluded that ‘normal day-to-day activities’ must be interpreted as including activities relevant to professional life. It emphasized that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life.

20. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be taken into account in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations in itself, tribunals must take account of it where they consider it to be relevant.

21. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).

22. Para 5 Sch. 1 Part 1 EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning ‘could well happen’. The

practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).

23. In determining the effects of an impairment without medication, the EAT has stated that: *'The tribunal will wish to examine how the claimant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the deduced effects. The question is then whether the actual and deduced effects on the claimant's abilities to carry out normal day-to-day activities [are] clearly more than trivial'* — Goodwin
24. The question of whether the effect is long term is defined in Sch. 1 Part 2 as
- a. Lasting 12 months;
 - b. likely to last 12 months;
 - c. likely to last the rest of the person's life.
25. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen.
26. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood.
27. Finally, the burden of proof is on the claimant to show she or she satisfied this definition. The time at which to assess the disability i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities, is the date of the alleged discriminatory act (Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect

Facts

28. The Claimant was born on 9 January 1995. The Claimant's medical records indicated that he was delivered at 33 weeks and received neonatal care for approximately two weeks [262]. As a child, the Claimant was diagnosed with Developmental Co-Ordination Disorder (Dyspraxia) [310] and, by 5 years of age, social communication difficulties had been highlighted, issues regarding his motor skills having been in issue from an early age [287]. A number of records refer to this diagnosis [e.g. 262, 270, 278, 284] and this diagnosis is not disputed by the Respondent. Childhood reports indicated day to day problems in motor skills including not using cutlery and needing assistance to dress [310].
29. In 2008, at 13 years of age, the Claimant was referred by his GP and assessed by a Dr Trudy Brew, clinical psychologist. A copy of her report of 18 September 2008 was contained in the Bundle [278] together with the

Autistic Diagnostic Observation Scale (“ADOS”) Report [280] which contained as a conclusion the following:

“Information obtained from this assessment can be used in order to rate communication and social interaction in terms of whether they meet criteria consistent with Autistic Spectrum Disorder. Although Ryan’s score for Reciprocal Social Interaction was suggestive of the sorts of difficulties seen in children with an Autistic Spectrum Disorder, his score for Communication did not indicate this and it was felt that his difficulties were better explained by his diagnosis of developmental co-ordination disorder.”

30. In 2014, when the Claimant was 9 years of age, the Claimant’s GP, Dr Burrows, reported that the Claimant had difficulties communicating with others, coping with changes or social engagement and appropriateness of behaviour [270-271].
31. The Claimant achieved good grades at school [386] and, in June 2016, the Claimant graduated from Aberystwyth University with a First Class Honours degree in Business Economics, having some years earlier changed course from Economics due to the difficulties that the maths modules in that particular course presented for him.
32. In October 2016, the Claimant’s University Tutor, Dr Choudhury provided a reference to the Respondent for the Claimant’s application for volunteering work with them, in which he described the Claimant as doing ‘*very well in both curricular as well as co-curricular activities*’. He also commented that he possessed ‘*good communication skills*’.
33. In October 2016, the Claimant commenced a six month post graduate voluntary internship with the Respondent and, on 13 February 2017, was employed as a Finance Assistance by the Respondent.
34. By April 2019, the Claimant was reporting difficulties in the workplace and on 5 April 2019 had one day off work reporting his absence as ‘*stress*’ [267]. At around this time, the Claimant moved departments within the Respondent Council.
35. In June 2019, the Claimant was referred by the Respondent to Occupational Health [269] and to Remploy. The Claimant says that he had no explanation from the Respondent why these referrals were made. None have been forthcoming during this hearing or are evident from the documents in the Bundle. The referral letter to occupational health provides no assistance. Either way, the Claimant did not attend the occupational health appointment and there is no clear evidence before me why the Claimant was referred to Remploy at this point or what the referral achieved.

36. The Claimant had a further 4 days off work in July 2019 [267]. The reason for the sickness absence was a virus and not relevant for the purposes of these deliberations.
37. On 16 August 2019, the Claimant was referred by his GP to the Community Mental Health Service, regarding an episode of possible psychosis in June that year. It is not necessary to repeat the report of the episode within the body of these written reasons, but the detail of the referral letter sets out the Claimant's mother's concerns regarding the Claimant's behaviour that resulted in the referral, and I incorporate its contents by reference [266]. The Claimant failed to make contact with the Mental Health Services following that referral and was a consequence discharged [264]. The Claimant does not rely on this suspected psychosis to support his claim that he is a disabled person – it was a 'one-off' event unrelated to his impairments.
38. On 23 September 2019, the Claimant was informed that his fixed term contract would not be renewed on 31 December 2019 and he was placed on the redeployment register.
39. From 24 October 2019 to 4 November 2019, the Claimant did not attend work and submitted a FIT note for depression and stress.
40. In December 2019, the Claimant was again referred to Occupational Health and on 3 December 2019 met with the Occupational Health, Safety and Wellbeing Manager. No specific occupational health advice appears to have been requested or indeed provided, but, following the consultation with the Claimant, the Manager confirmed that she had provided the Claimant with a copy of the NHS Community 24 hour helpline and that he had been encouraged to discuss any concerns regarding his emotional health with his family of his GP [263].
41. In November 2019, an investigation was undertaken to establish if the work culture subjected the Claimant to a disrespectful workplace and as part of that investigation statements were taken from the Claimant who described his autism as '*light*' [358] and that he considered he had '*minor disabilities*' [366].
42. For completeness, although I was not taken to them in live evidence, statements were also taken from work colleagues as part of that investigation and were contained in the Bundle, some of whom reported the following:
- a. The Claimant found it difficult to interact with people and social interaction, that he wasn't good at taking calls even when a script was provided [339];
 - b. A colleague considered that he 'blanked' them when passing him [343]; and
 - c. that the Claimant was 'socially awkward' [349].

Impact Statement

43. Within his impact statement [113] the Claimant explained that he now lives at home with his mother, which I have taken to mean since the latter part of his University days when he returned home, and for the large part is reliant on her.
44. He has no real friends with whom to interact. He finds it difficult to interact with people, and gave an example of how he becomes anxious when meeting new people and for the majority of his time, he stays at home and avoids social functions, even family functions as a consequence.
45. The statement included examples of how the Claimant:
- a. finds it 'almost impossible to make small talk' and that he struggled to identify with people and show interest in topics which they may wish to talk about.
 - b. took comments literally and how his mother had to explain a particular social interaction that the Claimant had experienced when he had been looking at a girl.
 - c. Struggled to maintain eye contact and engage with others in the workplace due to difficulties in communication.
 - d. did not understand office banter and was not interested in small talk.
 - e. If he has to use public transport, struggles to ask for direction and assistance;
 - f. With regard to telephone communication, he explained in response to a question from me, that he needed to adopt a system of writing things down and making notes to properly function in taking telephone calls which he finds difficult.
46. In relation to his co-ordination, the Claimant gave examples of:
- a. how he needed assistance with cooking as whilst he is capable of using the microwave, he cannot chop vegetables, nor use a tin opener unpeel or open packets. He cannot cut bread or peel bananas.
 - b. How he is unable to follow an unfamiliar journey without accompaniment and he rarely leaves the house unaccompanied. He is accompanied to appointments, including doctor appointments by a member of his family
 - c. How he struggled to process information and struggled when there is inconsistency to set processes and how he had to adhere to strict routine is not able to move from one task to another and takes longer to learn new tasks, giving an example of how he struggled to use a telephone headphone after using a telephone handset.

47. Mr Garrett invites me to be cautious regarding the evidence contained in the Impact statement in the context of the documents in the Bundle, such as the ET1 the Health Questionnaire and the reference from the Claimant's tutor, Dr Choudhury, and the Claimant's own statements made to the Respondent whilst still employed by the them, that his disabilities were 'minor' and that his dyspraxia was 'light'.
48. In that context, the Claimant was cross-examined on his time at University and in particular on the response that the Claimant had made to a questionnaire from Dr Tunstall that he had 'significant problems' at University [140]. At first, it appeared from the responses the Claimant gave to questioning from Mr Garrett, that the reference that the Claimant made to 'struggling' at University related to the content of the academic course itself only. However as questioning continued I was persuaded that despite the content of the reference that Dr Choudhury had given in relation to his communication skills, the Claimant had in fact struggled at University with relationships, socialisation and communication and that the 'struggle' did not just relate to the course itself. In response to a question from me, he spoke of how in University, he didn't have much experience with face to face communication before he had started work as he had no friends and when in lectures there had been no pressure to interact with people but that once he entered the workplace, it was a '*step up in difficulty*' for him and he struggled with face to face communication.
49. I accepted the evidence given by the Claimant in his statement and in live evidence in response to questions as reliable. I was not persuaded that an academic tutor would have any ability to comment on the Claimant's extra curricular engagement (his reference being limited to curricular and co-curricular engagement) or indeed his social interaction and communication with his peers and placed limited weight on his reference as accurately presenting a rounded portrait of the Claimant's communication whilst at University.
50. The Claimant was also cross-examined on how he could have lived independently at University for his period of study when his evidence contained in his impact statement referenced difficulties in cooking and looking after himself. The Claimant explained that during his time at University, whilst he did live away from home independently, his mother continued to undertake his weekly shop for him, ordering on-line ready made meals for him to microwave and that he did get lost a few times and needed help whilst living there. He struggled more with coping independently as time went on and at the end came home to live.
51. In his answers to the pre-employment questionnaire with the Respondent [317], in particular his answers to questions 8, 20, 25 and 26, the Claimant had given no indication of pre-existing condition or disability. I placed little weight on the Claimant's responses to the Health Questionnaire and accepted the Claimant's live evidence, given in cross examination, which

was that when he had completed the Questionnaire (at the outset of his time with the Respondent albeit incorrectly dated the Claimant's birth date), with the exception of what auxiliary aids might be needed whilst he understood the questions, he was not aware at that point of how relevant the questions would be and did not believe at that time that he would have problems in work as a result of his impairments.

52. In relation to his anxiety and depression, whilst the impact statement referenced the Claimant suffering both since being employed by the Respondent, the statement contained little evidence of what impact those impairments had on the Claimant's day to day activities. The Claimant did indicate that he 'struggled to sleep', but contained no information of when this started and how often this arose.
53. Whilst he referenced that there had been occasions when he couldn't be bothered to dress, it was clear that this arose in the period after his employment had ended with the Respondent.
54. Whilst the Claimant did refer to feelings of anxiousness (paragraph 23 of the Claimant's witness statement [116]), this related to a change in meeting time which had upset the Claimant, and a reaction to having to undertake certain tasks in work (e.g. use the photocopier (paragraph 29)).

Disability – Conclusions

55. The Respondent places reliance on the fact that:
- a. the Claimant had ticked that he did not have a disability at Box 12 ET1 Claim Form [79];
 - b. the Claimant's own reference to his disabilities being not 'major; and 'light'
56. In relation to the ET1 Claim form, the failure to tick the disability confirmation at Box 12 was in direct contradiction to the fact that the Claimant had ticked in ET1 Claim Form Box 8.1 [76] that he was bringing a disability discrimination claim and had articulated a disability discrimination complaint at Box 8.2 [77]. I did not consider the contradictions in the ET1 Claim form to be a relevant consideration as a result and little more than an error that was inexplicable and not because the Claimant genuinely did not consider himself to be disabled.
57. Dealing firstly with the Dyspraxia/Developmental Co-Ordination Disorder and Autism Spectrum Condition, by their very nature these conditions are lifelong conditions. The Respondent disputes however that the Claimant has demonstrated that either impairment had a substantial adverse effect on the Claimant's normal day to day activities.
58. I was not persuaded that this case had all the hallmarks of a Claimant who was coping and able to function as has been submitted by the Respondent. Whilst I accept, as suggested by Mr Garrett, that struggling to cope with

living away from home is something that many independent adults would be familiar with, I accepted the live evidence from the Claimant which was that whilst the Claimant had coped living from home for a period at University, he struggled and had considerable support from his mother during this time. This placed the difficulties that the Claimant experienced at a different level to the everyday routine lack of familiarity and independence. I was satisfied that even if the Claimant had coped with how his impairments had impacted on his day to day activities during his full time education, once he left the confines of that protected environment, it caused a greater impact on the Claimant's day to day activities, which became even more marked.

59. Whilst the Claimant had referred to his disabilities as being not 'major' and 'light', I was not persuaded that this should impact on my consideration of whether the Claimant was a disabled person or undermined the evidence that the Claimant now gave in relation to the impact on day to day activities. The Claimant gave his evidence candidly. I accepted the Claimant's evidence that whilst the Claimant and lived with his conditions and functioned to an extent independently, these impairments had a significant impact on his day to day activities particularly once he become an adult out of full time education.
60. I was satisfied that the Claimant had demonstrated that the impairments from both his ASD and his Developmental Co-Ordination Disorder/Dyspraxia did have a substantial adverse impact on the Claimant's day to day activities.
61. In coming to this conclusion I took into account that the threshold of what is substantial is low; it is more than minor or trivial.
62. Where an individual's condition impacts on his ability to undertake basic every day functions of communication and social interaction, such that he is having difficulty in understanding normal social interaction and having significant difficulty in taking part in normal social interaction and communicating with others on a social basis, and that his impact extends to him persistently wanting to avoid people, I was persuaded that impairment had a substantial adverse impact on the Claimant's day to day activities and the Claimant was disabled by reason of his ASD.
63. Having accepted the evidence from the Claimant regarding the impact of his developmental co-ordination disorder on his ability to prepare a meal for himself because of his restricted ability to do things like open cans or packaging or prepare a meal or even peel a banana, I concluded that this had a substantial impact on the Claimant's day to day activities.
64. In addition, when viewed cumulatively with the impact that this impairment had on the Claimant's ability to following simple route plans, however infrequently that arose, the difficulty the Claimant had in following simple instructions with regard to the photocopier and telephone calls, I was persuaded that, whilst each of those might not have a substantial effect on

day to day activity in isolation, when taken cumulatively, resulted in an overall substantial adverse effect.

65. Taking into account the purposive approach and the need to focus on what the Claimant cannot do, I concluded that there was a substantial adverse effect on the Claimant's normal day to day activities in respect of both impairments and that these effects were long term.
66. The Claimant was therefore a disabled person by reason of his ASD and Developmental Co-Coordination Disorder (dyspraxia) at all relevant times.
67. With regard to the Claimant's stress-related anxiety and depression, I was not persuaded that the Claimant had proven on the basis of the evidence before me, that he met the s.6 Equality Act 2010 definition. I shall deal with this briefly:
 - a. Whilst there was evidence to demonstrate that the Claimant did suffer from periods of stress-related anxiety, there was no evidence to indicate how often this arose or the impact that this had on the Claimant's day to day activities.
 - b. Whilst there is reference to the Claimant being on a dosage of anti-depressant by March 2020, and the Claimant had indicated that he was off from work with depression and stress in October/November 2019, I have no detailed medical records to make any findings as to the form of depression, how long it had lasted and/or when his anti-depressants had been prescribed to the Claimant to assist in determining whether the Claimant suffered from depression at the relevant times and when that started.
 - c. I draw no conclusions from the suspected psychotic episode in the summer of 2019 and the Claimant in any event does not rely on that.
 - d. There was no evidence from the Claimant of when such impairments of either stress-induced anxiety or depression had started to impact on his sleeping or how often.
 - e. The Claimant's evidence in relation to problems sleeping did not indicate an impact that was substantial and the inability to dress did not arise until after his employment had ended and was not, as a result, a relevant consideration. The Claimant's absences from work were insignificant.
 - f. I was not persuaded that the Claimant had demonstrated that the effect of either met the definition of 'long term'.
68. In any event, I concluded that, on the evidence before me, the stress-related anxiety, and indeed the references to depression, were more indicative of a stress-reaction to the situations that the Claimant found himself in – whether a new task or having to deal with the ending of his

employment, than an impairment that had a substantial adverse impact on the Claimant's normal day to day activities.

69. On that basis, it was my conclusion that the Claimant had not met the definition of a disabled person by reason of his anxiety and/or his depression.

Employment Judge RL Brace

10 February 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 12 February 2021

.....
FOR EMPLOYMENT TRIBUNALS