



EMPLOYMENT TRIBUNALS

Claimant: Mr M Neto

Respondents: 1. Packaging Automation Limited
2. Jayne Thompson

Heard at: Manchester

On: 18 October 2021

Before: Employment Judge Johnson

REPRESENTATION:

Claimant: Mr S Martins (Lawyer)

Respondents: Ms K Barry (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not disabled within the meaning of section 6(1) the Equality Act 2010.
2. The claim of disability discrimination must therefore fail, and accordingly this complaint is dismissed.
3. The claim insofar as it relates to the second respondent is dismissed as there are no complaints of discrimination under the Equality Act 2010 in these proceedings.
4. The complaints of breach of contract and unlawful deduction from wages are unaffected by this decision and will proceed to be determined at the final hearing.

REASONS

Introduction

1. The claimant was employed by the first respondent as a Store Assistant from 26 July 2019 until his employment terminated on 8 June 2020.
2. The claimant presented a claim form to the Tribunal on 4 September 2020 naming both respondents and following a period of early conciliation from 15 July 2020 until 10 August 2020. In his claim form he brought complaints of disability discrimination, breach of contract and unlawful deduction from wages. He identified his disability as being a '*stammering speech impediment and anxiety*'.
3. The first respondent and second respondent presented a joint response which resisted the claims being brought and in particular disputed that the claimant was disabled within the meaning of the Equality Act 2010.
4. The case was subject to preliminary case management by Employment Judge Aspinall on 22 December 2020 when she listed this case for a final hearing of five days from 4 to 8 July 2022. She also made Case Management Orders concerning the disability issue and the claimant provided an impact statement and medical evidence in accordance with those orders.
5. On 13 April 2021 the respondent advised that disability was not conceded, and an explanation was given as to why they continued to resist this particular matter.
6. On 9 June 2021 Employment Judge Aspinall listed the case for a preliminary hearing today in order that the Tribunal could determine whether or not Mr Neto, the claimant, was disabled within the meaning of the Equality Act 2010.

Issues

7. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide the following:
 - (1) Did the claimant have a physical or mental impairment?
 - (2) Did it have a substantial adverse effect on his ability to carry out day-to-day activities?
 - (3) If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - (4) If so, would the impairment have a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
 - (5) Were the effects of the impairment long-term?
8. At the beginning of the hearing, the respondents confirmed that they accepted the claimant had a condition of stammering or stuttering which could amount to a physical or mental impairment.

9. Additionally, they also acknowledged that in view of the claimant's disclosure of limited medical evidence (a letter from Dr Nwoji dated 7 August 2020), the condition was something that he had had since at least 2010 and therefore it should be considered to be a long-term condition.

10. The claimant confirmed that the only complaint of disability that he was making related to the stammering or stuttering condition. His reference to 'anxiety' in his claim form related to the *effect* the condition of stammering or stuttering could have upon his mental health. Anxiety was therefore *not* a separate complaint of disability. The Tribunal was therefore left to consider the much narrower question of whether the condition of stammering or stuttering had a substantial adverse effect on the claimant's ability to carry out day-to-day activities.

Evidence used

11. Mr Neto gave evidence and did not call any witnesses. In accordance with the Equal Treatment Bench Book and the overriding objective under Rule 2 of the Tribunal's Rules of Procedure, I made enquiries about any adjustments that he felt would assist him with giving his evidence and ensuring that he could fully participate in the hearing. Although he was represented, I was conscious that given the condition we had, he may need some support with how he gave his evidence and whether cross examination by Ms Barry would need to be adjusted so that he could communicate effectively.

12. Mr Neto explained to me that he simply required time to give his answers to questions and that he should not be interrupted as he was speaking. Ms Barry confirmed that she would take account of this request and I feel that both she and myself allowed Mr Neto time to provide his answers to the questions put to him while he gave his evidence. Additionally, I made sure a number of breaks were incorporated into the day's hearing and reminded Mr Neto that he should ask for a break where he felt it would be of assistance.

13. The respondent witnesses gave evidence in the following order and were as follows:

- a) Matt Royle (stores assistant/claimant's work colleague);
- b) Howard Taylor (stores assistant/claimant's work colleague);
- c) Emilie Hale (service administrator/assisting the spares department as required);
- d) Michael Chesters (Assembly Team Leader);
- e) Dorothy Wainscott (HR and Health & Safety Manager/involved in recruitment and induction of claimant);
- f) Jayne Thompson (second respondent and Supply Chain Manager);
- g) Sam Higgins (stores team leader/claimant's line manager).

14. It should be noted that of all the witnesses who appeared before me during the hearing, it was Mr Taylor who perhaps required the most assistance in being able to give his evidence. He was helpfully very open concerning his own impairment, being a right sided hemiplegia which he described as having had since birth and which produced symptoms which he believed were similar to those experienced by someone who had suffered a stroke. I found that he needed additional time to process questions which were put to him and for an answer to be given and sometimes it was necessary to repeat questions in order that he could be certain of understanding what he was being asked. Nonetheless, his evidence was in my opinion, both reliable and convincing. It was his evidence and the evidence of the other stores staff (Messrs Royle and Higgins), which was particularly helpful as they had worked with Mr Neto on a daily basis.

15. It was unusual for a respondent to call so many witnesses at a preliminary hearing to determine the preliminary issue of disability, but this was a case where the claimant's asserted disability impacted upon communication and ability to focus at work. All of the respondent witnesses called provided useful evidence concerning how they saw the claimant's condition impact upon his day to day activities and how it affected his performance. It was nonetheless important to listen carefully to what Mr Neto said himself and in particular the difficulties which he himself found in the workplace as a person with a condition of stammering or stuttering.

16. A hearing bundle was provided for use at the preliminary hearing and which had been agreed by the parties. It primarily contained the procedural documents and the witness statements, but also a single item of medical evidence, being a letter from Dr Nwoji, who was the claimant's GP and it was dated 7 August 2021 and produced following the effective date of termination and presumably in contemplation of these proceedings.

Findings of Fact

17. The claimant Mr Neto has had a history of stuttering from childhood. He gave evidence to explain that because there was a history of this condition amongst other male members of his family, including his father, it was not really noticed by his family or friends as he was growing up. However, in or around 2010 he began a course at college in mechanical engineering. His tutor noticed a stammer and suggested to him that he could go to his GP and obtain support for that condition.

18. Mr Neto had produced limited medical information and it consisted solely of a letter from his GP Dr Nwaji dated 7 August 2020, which confirmed that he had had this condition for many years and that he underwent treatment with a speech and language therapist in 2010.

19. Mr Neto had a number of sessions with the speech and language therapist but was eventually discharged and informed that his stammering amounted to a lifelong condition. His therapist spent some time helping him develop strategies to limit the effect of the stammering and the claimant confirmed that he used the prescribed strategies which included practising talking into a mirror, talking with headphones on and learning to pause before he spoke in order that he could gather

the necessary words and speak clearly without any stammering taking place. He said that this was a condition which he had managed reasonably successfully since the treatment 10 years ago, but he was aware that it was something that would not go away, and this could cause him anxiety. He also said that when he became anxious it became much more difficult for him to deploy his strategies and for him to avoid stammering. Anxiety could also be induced by certain situations which he found stressful and he said that this made his strategies less effective and his stammering could reappear.

20. Mr Neto provided little evidence in his impact statement concerning the day to day activities other than those relating to work, of how his condition would adversely affect him. He also said that his condition could cause him to have '*...difficulties with understanding, writing, sequencing, order and concentration*'. Mr Neto also made reference to avoidance strategies and that he could overact if frustrated.

21. Mr Neto managed to continue with his university course but explained that while the first year was relatively easy, he found the second year difficult and had to re-take it again. He found the third year to be particularly difficult and challenging and ultimately decided to leave university without taking his degree. I did not hear evidence that his condition of stammering or stuttering had contributed to his decision not to complete his course. Since he left university, he was able to work on a regular basis and in July 2019 he was able to secure employment as a Store Assistant with the first respondent.

22. I accept that Mr Neto notified the recruitment agency that placed him with the first respondent of his stammering, and he wanted his employer to be aware of it. The respondents' HR Manager, Dorothy Wainscott, confirmed that this was the case, although she was clear that she did not notice that Mr Neto stammered, although she confirmed that she did not see him or spend time with him on a regular basis, and her daily encounters with him might be limited to saying hello. Mr Neto said that background noise could be an issue which affected his stuttering, but Ms Wainscott was clear that the warehouse where he worked was noisy and she was not aware of any occasion where he had become overwhelmed. As a manager with responsibility for HR, I accept that issues of this nature would have been communicated to her had they posed a problem. This belief was supported in the evidence from Mr Neto's colleagues in the stores team.

23. The Store Assistant role had three main roles and The Stores Team Leader Sam Higgins provided details of what they were.

- a) There was '*booking in*', which involved dealing with items purchased and checking that they corresponded with delivery notes. Discrepancies could require a call being made by stores staff to chase the supplier.
- b) The '*Dispatch*' role involved picking the order, packing it, entering the details on the computer and arranging for a courier to take the product.
- c) The '*Kitting*' role would involve gathering the necessary parts delivered so that they could be supplied ready for assembly. Mr Higgins said that a list of the Kitting jobs would be provided each week and Mr Neto would print a picking list, pick the parts and kit them together in a box, before issuing.

Mr Higgins said that Mr Neto would always work in a team of four and the roles each assistant did would *'alternate'* on week by week basis.

18. Mr Neto gave evidence concerning those parts of his role which he found particularly difficult. These related to the making of phone calls to obtain spares, which he said was particularly challenging when dealing with someone whom he had not spoken to before. He also said that he found it difficult to interact with other colleagues at the workplace who came to the store seeking parts, especially as he found his workplace noisy and he could become overwhelmed and angry. Finally, he said that all members of staff had to attend a daily meeting where they would take it in turns to present performance information from a whiteboard to other members of staff. This meeting would normally include members of the management team. Mr Neto said that he had to do this every few days and it was a source of particular anxiety and he felt that *'...I wasn't coming over clear enough to other staff'*. He said that all three of these activities were particularly difficult and he struggled to perform them.

24. Each of the respondent witnesses confirmed that Mr Neto's speech could involve pauses and his stores colleagues all confirmed that from time to time there could be a slight stammer. However, none of them said that it was particularly noticeable or caused particular difficulties in communication. His line manager Mr Higgins acknowledged that he did notice a slight delay in Mr Neto speaking, but never felt a speech impediment was present. He was clear in his evidence that he had never seen him anxious or angry and if anything, Mr Neto could be *'pretty laid back'*. He did not witness any evidence of him struggling at work and the only issue where he was described as being frustrated was when he refused his holiday request. As his line manager, I accepted that Mr Higgins was well placed to comment upon Mr Neto's ability to work and although he might get things wrong, there was no evidence that his speech impediment was noticeable or affected his work in any significant way. This evidence was supported by his other stores' colleagues.

25. I was struck by the range of employees who gave evidence in support of the respondents' case. I noted that it was not just management but also members of staff who would visit the claimant in the stores area, and perhaps more importantly his work colleagues who worked in the stores with him. What was clear to me was that all of his stores colleagues found speaking at the daily meeting to be anxious, but they did not accept that Mr Neto came over poorly when speaking and on balance I accept that this was the case, even though Mr Neto was worried about how he spoke when it was his turn to present.

26. It is not surprising that Mr Neto's work colleagues acknowledged that he stammered from time to time as it was they who worked with him on a regular basis, would spend the most time speaking with him and who would be most likely to encounter evidence of his speech impediment. However, while Mr Neto was clearly anxious about his condition and the effect it might have upon his ability to communicate (together with the possible reaction that he might get from work colleagues and customers), it appears that he was able to continue working and perform the tasks which he described, including the three tasks which he said caused him the most difficulties. In relation to those matters there was no evidence to suggest that work colleagues, or indeed customers, found Mr Neto difficult to

understand or found it difficult for him to perform his job. This was confirmed by Ms Wainscott who would have no doubt have become aware of any problems by virtue of her HR and health and safety roles. But the absence of any perceptible difficulties in Mr Neto being able to carry out his job was also confirmed by the other former work colleagues called by the respondents.

27. Mr Neto continued to work and was dismissed on 8 June 2020 in relation to a particular incident, which it is not necessary to consider in detail for the purposes of today's hearing. This incident did not appear to relate to his speech impediment in terms of poor communication, behaviour or anxiety. I did note that there was some suggestion by his line manager that pauses in his speech might arise when he had done something wrong and where he appeared to be trying to find the best words to support his position in those circumstances. However, this way of speaking did not appear to be something which prevented Mr Neto from communicating and if anything, it perhaps gave the impression that he was thinking harder about the answer that he was going to give rather than producing an answer which was unintelligible or confusing.

The Law

28. Section 6 of the Equality Act 2010 provides that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

29. The general approach to be adopted in relation to section 6 when it is being considered by a Tribunal was considered in the case of **Goodwin v Patent Office 1999 ICR 302, EAT**. While this Employment Appeal Tribunal decision included an analysis of the predecessor provision in the Disability Discrimination Act 1995, the four components which it describes remain relevant in relation to section 6 of the Equality Act 2010 as follows:

- a) In relation to the *impairment* condition, the Tribunal should consider whether the claimant has an impairment which is either mental or physical.
- b) In relation to the *adverse effect* condition, the Tribunal should ask itself whether the impairment affects the claimant's ability to carry out normal day-to-day activities and does it have an adverse effect upon them?
- c) In terms of the *substantial* condition, the Tribunal should ask whether the adverse effect is substantial.
- d) In relation to the *long-term* condition the Tribunal should ask itself whether the adverse effect was long-term.

30. In addition, there are also two important sources of extra statutory guidance which are the *Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability*; and the *Equality Act 2010 Code of Practice*. Paragraph 12 of Schedule 1 of the Equality Act 2010 requires a Tribunal to take account of such guidance as it thinks is relevant.

31. Ms Barry referred in her submissions to the recent Employment Appeal Tribunal case of ***Elliott v Dorset County Council* [2021] 4 WL UK 10**. Although this case related to a claimant who had Autistic Spectrum Condition, it provided a helpful description of how the term “substantial” (in relation to assessing the extent of an impairment for the purposes of a disability discrimination claim), was defined by the Equality Act 2010 section 212 as “more than minor or trivial”. It provided that where the statutory definition was met, on a consideration of the ordinary meaning of the words, that must take precedence over the 2010 Act guidance on matters to be taken into account in determining questions relating to the definition of disability; and the Equality Act 2010 Code of Practice, including the reference to the “general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people”.

32. Mr Martins referred to the case of ***Goodwin*** (see above), in his submissions and the guidance provided in that decision concerning the determination of a disability.

Discussion

33. Firstly, as discussed above, it is not necessary for the Tribunal to spend time dealing with the question of whether this condition of stammering or stuttering was long-term in nature. This has been conceded by the respondent following its consideration of the letter provided by the claimant’s GP, Dr Nwoji, dated 7 August 2021. This was a reasonable concession to make and clearly this is a condition that has been with Mr Neto for much of his life. It is fair to say that it is a lifelong condition.

34. Although there was no dispute that the condition of stammering or stuttering was a physical or mental condition, I did take into account the description provided within Equality Treatment Bench Book appendix B, providing a summary of medical conditions which might amount to a disability under the Equality Act 2010. While this Book was a document produced to assist the judiciary in supporting parties with disabilities (and indeed other conditions and circumstances), which might affect their ability to fully participate in a hearing, I am satisfied that it provided a useful summary of the precise nature of stammering or stuttering.

35. It notes that stammering can also be referred to as stuttering and describes the condition as being ‘...a neurological condition which causes a person to repeat, prolong or block on sounds and words when speaking. The most common type of stammering starts in early childhood when speech and language skills are developing. At least 8% of children will start stammering, but roughly two in three children will stop stammering at some stage.’ While it is estimated that stammering affects about one in 100 adults, men are 3-4 times more likely to stammer than women.

36. Helpfully, the Equal Treatment Bench Book notes that a ‘...person may have times when they stammer and times when they speak fairly fluently. Stammering varies in severity from person to person’. It may also be difficult to know to what extent an individual is working hard to hide a stammer. Indeed, it mentions that the

impact of other people's responses may have caused lifelong feelings of fear, shame and humiliation. This can leave many who stammer going to extraordinary lengths to change what they want to say or to avoid speaking altogether. Some people who stammer can hide it completely even from those closest to them and can appear fluent. This was described as being "covert" or "hidden" stammering.

37. Stammering in adults and children can also be accompanied by secondary behaviours caused by the increased physical effort involved in speaking or by the act of trying not to stammer to avoid ridicule or over negative social consequences. These behaviours can include bodily tension and involuntary face, head or body movements and the description goes on to say that, '*...[p]eople might change words, use filler words such as "um", "eh", "you know", "actually" etc., or avoid certain words they usually stammer on. Hesitation in speech can make it seem as though the person is thinking about what to say next rather than struggling to talk. People might claim to forget what they want to say when they are having trouble or change the style of their speech to prevent stammering, for example by speaking very slowly or softly. They may also talk very fast.*'

38. It should be noted that during the hearing Mr Neto presented himself exceptionally well and did not give the impression that he was struggling with finding words or being able to communicate. Indeed considering that a giving evidence at a Tribunal could be considered to be one of the more stressful experiences that an individual could participate in, (which is precisely the reason why the Equal Treatment Bench Book was created), I consider that Mr Neto performed extremely well during the hearing and was able to answer the questions put to him clearly and in a thoughtful and clear way.

39. While this might be the case, I did take into account the fact that despite his coherent presentation in his evidence, Mr Neto may have experienced a heavy 'mental load' in trying to ensure that his stammering does not become obvious and I needed to consider the evidence available to me concerning how his condition affected him in his day to day activities at the material time, namely during his employment with the respondent.

40. A problem in this case was that there was limited medical information available to me and within it, limited content concerning the magnitude of Mr Neto's impairment. In accordance with the Case Management Order of Employment Judge Aspinall, Mr Neto produced a single letter from Dr Nwoji dated 7 August 2021. While it was helpful in confirming that Mr Neto had a condition of stammering and that it was long-term in nature, it did not really deal with the question of whether it had a substantial adverse effect upon his day-to-day activities. The speech and language therapy was clearly something which had taken place but it was very much 'historic', having taken place in 2010.

41. Additionally, while Mr Neto had provided an impact statement, it did not go into sufficient detail about the impact that his condition had upon his day-to-day activities at work. I was therefore left with the oral evidence of Mr Neto and of course that of his work colleagues who came from a number of disciplines in that workplace and who dealt with him in different and diverse occasions at work.

42. Ultimately, while I do not doubt that Mr Neto has found the condition of stammering to be a challenging condition which has affected his life and which has required him to develop strategies, the available evidence on balance, led me to conclude that his condition did not severely impact him at work. The three activities which he said caused him problems, did not appear to be noticeable in any significant degree to those work colleagues who gave evidence. It was fair to say that there was some attention given by several of the respondent's witnesses to the pauses which could arise in conversation and also some occasional mild stammering noticed by his work colleagues in the stores. However, this did not result in a communication difficulty at work and it was certainly not a matter which caused difficulties in terms of performance.

43. Ms Barry was very clear in her submissions that this was a case for which the definition given in section 212 of "*substantial*" (being something that was "*not minor or trivial*"), was designed to cover. I did take into account the guidance concerning the definition of disability. I noted that I did not have evidence to suggest that the claimant took longer to carry out his activity or that the condition affected his behaviour at work in a particular way. I acknowledged that he was developing strategies to assist him in reducing the amount of stammering which took place. However, from the evidence which I had before me I was satisfied that this condition did not have a substantial adverse effect on day-to-day activities which he carried out at work and which he had referred to in his evidence.

44. The appendix to the guidance included an illustrative and non-exhaustive list of factors which if experienced by a person could be reasonable as regarding to having a substantial adverse effect on normal day-to-day activities. A parallel list was also provided within the appendix, where the factors identified would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities.

45. In terms of factors which *could* be substantial, I noted that an inability to converse or give instructions orally in the person's native spoken language might be relevant. This did not appear to be the case with the Mr Neto in relation to his condition of stammering. However, in relation to the factors where it would *not* be reasonable to consider the condition as having a substantial adverse effect, I noted that the inability to speak in front of an audience simply as a result of nervousness should not be substantial. Additionally, an inability to converse orally in a noisy place would not amount to a substantial adverse effect. It should be noted that having heard the evidence from the witnesses during the hearing, I was not satisfied that either of these factors actually caused Mr Neto significant difficulty at work.

46. There was no evidence to suggest that Mr Neto actually displayed any obvious anxiety or any difficulty in presenting his evidence at the daily meeting which he described to the Tribunal. Indeed his colleagues in the stores who also had to take turns at performing this task also found that activity stressful, and I was left with the conclusion that the claimant performed no differently to them, and potentially may have even performed better than them. In relation to the telephone calls, there was no evidence to suggest that the claimant could not perform the tasks given to him by his manager, and I was satisfied from the available evidence that he was able to perform those duties without causing any difficulties for potential customers or clients, and certainly there was no evidence of any complaints being received.

47. Finally, in terms of transactions which took place at work concerning the provision of spares from the stores, there was no evidence that the claimant was unable to communicate. There was some evidence to suggest that once individuals became aware of the claimant's stammer, people might be aware of a slight difference in how he spoke. Importantly, based upon the evidence that I heard, I accept that it was a *slight difference*, rather than something which impacted upon his ability to communicate and would normally be noticed in relation to the pauses which might take place before he provided an answer or between sentences. His colleagues in stores, did notice a stammer, but again it was something which was not considered to be significant and which did not affect his ability to do the job.

48. Accordingly, and on balance of probabilities, this was a case where insofar as Mr Neto's ability to do his job was concerned, the condition of stammering or stuttering was something which was not substantial and did not have an adverse impact upon his day-to-day activities.

49. Mr Neto should note that in considering the evidence before me I am not seeking to belittle or diminish the impact that this condition has upon him. It has no doubt been something which he has spent a great deal of time trying to manage and which at times, especially in the past, has caused him some considerable dismay.

50. However, insofar as the relevant period is concerned in this case I am unable to conclude that this is a condition which is substantial in terms of the adverse impact it has upon day-to-day activities. For this reason the claim that the claimant was disabled by reason of stammering or stuttering must fail. This of course has the additional consequence that the complaints of disability discrimination which rely upon the existence of this protected characteristic must also fail.

Conclusion (and case management orders made in accordance with the Tribunal's Rules of Procedure)

51. Accordingly, the claimant is not disabled within the meaning of section 6(1) of the Equality Act 2010. This means that the complaint of disability discrimination is not well-founded and must be dismissed.

52. This also means that the claim insofar as it relates to Ms Thompson must also be dismissed as no complaints brought under the Equality Act 2010, remain in these proceedings.

53. The complaints of unlawful deduction from wages and breach of contract remain unaffected by this decision and shall proceed to the final hearing.

54. I note that the final hearing has been listed for five days from 4 to 8 July 2022. Taking into account the dismissal of the disability discrimination claim, it is unlikely that the case will require more than one day of hearing time. Indeed, it may only require two- or three-hours' hearing time.

55. On this basis I would invite the parties to respond **within 14 days** of receiving this Judgment confirming to me whether they are satisfied that the hearing date should be retained but with a reduced time allocation being given. However, the

parties may prefer to request that the hearing date be brought forward if the Tribunals Listing Team will permit it, and for it to be listed with a shorter time estimate earlier during 2022.

56. Similarly, the Case Management Orders made by Employment Judge Aspinall on 22 December 2020 were suspended in order that the preliminary issue could be determined. I would also ask the parties to return to me **within 14 days** confirming (agreed if possible) a suggested list of revised Case Management Orders and dates for compliance in order that the case can be prepared for the final hearing to determine the remaining issues.

Employment Judge Johnson
Date: 29 October 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
2 November 2021

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