



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant and Respondent

Mr M Ives

Lidl Great Britain Limited

HELD AT: Croydon (by CVP)

ON: 3 March 2022

BEFORE: Employment Judge K Bryant QC

Appearances:

For the Claimant: In Person

For the Respondent: Ms A Beech (Counsel)

RESERVED JUDGMENT

1. The Claimant was not disabled within the meaning of the Equality Act 2010 by reason of dyslexia or post-traumatic stress disorder at any time material to his claims for direct disability discrimination, harassment related to disability, and failure to make reasonable adjustments.
2. However, the Claimant was disabled within the meaning of the Equality Act 2010 at all times material to those claims from 24 March 2020 onwards by reason of anxiety and depression.

REASONS

Introduction

1. This Preliminary Hearing ('PH') was listed to consider the question of whether the Claimant was disabled within the meaning of the Equality Act 2010 ('EqA') at the times material to his claims of disability discrimination and/or harassment and for failure to make reasonable adjustments. Having heard evidence from the Claimant and submissions from both parties, there was insufficient time on the day of the PH to reach a decision on this issue; the

decision was therefore reserved and further case management orders were made which will be set out in a separate document.

2. The times material to the Claimant's disability discrimination claims appear to the tribunal to be the period from around May 2020 leading up to the Claimant's dismissal which was with effect from 21 July 2020. This was suggested more than once during the course of the PH and the Claimant did not disagree.
3. Relevant steps in this claim which have led to this PH include the following:
 - 3.1. The Claimant's ET1 was presented to the tribunal on 22 October 2020, in which the Claimant indicated that he wished to raise a claim for disability discrimination but did not indicate what impairment(s) he relied on as giving rise to a disability at any material time.
 - 3.2. By letter dated 19 April 2021 the tribunal asked the Claimant, amongst other things, to provide full particulars of his claims for disability discrimination.
 - 3.3. This led to a letter from the Claimant dated 1 May 2021 which referred a number of times to anxiety and depression and also said that he suffered from dyslexia.
 - 3.4. A PH took place by telephone on 12 October 2021. The Claimant was present on that call. The tribunal noted (paragraph 13) that the Claimant said that his disability arose from dyslexia and post-traumatic stress disorder ('PTSD'). The Claimant was ordered to provide, amongst other things, detailed information concerning each of his claimed disabilities, and also copies of GP and/or other medical records and/or other evidence in so far as they were relevant to the question of whether he had a disability at the times material to his claim.
 - 3.5. The Claimant sent a document on 14 November 2021 which he had written and which contained, amongst other things, further information concerning his claimed disabilities; as well as dyslexia, he referred in that document to 'Depression and Anxiety PTSD'.
 - 3.6. The Claimant then sent two further documents under cover of an email on 6 December 2021 which were a report dated 22 September 2020 from Dr Jacquie Hetherington, a clinical psychologist (the Claimant says that this report had been prepared for the purpose of a civil claim arising from a road traffic accident in August 2019), and a printout of the results of an online dyslexia assessment by Davis Dyslexia Association International.
 - 3.7. As it had been ordered to do, the Respondent notified the Claimant and the tribunal by letter dated 18 January 2022 of its position on disability, which was that it did not accept that the Claimant was disabled at any material time by reason of dyslexia or PTSD.

Relevant statutory provisions and guidance

4. Disability is defined in section 6 of the EqA as follows:

‘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.*
- ...
- (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.’*

5. Schedule 1 to the EqA includes the following provisions:

‘PART 1 DETERMINATION OF DISABILITY

...

Long-term effects

- 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.*

...

Effect of medical treatment

- 5(1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—*
- (a) *measures are being taken to treat or correct it, and*
 - (b) *but for that, it would be likely to have that effect.*
- (2) *“Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.*

...

PART 2 GUIDANCE

Preliminary

- 10 *This Part of this Schedule applies in relation to guidance referred to in section 6(5).*

...

Adjudicating bodies

- 12(1) *In determining whether a person is a disabled person, an adjudicating body must take account of such guidance as it thinks is relevant.*
- (2) *An adjudicating body is—*
- ...
 - (b) *a tribunal;*
 - ...

...’

6. Guidance was issued in 2011 by the Secretary of State under section 6(5) of the EqA in the form of 'Guidance On Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability'. The tribunal has taken that guidance into account.

Evidence, fact-finding, discussion and conclusion

7. The only live evidence given at this PH was from the Claimant. He relied on the documents dated 1 May 2021 and 14 November 2021 which he confirmed had been written by him. He also relied on the two documents sent under cover of the email of 6 December 2021 as outlined above. He answered a number of questions in cross-examination from counsel for the Respondent and questions from the tribunal.
8. It became clear during the course of the PH that the Claimant seeks to rely on three conditions as giving rise to disability within the meaning of the EqA, namely dyslexia, PTSD, and anxiety and depression. He was unable to explain why the record of the previous PH noted that he only relied on the first two of those conditions, but the tribunal noted that his letter of 1 May 2021 clearly referred to anxiety and depression, and his further document of 14 November 2021 also referred to 'Depression and Anxiety PTSD', and so was prepared to consider all three conditions for the purposes of this PH.
9. In relation to dyslexia, the Claimant said in his document of 14 November 2021 that he had first been diagnosed at school when around 8 years old. In fact he accepted in evidence today that there was no formal diagnosis when he was at school but that problems with reading and writing had been noted and brought to his parents' attention and that he had been given extra support at school. A formal diagnosis, he said, did not come until some time in adulthood. In fact, the tribunal has not been provided with any medical or other evidence to indicate that a formal diagnosis has ever been made.
10. The Claimant relies on an evaluation from Davis Dyslexia Association International which the tribunal understands was produced online in June 2021. The Claimant told the tribunal that this was produced as a result of him completing some sort of online questionnaire. The tribunal has not been provided with a copy of the questionnaire or any indication as to the type of questions asked of, or answers given by, the Claimant. Nor has the tribunal been provided with any information as to how the answers to the questionnaire were analysed and converted into an evaluation, or the qualifications or experience of those who undertook the evaluation or, as may have been the case, wrote the algorithm(s) that produce the evaluation.
11. The Claimant said in evidence that he took this evaluation as giving a diagnosis of dyslexia, but the tribunal notes that the evaluation itself says that it is only an '*informal assessment*' and that if two or more of the areas analysed are assessed as being in the moderate to severe range then '*chances are it is dyslexia, and can be corrected*'. On the face of the

evaluation, it seems that all of the areas analysed were assessed as being severely affected, including reading and spelling, attention focus, and coordination and handwriting. However, on the Claimant's own evidence he has not suggested that he has a severe difficulty with any of those activities. In all the circumstances, the tribunal finds that the evaluation document is of little assistance.

12. Turning to what the Claimant himself says about the effect of dyslexia on normal day-to-day activities, he said in his 14 November 2021 document that the main issue is recognising short words, giving rise to issues with spelling, and that he 'sometimes' has difficulty expressing himself and this can cause issues with speaking in certain situations, and that he can often take longer to read things. That, in effect, was the full extent of the written evidence provided by the Claimant on this issue.
13. The Claimant said in cross-examination that he has developed coping mechanisms to compensate for his dyslexia on a daily basis. The tribunal has also seen a number of documents which were written by the Claimant in the context of this litigation, has heard the way in which he has articulated his oral evidence to the tribunal, and has also seen a copy of his CV which shows that his academic results at school were very good and that prior to joining the Respondent in late 2019 he had followed a successful career in management roles for many years.
14. Although the Claimant has had a number of opportunities to put forward clear and detailed evidence of the impact of dyslexia on his ability to carry out normal day to day activities there is no medical evidence from the Claimant's GP or elsewhere to support this aspect of his claim, and the extent of the Claimant's evidence is as summarised above. That, in the tribunal's judgment, is insufficient to discharge the burden of proving a substantial adverse impact on ability to carry out normal day-to-day activities as a result of dyslexia at any time material to the Claimant's claims.
15. The second condition relied on is PTSD. This developed shortly after a road traffic accident in which the Claimant was involved in mid-August 2019. In his document of 14 November 2021 the Claimant says that the PTSD criteria were met for a period of around 5 months. This is confirmed in the report of Dr Hetherington. The Claimant said in his oral evidence at this PH that he considers that PTSD has continued and that he is to undergo further testing, but the tribunal finds that although he suffered from PTSD, that specific condition was no longer present from around January 2020 and there is no evidence, or no sufficient evidence, to support a finding that it had recurred or was likely to recur (in the sense meant in Schedule 1 to the EqA) at any time up to and including the Claimant's dismissal in July 2020. In the circumstances, the tribunal finds that the impact of PTSD on the Claimant's ability to undertake normal day-to-day activities was not long-term in the sense required under section 6 of the EqA.

16. The third and final condition relied on by the Claimant is anxiety and depression.
17. In his letter of 1 May 2021 the Claimant referred to anxiety and depression a number of times, saying that it was triggered by the road traffic accident in August 2019. He said that he had been under medical support for more than 12 months and that he had been prescribed depression medication (Sertraline) at a dose of 200mg which was, he said, the highest of dosages.
18. In his document of 14 November 2021 the Claimant said, as noted above, that the criteria for PTSD were met for a period of around 5 months, but that he had ongoing medical treatment thereafter. He mentioned travel anxiety and impact on his mood and social awareness. He said that his condition worsened during the investigation which led to his dismissal (which appears to have commenced in around late May 2020) and following his whistleblowing (which he says was in mid-July 2020).
19. This is consistent with the evidence given by the Claimant to the tribunal at this PH. He accepted that his symptoms had improved to an extent by early 2020 and were then exacerbated by the Respondent's treatment of him in the period of a few months before, and leading up to, his dismissal. He accepted that although his dosage of sertraline was increased in around October 2019 (in fact to 150mg rather than 200mg as his letter of 1 May 2021 said) it was reduced and then stopped altogether on the recommendation of his treating psychologist. At the time of his examination by Dr Hetherington in September 2020 it was reported that he had had 6 sessions with a psychologist although more were recommended at that time. He says that he has had more sessions since then, but he accepted that the initial 6 sessions took place within a few months of the road traffic accident. It seems likely, therefore, that the Claimant had reduced and then stopped taking anti-depressant medication at some time in the first few months of 2020. This is consistent with the extract from the Claimant's GP records as set out in Dr Hetherington's report, which shows that he was seen by his GP in September 2019 and again (twice) in October 2019, that he was given a repeat prescription in mid-December 2019 and, as he accepted in evidence, that he did not then see his GP again until after his dismissal in July 2020.
20. It appears from Dr Hetherington's report that the Claimant was again taking anti-depressant medication by September 2020 but it is not clear when that restarted, although in light of the extracts from the GP records and the Claimant's evidence, it is likely that it was not until after his dismissal.
21. It is clear from Dr Hetherington's report that the Claimant suffered from significant symptoms in the period of 5 months from August 2019 in respect of which a diagnosis of PTSD has been given. These included mood disturbance, anxiety (including in relation to travel), ability to socialise and have family

interaction, and a degree of cognitive impairment. During this period, the tribunal finds, there was a substantial adverse effect on the Claimant's ability to carry out day-to-day activities.

22. Dr Hetherton gives a diagnosis of 'Other Specified Trauma- and Stressor-Related Disorder' for the period after the criteria for PTSD had ceased to be met, ie from early 2020 onwards. However, it seems clear that although PTSD as a separately diagnosed condition did not continue after early 2020, the ongoing symptoms which thereafter were given a different diagnosis were a continuation, albeit in milder form, of a set of symptoms from which he had already been suffering since the road traffic accident in August 2019.
23. By the time of Dr Hetherton's examination of the Claimant in September 2020 she reported that he had good recall of the accident and its after effects, that his mental state was intact as was orientation in time and place, that his talk was normal, and that *'He was not depressed or subdued during the interview'* and *'There were no objective indications of anxiety at the interview.'* However, she also reported ongoing symptoms including intrusive thoughts and flashbacks (albeit less frequent) mood disturbance and generalised anxiety (albeit improved with anti-depressant medication), a gradual improvement in travel anxiety which was rated as 7/10 for driving and 5/10 as a passenger (10 being maximum anxiety), a slight improvement in cognitive function and no improvement in family and social-related effects. Dr Hetherton gave the opinion that he was still suffering from Other Specified Trauma- and Stressor-Related Disorder.
24. Taking into account the Claimant's evidence and the level of symptoms indicated in the medical evidence, and assessing as best the tribunal can the level of symptoms the Claimant would have experienced if he had not been taking anti-depressant medication, the tribunal finds that there was a substantial adverse effect on the Claimant's ability to carry out day-to-day activities at the time of his examination by Dr Hetherton and there had been since his symptoms were exacerbated from around May 2020 onwards.
25. The next question, which the Respondent urged the tribunal to answer in the negative, is whether the Claimant continued to suffer from symptoms associated with anxiety and depression and which caused a substantial adverse effect on his ability to carry out day-to-day activities during the period from early 2020 until around May 2020.
26. The Claimant accepted in evidence that his symptoms had improved by early 2020 before being exacerbated in around May 2020. By early 2020 the Claimant had received 6 sessions of psychological counselling and, as the tribunal has found, some time in early 2020 he stopped (albeit temporarily as matters transpired) taking Sertraline and did not then visit his GP until after his dismissal.

27. However, the tribunal also notes an extract from a medical report which is set out in Dr Hetherton's report. The report appears to have been dated 24 March 2020 and to have been prepared by a GP (but not the Claimant's GP), presumably for the purposes of the Claimant's civil claim relating to the road traffic accident. The tribunal finds that the report was prepared following an examination of the Claimant on or close to the date of the report. The extract refers to '*Onset: Immediately. Severe, ongoing. Manifestations: Depression, Fear of travel. Generalised Anxiety. The claimant has been a nervous driver since the accident. This has not prevented driving but makes his a great deal more wary. He also states that he has since felt generally anxious and depressed. ... The claimant continues to suffer from disturbed sleep ... The claimant states that his social life remains restricted due to his anxiety symptoms.*'
28. This appears to the tribunal to be the best contemporaneous evidence as to the Claimant's ongoing symptoms in the period between early 2020 and May 2020. There is also no suggestion in Dr Hetherton's report that the Claimant's symptoms improved sufficiently in that period that the diagnosis of Other Specified Trauma- and Stressor-Related Disorder was no longer appropriate. Indeed, in her report she noted that although there had been some improvement in symptoms since the accident, '*The duration of clinically significant (i.e. significantly disruptive) accident-related symptoms/disorder was one year and one month, ongoing.*'
29. Taking all of the available evidence into account, the tribunal has concluded that there continued to be a substantial adverse effect on the Claimant's ability to carry out day-to-day activities as a result of symptoms related to anxiety and depression throughout the period from August 2019 until after his dismissal in July 2020. The normal day-to-day activities that were adversely affected included travelling and taking part in social activities.
30. The tribunal notes that the Claimant's dismissal took place before a period of 12 months had expired since the road traffic accident in August 2019 which was the trigger for his symptoms associated with anxiety and depression. However, the tribunal has concluded, again based on all of the evidence presented at this PH, that by 24 March 2020 (ie the date of the GP report referred to in Dr Hetherton's report) it was likely (ie it could well happen) that the substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities would continue for at least 12 months.
31. In light of the above findings, the tribunal has concluded that the Claimant was disabled within the meaning of section 6 of the EqA at all material times from late March 2020 by reason of symptoms related to anxiety and depression.
32. The tribunal has not heard evidence or submissions from either party as to when the Respondent knew, or could reasonably have been expected to

know, of the Claimant's disability and that issue is therefore left to be determined at the final hearing of this case.

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Employment Judge K Bryant QC
11 March 2022 – Croydon

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Date sent to the parties
06 April 2022