



# EMPLOYMENT TRIBUNALS

**Claimant:** X

**Respondent:** Moss Care St Vincent's Housing Group

**Heard at:** Manchester

**On:** 14 March 2022

**Before:** Employment Judge Leach

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms L Kaye (Counsel)

# JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claimant's condition of dyslexia is a disability for the purposes of the Equality Act 2010.
2. Whilst the claimant presented his claim outside of the time limit set out in s123(1)(a) EQA, his complaint about the alleged discrimination on 26 November 2021 was presented within the time limit at s123(1)(b).

# REASONS

## Introduction

1. This preliminary hearing was held to determine two issues, as identified at an earlier preliminary hearing (case management) on 15 October 2021:
  - (1) Whether the claimant had a disability for the purposes of the Equality Act 2010; and

- (2) Whether or not the Tribunal has the legal power to consider the claim, having regard to the statutory time limit.

### **The Hearing**

2. The hearing was in person. A pack (bundle) of documents had been prepared for the hearing. References to page numbers below are references to this pack of documents.

3. The pack was updated recently to include a diagnostic assessment report dated 8 March 2022 (Report).

### **The first issue – whether the claimant's dyslexia amounts to a disability**

4. The claimant claims that he has two disabilities that are relevant to these proceedings. The respondent has admitted that one of these, a mental impairment of depression, is a disability for the purposes of the Equality Act 2010.

5. I was therefore only required to consider the second claimed disability, being the mental impairment of dyslexia.

### **Findings of Fact – Dyslexia Issue**

6. The claimant is 48 years old. He has had a good employment history, having held finance and similar roles in a range of organisations.

7. The claimant entered employment after completing A Levels. He began but did not complete an accounting course called AAT. The claimant claims (but there is no evidence of this other than the information provided by the claimant verbally at the hearing) that there had been concerns at the time he undertook this course that he may be dyslexic. The claimant told me that he had tried to look for a report from this time but was unable to find it.

8. When the claimant started work with the respondent he completed a medical questionnaire (page 216). The claimant was open and candid in the detail provided in that questionnaire. He told the respondent that he had suffered from “nervous breakdown or mental illness”, that he had suffered from diabetes and migraines. He did not mention a dyslexia condition.

9. The claimant informed the Tribunal today (but not previously and not contained in a witness statement provided by him) that he had mentioned dyslexia to the first manager that he had, Andrea Howarth (“AH”), during his employment with the respondent. AH managed the respondent during the claimant's first 12 months, and so until about September 2016. I need make no finding of fact about that today. If necessary, this will be considered at a final hearing.

10. The claimant accepts that he did not refer to the condition again until August 2020 when he told Preeti Parekh (“PP”) that he had “*partial dyslexia*”.

11. At all relevant times prior to about March 2020 there was no issue with the claimant's work. No-one spoke with him to tell him his work was not adequate and the claimant's clear view is that his work was adequate.

12. The claimant started to be managed by PP at about the end of 2019.

13. Between March 2020 and June 2020, the claimant and colleagues were required to work from home. Sometimes the claimant found it difficult to obtain information from his colleagues that he needed in order to complete the tasks that he had to do. The claimant was asked why it was difficult and he explained that it was because people were working at different times (as there was more flexibility of hours during the pandemic period when colleagues were working from home) and were harder to get hold of. Had the claimant been in the office the colleagues would have been physically nearby and he would have been able to ask them, and if they were not there then he would have been able to ask their manager or supervisor.

14. On 5 August 2020 PP spoke with the claimant about ensuring that he carry out tasks particularly relating to rent refunds. It was then that the claimant told PP that he was "*partially dyslexic*", explaining that that had an impact on interpreting messages received and he often had to read them more than once before then discussing over the telephone. The claimant mentioned partial dyslexia again during a performance review meeting on 20 August 2020, although he also told PP that he did not require any further support in relation to partial dyslexia at that time.

#### Assessment Reports

15. There are two reports in the pack of documents, the most recent of which is the Report, dated March 2022, which was conducted by Dr Zacharia, a Chartered Psychologist.

16. The earlier report is from an organisation called Quick Screen and is dated May 2021 (QS report). The QS report makes clear that it is not a full diagnostic assessment. Although it is not what one might consider to be a quick screen either. The claimant was tested/examined for around three hours for the purposes of the QS report.

17. The QS report states that there was a moderate indicator of dyslexia. A helpful summary of the outcome is at page 102, where it states as follows:

*"In conclusion, your performance on the Quick Screen tests display moderately high indicators of dyslexia due to a slight difficulty with sequencing skills, certain difficulties with verbal processing and literacy skills, a slight difficulty with general speed of processing and a slight disparity between verbal and visual skills relative to your other results.*

*In contrast, performance on visual skills is in the average range. Your reading speed and typing speed have been highlighted as an area of difficulty.*

*It is noted that you reported an earlier dyslexia diagnosis and lifelong difficulties with aspects of literacy (together with a family incidence of*

*dyslexia). This profile is consistent with an individual experiencing indicators of dyslexia. It is therefore recommended that you seek further advice.*

*Furthermore the results suggest that a lack of fluency in the use of language may have an additional impact on some of the difficulties in learning that have been identified.”*

18. In relation to this last comment, “*a lack of fluency in the use of language*”, the body of the QS Report indicates that this is not caused by or resulting from a dyslexia condition. It arises from the result of a verbal vocabulary test in which the claimant achieved a score in the “*low average range*” and the assessor’s stated opinion that this score “*may be due to a lack of fluency or may indicate the need for some study skills training*”.

### The Report

19. I note (and accept) the following from the Report:

- (1) That Dr Zacharia states that the claimant meets the criteria for a diagnosis of dyslexia;
- (2) That it indicates that the claimant may also have Attention Deficit Hyperactivity Disorder, but that was a medical condition and Dr Zacharia was not qualified to provide a formal diagnosis;
- (3) That the claimant’s problems were evident early on at school;
- (4) That the challenges in the claimant’s cognitive processing have an impact on his ability to be an efficient reader and writer;
- (5) That the dyslexia particularly affect the claimant’s ability to write, read and understand what he has read at speed, and that it may
  - (i) affect his ability to focus for extended periods of time;
  - (ii) make the taking of notes in meetings/classes or when on the telephone difficult without adequate support strategies and assistive technology;
  - (iii) affect his ability to process auditory information at speed;
  - (iv) that the claimant will experience particular challenges at work/study when required to listen and take notes, and to read and simultaneously comprehend.

20. I heard the following evidence from the claimant, which I also accept:

- (1) If required to read and understand short emails/short instructions he finds it manageable;

- (2) He has difficulty understanding lengthy emails, particularly where being asked to carry out various tasks within the content of the lengthy email;
- (3) Although he has not been asked to take notes of meetings within his employment, were he asked to do this then he would have difficulty doing it;
- (4) He has lapses or drops in concentration but he takes regular breaks from work tasks in order to assist that;
- (5) He accepted that he could put together his grievance document, appeal document and Tribunal documentation but that he did so with the assistance of his partner.

**The second issue– Time Limit (identified at paragraph 7.1 of Case management Summary following the previous preliminary hearing – page 44) .**

21. It is not disputed that the claimant's claim form was presented outside of the 3 month time limit at s123(a) EQA (see below). The most recent alleged act of discrimination occurred on 26 November 2020 when the claimant was invited to a performance improvement capability meeting. On that basis, to comply with this 3 month time limit, the claimant should have presented his claim by no later than 25 February 2021 – subject to the extensions of time that would have applied had the claimant commenced ACAS early conciliation by that date ( 25 February 2021). In fact he did not begin ACAS early conciliation until 9 May 2021. The claim form was presented on 16 June 2021.

22. The claimant had been absent from work from 30 November 2020 due to anxiety and depression. As late as 24 June 2021 an Occupational Health assessment stated that the claimant was still unfit for work due to ongoing symptoms of depression.

23. The claimant endured three family bereavements in or around the relevant time. In August 2020 one of his aunties died. In December 2020 his father died. In March 2021 another of his aunties died.

24. The claimant was dissatisfied with the way he considered he was being treated at work, which is why he raised a grievance on or about 18 December 2020. However, the claimant had taken some steps before then to find out about his workplace rights and possible courses of action. Earlier in November 2020 the claimant had made contact with ACAS. Also, around this time the claimant had contacted other organisations including:

- (1) Equality Action Group;
- (2) Disability Rights Group;
- (3) Mind.

25. The claimant submitted his grievance on 18 December 2020. He was dissatisfied with the grievance outcome and appealed on or about 4 February 2021.

The claimant was provided with the outcome of his appeal on 23 April 2021. It was only after then that he commenced the ACAS early conciliation process two weeks later (on 7 May 2021).

26. The claimant spoke with ACAS towards the end of 2020. I accept the claimant's evidence, that they told him that he should follow the respondent's internal grievance procedures. Having regard to the potential for an increase or reduction compensation awards (under s207A Trade Union and Labour Relations (Consolidation) Act 1992) such a recommendation is unsurprising although where an internal process takes some time (as here) it does still require a potential claimant to pay close attention to the applicable time limits.

## The Law

### Disability

27. The claimant claims he has a disability for the purposes of section 6 Equality Act 2010 (EQA). Section 6 provides as follows:-

- (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.*

28. S212(1) of the EQA defines "substantial" as meaning "*more than minor or trivial.*"

29. I have also considered:-

- (i) Part one of schedule one to the EQA regarding the definition of disability.
- (ii) The Secretary of States guidance on matters to be taken into account in determining questions relating to the definition of disability. (Guidance)
- (iii) The EHRC Employment Code

30. I note from the materials above and from relevant case law:-

- a. That I am to apply this definition at around the time that the alleged discrimination took place; **Cruickshank v. VAW Motorcast Limited [2002] ICR 729;**
- b. That I should apply a sequential decision-making approach to the test (see for example **J v. DLA Piper [2010] WL 2131720**) ("DLA Piper") addressing the following in order
  - did the claimant have a mental and/or physical impairment? (the 'impairment condition')
  - did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')

- was the adverse condition substantial? (the ‘substantial condition’), and
  - was the adverse condition long term? (the ‘long-term condition’).
- c. That the appendix to the Guidance includes a non exhaustive list of factors that would be reasonable to regard as having a substantial adverse impact on normal day to day activities. This list includes:-
- Inability to converse or give instructions orally
  - Difficulty understanding or following simple verbal instructions
  - Persistent and significant difficulty in reading or understanding written material where this is in the person’s native written language, for example where this is because of a mental impairment or learning disability
  - Persistent difficulty in recognising or remembering the names of familiar people
  - Persistent distractibility or difficulty concentrating
- d. The same appendix also includes a non-exhaustive list of factors that would not be reasonable to regard as having a substantial adverse impact on normal day to day activities. This list includes:-
- Minor problems with writing or spelling
  - Inability to reach typing speeds standardised for secretarial work
  - Inability to fill in a long, detailed technical document in the person’s native language, without assistance
  - Inability to concentrate on a task requiring application over several hours.
- e. That when applying the Guidance, I should consider the effect that an impairment has on a person’s professional life. See for example the judgment of Judge David Richardson in **Banaszczyk v. Booker Limited UKEAT/0132/15** where he states (para 47)

*“It is to my mind essential, if disability law is to be applied correctly, to define the relevant activity of working or professional life broadly: care should be taken before including in the definition the very feature which constitutes a barrier to the disabled individual’s participation in that activity”*

### Time Limits

31. Section 123 EqA provides that complaints may not be brought after the end of 3 months *“starting with the date of the act to which the complaint relates”* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

32. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within “*such other period as the employment tribunal thinks just and equitable.*”

33. I note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre 2003 IRLR 434**:-

“if the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so.” (para 23)

“...the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule.” (para 25 of the judgment)

34. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. I note the following:-

**35.1** **British Coal v. Keeble EAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

**35.2** The fact that a claimant presents a claim outside of the relevant time limits, because he has been pursuing an internal appeal is a factor (but not a determinative factor) that a Tribunal may take in to account in determining whether a claim, which has been presented outside of the 3 month time limit in s123 has been brought within such further period as is just and equitable. (**Robinson v. Post Office [2000] IRLR 804**; **Apeloqun Gabriels v. LB Lambeth [2001] EWCA Civ 1853**)

**35.3** **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT**. This case noted that the issue of the balance of prejudice



and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

- 36 What is clear from the appeal authorities is that Employment Tribunals have a wide discretion in determining time limit questions under section 123. They are not bound to consider all of the factors set out in section 33 of the Limitation Act ( above) and not restricted to those factors either.
- 37 Paragraph 18 of the Court of Appeal’s judgment in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** says as follows:-

*”18. ... [I]t is plain from the language used (‘such other period as the employment tribunal thinks just and equitable’) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980 , section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see [ Keeble ]), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark LBC v. Alofabi [2003]EWCA Civ 15;..”*

*19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”*

## Conclusions

### Disability

35. I have applied the sequential decision-making approach set out in the DLA Piper case.

36. Did the claimant have a mental and/or physical impairment? (the ‘impairment condition’). The claimant did have a mental impairment at the relevant time. He has been diagnosed with dyslexia. I am satisfied that he had this condition at the relevant time for the purposes of his disability discrimination complaints.

37. Did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’). I accept the findings of the 2 reports. The

impairment condition had some effect on the claimant's ability to carry out day to day activities.

38. The Report makes clear that the claimant has difficulty carrying out combined tasks which, in an office environment, are standard or normal day to day activities. Being on the telephone and taking notes at the same time; paying attention in a meeting whilst taking notes; are normal day to day activities. Considering the conclusions of the 2 reports, I also find that the claimant's reading and writing speed is impacted.

39. Was the adverse condition substantial? (the 'substantial condition'), I am reminded of the definition of "substantial" at s212 EQA – as meaning more than minor or trivial.

40. As is often the case, the claimant's circumstances fall somewhere between the 2 sets of examples provided in the Guidance. I find that the impact was substantial. I base this finding particularly on:-

- a. the conclusion in the Report that the claimant requires support strategies and/or assistive technology in order to take notes whilst in meetings or on the phone.
- b. The findings in the Report about the challenges caused by the claimant's cognitive processing, together with the claimant's own description of the difficulties he has with reading and understanding lengthy emails, particularly where tasks or instructions are contained in the narrative of those emails.

41. was the adverse condition long term? (the 'long-term condition'). I find that the claimant's condition is long term. Dyslexia is not a short-term illness or condition. Unsurprisingly the report refers to the claimant's problems being evident early on when at school.

#### Time Limits

42. Whilst the claimant presented his claim outside of the time limit set out in s123(1)(a) EQA, I find that he presented his complaint about the alleged discrimination on 26 November 2021 within the time limit at s123(1)(b).

43. This finding has required that I exercise my discretion in the claimant's favour. In doing so I took account of the following factors:-

- a. The personal circumstances of the claimant at the time. He suffered 3 family bereavements within a short period, including the death of his father and the expiry of the 3 month time limit came in the midst of these.
- b. The claimant was not well enough to attend work from November 2020 up to and beyond the expiry of the 3 month time limit.

- c. The claimant had spoken with ACAS towards the end of November 2020 and taken their advice to raise grievances through the respondent's internal procedures. These did not end until 23 April 2021 and it was only at that stage that he turned to the Employment Tribunal process.
- d. he needed assistance to complete the claim form and provide particulars of his claim.
- e. The delay in issuing the claim will have no impact on the cogency of evidence in this case.
- f. Other than the burden of responding to these proceedings, there is no prejudice caused to the respondent in allowing the claim. The prejudice to the claimant in denying him the opportunity to proceed with his claim is considerable.

44. Finally, it is important that I make clear that I have not made a finding about whether the various alleged acts of discrimination running from June 2020 to 26 November 2020 amounted to conduct extending over a period (for the purposes of s123(3)(a) EQA. In its grounds of resistance, the respondent denies that they do and that is an issue that will need to be determined at the final hearing, once the Tribunal has had the benefit of hearing and considering all of the relevant evidence

Employment Judge Leach

Date: 17 May 2022

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

27 May 2022

FOR THE TRIBUNAL OFFICE

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