



EMPLOYMENT TRIBUNALS

At an Open Preliminary Hearing by Cloud Video Platform

Claimant: Mr K Grundy

Respondent: Loram UK Ltd

Heard at: Midlands (East) Region by Cloud Video Platform

On: Friday 24 June 2022

Before: Employment Judge M Butler (sitting alone)

Representation

Claimant: In person

Respondent: Mr J Jupp of Counsel

RESERVED JUDGMENT

1. The Claimant's application to strike out the Response is dismissed.
2. At the material time, the Claimant's mental impairment of dyslexia did not amount to a disability within the meaning of Section 6 of the Equality Act 2010.

RESERVED REASONS

Introduction

1. The Claimant has brought two claims against the Respondent. Claim number 2602815/2021 was submitted to the Tribunal on 8 November 2021 and pursues claims of breach of contract and for wages. The second claim, number 2602896/2021, was submitted on 19 November 2021 and pursues claims of unfair dismissal and disability discrimination. Across the two claims, there are also further claims in respect of not being provided with an itemised pay statement and being subjected to a detriment as a result of making a protected disclosure.
2. This open preliminary hearing was listed by my colleague, Employment Judge Heathcote, at a Case Management Preliminary Hearing on 11 March 2022. The issues before me are an application by the Claimant to strike out the

Response on the grounds that the Respondent and/or its Solicitors had interfered with employees of the Respondent giving witness statements to support the Claimant and, secondly, to determine whether the Claimant was disabled by virtue of his dyslexia at the material time between March and September 2021.

3. The Respondent accepts that the Claimant has the lifelong mental impairment of dyslexia but disputes that it had a substantial adverse effect on his ability to carry out normal day to day activities.

The strike out application

4. On 16 June 2022, the Claimant made an application to strike out the Respondent's Response on the ground of the alleged unreasonable conduct of proceedings by the Respondent, namely, interference by the Respondent with potential witnesses at this and future hearings.
5. The issue for me to determine is whether such interference took place.
6. Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

“37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) ...

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) ...

(d) ...

(e) ...”

7. In making his application, the Claimant confirmed that his allegation that the Respondent had interfered with potential witnesses was based on what he referred to as probability and assumption. In particular, he referred to the statement of Mrs Emily Robe. The Claimant contacted Mrs Robe to ask her to give a statement in relation to his dyslexia. As with many continuing employees of a respondent when asked to give a statement for a former employee, Mrs Robe had some concerns. She consulted Mrs McAra, Financial Director, who confirmed to her that she was perfectly entitled to give a statement if she wished although she was under no compulsion to do so. Mrs Robe duly gave a statement and sent it to the Claimant. He amended the statement at paragraph 2 (page 575 of the bundle) by an insertion as follows:

- “2. *Whilst I am still an employee of the Respondent, I can confirm that this statement is given at my own free will without any input, guidance, influence from the Respondent. I also confirm that the respondent has not had sight of this statement upon this submission.*”
8. Mrs Robe was concerned with this amendment and did not agree to it. She asked the Claimant to delete the sentence beginning: “*I can confirm ...*” since she did not consider it was true. This is because she had sought guidance from Mrs McAra as to whether she could give a statement and had copied her witness statement to her. I find the Claimant’s assumption that this evidenced interference by the Respondent to be entirely without foundation.
9. The Claimant contacted a number of other employees of the Respondent. A number of them chose not to reply at all and others voiced their concern to the Respondent. As a result of this, on 26 May 2022, Mr Richard Kelly, the Respondent’s Managing Director, wrote to all employees notifying them of their choices when asked for a witness statement from an employee or a former employee (page 570 - 571). The Claimant was not named in this letter. The letter is written in simple terms. It advises employees that so long as their statement is true to the best of their belief, there will be no consequences imposed on them by the Company “*whatever your statement says*”. It goes on to advise the employees that they are not obliged to make a statement simply because they are asked to do it, but if they do decide to make a statement they may do this in writing in their own words. The letter also states that the employees do not have to submit to an interview or answer questions, accept coaching or suggestions as to what might be included in those statements.
10. I explained to the Claimant that, in order for his application to succeed, he must demonstrate on the balance of probabilities that the Respondent did interfere with the witnesses’ participation in the proceedings. A mere assumption, without more, is not enough to maintain a strike out application. Since I found no evidence at all of any such interference, I dismissed the application, which the Claimant said he accepted.

Disability

11. The application to strike out the Response formed a small part of this hearing. The witnesses giving evidence made reference to the application but primarily concentrated on the disability issue. I heard evidence from the Claimant and, for the Respondent, from Mr Kelly, Managing Director, and Mrs Robe, HR Adviser.
12. The issue before me, agreed by the parties, was whether the Claimant was disabled for the purposes of Section 6 of the Equality Act 2010 (EqA) at the material time. There was an agreed bundle of documents comprising 658 pages and references to page numbers in this Judgment are to page numbers in the bundle.

The law

13. The law is found principally in Section 6 and Schedule 1 EqA including the 2011 Guidance made under Section 6(5) EqA (The Guidance). Section 6 EqA states, so far as relevant:

“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.”*

14. It remains good practice to state conclusions separately on the questions of impairment, adverse effect, substantiality and long-term nature (***Goodwin v Patent Office [1999] ICR 302***)
15. The Respondent accepts that the Claimant has a mental impairment, namely, dyslexia. It further accepts that it is a lifelong condition and is therefore long-term.
16. What is in issue in this case is whether the Claimant's mental impairment has a substantial adverse effect on his ability to carry out normal day to day activities. By Section 212(1) EqA and paragraph B: 1 of the Guidance, “substantial” means more than minor or trivial.
17. This is a relatively low threshold for a claimant to establish. Substantial may be considered in respect of different times, different activities, the way an activity is done and having regard to modifications which are reasonable for the Claimant to make but based on what the deduced effect of the impairment is excluding the effect of medical treatment. There must be clear evidence on what the deduced effect would be (***Woodrup v London Borough of Southwark [2003] IRLR 111***) Although a low threshold, the Claimant carries the burden of showing it. “Substantial” is likely to be made out where the degree of limitation established in the adverse effect goes beyond the normal differences in ability which may exist among people without a disability in the general population.
18. The focus in an assessment of disability should be on what an employee cannot do or can only do with difficulty, and not what they can do. I am required to look at the whole picture and it is not simply a question of balancing what an employee can do against what they cannot. If the employee is substantially impaired in carrying out any normal day to day activity, then they are disabled notwithstanding their ability in a range of other activities.

19. In ***Cruickshank v VAW Motorcast Ltd [2002] ICR 729 EAT***, it was held that a broad view is to be taken of the symptoms and consequences of the impairment as they appeared during the material time.
20. In ***Elliott v Dorset County Council [2021] IRLR EAT***, HHJ Tayler restated the principles for determining the question of disability as first set out in ***Goodwin***. The questions to be considered are:
 - (1) Does the Claimant have an impairment which is either mental or physical?
 - (2) Does the impairment affect the Claimant's ability to carry out normal day to day activities and does it have an adverse effect?
 - (3) Is the adverse effect upon the Claimant's ability substantial?
 - (4) Is the adverse effect on the Claimant's ability long-term?
21. For the purposes of this hearing, I am concerned with questions 2 and 3 above.

The facts

22. So far as it is necessary to determine the issues before me, I make the following findings of fact on the balance of probabilities.
 - 22.1 The Claimant was born on 14 March 1985. He was employed by the Respondent as Head of HR and on 5 November 2018 he was promoted to HR Director. He was part of the Respondent's senior management team.
 - 22.2 The Claimant produced an impact statement (page 108 - 111) and gave oral evidence. Unfortunately, I found the Claimant's impact statement and his oral evidence in many instances to be inconsistent with the documents produced to me. I gained the impression that he was exaggerating the impact of dyslexia on his normal day to day activities.
 - 22.3 In his oral evidence, the Claimant accepted that in what he described as "normal circumstances" the effect of his dyslexia on his normal day to day activities did not meet the threshold to qualify as a disability. However, he said that at other times certain factors could make the impact of his dyslexia substantial in carrying out those activities. After lockdown, the Respondent suffered a significant reduction in work and revenue. Restructuring was put in place and, as a result of this and other factors, the Claimant's team was reduced from its usual complement to just him and Mrs Robe. This created more pressure on the Claimant's workload and, he says, impacted on his dyslexia and his ability to carry out normal day to day activities. He attributed this alone to his alleged inability to produce policies and documents and was a factor in the data breach for which he was ultimately dismissed.

- 22.4 In his impact statement (page 109) he said: “... *I am unable to write policies, key communications without the intervention of others proof checking my work. ...*” Mr Kelly, whose evidence was given in a straightforward and, I found, honest manner, said he had not noticed any issues with the Claimant’s work apart from the odd spelling mistake. But Mrs Robe’s evidence shed more light on the Claimant’s alleged difficulties. I have no doubt that her evidence was given entirely honestly. She did not seek to embellish her answers to questions, answered them concisely and when asked to enter into conjecture refused to do so on the sensible basis that she could not give evidence on the thought processes of others. Whilst the Claimant said he had a nominated proof reader within his team, Mrs Robe, who worked closely with him, had no knowledge of such nomination. She admitted that on a number of occasions she proof read the work of the Claimant and found few issues with that work other than to occasionally correct confusion with words such as “except” and “accept”. Further, she occasionally had to correct minor grammatical errors. Having said that, Mrs Robe gave evidence that she also proof read the work of others when they were in the team and, moreover, that the team was in the habit of frequently proof reading each other’s work.
- 22.5 The Claimant’s evidence that his dyslexia was affecting his work and day to day activities because of his workload alone is also called into question by the contents of his email to Mr Kelly dated 18 March 2021 (page 120). Having bemoaned the lack of resource in his team he went on to say:

“... I also held everything together emotionally to focus on things professionally to achieve the objectives in hand with a smile on my face whilst experiencing everything else that I was outside of work which in isolation is enough to potentially tip someone over the edge. ...”

This is a reference to issues which arose in the Claimant’s personal life as set out in the timeline he produced at page 133. I do not wish to give significant detail of these personal issues but, for context, they involve the birth of his child, discovering his wife was taking drugs, her very serious mental health issues and subsequent divorce and custody proceedings. The Claimant’s assertion that his issues at work were created by his workload alone cannot, therefore, be reliable.

- 22.6 In cross-examination, the Claimant was referred to the completion of his Claim Forms and, in particular, his comments in box 12 of each Claim Form (pages 15 and 33). In both forms, the wording was the same. He wrote a heading “*Dyslexia*” and underneath wrote: “*Applicant requests reasonable time to digest and read through documentation prior to proceedings and allowances by the court for any grammatical errors contained within submissions from the applicant.*” These are the only references he made to dyslexia in his Claim Forms.

22.7 In his impact statement at page 91 he claimed the following normal day to day activities are affected by his dyslexia:

- Reading
- Writing
- Data inputting/processing
- Meeting deadlines
- Memory recall for sequence, facts, information
- Organisation/Planning
- Understanding large amounts of information
- Compliance owing to all the above.

He continued:

“Mistakes in the affected areas shown above increase dramatically with confusion, time pressures, emotional stress, or poor health. This leads to further mental/social implications such as low self-esteem, anxiety, and withdrawal from social networks, making the affected areas above exacerbated in the Claimant’s life.”

He then goes on to contradict that statement by say:

“The adverse effects are present constantly in every aspect of life daily, the adverse effects manifest themselves further becoming more pronounced owing to unsuitable environments the claimant is subject to.”

I note that the Claimant gives no actual examples of any of the above issues he says arose as a result of his dyslexia.

22.8 After his dismissal by the Respondent, the Claimant secured a position with Rolls-Royce. Despite claiming that he required a proof reader throughout his employment with the Respondent, at page 215 is his completed questionnaire for employment with Rolls-Royce. He notes at page 215 that he suffers from dyslexia and then in response to the question: *“Do you think you may need any adjustments or assistance to help you to do the job?”* he replies: *“No”*.

22.9 At pages 225 - 237 is the report of the Claimant’s Quick Screen Dyslexia Test taken on 13 April 2022. This is, of course, outside the material time with which we are concerned in his claim and is an online form capable of manipulation by the person taking the test. Even so, most of the issues tested indicated average results with a conclusion indicating only moderate dyslexia. The Claimant disagreed with Mr Kelly’s evidence that he had told Mr Kelly at interview that he had mild dyslexia, but I prefer the evidence of Mr Kelly.

22.10 In light of the above matters, I conclude that the Claimant had exaggerated the symptoms of his dyslexia and the impact it had on his ability to carry out normal day to day activities with a view to bolstering his claim to be disabled.

22.11 Whilst the Claimant was open about his dyslexia during his employment, I find that at no time did he complain that it was affecting his work or other day to day activities until the data breach on 23 May 2021. The Respondent was submitting a tender for work for Network Rail and was required to provide some limited and anonymised employee data. Another employee was responsible for forwarding this data to Network Rail upon receipt from the Claimant. When that employee received the data, it contained virtually all of the personal records of the employees involved including highly sensitive information about the disability status of the entire workforce of the Respondent. It was only when the disciplinary procedure began that the Claimant sought to rely on his dyslexia. Up until that point, during the entirety of his employment with the Respondent, he had not relied on his dyslexia and no one at the Respondent seems to have noticed any issue other than the occasional spelling mistake and grammatical error.

22.12 Whilst in his impact statement he refers to suffering “*brain fog*” in his email to Mr Kelly on 18 March 2021 (page 121) he makes no mention of his dyslexia only that he is suffering from burnout saying:

“I will be signing myself off as sick and I ask you that you give me a little time and space to drag myself out of the hole I have found myself in and suggest we connect early next week”.

This came at a time when the Claimant had a high workload and had developed a difficult relationship with the HR team in the Respondent’s US Parent Company. His inability to make progress in completing projects assigned to him led Mr Kelly to begin performance management of the Claimant but I note that he still did not rely on any adverse effects on his normal day to day activities caused by his dyslexia.

Discussion and conclusion

23. The material time in this claim is from March to September 2021. I note that the Claimant does not rely on the work-related stress which saw him take sickness leave for a month from 18 March 2021. In his correspondence with Mr Kelly, he does not rely on stress, anxiety or depression or dyslexia.
24. As is conceded by the Respondent, the Claimant has a long-term mental impairment. I accept that an increased workload and the quite dreadful personal circumstances the Claimant found himself in are capable of raising a disability above the threshold to which the Claimant has referred. However, having said that, there is no evidence before me, other than the Claimant’s own evidence, that supports this possibility. His poor performance is

explained, not by his dyslexia, but by his workload and his personal issues. This view is supported by the fact that he did not mention dyslexia as having any impact on his work or day to day activities until the disciplinary process began.

25. The Claimant on many occasions during his evidence talked about the coping strategies he employed to combat the effects of dyslexia. The reality of it is, however, that his only reference to copying strategies was to have his work proof read by someone else. As Mrs Robe's evidence shows, proof reading the work of others within the HR team was a common occurrence and was not something afforded to the Claimant in isolation. Further, I do not accept his evidence that he had a nominated proof reader and his work deteriorated when that proof reader left the Respondent. No one else, including Mrs Robe who worked closely with the Claimant, was aware of any such nomination.
26. Of course, I bear in mind that the EqA does not require a medical diagnosis. Such diagnoses for dyslexia are quite rare. What the EqA does require is an impairment. The cause or label of that impairment is less important than any substantial adverse consequences it has on the employee's ability to carry out normal day to day activities. In ***J v DLA Piper UK LLP [2010] ICR 1052*** and ***Herry v Dudley Metropolitan Borough Council UKEAT/0100/16/ELA*** it was found that the presence of the substantial adverse effect can be of great assistance in the identification of the presence of an impairment. Unfortunately for the Claimant, apart from his own evidence, which I find lacks credibility, there is no evidence that his dyslexia caused a substantial adverse effect on him undertaking normal day to day activities.
27. Accordingly, bearing in mind all of the above factors, I do not find that the Claimant was disabled at the material time.
28. The Claimant's remaining claims are unaffected by this decision. They are currently listed to be heard on 3, 4 and 5 March 2023 in Nottingham and I have listed a further Preliminary Hearing by telephone to make appropriate Case Management Orders.

Employment Judge M Butler

Date: 30 June 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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