EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Hilton-Brown**
Respondent:	**TJ Hall Limited**

Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On:	8 December 2022
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Mrs J Hilton-Brown, lay representative
For the respondent:	Mr M Islam-Choudhury, Counsel

JUDGMENT

1. The claimant was not disabled at any relevant time because of dyspraxia.
2. As a condition of pursuing the following allegations the claimant must pay a deposit of £500 per allegation (details of when and how to pay are set out under separate cover):
    - 2.1. for the purposes of the claim of discrimination arising from a disability (**Equality Act 201 section 15**), that the respondent knew or ought to have known that he was disabled because of depression (allegation 1)
    - 2.2. For the purposes of the claims for failure to make reasonable adjustments (**Equality Act 2010 sections 20 and 21**) the respondent knew or ought to have known that he was disabled because of depression (allegation 2); or
    - 2.3. For the purposes of the claim of harassment related to his disability (**Equality Act 2010 section 26**), that any unwanted conduct was related to his disability of depression (allegation 3).

REASONS

1. Mr Hilton-Brown has presented 3 discrimination claims. The details do not matter for today's purposes beyond this: One is a claim that the respondent

has discriminated against him because of something arising from his disability **(Equality Act 2010 section 15**), one is a claim that the respondent failed to make reasonable adjustments (**Equality Act 2010 sections 20 and 21**) and one is an allegation the respondent harassed the Mr Hilton-Brown, and that that harassment was related to his disability (**Equality Act 2010 section 26**). That latter claim does not rely on any alleged perception of disability. In the first two claims the respondents deny they knew of disability or that they could have known. In relation to harassment they say simply, if they did not know he was disabled, then the alleged unwanted conduct could not factually be related to it. Beyond that the parties' disagreements are not relevant for today's purposes.

2. Mr Hilton-Brown alleges that he was disabled because of dyspraxia, which is disputed, and depression, which is conceded.

3. The issues that I must decide today are:

   3.1. whether Mr Hilton-Brown was disabled at the times relevant to this case because of dyspraxia,

   3.2. whether Mr Hilton-Brown should pay a deposit as a condition of continuing with his three claims identified above, and if so, how much.

Hearing

4. The hearing took place in person at Leicester. There was an agreed bundle of documents of about 219 pages. Mr Hilton-Brown gave evidence to the Tribunal. Both parties then presented their arguments on the issues. In addition, the respondent relied on a skeleton argument. I have taken all of those into account.

5. Mr Hilton-Brown required some adjustments. These were made. These were that questions were put simply, he was afforded time to think and that passages from the documents in the bundle were read aloud. Everyone agreed that the Tribunal would take extra breaks if requested. None were requested.

6. In its skeleton argument, the respondent sought apply for the claims insofar as they depended on depression to be struck out because they had no reasonable prospect of success, alternatively that I order Mr Hilton-Brown to pay a deposit because those allegations have little reasonable prospect of success. I allowed the issue of the deposit order to continue. The rules do not require a particular period of notice, and deposit orders can be made at any hearing. I did not allow the application for strike out to proceed. There was insufficient notice because the skeleton argument was presented on 1 December. In any case, I do not consider that some paragraphs in a skeleton argument are sufficient. If one is seeking such a draconian sanction, it warrants a proper application made in good time that unquestionably makes the other side aware of the application. The respondent's skeleton does not do that. There has been plenty of time to make an application for strike out. The respondent has been represented throughout. There is no reason why such an application could not have

been made. To allow it to proceed would contradict the rules and would not further the overriding objective because the parties would not be on an equal footing.

7. Neither party alleged that the hearing was unfair. I am satisfied it was a fair hearing.

Issues

8. The parties agree the relevant times are from 19 July 2021 (when the claimant commenced employment) to 10 October 2021 (last alleged act of harassment related to disability).

9. The respondent concedes that at all relevant times, Mr Hilton-Brown was disabled because of depression.

10. The respondent accepted that, in principle, dyspraxia could be either a physical or mental impairment for the purposes of the **Equality Act 2010**. The respondent does not accept that Mr Hilton-Brown has dyspraxia, however. Alternatively they says it did not have a substantial, adverse impact on normal day-to-day activities.

11. The respondent has not sought to argue that Mr Hilton-Brown's alleged dyspraxia would not satisfy the requirement it be long term, regardless of any other conclusion I might reach. I take this as a concession and therefore do not consider it to be an issue.

12. Although the claimant has referred in his disability impact statement to the alleged impairments of scotopic sensitivity and dyslexia, he has not referred to them in his claims as impairments on which he relies. At no previous case management hearing has he alleged these are disabilities for the purposes of these claims. There has been no application to amend his claims to add them. Therefore I ruled that I do not have to determine if they are disabilities for the purpose of these claims.

13. The issues I must decide therefore are as follows

    13.1. ***The disability issue:*** Has Mr Hilton-Brown proven on the balance of probabilities that at all relevant times:

        13.1.1. he had dyspraxia? And

        13.1.2. if so, it had a substantial adverse impact on his normal day-to-day activities?

    13.2. ***The deposit issue:***

        13.2.1. Has the respondent persuaded me that Mr Hilton-Brown should pay a deposit in respect of the allegation the respondents knew or ought to have known about his depression, and/or any alleged unwanted conduct was related to his depression?

        13.2.2. If so, how much?

Factual findings

14. Mr Hilton-Brown was an honest witness in my opinion, doing his best to tell me the truth. However some of what he said is at odds with contemporaneous documents, or documents he wrote nearer the time of these events. He is also convinced about e.g. there has been a clear diagnosis of his dyspraxia when the documents he relies on are not nearly so clear about it as he asserts. When these ambiguities were pointed out, he refused to accept there were ambiguities and, in effect, ignored them – insisting instead on the certainty he has been diagnosed with and has dyspraxia. I am therefore left with the impression he has a fixed conclusion on things, and he interprets things to support that conclusion, rather than looking at things and then thinking what conclusion might be appropriate. Therefore, I cannot accept his oral evidence at face value, and believe I must rely more closely on the documents.

The disability issue

15. The parties relied on NHS England's definition of dyspraxia as being accurate for the purposes of this case, taken from the NHS website that no-one sought to challenge or suggest I cannot rely on. There is no suggestion the definition has changed in any meaningful way at any relevant time. I therefore adopt it:

    "Dyspraxia, also known as developmental co-ordination disorder (DCD), is a common disorder that affects movement and co-ordination.

    "Dyspraxia does not affect your intelligence. It can affect your co-ordination skills – such as tasks requiring balance, playing sports or learning to drive a car. Dyspraxia can also affect your fine motor skills, such as writing or using small objects."

    https://www.nhs.uk/conditions/developmental-coordination-disorder-dyspraxia-in-adults/ (retrieved 8 December 2022)

16. The NHS website adds:

    "If you have dyspraxia, you may also have other conditions, such as:

    "● attention deficit hyperactivity disorder (ADHD)

    "● dyslexia

    "● autism spectrum disorder

    "● difficulty learning or understanding maths (dyscalculia)

    "● depression or anxiety"

17. While a student at New College Nottingham, he was assessed for possible obstructions to learning (sometimes called "learning difficulties"). The report was not prepared for court proceedings, and in case there is doubt, no criticism is being made of the assessor.

18. Ms PM Gurney assessed him on 18 July 2007. It was done in accordance with the appropriate guidelines, and she was suitably qualified and authorised to do it.

19. At the time, Ms Gurney had certificates and qualifications in assessing dyslexia, was an associate member of the British Dyslexia Association, and had an Assessment Award Practising Certificate from the Professional Association of Teachers of Students with Specific Learning Difficulties. She disclosed no specific qualification relating to dyspraxia. I am prepared to accept she would have been aware of dyspraxia because she was qualified to carry out assessments of learning difficulties and because there is, according to the NHS, often a coincidence between dyslexia and dyspraxia. I am satisfied she was sufficiently qualified to carry out the assessment. However her role was not to diagnose as such, but to identify obstructions to learning and remedies. I have no basis on which to assess her actual level of expertise in dyspraxia or to assess if she was qualified to diagnose it. It is perfectly conceivable she could identify symptoms and recommend adjustments, but not be qualified to make the formal diagnosis – like for example a therapist might be able to assess a client has generalised depression but is not formally able to diagnose it.

20. Ms Gurney wrote:

“Diagnosis

“Scott displays low average verbal and visual skills with underlying cognitive deficits that indicate **few signs of dyslexia**. He shows tendencies suggestive of **dyspraxia** and has symptoms of **scotopic sensitivity**.”

21. The report cites a number of results from assessments that Ms Gurney carried out. They are summarised in my view sufficiently in the conclusion of her report:

“The pattern of difficulties revealed by the tests administered on this occasion indicated few signs of dyslexia. [Mr Hilton-Brown] is a functioning reader who is capable of communicating in writing by means of fanatically recognisable spellings, although evidence did emerge of some underlying cognitive difficulties in his working memory, in terms of ability to retain, analyse and sequence data. He experiences severe difficulties with coding and appears to have some weaknesses in auditory discrimination.

“[Mr Hilton-Brown]’s writing speed of 16.2 words per minute is below that which would normally be expected in an adult but reflects the underlying cognitive difficulties that he experiences in expressing himself in writing.

“His skills of written arithmetic were seen to fall within the average range for his age.

“However, [Mr Hilton-Brown] also displayed and anecdotally described some characteristics suggestive of dyspraxia as defined by the Dyspraxia Foundation (2003):

“…It is an immaturity in the way that the brain processes information which results in messages not being properly or fully transmitted…. Dyspraxia affects the planning of what to do and how to do it. It is associated with problems of perception, language and thought.”

"Today's testing confirmed that [Mr Hilton-Brown's] manual speed is slow and indicated that his manual skill is also fairly slow he also manifested weak organisational skills; slow processing speed and difficulty in expressing his ideas in writing. Such features would typically be anticipated amongst the dyspraxic population."

22. Mr Hilton-Brown says this is a diagnosis of dyspraxia. I do not accept that. To work out what words mean, I have to decide what they would mean to the reasonable person in this factual situation, here someone suitably qualified to be reading this report. In addition I must read the report as a whole. The diagnosis, conclusions and outcomes of assessment are all one document.

23. In my view the only conclusion the reasonable reader could come to in these circumstances is that there are some features in Mr Hilton-Brown's abilities that hint at or point towards dyspraxia being a possibility. The author could well have said "he has dyspraxia" or similar if the evidence were there and if she were qualified to make such a diagnosis. She could, perhaps, have used the words "strongly suggestive", "highly consistent with" if there were a coincidence between dyspraxia and his abilities. Instead she appears to have been weaker in her choice of words. I do not accept on any reasonable reading these words are a diagnosis of dyspraxia. They merely point to symptoms that in turn point towards dyspraxia.

24. Mr Hilton-Brown relies on letters from his general practitioners (GPs).

24.1. The first is from Dr K Evans and dated 17 March 2022, written for these proceedings. It says:

"This is to confirm that this 34-year-old gentleman was seen and assessed on the 18th of July twenty 07 by a qualified learning advisor com if qualified in educational needs. He had a diagnosis of dyslexia dyspraxia and scotopic sensitivity. At this time he also showed low average verbal and visual skills.

"He still has struggles with physical balance, time management, awareness skills and some maths and English tasks."

I do not accept this letter confirms a diagnosis. It is predicated on the 2007 report, above. In my view the report does not support the definite diagnosis to which Dr Evans alludes.

In addition, Dr Evans did not examine Mr Hilton-Brown before writing the letter. As will be seen, the GP medical records disclose no issues reported to them of physical balance, time management, awareness skills or difficulties with some maths and English tasks, beyond those reported by Mr Hilton-Brown himself. Information about those matters can have come from him alone. It is therefore no more than a hearsay report of Mr Hilton-Brown's own evidence, and insofar as it relies on Ms Gurney's report, overstates her conclusions.

24.2. The second is from Dr M Chawla and dated 15 September 2022, again written for these proceedings. It says:

"This is to confirm that this 34-year-old gentleman was seen and assessed on the 18th of July 2007 by a qualified learning advisor, qualified in educational needs. He had a diagnosis of dyslexia, dyspraxia and scotopic sensitivity. These are lifelong conditions. At this time, he also showed low average verbal and visual skills.

"He still has struggles with physical balance, time management, awareness skills and some maths and English tasks."

Everything I said about Dr Evans's letter applies equally to Dr Chawla's letter.

The letters therefore in my opinion do not assist the claimant.

25. He alleged he was diagnosed with dyspraxia in 1994 while at school. Neither the medical records nor assessment at New College Nottingham support that. The lack of corroborating evidence (including the GP notes below), uncertainty about the credibility of his evidence and ambiguity in the report of Ms Gurney leads me to reject that assertion.

26. Mr Hilton-Brown also relies on his GP's notes. The following entries are worthy of note:

26.1. "12 July 2007… wants to know if there is a read code saying he is dyslexic. He is hoping to go to Lincoln Uni in September and is applying for funds. He will get more if he is noted to be dyslexic. Parents have told him he had a test when he was younger advised to go to ca be as there is no report on computer. Likely to be something dealt with by education advised to contact his school and college."

This was a few days before his assessment at New College Nottingham. It is notable that he did not mention dyspraxia to his GP, but only dyslexia, even though he says he was diagnosed with it nearly 13 years previously. However there is no mention of dyspraxia before the report from New College Nottingham. It does not support the claimant's case.

26.2. On 18 March 2009, the GP diagnosed him with "tiredness" and commented "plan: check [for glandular fever]... reluctant to have bloods needle phobia suggest wait for MSU result and if negative check bloods then discussed stress and anxiety maybe cause tiredness and sleeping patterns, has seen student services counsellors previously."

It is quite apparent therefore that after Ms Gurney's report, Mr Hilton-Brown was reporting tiredness. Even though at this point Mr Hilton-Brown was aware of the possibility of dyspraxia for at worst over 2 years and what he considers its effects, he did not think it a possible cause of tiredness. It is also pertinent to note

the GP had no reason to think that e.g. dyspraxia or another condition in that family of conditions might be a root cause.

26.3. On 28 September 2010 the claimant attended his GP with a severely moderate depressive disorder. He reported “feeling tired more than half the days”. Further, the GP noted, based on his presentation and what he said,

“On examination anxious: since first term of last year at Uni he has now graduated from Lincoln in interior design but feels unhappy since Christmas unable to enjoy things, anxious and snappy easily gets to sleep OK but wakes a lot and appetite is down worried that he will not get a job or get married and never leave home... Had some counselling at Uni”.

The entry clearly links tiredness and low mood to depression. It is notable that Mr Hilton-Brown did not mention the alleged diagnosis of dyspraxia.

26.4. On Friday 26th November 2010, the GP recorded Mr Hilton-Brown had mild depression and recorded that he had told the GP that he had sleeping problems for “more than half the days” and that he was “feeling tired for several days”.

On 2 July 2012, his GP noted that Mr Hilton-Brown’s sleep, appetite, interest, motivation and enjoyment in things were “all OK.” He recorded that Mr Hilton brown told him “Thinks a lot of things stem from struggling to find a full-time job doesn't feel ready to wean off meds yet”

Again, on both of these occasions, I think it remarkable that that Mr Hilton-Brown did not raise the possible involvement of dyspraxia, and that the GP had no reason to consider that line of enquiry. In particular there is clear reference to depression being connected with these symptoms in 2010. I believe I can properly take notice based on experience of the Tribunal with cases of depression as a disability, that these symptoms can be typical symptoms of depression and so the link is consistent. It is pertinent to note that in 2012 Mr Hilton-Brown made no link with the dyspraxia, and again the GP had no reason to consider that family of conditions as a line of enquiry.

26.5. On 28 January 2016 Mr Hilton-Brown attended his GP in relation to depression he said that he “feels better on tablets but still some anxiety and low mood at time, tends to ruminate a lot.” The GP also recorded

“says he has dyspraxia, I also wonder about ASD speaking to him today… referral to improving access to psychological therapies prog- self referral information given”

This is the first time that Mr Hilton-Brown mentioned dyspraxia in a consultation. It is also pertinent to note the GP is not making a diagnosis, but merely recording what was reported.

26.6. On 17 July 2017, the claimant attended his GP about work. It was noted “due to dyspraxia wis struggling with workload.” The entry is not a diagnosis. It is a report of what he told the GP. I do not accept this is evidence of a diagnosis of dyspraxia.

26.7. On 18 June 2021, Mr Hilton-Brown spoke to his GP again. It was a review of his mental health, which the GP felt had improved. There is again no consideration or mention of dyspraxia or any condition from that family of conditions.

26.8. A similar mental health review took place on 16 July 2021 (just before his employment began) and again notes “still having some anxiety but better” and again makes no reference to dyspraxia.

27. They show Mr Hilton-Brown reported dyspraxia to them as a problem only 2016, and even then it appears to be in passing. In my view that is telling. If dyspraxia were such a big problem as Mr Hilton-Brown alleges, I would expect him to have mentioned it to his GP long before 2016, or for them to have considered investigation. In fact it is my opinion that the overwhelming impression that the GP considered that his low mood, anxiety tiredness were all connected to and arose from his depression. I accept that in principle the depression could be linked to or arise from dyspraxia. The NHS website makes that clear. However it also makes clear it is not inevitable and I can see no reason on the evidence why they could not arise independently of each other. The evidence gives me no indication of how often to expect a coincidence in a patient of depression and dyspraxia. I have no other evidence to assist. I am not satisfied on balance that the medical notes therefore establish the link between the depression and dyspraxia that Mr Hilton-Brown is convinced is the case. I am fortified in that view by the fact (as set out below) he did not attend his GP with any other symptoms associated with dyspraxia, such as bumping into objects or poor coordination.

28. He explained that GPs do not carry out assessments of dyspraxia. Assuming that is correct, without deciding, they are able to refer patients for assessment to e.g. occupational therapists and physiotherapists, as the NHS England website to which I was referred without objection makes clear.

29. Finally I look to the impacts on normal day-to-day activities.

29.1. He was allowed extra time in exams (25%) and had teaching assistant support.

29.2. It took him 2½ years to learn to drive He often gets in the wrong lane, and when given directions, might inadvertently enter the path of oncoming traffic or turn when not supposed to, for example. However, he has a full UK driving licence, and that there are no restrictions imposed on his licence to drive arising from dyspraxia or for any other reason. It is also pertinent to note

he uses technology (Google Maps) to assist because it provides directions and information about the correct lane.

29.3. He has difficulty learning new skills. He finds new computer systems difficult to learn and navigate until he is familiar with them. He says he overcomes these difficulties with help, support and guidance.

29.4. He has difficulties with balance and movement. However there are no records of him reporting this to his doctor or having to seek treatment for injuries sustained. There is no evidence that impacts adversely on his life such that he has to avoid or modify other normal day-to-day activities. I find as a fact that the impact is minor or trivial.

29.5. Learning new skills, processing information, following and remembering instructions is difficult, and as such it takes time to adjust to new environments. In particular

"In my personal life, for example I have to be constantly reminded to take my keys and doing other day to day tasks which most people take for granted. I have learnt over the years strategies to me overcome some of my difficulties, for example I find writing notes down helpful to remind me to do tasks, repetitive activities help me to learn and Microsoft Excel spreadsheets, such as using particular colours, help me manage and visually plan my time more affectively."

29.6. He found it difficult to read social cues in new social situations. He can become overwhelmed with interactions. However as the respondent pointed out, there is no medical evidence that supports this contention.

29.7. Finally, to use his own words,

"I can find it quite hard to deal with my emotions at times and can become anxious quite quickly which has led to me becoming depressed. The anxiety has stemmed from a frustration that I have not picked up tasks quickly enough in comparison to my peers. I find it hard to relax sometimes and highly stressful situations become overwhelming. In my home life, I find that after stressful situations, I withdraw and stay in my room. I have been prescribed Propranolol medication in September 2010 for depression and anxiety. However, a by-product of my disability is a strong sense of empathy to others and being able to look at a situation from both sides."

30. Mr Hilton-Brown's depression can result in reduced sleep. He often took his own notes of instructions when at work and asking people to repeat instructions so he is clear about what to do.

The deposit issue

31. The facts are quite straightforward. The claim and the grounds of complaint were written by Mr Hilton-Brown himself. It is based on his own knowledge. In his grounds of complaint, he wrote repeatedly of a disability – singular – and his dyspraxia as the disability. He repeatedly alleged the discrimination and harassment are connected to his dyspraxia. At no point in his claim does he intimate that the discrimination was connected to his depression. Specifically he does not allege at any time that he told the respondent of his depression or that there is any basis on which the respondent ought to have known he was depressed. He does not allege anything like a perception of disability: the case depends on and only on his depression.

32. As for his personal finances, they are as follows:

    32.1. He is employed in stable employment. He has a net income of £2,100 of which £800 is left each month;

    32.2. He has £12,000 in a cash bond which he cannot access because of the terms of the bond;

    32.3. He has £13,000 in a stock and shares ISA that is accessible;

    32.4. He owns no property and has no debts.

33. There is no suggestion that the claimant has instructed legal representatives or proposes to do so.

Law

Disability

34. The **Equality Act 2010 section 6(1)** provides

    “(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.”

35. The **Equality Act 2010 schedule 1** provides details of how to determine disabilities.

36. The Secretary of State has issued guidance called Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (‘the guidance’).

37. In **Goodwin v Patent Office [1999] ICR 302 EAT**, Morison J said

    37.1. Tribunal should look carefully at what the parties have said in their pleadings and clarify the issues;

    37.2. The Tribunal may take a quasi-inquisitorial approach to help a claimant to give relevant evidence about their disability

    37.3. It should construct the legislative protections purposively;

    37.4. It should refer expressly to any relevant provisions the Guidance it has considered;

37.5. It should bear in mind that the fact that a person can carry out activities with difficulty does not mean that his ability to carry them out has not been impaired – the focus is not on what the claimant can do, but what they cannot do or can do only with difficulty (see also **Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19 EAT**)

37.6. Where a claimant is or has been on medication, the Tribunal should examine how the claimant's abilities were affected while on medication and how those activities would have been affected without the medication;

37.7. Each element should be considered in turn.

37.8. It should be careful not to lose sight of the overall picture when considering each element of the statutory definition in turn.

38. While one cannot determine an allegation a person is disabled by reference to what they can do, a Tribunal is entitled to take into account all the evidence to decide if it finds the claimant's case credible: **Ahmed v Metroline Travel Ltd [2011] EqLR 464 EAT**

39. The appropriate time to consider disability is at the time of the alleged discriminatory acts: **Cruickshank v VAW Motorcast Ltd [2002] ICR 729 EAT**.

40. Normal day-to-day activities means those activities relevant to professional or work life where it applies across a range of employment situations. It requires a broad definition but can include irregular but predictable events: **Paterson v Commissioner of Police for the Metropolis [2007] ICR 1522 EAT; Chief Constable of Dumfries and Galloway v Adams [2009] ICR 1034 EAT**. "Normal" has an ordinary everyday meaning **Guidance D4**.

41. As for deciding if an impairment is substantial, in **Paterson** the Appeal Tribunal said at [68]

"In our judgment the only proper basis, as the Guidance makes clear, is to compare the effect on the individual of the disability, and this involves considering how he in fact carries out the activity compared with how he would do if not suffering the impairment. If that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial."

42. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination: **John Grooms Housing Association v Burdett UKEAT/0937/03 EAT**.

43. I must have regard to the medical evidence: **Kapadia v Lambeth LBC [2000] IRLR 699 CA**.

44. Though I have had regard to the whole guidance, we found the following paragraphs of the guidance particularly helpful in this case:

44.1. A1, A3, A5, A6

44.2. B1, B2, B6, B7

44.3. C1

44.4. D2 and D3, D8 and D12 and the appendix thereto.

45. In **J v DLA Piper LLP [2010] ICR 1052 EAT** the Appeal Tribunal held that in a case like anxiety and depression where it may not be clear if there is a mental impairment, the Tribunal can start with the adverse effects first. I can see no reason why that does not apply to other situations when appropriate like, say, dyspraxia.

Deposits

46. **Rule 39** empowers the Tribunal to make an order that a party pay a deposit of up to £1,000 per allegation. In default of payment that part of the claim will be struck out. The Tribunal has to take into account the party's ability to pay. The power is more relaxed than that for strike out: **Van Rensberg v Royal Borough of Kingston Upon Thames UKEAT/0096/07**.

47. The tribunal retains a discretion in the matter and the power to make such an order has to be exercised in accordance with the overriding objective — to deal with cases fairly and justly — having regard to all of the circumstances of the particular case — **Hemdan v Ishmail and anor 2017 ICR 486 EAT**. This means that regard should be had, for example, to the need for case management and for parties to focus on the real issues in the case. Another relevant factor is the extent to which costs are likely to be saved and the case likely to be allocated a fair share of limited tribunal resources. It may also be relevant to consider the importance of the case in the context of the wider public interest

Conclusions

The disability issue

Has Mr Hilton-Brown proven on the balance of probabilities that at the relevant times he had dyspraxia?

48. I am not satisfied that Mr Hilton-Brown has proven on the balance of probabilities that he has dyspraxia. My reasons are as follows:

48.1. Though he claims he was diagnosed in 1994 there is no medical evidence to support his assertion and it is not referred to in the report of Ms Gurney.

48.2. Based on my findings of fact above, I do not accept that the report of Ms Gurney is a diagnosis that Mr Hilton-Brown had dyspraxia. As I commented above, it goes no further than to suggest that it was a possibility.

48.3. There is no medical evidence either in the GP's notes or in the GP's letters that in my view supports the proposition that Mr Hilton-Brown has dyspraxia. The only mentions of dyspraxia are twice from 2016, and they record only what the claimant told

them. They do not amount to a diagnosis. In my view it is telling that Mr Hilton-Brown sought no diagnosis through his GP, and that Mr Hilton-Brown's medical notes show in strong contrast that he had depression rather than dyspraxia.

48.4. The affect on the normal day-to-day activities does not point to a conclusion that on balance of probabilities he has dyspraxia, only that he might have it.

49. Therefore I dismiss the allegation that Mr Hilton-Brown had the impairment of dyspraxia.

In any event, did the alleged dyspraxia have a substantial adverse impact on his normal day-to-day activities

50. Even if Mr Hilton-Brown had dyspraxia, I would have dismissed the allegation it amounted to a disability. My reasons are as follows:

50.1. The reliance on tiredness cannot be on balance attributed to alleged dyspraxia. The reason for that is that the medical evidence and GPs' notes show on balance that his tiredness is attributable to the depression. As I remarked in my findings of fact, depression may be linked to dyspraxia but equally may not. There is no basis on which I can attribute any link between the two. Rather the medical notes show in my opinion that the depression is a standalone condition. In addition the medical evidence and his own evidence attributes a lack of sleep to depression lead me to conclude this is a more likely explanation of his tiredness.

50.2. I acknowledge that Mr Hinton-Brown had adjustments for his exams. I am prepared to accept that, without deciding, taking exams is a normal day-to-day activity because a large portion of the population do it. However I am not satisfied it demonstrates a severe adverse impact. Firstly the fact is that the exam was adjusted to reflect his need – howsoever that arose. Secondly and more importantly he was still capable of doing exams. I do not accept that having teaching assistant support is demonstrative of anything. Rather it seems to me to be normal.

50.3. I do not consider that the length of time it took to learn to drive is indicative of anything. Again assuming but without deciding that taking a driving test is a normal day-to-day activity, the length of time does not seem to me to so remarkable as to mark him out in any way. Moreover it has to be set against the fact that he passed and has a licence without restriction. Insofar as he has issues with directions and lane discipline I would remark that this is quite common and, in any event, he uses readily available free technology to assist him. It seems to me that is the sort of adjustment it would be reasonable for him to make and so, relying on the guidance, it does not amount to a substantial adverse impact as he alleges.

50.4. I find nothing remarkable in that he finds it difficult to learn new skills or computer systems until he is familiar with them. In my opinion that is entirely ordinary and unremarkable. There is no evidence that takes wholly without the experience of a significant cross-section of the population. Besides relying on support and guidance is the sort of adjustment I would expect him to make, and I would expect many people to require.

50.5. Given my findings of fact and the lack of treatment or GP records on the issues, I do not accept that there is any impact that is more than minor or trivial on his balance and movement.

50.6. On the evidence before me I see nothing out of the ordinary in the fact he finds it difficult to learn new skills, process information, follow and remember instructions. To the extent he does need prompting, taking notes is the sort of adjustment it is reasonable for him to take. I take the same view on the social cues in social situations. The evidence does not persuade me that any impact is more than minor or trivial. Likewise, his emotions. Moreover though, to the extent there is a substantial adverse impact on these, the clear medical evidence of depression coupled with the impacts complained of appears to be as consistent with depression as anything else.

51. Therefore individually I am not satisfied that the evidence shows a substantial adverse impact as alleged.

52. In any case, I have taken a step back and looked at the alleged impacts as a whole. I do not accept that, as a whole they are substantial or adverse. This is somewhat demonstrated by his employment, the lack of evidence of the alleged impacts in the GP notes and the fact that he had made the adjustments it would be reasonable to expect him to make, as the guidance describes. Simply put, the evidence he relies on does not support what he alleges.

53. To my mind, the most significant symptoms are tiredness and generalised anxiety. These are the ones that repeatedly cause visits to the GP. They are as consistent with the depression as anything else, and the GPs notes all link them to the depression. The GP's notes confirm in my mind that they are more

The deposit issue

54. I am satisfied that the argument that they knew or ought to have known of his depression has little reasonable prospect of success, or that any unwanted conduct was related to his disability has little reasonable prospects of success. I come to that conclusion for the simple reason that in the claim he presented and which he wrote himself, he did not once allege that the respondent knew or ought to have known, or that the discrimination or harassment was in any way attributable to the depression. I acknowledge that the document is not like that one might expect from a lawyer. However one does not need a legal qualification to set out that any alleged

discrimination was because of the disability of depression. When he wrote the claim, he would have had available to him all necessary knowledge to be able to set out his case and to be clear what was the cause of the alleged discriminatory treatment. That he did not mention the link shows that even he at the time did not think there was a connection. Nothing has happened since to point to a connection: i.e. there is no new information that might clarify the claims. There is no new information or evidence that points to a link. Overall I am of the opinion this so undermines the credibility of the argument that his depression was something of which the respondent knew or ought to have known or was related to any alleged unwanted conduct that it has little reasonable prospects of success. I also take into account the short period of employment. It seems inherently implausible that anything happened in such a short period of time that the respondent would have been on notice of the depression. This is particularly in light of the fact the claimant does not cite anything which happened that might have put the respondent on notice.

55. Therefore for those reasons:

55.1. for the purposes of the claim of discrimination arising from a disability (**Equality Act 201 section 15**) in my view there is little reasonable prospect of Mr Hilton-Brown establishing facts from which the Tribunal could properly conclude that the respondent knew or ought to have known that he was disabled because of depression (allegation 1)

55.2. For the purposes of the claims for failure to make reasonable adjustments (**Equality Act 2010 sections 20 and 21**) there is little reasonable prospect of Mr Hilton-Brown establishing facts from which the Tribunal could properly conclude that the respondent knew or ought to have known that he was disabled because of depression (allegation 2);

55.3. For the purposes of the claims of harassment related to disability (**Equality Act 2010 section 26**) (allegation 3), there is little reasonable prospect of the claimant establishing that any unwanted conduct was related disability. I acknowledge that knowledge is not a pre-requisite to a successful claim for harassment. However if in reality the respondent did not know and could not be expected to know of his depression, then it seems there is little prospect of Mr Hilton-Brown establishing facts from which the Tribunal could properly conclude that any unwanted conduct is related to his disability. He has provided no basis to conclude they knew or ought to have known. He makes no allegation of e.g. perceived disability. He relies only on his own depression.

56. I have reflected on his income, savings and lack of debts. I believe that a deposit of £500 per allegation (therefore a total of £1,500) is not disproportionate. It would be enough to cause the claimant to think twice. On the other hand it is affordable and would leave sufficient resources to

facilitate access to legal representation, if Mr Hilton-Brown chose to pursue that.

Employment Judge Adkinson

Date: 12 December 2022

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