



EMPLOYMENT TRIBUNALS

Claimant: Mr J McCaffery

Respondent: British Transport Police

PRELIMINARY HEARING

Heard at: Liverpool by CVP

On: 25 July 2023

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: Mr D Tinkler, Counsel

Respondent: Mr N Caiden, Counsel

JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant was a disabled person within the meaning of s6 of the Equality Act 2010 at the relevant time.
2. The case management order of 22.2.23 shall be varied to provide amended filing dates as follows- exchange of all witness statements by 4pm on 11 August 2023 and the indication to the Tribunal the case is ready to proceed or not with reasons if not by 4pm on 14 August 2023.

REASONS

1. The Tribunal gave reasons to the parties orally on the day of the hearing, reserving the right to set out those more specifically in writing as the final hearing is listed to commence on 21 August 2023, but not to alter the substance.
2. The claimant brings claims for disability discrimination arising from a disability and in respect of reasonable adjustments. Those claims are listed for hearing shortly in August 2023. The case management orders have been made by Employment Judge Leith on the 23rd of February 2023. At all relevant times the claimant was employed by the respondent as a trainee British Transport Police officer.

3. The issue for the Tribunal today is whether the claimant can satisfy the definition of disability as set out in s6 of Equality Act 2010. As follows-

“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.

4. The burden of proof is on the claimant. The dispute was not the question of long term mental impairment, the claimant being diagnosed with dyslexia and dyscalculia, the former since aged 7 and such conditions being conceded by the respondent, but whether the Tribunal has before it sufficient evidence to conclude such impairments have **“a substantial and long term adverse effect on his ability to carry out normal day-to-day activities.”**

2 The Tribunal heard from the claimant on oath and heard the submissions of counsel on behalf of the claimant and the respondent. The tribunal had an extensive bundle of documents containing a number of reports detailing the claimant's history regarding these conditions as set out in the index to the bundle- most particularly Dr Rack (psychologist) from 1999, Dr Schneider (Ed Psychologist) from 2008 and Dr Cheesman (Occupational Health Psychologist) from October 2022. There were further OH reports from the respondent also as set out in the index.

3 Further documents were sent to the tribunal which included :- The CMO of EJ Leith on 22.2.23, (although in the bundle already) and a second statement from the claimant – 19 July 2023; a report from the claimants trainer,- BT police officer PC Mottershead (“Document 68”). And each party provided submissions in writing. A further authority **Paterson v Commr of Police of the Metropolis 2007 IRLR 763** was sent to the tribunal after submissions (at the Tribunal's request) and was referred to during the hearing.

4 The claimant's submissions were as set out in the note to the Tribunal, in brief the following are relied upon- as quoted from the Note referring to the statement,

“C identifies the following difficulties which arose from his condition:.1 spatial difficulties which impacted on a range of nonverbal problem-solving tasks (para 6 and para 10).2 spatial and sequencing difficulties in spelling and written work (para 6).3 problems breaking down things into segments (para 7).4 lower processing speed when required to reduce matters into writing (para 10). “

The claimant relied on the assessment of PC Mottershead's description of C's performances (and failings) reflect the difficulties presented by C's disability as set out in an email dated March 22 after the training on the job element was being undertaken:

PC Mottershead notes that C ‘really struggled’ to learn how to use the niche computer system and this needed to be explained to him ‘multiple times.’ This accords with C's evidence that he has difficulty inputting information onto the computer and needed instructions broken down or written down;

PC Mottershead states that C 'does not have the competence to effectively interview and deal with [a] case file himself.' C identifies interviews as presenting a particular difficulty because of his disability;

PC Mottershead notes that C had difficulty remembering new processes and procedures and needed repeat instructions for the same task. This reflects C's need for material to be broken down into chunks and the need for his training to be supported with checklist and templates."

5 The tribunal's assessment of the claimant's evidence after the claimant confirmed the contents of his statements dated 13.4.23 and 19.7.23 was that from this short snapshot the Tribunal found his evidence to be straightforward, intelligent and thoughtful.

6 He indicated that in examinations taken whilst in training which could last either 30 or 40 minutes: he was given an additional 10 or 15 minutes to answer the questions. He indicated he had problems with the niche system. This is the police system for recording occurrences and actions essential to police recording. He indicated difficulty in on occasion, making notes and writing things down. Especially as there had been gaps between learning policies and procedures and putting them into effect. He also required additional tutoring with regards to personal safety matters.

7 He accepted PC Mottershead identified that he needed further training support. And he had gaps in his encoding memory. At certain times he also indicated difficulties with short term memory and difficulties memorising and following sequencing-*ie.* He had difficulty in recalling things in the right sequence. In document 68 authored by PC Mottershead it records that. **"Every officer in BTP has had to get to grips with niche at some point, but with a little time and playing about people generally get used to the interface. His assessment of the claimant was that he had really struggled."** (The first sentence was unfortunately redacted at the time the hearing began but is of importance and a unredacted copy has been before the tribunal.)

8 In oral submissions, Mr Tinkler developed the point, relying on Paterson above 2007 IRLR 763 regarding the claimant requiring 25% plus extra time in doing tests-. relying on the judgement of Elias J. in relation to the assessments, this was a fact to be taken into consideration.

9 The EAT holding in that case (where a police officer was concerned re non promotion he said due to disability discrimination) is instructive-

The EAT held: *The employment tribunal had erred in holding that although Mr Paterson suffered from dyslexia he was not a disabled person within the meaning s.1 of the [Disability Discrimination Act 1995](#).*

Carrying out an assessment or examination is properly to be described as a normal day-to-day activity. Moreover, reading and comprehension are themselves normal day-to-day activities. The decision of the ECJ in Chacón Navas was decisive of the point. "Day-to-day activities" has a meaning which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable an employee to advance his employment. Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life.

The only proper approach to establishing whether the disadvantage was substantial is to compare the effect of the disability on the individual; this involves considering how he in fact carries out the activity compared with how he would do it 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.

In the present case, once the tribunal accepted that Mr Paterson was disadvantaged to the extent of requiring 25% extra time to do the assessment, which was what the first report considered appropriate, then it inevitably followed that there was a substantial adverse effect on normal day-to-day activities. Mr Paterson was, therefore, a disabled person within the meaning of s.1 of the 1995 Act.

10 Further, Counsel drew the tribunal's attention to the Educational Psychologist report of Doctor Schneider in 2008 and Doctor Cheesman in October 2022, asserting that the picture was consistent. Although the claimant's presentation is not "classic" in respect of dyslexia. There are certain weaknesses, for example in his short term memory.

11 Doctor Cheesman reported in October 2022 and explored with the claimant what he experienced at the time of his employment. And Mr Tinkler drew the tribunal's attention to his borderline functioning in some areas, particularly at page 133, paragraph 5.3.4. At page 134 paragraph 5.3.6. - his processing speed. And tasks taking longer at page 135. And at page 143. Paragraph 6.3.1 the working memory aspect.

12 He drew attention to the status of the day-to-day activities that the claimant would then be carrying out at work, such as conducting interviews with suspects, preparing MG11 statements, uploading information onto the computer system. And how to manage the IT system all of which it is submitted would require structured support to enable learning to take place.

13 Mr Tinkler invited the tribunal to consider the matter through the lens of the adjustments the claimant would need to carry out the claimant's day-to-day activities. He drew attention to the claimant's evidence regarding the necessity for chunks of material to be given to him, templates to be provided and checklists. He submitted that timetables would be necessary to assist the claimant.

14 He distinguished the application of **Jackson v Lidl**. as referred to in the respondent's submissions as in that case, there was no evidence of a disability.

15 He drew attention to the Guidance making the point regarding it being illustrative and non exhaustive. Further relying on the fact that here there are a number of different impacts for the claimant of his disability not only one aspect.

16 Mr Tinkler submits that the claimant suffers from complex and profound difficulties. And although he can read difficult matters which may include complex texts, that is not to say he does not have a substantial effect from the disability in other ways.

Re- Issue of SERVICE OF 2ND Statement of the claimant

17 The respondent did not oppose the introduction of the second statement of the claimant although it was submitted without permission. The claimant says it was sent by email on 19.7.23 at 15.46. The respondent says it is an attempt to correct deficiencies from first statement but overall takes a pragmatic approach and reserves the right to raise any issue regarding the statement on costs if the case proceeds.

18 The respondent's submissions by Mr Caiden were as in writing as set out in his note to include that the claimant had not ticked box at page 10, ie not say disabled;

deficits in the claimants witness statements; and the “ medical evidence” and his impact statements did not establish ‘ substantial adverse effect.’”

19 Mr Caiden, on behalf of the respondent developed this in oral submissions and submitted that the date to be considered here is plainly when alleged discriminatory conduct occurred, ie during the course of the claimant’s employment not at the time that Dr Cheesman had examined the claimant.

20 He asserts that the claimant’s conditions do not have a substantial adverse effect on his day-to-day activities. Although he accepts that the reports have been undertaken at various times and that on a reading of some aspects of the tests, the claimant is in lower percentiles on some aspects of functioning but that in itself does not necessarily lead to a conclusion of substantial adverse effect. He submits that functional diagnosis do not assist the tribunal.

21 He invites the tribunal to consider evidence which goes the other way. And that the best evidence is what happened at the time.

22 He criticised the claimant’s approach in considering what adjustments the claimant would require and working backwards.

23 He did not accept the reason the claimant had difficulties with “niche” was due to his dyslexia and that a causal link had been established. He asserted that for example- If the claimant relied on a failure of sequencing memory in in the abstract, he had failed to give concrete examples of it, such as not being able to remember his phone number. He asserted that it did not follow that the claimant had a particular diagnosis and was therefore disabled. He asserted that the claimant had not given sufficient concrete examples of actions to allow the tribunal to conclude that there was substantial adverse effect. He says the claimant’s evidence lacks the necessary detail and examples.

24 He asserted that because of the diagnosis, the claimant would in any event be given further time in exams as a matter of course by the respondent. He drew the tribunal's attention to the report of PC Paul Franklin. detailing the training modules. that the claimant had completed showing he asserted a sound understanding of the law requiring some aspects of memory. Further that the claimant had been able to do certain things putting in doubt the claimant's assertion that there was a substantial effect.

The law to be applied

25 The tribunal has considered the definition of disability within section 6 of the Equality Act. The tribunal has had regard to the authorities referred to by the parties within their skeletons.

The landmark case of Goodwin v the Patent Office 1999 IRLR 4 EAT Elliott v Dorset County Council 2021 IRLR 880 EAT, And Paterson as above

26 Further the respondent relied on landmark authority establishing the claimant bears the burden of proof Kapadia (2000) and MutomboMpania (2018). Further that the time for assessing the disability is the date of the alleged discriminatory act –

Cruickshank v VAW Motorcast Ltd 2002 ICR 729 EAT and Richmond Adult Community College v McDougall 2008 ICR 431

Jackson v Lidl GB Ltd 2302259/19 expressing difficulty in, “at what point the condition of dyslexia which is shared by many people crosses the line to be classed as a disability”.

27 The tribunal considered the Guidance to the definition of disability provided within the Equality Act 2010 and in particular with regard to the meaning of “substantial adverse effect.” At B1, the requirement that an adverse effect on normal day-to-day activities should be a substantial one, reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at section 212(1).

28 One of the features which is included in the guidance is the time taken to carry out an activity. At B2, the time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment is substantial. It should be compared with the time it might take a person who did not have the impairment to complete an activity.

29 At B3, the way in which an activity is carried out,- another factor to be considered when assessing whether the effect of an impairment is substantial is the way in which a person with that impairment carries out a normal day-to-day activity. The comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment.

30 The guidance goes on to consider the cumulative effects of an impairment. Before an impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.

31 Day-to-day activities in the guidance is considered at D. Within D3 it indicates that “normal day-to-day activities” can include general work- related activities and study and education related activities such as interacting with colleagues, following instructions, using a computer, driving. Carrying out interviews, preparing written documents and keeping to a timetable or shift pattern.

32 This tribunal accepts that the guidance is guidance and is non exhaustive in its examples. The tribunal has had an opportunity to review the totality of the evidence and the reports and submissions made and re read the bundle and skeletons.

CONCLUSION

33 The tribunal has reached the conclusion that the claimant has satisfied the burden of proving that his dyslexia (and dyscalculia) have a substantial adverse effect on his ability to carry out normal day to day activities.

34 The tribunal has taken a holistic approach to considering this question. There are several medical reports as listed in the index historically and from the respondent's

OH evidence, the “medical / “ psychological” evidence from Dr Schneider albeit from 2008 and Dr Cheesman from October 2022 albeit instructed for these proceedings and but which bear out an effect which is beyond minor.

35 The reasons why the tribunal concludes the claimant has demonstrated that test are essentially these:-

- (1) The medical evidence read overall is quite compelling. The claimant has those difficulties explained in the skeleton of Mr Tinkler particularly processing, segmenting and sequencing. There is no quantum leap to those being caused by mental impairment and illustrated by the difficulties faced as evidenced in PC Motterhead’s email of March 2022
- (2) The Email of PC Mottershead (DOC 68) is very telling –It is critical of the claimant’s competence on NICHE which did not improve as time went on, on uploading a MG11 – witness statement -a crucial police task – “ that he was unable to retain the knowledge” that he required “constant supervision when completing paperwork”, that there was poor interview criticism and also criticism of the process of a “GO WISELY STOP AND SEARCH”.
- (3) These professional activities can be regarded as normal day to day activities in the role per the authority of Paterson and the Guidance.
- (4) To a point, the assessment is at loggerheads with the assessment of the trainers in November 2021 – “*James demonstrated competencies across core skill areas, applying the law and communicating effectively and making timely decisions. He showed a willingness to learn and took on board constructive feedback. He impressed his tutor with his abilities and it was stated that he now needs the experience and opportunities to develop further what he has learnt.*”
- (5) The tribunal’s assessment is that that evidence is regarding the claimant not in the actual role, but in a training setting and the on- the- job competence was the real issue where the “experience and opportunities” actually showed how the claimant was compromised by being affected by his disability in a substantial way. This has been weighed in the balance.
- (6) The tribunal accepts the submission at paragraph 15 of the claimant’s note re the claimant’s performance as a student constable reflects a substantial adverse effect—niche/ interviewing /new process /recall –These are major and cannot possibly be said to amount to minor matters.
- (7) The tribunal does accept Mr Caiden’s argument that the claimant has to a degree put the cart before the horse and is not persuaded that it needs to look through lens of reasonable adjustments, but what the tribunal can legitimately do is look at how a person not labouring with the disability copes and they for example- would not need extra time, not need further training, nor repetition to complete tasks nor constant supervision.– all of which are of some significance when one looks at the matter as a whole.

- (8) The tribunal is not persuaded as per page 10 of the box which is not ticked to say the claimant does not rely on being disabled-it may be a processing mistake but it is not conclusive or helpful.
- (9) This is not a simple case as the claimant's presentation may not be classic dyslexia, it requires to delve down into the subtleties, it is not one thing on its own but a cumulation of effects so for example- more time for assessments or exams -- NICHE not equipped/ grasped after " playing around", the claimant missed out a key part of script for arrest. In conclusion there is not one part of what is at play – there are several strands tying together to make the substantial adverse effect. This is an important consideration and the tribunal accepts there is not "ONLY" one aspect here.
- (10) Overall the tribunal concludes that substantial adverse effect on day- to-day activities is made out by the claimant.

Employment Judge Grundy

Date: 25th July 2023

JUDGMENT AND REASONS SENT TO THE
PARTIES ON 2 AUGUST 2023

FOR THE TRIBUNAL OFFICE