



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Garner

Respondent: Cheshire Autism Practical Support Limited

Heard at: Liverpool

On: 2 October 2023

Before: Employment Judge Aspinall (sitting alone)

REPRESENTATION:

Claimant: In person (supported by friend Mrs Sillitoe)

Respondent: Mr Flood (Counsel)

JUDGMENT having been sent to the parties on 9 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form dated 3 August 2022 the claimant brought complaints of unfair dismissal, breach of contract (notice pay), outstanding wages and holiday pay and disability discrimination, relying on autism as her disability. The respondent defended the complaint by its response form dated 16 September 2022.
2. The preliminary hearing was listed to decide whether or not the autism amounted to a disability within the definition in section 6 of the Equality Act 2010 between 3 June 2021 and 19 April 2022.
3. At a ground rules hearing before Employment Judge Howard on 28 June 2023 it was decided (because of the sensitive personal nature of a disability impact statement) that this preliminary hearing would be a private hearing.
4. Further discussion at the outset of our case today led to further adjustments for the claimant, including adjustments on communication; we talked about spiralling and agreed that a signal would be given if the claimant fell into spiralling; and we talked about ranging, and again agreed a signal would be given. In the event neither of these

interventions were needed and the claimant gave her evidence competently and in a straightforward and helpful way.

5. An adjustment was made in relation to the physical layout of the room because the claimant was uncomfortable at being in the same room as two members of the respondent organisation who had attended. The claimant was offered a courtroom with screening in place but did not feel that necessary, and it was agreed that if the furniture was moved so that the claimant could sit at an angle facing the Judge where she could be seen by Mr Flood but where she did not have to see those respondent members then this would work, and this was put in place and worked well for her.

The Issues

6. There was no List of Issues today but there was a single issue to be determined, and that was whether at the material time the claimant was a disabled person within section 6 of the Equality Act 2010.

Documents and Evidence

7. At the hearing today there was a bundle which had been sent electronically and was printed at Tribunal. It ran to 61 pages. The claimant also wished the Tribunal to see a copy of her letter to the Tribunal dated 9 March 2023 in which she set out her arguments (in effect, a set of submissions on disabled status) and that document was added to the bundle.

8. The respondent produced an addition to the bundle (pages 62-198) and they were prints of Facebook entries made by the claimant in around September 2022. Mr Flood regretted that having only been brought to his attention the previous working day there had not been time for them to be shared with the claimant before attendance at Tribunal today. He wished to have them admitted as they were of potential relevance, and he was clear before evidence was given that they might go to credibility and to the claimant's position on whether her condition was having a substantial effect on her day-to-day activities at the material time. It was agreed at his suggestion that an adjournment should be taken to give the claimant time to look at those documents so that she was not surprised by them. We adjourned for an hour. The claimant took that time to look at the entries and was happy to be referred to them in cross-examination. I directed that the claimant remain focused on what she would say in response to questions about her condition and leave it to me to decide what weight (if any) to attach to what she had said on Facebook in September 2022 and thereabouts when the relevant period that I was looking at ran from June 2021 to April 2022.

9. Mrs Sillitoe agreed that she would remain with the claimant during the adjournment, and the claimant has had support from Mrs Sillitoe throughout today, helping her to focus on her impact statement and to remain calm and ready to answer her questions.

10. After the adjournment the claimant confirmed she was ready to continue to give evidence. I heard oral evidence from the claimant on oath. She was a witness who was guarded in some of her responses, giving limited or partial answers on occasions and sometimes seeking to deflect the thrust of the question with an additional piece of information.

The Facts

11. The claimant was diagnosed with Autism Spectrum Condition Asperger's Syndrome at age 45. She had set up and grown a charity called CHAPS. She was its Managing Director on a salary of around £40,000 reporting to a Board of Trustees. She worked around 60 hours a week. She had a degree in leadership and management and a bookkeeping qualification. She had been prescribed low dose fluoxetine in 2018 to manage menopausal symptoms. In February 2021 she changed GP, moving to the Weaverham Surgery, and reported feeling stressed at that time. The claimant was still taking a low dose of fluoxetine.

12. In June 2021 the events the claimant complains of as discrimination began. They can loosely be described as increased performance management. From July 2021 she was keeping diary entries, having to record how her time was being spent. She continued to attend work, run her home, look after herself and her daughter, though she was stressed and anxious about what was happening to her at work. She engaged less socially than she had done before and the problems at work and her feeling stressed by them, were beginning to affect her health.

13. By October 2021, after a meeting at work about performance, the claimant became very unwell and went off sick. She consulted her doctor who recorded a stress-related problem. The entry said, "Chosen not to be in work since last Friday, problem with employer". The doctor issued a fit note declaring her unfit for work from 8 October to 29 October 2021.

14. On 15 October 2021 the claimant was prescribed the anti-anxiety medication propranolol. The claimant was unwell at this time. She was paying less attention than usual to washing and cleanliness of her home. She ignored correspondences that she received and she stopped cooking, managing on frozen food or takeaways for a while.

15. Within the month (by 4 November 2021) the claimant was well enough to return to work. The doctor changed her medication. Although it was kept at the same dose, she was changed to a slow release form of propranolol so that she could manage the uptake of the drug throughout the day.

16. On 2 December 2021 a performance review meeting took place with an outsourced HR person present.

17. On 10 December 2021 the claimant was suspended on full pay facing allegations of bullying and victimisation of staff. This was devastating news to the claimant.

18. In February 2022 the claimant again consulted her doctor who recorded (again), "Stress-related problem. Has been suspended from work". The doctor did not change her medication and recorded that the claimant was able to take her dog for a walk, that knitting and craft helped her and she was referred for counselling. The claimant was at her lowest point at this time. She was withdrawn and detached from her family and from relationships. She felt unable to leave home and was tired and stayed on the sofa.

19. On 21 April 2022 the doctor diagnosed mixed anxiety and depressive disorder and at that point increased the claimant's fluoxetine to 40mgs. The doctor recorded that the claimant was not sleeping, feeling sick, but was bright and able to joke on the phone, was taking her dog for walks and had good friends and support around her. On 26 April 2022 the doctor considered the claimant unfit for work. She remained signed off sick from 26 April 2022 until September 2022. The doctor referred the claimant for social prescribing, hoping to encourage her to engage more and get her to go to the gym. The sick notes were extended so that in the event the claimant remained off sick until around February 2023.

20. The claimant had been dismissed on 19 April 2022. She made an application for benefits. In August 2022 she took out an insurance policy for a business that she intended to start called "Recycled Goodies", and she cited in the application for that policy her role as a Carer. This related to paid work that she took as an assistant to a disabled person. The claimant started "Recycled Goodies" and began making products to sell and offering craft sessions from her home in early summer, June and July 2022.

21. In November 2022 the claimant had an assessment for Universal Credit in which she described herself as being unable to mix with people; being unable even to answer the door to strangers who might call at the house; being anxious about delivery drivers coming to the home; being unable to get off the sofa, cook or look after herself.

22. Later, in 2023 the claimant set up a catering business which she ran with a colleague from a local pub.

Submissions

Respondent's Submissions

23. I heard submissions from Mr Flood on the basis (in effect) that the burden of proof of the claimant had not been met in establishing that her condition met the test in section 6 of the Equality Act 2010. There were no medical records referring to the impact of autism at that time and the medical records revealed a clear picture of anxiety and depression and stress being the factors that were causing the symptoms the claimant was experiencing.

24. Mr Flood also quoted the claimant's own disability impact statement and said that this ran contrary to the evidence that she was giving at Tribunal where she would have me believe that autism was causing the debilitating symptoms when in fact prior to the stressful events at work the claimant did not describe any debilitating symptoms of autism. Even if they go hand in hand (he submitted) they would not amount to "substantial" in law.

25. Mr Flood invited me to reach conclusions about credibility issues with the claimant because of the position in her Universal Credit application and the position on Facebook, suggesting that they could not both be true at the same time. He invited the Tribunal to find that the claimant's account of the impact of the stress, anxiety and depression were a falsehood and any effect she was experiencing was exaggerated and was not in any event attributable to autism.

Claimant's Submissions

26. The claimant referred me to the National Autism Society, she quoted from its website and the Citizens Advice Bureau website about autism; she cited the Equality Act and in documentation she sent to the Tribunal also quoted not just the Equality Act but from guidance on the definition of disability contained in the Code to that Act. She was well prepared and well able to represent herself (with support from Ms Sillitoe) at Tribunal today.

The Law

27. Applying the relevant law, the definition (everybody agreed) is contained in section 6 of the Equality Act 2010 which provides

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."**

The section goes on to provide that any reference to a disabled person is reference to a person who has a disability. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial".

28. There are additional provisions about the meaning of disability in Schedule 1 to the Act. Under paragraph 5 of Schedule 1,

"an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if

- (a) measures are being taken to treat or correct it, and**
- (b) but for that, it would be likely to have that effect."**

Guidance

29. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011. Section D of the guidance contains some provisions on what amount to normal day-to-day activities, and paragraph D3 provides:

"In general day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. 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."

30. However, paragraph D8 of the guidance goes on to make clear that some highly specialised work activities are not included in day-to-day activities; examples given are watch repair work and playing the piano to a high standard of achievement. The

guidance also includes an appendix which sets out an illustrative and non-exhaustive list of factors which if experienced it would be reasonable to regard as having a substantial adverse effect. Those factors include the following:

Difficulty in getting dressed, in toileting, incontinence, difficulties preparing meals because of for example inability to open cans or inability to follow and understand a simple recipe, difficulty eating; being unable to coordinate the use of cutlery or because of an eating disorder, difficulty going out of doors because of a phobia, physical restriction or learning difficulty.....persistent general low motivation or loss of interest, difficulty operating a computer, inability to converse or give or follow instruction, confused behaviour, intrusive thoughts or delusions, persistently wanting to avoid people, significant difficulty taking part in normal social interaction, avoiding taking part in normal social activities, persistent distractability or difficulty concentrating.

31. The long-term effect of autism was not disputed. Everyone agreed that autism is a lifelong condition, so the decision for me focused on the *substantial adverse effect on ability to carry out normal day-to-day activities* in that window from June 2021 to April 2022.

32. I also had regard to **Goodwin v Patent Office [1999]** from the EAT which set out the factors that I must address sequentially:

- (1) Did the claimant have a mental or physical impairment?
- (2) Did it affect the claimant's ability to carry out normal day-to-day activities?
- (3) Was it "substantial"?
- (4) Was it long-term? (That was agreed in this case).

Application of Law to Facts

33. The claimant has not produced a letter of diagnosis. There was no written evidence of the descriptors of her autism or the impact of her autism on the claimant from any doctor. The claimant had moved GP surgery and told the Tribunal that she had been diagnosed by a Consultant Psychiatrist while under the care of her previous GP Practice. The records shown to the Tribunal just show that GP Practice accepting the diagnosis of autism in taking on the claimant from the previous Practice. The Tribunal accepts the claimant's oral evidence that she has the impairment of autism and was diagnosed with it at age 45, prior to 2018.

34. During the relevant period, June 2021 – April 2022, the claimant's medical records reveal consultations about work-related problems, work-related stress, anxiety and depression. Although autism is noted, it is noted as a pre-existing diagnosis and there is no suggestion in the record that the conditions the claimant was experiencing were linked to or products of autism. The express position is that the symptomatology is work-related. The claimant wanted me to accept that anxiety, depression and stress are a corollary of being autistic. That is not what the GP was recording. That is not the claimant's own evidence in her impact statement or borne out by her achievements prior to being performance managed at work. She has not said *I am always anxious, stressed, depressed so that I cannot do normal day to day activities because of my*

autism. The GP was recording expressly that these were work-related symptomatology.

28. In particular, we can map the GP records against the timeline of the alleged acts of discrimination at work. I notice the coincidence of the claimant going off sick with that performance review meeting and then the GP consultation around the time of the suspension. Those things are recorded in the medical notes, the claimant told her doctor about the suspension and the disciplinary process.

29. The claimant submitted that GPs do not really know about autism, that they are not expert, and I reject that suggestion. They may or may not be autism experts, but they are experienced, and they record (really importantly) what the claimant says to them, so it gives us a contemporaneous record of what she was saying at the time and the impact on her at the time. The claimant was not saying “this is my autism, I am always like this”, she was saying “this is work-related stress”. In the relevant period (apart from a short absence in October 2021) the claimant was (until she was suspended in the December) able to remain in work. The chronology shows that the absence relates directly to the stressful work events, again supporting the position that it is work-related stress that causes a deterioration in health such that absence is necessitated. The claimant's evidence in her own impact statement was of her stress. She describes a desperate time that she was facing; that clear link between the work events and the impact on her of the stress is made out in her impact statement. She was undoubtedly unwell, but I find she has not established that it was the autism that was causing those symptoms she was experiencing that caused her to be unable to go to work, unable to function.

30. I have not been asked to assess if anxiety, stress and depression were substantial adverse effects on the claimant at that time because she has not relied upon them in her claim.

31. I turn now to how I found the claimant as a witness. I accept Mr Flood's submission that the position as relayed to Universal Credit and as evidenced in oral evidence today (when the claimant accepted the veracity of her Facebook posts at that time) cannot both be true. I accept his invitation to find that the Facebook posts and the claimant's open oral evidence today, that she was able to set up the “Recycled Goodies” business, to create and run events at her home and to make products, market them, sell them at a range of locations she had not visited before, take orders online and deliver them, are the reality of the position. Whilst this fell outside the period under my consideration, it offered insight into the claimant's veracity when describing her condition.

32. Whilst the claimant was undoubtedly unwell for part of 2021 into 2022 by reason of stress and anxiety she was, to her credit, seeking to engage, to manage her stress and to provide for her family. I find that the claimant overplayed the effects of her stress, anxiety and depression upon her at the time in her account to Universal Credit. I find that the effects that she was experiencing were attributable to events at work and properly recorded by the GP (as told to the GP at the time) as stress, anxiety and depression. During June 2021 to April 2022 the claimant was able to go to work (save for short periods of absence) wash and dress herself, run her household and look after herself and her daughter and use her phone and computer, engage in normal

work interactions and social interactions though these reduced as she became more stressed.

33. The claimant submitted that she would not have become stressed, anxious or depressed at these events if she was not autistic, and in the absence of expert medical evidence to support that contention I reject that submission. It is not borne out by the claimant's medical notes. It is not borne out by the reality of her substantial academic and business achievements prior to her being performance managed at work. She achieved a qualification, set up and grew a charity as a person with autism prior to the events complained of. There is no evidence here that the stress that the claimant suffered was as a result of her autism, nor that the stress was worse for her as a person with autism than otherwise. The evidence points to stress as a reaction to performance management.

34. The claimant asked me to have regard to a range of sources, and I have looked at those sources, but it has not been necessary to take judicial notice of them. Everyone's experience of autism is their own and it was for the claimant to tell me how her autism affected her. She did that, I have listened carefully to her, read her impact statements and looked at the contemporaneous records, and the medical notes. From those I have found that the effect of the autism was not substantial at the time.

35. As that effect is not made out, the disability discrimination complaints now stand dismissed.

Employment Judge Aspinall

Date: 28 December 2023

REASONS SENT TO THE PARTIES ON
5 January 2024

FOR THE TRIBUNAL OFFICE

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