



## **EMPLOYMENT TRIBUNALS**

**Claimant:** Ms Adele Smith

**Respondent:** Dunton Environmental Limited

**Heard at:** Midlands West **On:** 6 October 2023

**Before:** Employment Judge Gilroy KC

### **Representation**

**Claimant:** In person

**Respondent:** Mr Ishfaq Ahmed (Counsel)

## **JUDGMENT ON A PRELIMINARY HEARING**

The judgment of the Tribunal is that, at the time of the events which form the basis of this claim, the Claimant was not a disabled person by reason of the condition of Attention Deficit Hyperactivity Disorder, "ADHD".

## **REASONS**

### **Background**

1. This matter was listed for a preliminary hearing for the purposes of determining whether the Claimant was, for the purposes of her claims of disability discrimination, and at the time of the events which are the subject of those claims, a disabled person within the meaning of s.6 of the Equality Act 2010 by reference to either or both of two separate conditions, namely dyslexia and/or ADHD.
2. It is not necessary for the purposes of this judgment to descend into any detail in relation to the substantive claims the Claimant brings. The Tribunal's sole focus for the purpose of this judgment is the disability issue.
3. Shortly before the preliminary hearing on 6 October 2023, the Respondent informed the Tribunal that the Respondent no longer contested the issue as to whether the Claimant was, for material purposes, disabled by reference to dyslexia. The issue for determination at this preliminary hearing, therefore, was whether the Claimant, for material purposes, was disabled within the meaning of s.6 of the Equality Act for the purposes of her claim by reference to the condition of ADHD.

4. In essence, the test for disability within the meaning of the Equality Act is whether the person has or had a physical or mental impairment, and the impairment has or had a substantial and long term adverse effect on his or her ability to carry out normal day-to-day activities.

### Issues

5. The Tribunal was essentially required to determine two questions, namely (1) did the Claimant have ADHD at the relevant time?, and (2) if so, did that amount to a disability within the meaning of the Act?
6. The simple fact of having ADHD does not necessarily mean that an individual is disabled within the meaning of the Equality Act. ADHD is a form of neurodivergence, and because it is neurodivergent it will frequently qualify as a disability under the Equality Act and that is the case even if the person concerned does not consider that he or she is disabled. The matter is always fact sensitive.

### Discussion

7. The Tribunal conducted a preliminary hearing for case management purposes on 14 April 2023 when it was directed that the Claimant, by 26 May 2023, serve on the Respondent copies of any medical notes, reports and other evidence in her possession on which she relied for the purposes of her disability claims.
8. In compliance with the above direction, the Claimant provided the Respondent with certain material, in the form of a disability impact statement, a report dated 7 October 2019 from Ms Alison Earey, a qualified specialist teacher holding an approved qualification as noted in the SpLD<sup>1</sup> Working Group 2005/DfES Guidelines and subsequent updates, and what was essentially a self-filled symptom checklist in relation to ADHD, called an ASDV1 form.
9. The report prepared by Ms Earey was an assessment in relation to the condition of dyslexia. It was prepared in connection with the Claimant's then intended embarkation on a degree course. Ms Earey did not assess whether the Claimant had ADHD, indeed she states in her report "*Adele might wish to pursue an assessment for dyspraxia and ADHD in order to understand the full extent of her difficulties*".
10. At the preliminary hearing on 6 October 2023, there was no evidence before the Tribunal confirming a medical diagnosis of ADHD. There was nothing in the form of material from the Claimant's medical notes, for example GP records, to support a diagnosis of ADHD. In fairness, the Claimant herself stated in her impact statement: "*a diagnosis of ADHD should only be made by a special psychiatrist pediatrician or other appropriately qualified healthcare professional with training and expertise in the diagnosis*". It is

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<sup>1</sup> Specific Learning Difficulties.

also fair to say that in the course of her evidence, the Claimant stated (a) that after she had finished working for the Respondent, she was aware that she could obtain an assessment with a view to establishing whether she had ADHD, but that she could not afford it, but, candidly (b) that she could now afford it, but *“it was simply a matter of finding the right clinic”*. The Claimant gave no indication as to what, if any, steps, she had taken to find such a clinic for the purposes of obtaining a diagnosis.

11. In summary, therefore, the position is that the Claimant conceded that she could, in terms of having the means to do so, have provided some kind of assessment report, the contents of which would obviously be a matter of speculation, but that she had not done so despite the fact that she could afford to do so privately.
12. The Claimant provided details in her disability impact statement as to what she maintains is the full impact that ADHD has had on her. She also referred to the treatment and medication she states she has received for ADHD and gave an account of the support measures she has in place together with a description of “things I can do at work without issue”, and “things I need support with at work”. The statement also covered such topics as reading and writing, spelling and grammar, computer work, verbal communication, concentration, appointments and deadlines, organising workflow and “supporting directional difficulties”.
13. Without the assistance of expert opinion addressing the issue of the causes of the symptoms described by the Claimant (in particular in her disability impact statement), the Tribunal was not in a position to reach a view on whether the Claimant satisfied the diagnostic criteria for ADHD. For example, in the absence of expert assistance, the Tribunal was unable to reach a view as to whether (and if so to what extent) the symptoms described by the Claimant in her disability impact statement could be attributed to dyslexia as opposed to ADHD.
14. The Claimant stated in her evidence that whereas reports can be obtained on whether someone satisfies the diagnosis of ADHD, it is essential for the purposes of providing such a diagnosis that the expert providing the report receives a full history of the family background of the individual concerned, given that the condition is widely regarded to have its origins in childhood. The Claimant explained that by reference to her family background, it was simply not possible to produce anyone who could provide an expert with that sort of information.
15. The Tribunal also had regard to the ASDV1 Form completed by the Claimant in June 2023, but self-evidently that is a self-serving document, in other words it is a document that is based upon the subjective opinion of the Claimant.

## Conclusion

16. The Tribunal was required to assess all of the evidence before it and ask itself whether it had been established (1) that the Claimant had ADHD at the

relevant time and if so, (2) whether that amounted to a s.6 disability. The Claimant bears the burden of proof in relation to both of those questions.

17. On the basis of the evidence it was provided with, the Tribunal was not persuaded, on the balance of probabilities, that the Claimant had the condition of ADHD at the relevant time (question 1) and therefore the question of whether the criteria under s.6 were made out (question 2 - see criteria at paragraph 4 above) does not arise.
18. As far as the disability claims are concerned, therefore, this case will proceed solely in relation to the admitted condition of dyslexia.

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**Employment Judge Gilroy KC**

**25 October 2023**