



EMPLOYMENT TRIBUNALS

Claimant: Mr J Coston

Respondent: Reds Restaurants Ltd

Heard: in public via CVP **On:** 14 March 2024

Before: Employment Judge Ayre, sitting alone

Representation

Claimant: In person

Respondent: Mr Chris Bateson Operations Director

JUDGMENT AT PRELIMINARY HEARING

1. The claimant was disabled at the time of his employment with the respondent by reason of arthritis.
2. The claimant was disabled at the time of his employment with the respondent by reason of symptoms consistent with Attention Deficit Hyperactivity Disorder.

REASONS

Background

1. This is the fifth preliminary hearing in this case. The purpose of today's hearing was:
 1. to decide whether at the relevant time (namely during the claimant's employment with the respondent) the claimant was disabled by reason of Attention Deficit Hyperactivity Disorder (ADHD) and/or arthritis and, if so, from what date; and
 2. if the Tribunal finds that the claimant was not disabled, which, if any, of the

claimant's claims can continue and which should be dismissed.

2. At the start of the hearing Mr Bateson conceded that the claimant was, at the time of his employment with the respondent, disabled by reason of arthritis. He did not admit that the claimant was disabled by reason of ADHD.

The hearing

3. There was an agreed bundle of documents running to 200 pages. I heard evidence from the claimant, and both parties had the opportunity to make oral submissions.

Findings of fact

4. The claimant has experienced symptoms consistent with ADHD for much of his life. He has not yet had a formal diagnosis but has been referred for one and is currently on what is a long waiting list. Both the claimant's GP and a therapist that he is seeing have expressed the view that he has ADHD.
5. The effects of the claimant's symptoms on his ability to carry out normal day to day activities can vary as he has good days and bad days. The symptoms also affect his mental health and cause him to suffer from depression and generalised anxiety disorder. The severity of his depression has varied over time, and he has been receiving medication for the depression since August 2022. At times the claimant finds it difficult to get out of bed.
6. The claimant struggles with organisation and with time management. He copes with this in part by setting numerous alarms and reminders on his telephone. For example, an alarm to get up, an alarm to get dressed, and an alarm to leave the house. Even with the coping strategies he has developed over the years, the claimant struggles to meet deadlines and to complete tasks on time. This means that tasks are often completed late.
7. It takes the claimant a long time to get read and prepare for things, and he spends a long period of time completing tasks. For example, he will put off sending emails or doing other things that he considers to be difficult, out of fear of doing them wrong. When he does prepare documents and emails they are often late and contain too much detail.
8. The claimant has difficulty following instructions, and in focusing and completing tasks. He finds it difficult to cope with stress, is restless and impatient and impulsive. He experiences what he describes as brain fog.
9. The claimant's symptoms affect his ability to communicate. He finds it difficult to keep quiet and speaks out of turn. When he feels under stress he stutters. He can blurt out responses and often interrupts others. This has an impact on his ability to communicate with others verbally. His written communications are also affected, as they are often lengthy and sent late.

10. The claimant has received medication and therapy for his condition. At the time of his employment with the respondent he was taking Sertraline and Amlodipine and had received talking therapy and hypnotism.
11. It is the view of the claimant's General Practitioner that ADHD is a condition from which the claimant likely suffers. On 3 April 2023 the claimant's GP wrote a letter in which he commented that although ADHD is not a diagnosis that a GP would routinely make, *"it is a diagnosis that having spoken with Mr Coston and reviewed him on several occasions in my professional opinion he does likely have but of course we await his assessment for a formal diagnosis."*
12. In November 2023 the claimant's GP wrote a letter in which he commented that :
- "Upon reviewing his medical records, I would observe that there exist certain features in Mr Coston's medical history that are often associated with ADHD, such as anxiety, depression, and irritability for which he has been receiving treatment and medication for several years. Additionally, he underwent a hearing assessment when in his teens, which can also be an indicator of concerns about inattention...."*

The Law

13. The relevant statutory provisions are contained Section 6 of the Equality Act 2010 which provides that:
- "(1) A person (P) has a disability if -*
- a) they have a physical or mental impairment, and*
- b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to- day activities"*.
14. Schedule 1 Part 1 Para 2 of the Equality Act defines long-term as:
- "an impairment which has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person effected"*.
15. Paragraph 12 of Schedule 1 of the Equality Act provides that:
- "When determining whether a person is disabled the Tribunal must take account of such guidance as it thinks is relevant"*.
16. The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability ("the Guidance") was issued by the Secretary of State pursuant to section 65 of the Equality Act in May 2011.
17. Paragraph 5 of Schedule 1 to the Equality Act obliges Tribunals to ignore the effect of medication and other treatment when deciding when someone is disabled (the so called "deduced effect" and provides that;

“an impairment is to be treated as having a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect”.

18. In ***Goodwin v Patent Office [1999] ICR 302*** the then President of the Employment Appeal Tribunal gave guidance on the approach for Tribunals to adopt when deciding whether a claimant is disabled. He suggested that the following 4 questions should be answered in order-

1. Did the Claimant have a mental or physical impairment?
2. Did the impairment affect the Claimant’s ability to carry out normal day-to-day activities?
3. Was the adverse condition substantial?
4. Was the adverse condition long-term?

19. Mr Justice Underhill, in ***J v DLA Piper UK LLP [2010] ICR 1052*** suggested that, although it is still good practice to the Tribunal to set out separately its conclusions on the question of impairment, there is generally no need to consider the impairment question of detail, as:

“In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant’s ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues.”

20. When considering whether a Claimant has an impairment the guidance of ***Rugamer v Sony Music Entertainment UK Ltd [2011] IRLR 664*** is helpful. In that case the EAT defined impairment as ‘some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition’ and the phrase “physical or mental impairment” as referring to a person’ having in everyday language something wrong with them physically or something wrong with them mentally’. The statutory Guidance states at paragraph A5 that a disability can arise from a range of impairments and sets out some examples of what those impairments can be.

21. The Tribunal has to decide whether the impact on the Claimant’s ability to carry out normal day to day activities is substantial. Section 21(1) of the Equality Act defines substantial as meaning “*more than minor or trivial*”.

22. When deciding whether the adverse impact is substantial or not the Tribunal must take account of the cumulative effects of the impairment. The Guidance provides examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. Paragraph B2 states that “*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". Paragraph B7 provides that: "Account should be taken of how far a person can reasonably be expected to modify his or her behaviour. For example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities". Account should also be taken of where a person avoids doing things example because they cause pain, fatigue or social embarrassment or because of the loss of energy or motivation.

23. It is for a Tribunal to decide whether an impairment has a substantial effect and when making that decision the Tribunal must take account of the impact on day-to-day activities were the individual not receiving the medical and other treatment to support their condition.
24. Day-to-day activities are given a wide interpretation and in general will be things that people do on a regular or daily basis. They can include general work-related activities but will not include activities which are only normal for a small group of people. In ***Adremi v London and South Eastern Railway Ltd [2013] ICR 5912***, the EAT held that a Tribunal has to consider the adverse effect not upon the claimant's carrying out of normal day-to-day activities, but upon his ability to do so. The Tribunal's focus should be on what the claimant says he cannot do as a result of his impairment.
25. Schedule 1 Part 1 Para 2 of the Equality Act defines long-term as;

"an impairment which has lasted for a least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person effected".
26. The burden of proving that he is disabled within the meaning of section 6 of the Equality Act 2010 falls on the claimant, ***Kapadia v London Borough of Lambeth [2000] IRLR 699***.

Conclusions

27. I am satisfied, on the evidence before me, that the claimant has a mental impairment which is consistent with the symptoms of ADHD, which is a lifelong neurodevelopmental disorder. ADHD is specifically mentioned in paragraphs A13 and E3 of the Guidance on the Definition of Disability (2011) as follows:

"A young man has Attention Deficit Hyperactivity Disorder (ADHD) which manifests itself in a number of ways, including exhibitionism and an inability to concentrate. The disorder, as an impairment which has a substantial and long-term adverse

effect on the young person's ability to carry out normal day-to-day activities, would be a disability for the purposes of the Act.....

Examples of children in an educational setting where their impairment has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities:

A 14-year-old boy has been diagnosed as having attention deficit hyperactivity disorder (ADHD). He often finds it difficult to concentrate and skips from task to task forgetting instructions. Either of these factors has a substantial adverse effect on his ability to participate in class and join in team games in the playground....”

28. The fact that ADHD is mentioned in the Guidance does not of course mean that the claimant meets the legal test of disability, as each case has to be decided on its facts, but it does demonstrate that ADHD is potentially capable of amounting to a disability.
29. I am satisfied that the impairment (i.e. the symptoms of ADHD) has an adverse impact on the claimant's ability to carry out normal day to day activities. He finds it difficult to concentrate and to organise his time. He is often late and unable to meet deadlines or complete tasks on time. He struggles to follow instructions.
30. His ability to communicate is affected. He stutters and finds it difficult to fit the right words into sentences. He has a tendency to interrupt. His written communications are lengthy and often late.
31. The claimant experiences depression and generalised anxiety. At times he struggles to get out of bed. It takes him longer to prepare for things that it would other people.
32. All of the above impacts on the claimant's ability to carry out normal day to day activities subsist despite the medication the claimant is taking, his coping strategies (such as the setting of alarms) and the therapy he receives. I have reminded myself that I have to consider what the impact on day to day activities would be without the medication and treatment and find that the impact is likely to be more pronounced.
33. I have then gone on to consider whether the impact of the impairment on the claimant's ability to carry out normal day to day activities is substantial, i.e. is it more than trivial. In reaching my decision on this question I have considered the cumulative effect of the impairment. Given the range of impacts that the impairment has on the claimant, and the impact on his day to day life, I find that the effects are substantial.
34. I take judicial notice of the fact that ADHD is a neurodevelopmental disorder which normally lasts for the duration of a person's life, although its effects can fluctuate. The claimant describes having experienced symptoms of ADHD for many years,

and his symptoms are ongoing. I am therefore satisfied that the affect of the impairment on the claimant's ability to carry out normal day to day activities is long term.

35. For the above reasons I find that the claimant was, at the time of his employment with the respondent, disabled by reason of symptoms which are consistent with ADHD.

36. In light of the respondent's concession, I also find that the claimant was disabled by reason of arthritis at the time of his employment with the respondent.

Employment Judge Ayre

Date: 14 March 2024

JUDGMENT SENT TO THE PARTIES ON

20 March 2024

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