



EMPLOYMENT TRIBUNALS

Claimant: Miss U Choudhury

Respondent: Innovative Technology Limited

JUDGMENT ON A PRELIMINARY ISSUE

Heard at: Manchester

On: 5 March 2024

Before: Employment Judge Batten (sitting alone)

Representatives:

Claimant: in person

Respondent: R Senior, Counsel

JUDGMENT

The claimant was not a disabled person at the material time.

REASONS

Background

1. By a claim form dated 12 June 2023, the claimant presented a complaint of disability discrimination. The claimant relies on the impairments of **traumatic brain injury and/or dyslexia** as her disability.
2. By a response filed on 25 July 2023, and at a case management preliminary hearing on 29 September 2023, the respondent confirmed that it was unable to concede that at the relevant time the claimant was a disabled person and asserted that it did not have knowledge of such in any event until the claimant raised disability at her appeal against dismissal.
3. This preliminary hearing was listed by agreement of the parties, to determine the issue of whether the claimant was disabled.

Evidence

4. The Tribunal was provided with a joint bundle of documents of 142 pages,

which included the claimant's disability impact statement, together with selected medical records amounting to 35 pages.

5. The claimant also provided a witness statement and the respondent provided a witness statement from Joe Whitehead, the claimant's team leader for the last 6 months of her employment. Both gave oral evidence and were subject to cross-examination.
6. At the conclusion of the evidence, both parties made oral submissions.

The applicable law

7. The law is contained in the Equality Act 2010 ("EqA"), section 6 and also in schedule 1 to that Act as follows:

Section 6 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.*

- (2) *A reference to a disabled person is to a person who has a disability*

...

- (6) *Schedule 1 (disability: supplementary provision) has effect*

Schedule 1, Part 1, Determination of Disability

2. Long term effects

- (1) *The effect of an impairment is long-term if-*
 - (a) *it has lasted for at least 12 months,*
 - (b) *it is likely to last for at least 12 months, or*
 - (c) *it is likely to last for the rest of the life of the person affected.*

- (2) *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

8. The word "likely" in paragraph 2 of Schedule 1 of the Equality Act 2010 means "could well happen" rather than "probable" or "more likely than not": *SCA Packaging Ltd v Equality and Human Rights Commission [2009] IRLR 746*, and paragraph C3 of the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' 2011 ("the 2011 Guidance") which is produced by the Equality and Human Rights Commission ("EHRC").

9. The word "substantial" is defined in section 212(1) EqA as meaning "more

than minor or trivial”.

10. Guidance is given on the meaning of normal day-to-day activities in section D of the 2011 Guidance. Paragraph D3 says:

“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 a shift pattern.”

11. 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.

12. 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.”

13. In the case of Goodwin v Patent Office [1999] the EAT has set out the factors which the Tribunal must address sequentially:

- a. Did the claimant have a mental or physical impairment?
- b. Did it affect the claimant’s ability to carry out normal day-to-day activities?
- c. Was it “substantial”?
- d. Was it long-term?

14. In submissions, Counsel for the respondent referred the Tribunal to the following case law authority:

J v DLA [2010] ICR 1052

The Tribunal took this case as guidance but not in substitution for the statutory provisions.

Findings of fact relevant to the issue of disability

15. Having considered all the evidence, the Tribunal made findings of fact relevant to the issues as follows.
16. It is not disputed that the claimant suffered a head injury in a car accident, when she was 2 or 3 years old, resulting in her being in hospital for 3 months. The medical records from 30 April 1980 do not however state that the claimant had suffered a “traumatic brain injury” as contended for and there is no diagnosis of such. In relation to the note of a head injury, the records state that the claimant had “made a remarkable recovery” and that the medical personnel at the time “can find no neurological abnormality apart from left sided facial weakness”.
17. In late 2013 / early 2014, the claimant herself enquired about an assessment for autism and dyslexia following comments about her reactions at work, with a previous employer, but this was not followed up by the claimant when she moved home.
18. The claimant was aged 44-45 when she was employed by the respondent, from 11 October 2021 to 1 March 2023. The claimant was recruited to do a pressured and responsible job for the respondent, testing cash handling equipment and software. When she commenced employment with the respondent, the claimant told the respondent that she had sustained a head injury as a child, as a matter of fact, but she did not elaborate for example in terms of any suggestion that this was a disabling condition nor did she seek any adjustments or accommodations as a result of her head injury.
19. In October 2022, Mr Whitehead became responsible for the claimant’s work. At an appraisal, he concluded that the claimant was not performing to the basic standards required across her work and he set new objectives for the claimant. In evidence, Mr Whitehead said that the claimant had indicated that she understood what was required and felt capable of completing her work. Mr Whitehead described several conversations with the claimant about performance issues. The claimant was specifically asked what support or training she might like to help her, but the claimant had indicated that she did not require support.
20. At no time during her employment with the respondent did the claimant suggest to Mr Whitehead, or to anybody else, that her work or performance was affected by her brain injury or dyslexia, until her appeal against dismissal. During her employment, the claimant had raised an issue about not being provided with a laptop in comparison with another employee but she never suggested that the provision of a laptop might

assist her because of any disability. At the time the laptop issue was raised, it was known that the claimant wanted to work from home and management understood the issue to have been pursued with that objective in mind.

21. On 1 March 2023, the claimant's employment was terminated for poor performance.
22. In October 2023, sometime after leaving the respondent, and after presentation of her claim to the Tribunal, the claimant sought cognitive testing, an autism assessment and dyslexia assessment because she said she had issues with her memory every day.

Conclusions

23. The Tribunal has applied its relevant findings of fact and the applicable law to determine the preliminary issues in the following way.
24. It is not, in the Tribunal's view, necessary to set out in detail the matters recorded in the claimant's medical records. The claimant has taken the Tribunal through the selected records in evidence and submissions. In short, the Tribunal has concluded that the claimant has failed to demonstrate a disabling condition which affected her daily or in any aspect of her life
25. There was a paucity of evidence of any physical or mental impairment in the medical records produced by the claimant, much of which do not relate to the material time of the claimant's employment with the respondent. None of the records disclosed suggest that the claimant had been suffering from a mental impairment or any continuing ill health, whether related to her head injury or at all save where it is recorded that the claimant had told doctors about her own diagnosis, on 4 occasions. Beyond reference to an historic "head injury" there is no suggestion of any or any substantial impairment.
26. The claimant contended that her disability started to develop as she got older. She gave vague evidence that "my disability effects (sic) my memory, attention span, visual perception and speech", without substantiating how or what she meant by such a statement or any part of it. In evidence, the claimant confirmed that she had never sought medical treatment regarding her impairment or any symptoms of such.
27. In respect of dyslexia, the claimant did not tell the respondent about dyslexia when she commenced employment with it and there are minimal references to this in the medical records disclosed. An entry on 18 December 2013 suggests that the claimant possibly suffers with dyslexia and an entry dated 11 October 2023 refers to a diagnosis of dyslexia in 2008 although there was no substantive evidence of such a diagnosis and the suggestion is inconsistent with the claimant having sought an assessment for dyslexia in either 2014 or 2023.

28. There was no evidence of any effect on day-to-day activities. Rather, there was undisputed evidence that the claimant was a capable and self-contained individual who lived independently in Manchester, cooked for herself and brought food/treats which she had cooked into work. The claimant accepted under cross-examination that she had travelled independently to India and Europe for holidays without any difficulty and had no encountered any issues with social interaction.
29. The Tribunal has focussed on what the claimant might not be able to do in terms of day-to-day activities but found there to be little that she might have been said to be unable to do at the material time or at all. In terms of issues with the claimant's work deficiencies, raised by her managers, the Tribunal considered these related to a highly specialised area of work, which fell outside of what could be termed normal or usual day-to-day activities save for a complaint about the claimant talking loudly or talking over her colleagues. When the claimant was found to have lost amounts of cash, during the testing procedures she undertook, she sought to blame her colleagues for such and did not suggest the losses, or indeed any aspect of underperformance, arose because of an impairment. Here the Tribunal accept the respondent's contention that, had any impairment been raised with them, they would have taken action to investigate it.
30. In all the circumstances above, in the absence of establishing an impairment or any effect upon day-to-day activities, it follows that the claimant has not met the tests of substantial or adverse impact.
31. The Tribunal took account of the fact that the claimant has been acting as a litigant in person in these proceedings albeit initially she enjoyed assistance from a Law Centre. Nevertheless, the Tribunal was satisfied that the claimant was at all times aware of the requirement to disclose all relevant medical records and to provide evidence to support her contention as to disability at the material time.
32. In light of all the above, the Tribunal concluded that the claimant has not discharged the burden of proof to show that she was a disabled person within the meaning of section 6 and schedule 1 of the Equality Act 2010 at the material time. The claim of disability discrimination is dismissed and the final hearing, listed on 31 March – 4 April 2025 is cancelled.

Employment Judge Batten
Date: 8 April 2024

JUDGMENT SENT TO THE PARTIES ON:

24 April 2024

FOR THE TRIBUNAL OFFICE

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