



EMPLOYMENT TRIBUNALS

Claimant: Mr R Bordon

Respondents: Iduna OMA Ltd

Heard at: Manchester (in public; by CVP) **On:** 14-15 January 2025,
5 March 2025

Before: Employment Judge Parkin (sitting alone)

Representatives

For the claimant: In person

For the respondent: Mr M Curtis, Counsel

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that the claimant was a disabled person at all material times.

REASONS

The claim

1. The claimant claimed direct disability discrimination in respect of his dismissal by the respondent and breach of contract (non-payment of expenses) in his ET1 claim form presented on 29 July 2023. He contended he was disabled by reason of his Attention Deficit Hyperactive Disorder (ADHD) and/or Dyslexia. He set out that he worked for the respondent between 11 July 2022 and 28 February 2023 and had received a diagnosis of having ADHD only in June 2022 shortly before commencing employment as a Construction Manager on special projects. He said that the respondent terminated his employment or at least gave notice of doing so very shortly after he notified it formally of his ADHD diagnosis.

The response and grounds of resistance

2. The respondent denied his claims in its ET3 response and grounds of resistance. Whilst initially reserving its position as to whether the claimant was disabled, it later in the proceedings acknowledged the claimant had the condition and impairment of ADHD but not that he was disabled within the

meaning of the Equality Act 2010 by this as a substantial and long term impairment of his ability to carry out day-to-day activities. In the absence of medical evidence, it did not admit he had the impairment of dyslexia. The respondent contended it began to have serious performance concerns about the claimant in late 2022 especially in relation to the way in which he over-complicated simple tasks and his communication lacked clarity. It said this was an issue both with internal and external colleagues and clients and it repeatedly articulated its concerns to him about his inadequate performance during his employment such that its reason for dismissing the claimant was indeed poor performance, a reason related to his capability,

This hearing

3. At the case management hearing, the case was initially listed for final hearing but Employment Judge Ross later directed that this preliminary hearing to determine the disability issue be listed instead. She directed that the hearing determine solely whether or not the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of his ADHD and/or dyslexia.
4. After various technical difficulties were overcome at the start of the preliminary hearing, the respondent renewed its application to exclude the claimant's most recent witness statement of 10 January 2025. The preliminary hearing was listed at the direction of Employment Judge Ross who heard the original case management preliminary hearing; she made case management orders initially listing the case for a final hearing but later directed this hearing solely for determine the preliminary issue whether the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of his ADHD and/or his dyslexia (at the material times those being up to and at the time of his dismissal on 28 February 2023 and the outcome of his appeal against dismissal which was given on 13 April 2023). The preliminary issue was therefore the disability issue itself, not whether the respondent had or should have had knowledge of any disability nor whether the respondent's real reason for dismissing the claimant was because of his disability, as he maintained, or for poor performance as it alleged.
5. This was a public preliminary hearing albeit held by CVP video format such that the content of any witness statements confirmed in oral evidence form part of the public record available to third parties as well as the parties themselves.

Preliminary admissibility ruling

6. The respondent sought that the claimant's additional witness statement, his fourth purporting to deal with disability matters, should be excluded as inadmissible or at least that paragraph 27 (the second paragraph numbered 27 in the witness statement) be excluded as inadmissible since it contained "incredibly serious allegations" against the respondent which were wholly irrelevant for the preliminary issue.
7. The claimant made lengthy submissions responding to the respondent's criticisms of his performance raised in its grounds of resistance. He acknowledged that his fourth statement included some new information not

contained previously in his disability impact statements. He contended his disability could not be separated from the performance issues which the respondent set out as its basis for dismissing him

8. I applied the overriding objective now at rule 3 of the Employment Tribunal Procedure Rules 2024 together with rule 41 which gives me the power to conduct the hearing fairly and without undue formality in accordance with the overriding objective and, where appropriate, not be bound by strict rules of admissibility which would bind the civil courts under the Civil Procedure Rules. Nonetheless applying that broad discretion I found that the fourth witness statement provided by the claimant was largely a supporting statement for a full liability hearing and included much irrelevant material for the narrow purposes of the preliminary issue. Only paragraphs 4-5 and perhaps 6-8 were really relevant to the preliminary issue; in any event, paragraphs 1-25 duplicated almost entirely the content of the claimant's ET1 claim form. I disregarded the rest of the statement beyond paragraphs 4-8 and, for the avoidance of doubt, expressly ruled that the second paragraph numbered 27, headed "Potential motivation to list "Performance" as the reason for dismissal", was strictly inadmissible and could not form part of the public record for this preliminary hearing.

Evidence on Preliminary Issue

9. I heard evidence over two days from the claimant and from the respondent's Chief Operating Officer Mr Adrian Fielden-Gray. There was documentary evidence in the respondent's Bundle (1-113) including the claimant's first three witness statements and medical evidence from Dr Asad Raffi, a consultant psychiatrist. The claimant's final witness statement annexed multiple exhibits and Mr. Fielden-Gray's witness statement too annexed various exhibits. In addition to its skeleton argument to which the claimant had responded at length in writing, the respondent provided a further note on the applicable law before the final day.
10. Whilst the claimant did not always directly answer the questions put to him and at times lost focus in giving his evidence, I found him and Mr. Fielden-Gray generally witnesses of truth trying their best to recollect details from a couple of years ago. I did not accept the respondent's argument that lack of documentary evidence of dyslexia meant the claimant had not established that he had that condition from early childhood. It was a matter of no great surprise to me that educational records from the late 1970s/early 1980s were not available for him to rely on or that he had made the best of things with coping strategies so his dyslexia did not dominate his working and daily life. I did not find persuasive the respondent's highlighting of the reference in Dr Raffi's report: "undiagnosed dyslexia" (65) as establishing the inconsistency or unreliability of the claimant's evidence. It may be this stemmed from a misunderstanding between him and Dr Raffi in their initial discussions but in any event it was a tiny reference within an otherwise comprehensive analytical report (62-82).

Findings of fact

11. Accordingly, I make the following findings of fact on the balance of probabilities specifically for the determination of the preliminary disability issue. Although they may assist the Tribunal at the final liability hearing,

they are not binding upon it and I have sought to avoid where possible fact-finding on questions of actual or constructive knowledge of the claimant's ADHD and dyslexia.

12. The respondent is an SME electric charging point supplier business at the cutting edge of installing charging points for the growing electric motor vehicle market.
13. The claimant, born on 30 June 1972, had long experience in the construction and engineering field both acting on his own behalf and as consultant and for some years up to 2022 employed by a major UK construction company.
14. He was diagnosed as having ADHD just a month before he commenced employment with the respondent as a senior Construction Manager on special projects. Having been offered employment by the respondent he had a little time to spare before taking up the new employment and consulted the consultant psychiatrist Dr Raffi, a specialist in the ADHD field with Spectrum Healthcare. He had become more aware over the past 5 or 6 years of increased public awareness and discussion about ADHD particularly amongst children but also amongst adults.
15. Previously the claimant had been exceptionally busy, often working away from home and not having regular access to a General Practitioner and medical advice. He had never done anything to discover whether he might have the condition of ADHD.
16. Many years before he had been diagnosed at about age eight as being dyslexic having already spelling and writing difficulties which must have caused his teachers to have him assessed probably by an educational psychologist. Whilst there is no documentary evidence of this, I accept the claimant was diagnosed as being dyslexic in early childhood and this condition has prevailed ever since.
17. Thus in June 2022, the claimant consulted Dr Raffi and a specific diagnosis of the condition of ADHD was made when he was almost 50 years old. Dr Raffi's report was not challenged by the respondent. In short, ADHD is a neurodevelopmental condition, often called a form of neurodiversity, causing cognitive and behavioural deficits and hyperactivity. Common symptoms are lack of attention and impulsivity and Dr Raffi conducted extensive interrogation and testing of the claimant in order to assess his attention deficit symptoms both during childhood and adulthood and hyperactivity/impulsivity again during childhood and adulthood. In his very detailed report (62-82) Dr Raffi diagnosed the claimant as having a combined condition sharing both elements and identified this as moderate to severe ADHD. He suggested the claimant undergo multimodal treatment including specific medication.
18. The claimant's condition fluctuated such that he had what he described as "good days" and "bad days". He had viewed his condition as providing him with a "superpower" which others did not have the benefit of. He proudly asserted and told Mr. Fielden-Gray early in the appointment process that he was unusually able to envisage "the pebble in the pond" or "the marble rolling down steps into a pond" by which he meant he could see where a

pebble dropped into a pond or a marble rolled down steps into a pond would come to rest and also where the ripples would move across the pond to the other side. What he was trying to explain was that he could anticipate the outcome despite variables taking place during the life of a project and he was often surprised that others were unable similarly to anticipate that outcome. However, the downside of his condition was that on a bad day or, as he put it, a day which was not a "writing day", he was unable to concentrate on the project in hand, almost unable to think and write and certainly unable to deliver useful output and having a feeling being useless.

19. I infer that, with time before starting a new, major and senior job, the claimant sought to understand better his own past behaviours because he recognised he was different in many of his actions and reactions from those he was generally working alongside. I infer that the claimant would not have sought the services of Dr Raffi if everything to do with his condition was entirely positive and only provided him with his "superpower". I infer that by the age of almost 50 he must very often have rubbed others up in the wrong way in his treatment and dealings of them particularly in group situations. These inferences are supported by Dr Raffi's initial record that the claimant had self-referred and that: "A lot of symptoms resonated with him - starting a new role and wanted to do something about it" (65).
20. As to the lifelong condition of dyslexia, the claimant was poor at spelling, had variable handwriting particularly when it was a bad writing day driven by his ADHD condition; he found extra difficulty finding text within lists and spend extra time checking and double checking documentation but he had always used his own coping strategies to deal with his dyslexia condition.
21. On 15 June 2022 Dr Raffi prescribed an amphetamine drug: Elvanse (lisdexamphetamine) at a daily dosage of 30mg initially with a view to the claimant being able to improve his focus throughout the day (83).
22. The features of his ADHD which affected the claimant in his day-to-day activities included behavioural aspects especially in interaction with other people. He had a domineering manner in group situations, talking across others who were often themselves specialist and expert in their own area, "procrastinating" - going on at length despite others seeking brevity from him or trying to give their own input and generally failing to "read the room" as was needed in team situations. Mr Fielding-Gray pulled together reports from others including e-mail, text or WhatsApp messages showing a pattern of runnings-with colleagues from early August 2022 onwards.
23. The respondent's regular external architect was deeply offended by the behaviour of the claimant feeling the claimant was undermining his experience and expertise (AF-G, pp3-4). In January 2023 at the presentation of a project which the claimant was leading in front of the respondent's CEO Mr Asif Ghafoor, the claimant was described in resounding terms by the CEO as causing a "car crash" of a meeting and, I infer, the CEO excluded the claimant from participating in the next project meeting (AF-G, pp20-23). Another feature of the claimant's behaviour resulting from ADHD was the extraordinary time he took to complete tasks; this was seen as excessive by the respondent. Later in January 2023, as he told the respondent's managers, he worked all night to finish off a task. It may be that this pattern of working is linked to the medication prescribed

by Dr Raffi.

24. The medication was a slow release drug of a dosage which was always planned to increase. Therefore the initial 30mg daily was increased after 14 days to 40mg (83), and on 24 August 2022 to 50mg. Dr Raffi then noted a “small improvement in symptoms” and “medication is working OK” recommending a further increase to 60 mg (95-96). This was being taken by 28 October 2022 when he noted “not procrastinating” as being reported by the claimant (98) and Dr Raffi recommended a further increase of medication to 70mg by the beginning of January 2022 (100). The amphetamine medication was expressly to improve the claimant’s consistency of focus on the task in hand. By 3 February 2023 (105), Dr Raffi reported the claimant was still on the 70mg dosage daily and that he had described his ADHD symptom control and quality of life as being “Better” and had answered the question: “How have you progressed since starting medication?” with answers including “Main initial concern was around focus and concentration which is now much better...”.
25. The claimant described his condition as having “Ying and Yang - opposites and extremes”: his feeling of complete uselessness when it was not a “writing day” contrasted with periods of hyperfocus and intensity on his part when he felt he was hugely productive. However, the respondent was critical of his excessive preparation, over-lengthy presentations in group meetings which he tended to dominate and the fact that he was needing to work through the night in order to produce work.
26. The claimant acknowledged that he needed to eat regularly when taking his new medication or he was at risk of increased focus hyperactivity because of his amphetamine medication.
27. Whilst there were dramatic swings and opposites in the claimant’s capacity to focus at times, he absolutely lacked ability to focus on the matter in hand regularly times in group situations and he lacked adherence to what might be described as “social norms” in group meetings tending to dominate brusquely and hog the meeting by talking over others. He failed to respect and even allow input from others expert in and experienced in the specialist field which he was relatively new.
28. I infer that the claimant’s ADHD was either a lifetime condition or at the very least a condition the claimant had experienced since childhood running alongside his dyslexia, which is often a co-related condition.

The parties’ submissions:

29. Both parties made helpful closing submissions. I was particularly helped by the respondent’s counsel’s Note on the Law produced following my order after the second day of hearing. Having set out the law, the respondent contended that the Tribunal’s task was to compare the claimant’s ability to do day-to-day activities with the ability he would have had if he did not have the impairment. It should identify what day-to-day activities he could not do or could only do with difficulty. The Tribunal must treat his oral evidence with caution unless supported by documentary evidence. Despite the case management order to provide clear examples of the impact of his impairment, his witness statements were vague and unspecific amounting

much more to complaints about the workplace than showing what he could not do. The comparison to be made was not with the general population but with what capability the claimant would have had but for the impairment as established in Elliott v Dorset County Council (EAT). This claimant would always have needed to work in a cramped office and been expected to work additional hours with a high volume of work. The Tribunal could conclude that the impact of the claimant's ADHD impairment was very mild, no more than minor or trivial.

30. The respondent contended that the claimant's oral evidence raised concerns whether he was a reliable historian: he had questioned in evidence whether additional documents from his GP had not been included in the respondent's bundle, but was unable when given the opportunity to point to any medical disclosure he had made which was not included; there was apparent inconsistency whether his dyslexia had been diagnosed since Dr Raffi referred to it as "undiagnosed" and about whether he first told the respondent of his disability just a week before dismissal, as set out in his ET1 claim, or had told Mr. Fielden-Gray about it before appointment and at various times during his employment. It would be very unusual if someone had such a significant condition only to seek medical input just before the age of 50; if his ADHD was having such an impact as he said in evidence, why did he not seek assistance earlier? The implication is that the impact was not that bad.
31. The claimant relied on the exhibits to his own witness statement and maintained that it had been acknowledged at his internal appeal that he had made no secret of his ADHD condition and how it affected him in the workplace. He maintained that he had set out a number of examples showing the impact of his disability upon his daily activities. He drew attention to the whole medical evidence from Dr Raffi of Sanctum Healthcare at pages 60-113 of the respondent's Bundle and in particular pages 61, 62, 65, 72, 84, 85, 95, 98, 102, 105, 111 and 112.
32. He suggested that he had found a "smoking gun" in disclosure from the respondent showing that at the time it dismissed him the respondent had identified a need to give him additional support. This was in a document, never provided to him during his employment, at page 19-20 in the exhibits to his response to the respondent's skeleton argument. It demonstrated that giving clear reports back to senior management, clear and succinct instructions and prioritising workload were areas where he needed additional support. Accordingly, the respondent was saying – just as he was saying - that these were his traits needing support; this demonstrated the substantial impact his ADHD had on his ability to carry out day-to-day activities. He pointed also to NICE (National Institute for Health and Care Excellence) guidance he had exhibited which showed that ADHD and dyslexia commonly co-occurred.

The Law: Disability

33. Section 6 of the Equality Act 2010 states:

(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 a reference to a person who has a disability.

(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability...

(6)Schedule 1 (disability: supplementary provision) has effect.

The interpretation provisions at Section 212(1) include: “substantial means more than minor or trivial...”

34. Schedule 1 includes:

Part 1 Determination of disability

... (2) Long-term effects

2(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...

5(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.

(2)“Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.

5A(1)This paragraph has effect for the purposes of the application to the protected characteristic of disability of—

(a)Part 5 (work)...

(2)References in the relevant provisions to a person's ability to carry out normal day-to-day activities are to be taken as including references to the person's ability to participate fully and effectively in working life on an equal basis with other workers.

(3)The “relevant provisions” are—

(a)section 6 (disability)...

Paragraph 5A was inserted with effect from 1 January 2024 under the Retained EU Law provisions.

35. I have considered and been assisted by the Secretary of State's Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) Guidance (2011), particularly at A13, B1, B4-6 and B12-17 and by the EHRC Equality Act 2010 Statutory Code of Practice at Appendix 1 on the meaning of disability.
36. I have sought to apply the approach laid down in the longstanding Employment Appeal Tribunal authority of Goodwin v Patent Office [1999] ICR 302 and also the much more recent Court of Appeal authority of Chief Constable of Norfolk v Coffey [2019] IRLR 805 and the EAT authorities of Paterson v Comr of Police of the Metropolis [2007] ICR 1522, Igweike v TSB Bank Plc [2020] IRLR 267 and Elliott v Dorset County Council [2021] IRLR 880. In particular, I seek to interpret normal day-to-day activities as expressly including the claimant's activities at work.

Conclusions

37. I take judicial knowledge of the much greater public awareness of the condition of ADHD amongst both children and adults over recent years and the difficulties they may often find in their day-to-day engagements. I cannot be as specific as the claimant in saying 5 or 6 years in terms of media coverage, but can tell the parties that even my own judicial professional training has covered some neurodiversity issues within that time frame. By way of contrast, when I first became an employment judge over 25 years ago there was no such training provided to judges on awareness of such conditions. Additionally, judges are provided with (and the public has access to) the Equal Treatment Bench Book giving considerable insight into a wide range of matters covering not just protected characteristics under the Equality Act 2010 but many other aspects of the work which judges in the courts and tribunals carry out.
38. Applying the 4-stage approach to determining disability, firstly, is there an impairment? I conclude that the claimant has co-related neurodiversity conditions of ADHD and dyslexia which amount to impairments. In respect of the ADHD impairment, my conclusion is based on unchallenged cogent and comprehensive medical evidence and the claimant's evidence, supported by some from the respondent. Notwithstanding the context that he was working at high level in the respondent's cutting edge organisation in a high pressure position leading and working alongside a team on many projects, writing reports, making presentations and taking part in group meetings with others, his condition caused him impairment. His interactions with internal colleagues, external colleague, consultants, architects and clients were all affected by his conduct or behaviour. I seek to avoid using the terminology "performance", mindful of the liability issues which the Tribunal must still deal with.
39. Next, I am wholly satisfied by the claimant that his impairment of ADHD with the co-related condition of dyslexia had an adverse effect on his ability to carry out normal day-to-day activities such as compiling reports within a reasonable timeframe and in a reasonably succinct summary form, making presentations on projects he was leading on and participating in group

meetings whether only with colleagues or with external consultants or clients. The adverse impact was his frequent inability to keep to time without procrastinating, his behaviour of speaking across others and being (using a word Mr. Fielden-Gray did not use but which came over strongly from the oral evidence) “bombastic” in manner, and his failure to allow and acknowledge the input of other colleagues with expertise and experience rather than overriding or interrupting their contributions. I find, both from direct evidence and as a matter of inference, that he was often poor in group situations at “reading the room” and adjusting his own conduct accordingly. Thus, had he not had his condition of ADHD in particular, the claimant would have been able to prepare better and more succinctly and to moderate his behaviour especially in group situations.

40. Thirdly (although Goodwin sets this out as the fourth element) these adverse effects were long term if not lifelong. I find that both the ADHD and the dyslexia stem from childhood perhaps early childhood.
41. The final element, which is really the crux of this preliminary hearing, is whether the impairment which had a substantial adverse effect on his ability to carry out normal day-to-day activities as well as on a long term basis. I may at times have overcomplicated matters for myself. It comes down to the bald language of section 212(1) and is really a straightforward determination. This impairment had a substantial adverse effect, an effect which was certainly more than minor or trivial, on his ability to carry out the normal day-to-day activities which I have described. I take account here of Schedule 1, paragraph 5: the “deduced effects” of what would have been the position but for the treatment the claimant had undergone. He was prescribed amphetamine medication for his ADHD specifically to seek to improve his focus his attention span and attention to detail. It was a progressive course of drug medication rising to 70mg daily by January 2023 with Dr Raffi’s reports noting improvement in the claimant’s symptoms. The claimant’s symptoms undoubtedly fluctuated sometimes perhaps even on a daily basis; I accept his oral evidence about feelings of uselessness on days he described as not an “writing day”. The medical evidence suggests that the medication was helpful in alleviating the symptom of lack of focus, thus improving his focus on projects and reports for the respondent. I conclude that his lack of ability to focus and thus the adverse effect upon his general behaviour which was insufficiently moderated even with the amphetamine medication did have a substantial adverse effect on his ability to carry out normal day-to-day activities.
42. Accordingly, I conclude that the claimant was at the material times from the commencement of his employment in July 2022 until the termination of his employment and the rejection of his appeal against dismissal a disabled person within the meaning of section 6 and schedule 1 of the Equality Act 2010.
43. To return to dyslexia, I conclude that his dyslexia is a co-related condition causing mild impairment and I take account of the combined effect of the dyslexia alongside ADHD in finding the claimant disabled. Had the claimant only been dyslexic that in itself would not have amounted to a substantial impairment of his ability to carry out normal day-to-day activities whether because of his coping mechanisms whether because he learned to deal with spelling writing reading in context difficulties that alone would not have

made the claimant a disabled person. Conversely, had I concluded that there was no co-related impairment of dyslexia, I would still have found the claimant's condition of ADHD amounted in itself to a impairment which had a substantial adverse effect on his ability to carry out normal day-to-day activities which was long term.

Approved by:

Employment Judge Parkin
10 March 2025

JUDGMENT SENT TO THE PARTIES
ON 28 MARCH 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

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