



EMPLOYMENT TRIBUNALS

Claimant: Mr R Shearwood

Respondent: London Fire Commissioner

Heard at: London South **On:** 23/10/2024

Before: Employment Judge Wright

Representation

Claimant: In person

Respondent: Ms J Shepherd - counsel

JUDGMENT

The claimant is not a disabled person for the purposes of the Equality Act 2010; he does not have the protected characteristic of disability. His claims of unlawful discrimination under the Equality Act 2010 are dismissed.

The claims of unfair dismissal and unpaid holiday pay will proceed to be heard.

REASONS

1. The claimant presented his claim on the 8/8/2023. He engaged in Acas early conciliation between 14/6/2023 and 26/6/2023. He was employed by the respondent as a Hydrant Technician from the 5/8/2019. He was dismissed by reason of conduct on the 18/4/2023.
2. At a preliminary hearing on the 5/3/2023 his claims were identified as unlawful discrimination contrary to the Equality Act 2010 (EQA), unfair dismissal and a failure to pay holiday pay (page 180). The claimant relied upon the protected characteristic of disability (s.6 EQA) and at that hearing he identified his disability as Austim Spectrum Condition (ASC) (page 183).
3. The claimant said that in the past he had called the condition Autism Spectrum Disorder and had referred to Asperger syndrome. Any such references should be taken to refer to ASC.
4. The respondent disputes the claimant is a disabled person for the purposes of s.6 EQA and this hearing was listed to decide that point.

5. At the preliminary hearing on the 5/3/2024, the claimant was directed to:

21. The claimant says the disability is: autism spectrum disorder ("ASD").

22. The claimant must write to the respondent by 16 April 2024 with the following information:

22.1 How long has the claimant had ASD?

22.2 What are/were the effects of ASD on the claimant's ability to do day-to-day activities between March 2020 and April 2023?

The claimant should give clear examples. If possible, the examples should be from the time of the events the claim is about. The Tribunal will usually be deciding whether the claimant had a disability at that time.

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.

22.3 Give the dates when the effects of ASD started and stopped. If they have not stopped, say how long they are expected to last.

22.4 If the effects lasted less than 12 months, why does the claimant say they were long-term?

22.5 Has the claimant had medical treatment, including medication? If so, what and when?

22.6 Has the claimant taken other measures to treat or correct ASD? If so, what and when?

22.7 What would the effects of ASD have been without any treatment or other measures? The claimant should give clear day-to-day examples, if possible.

22.8 Any other information the claimant relies on to show that they had a disability.

23. The claimant must by 16 April 2024 send to the respondent:

23.1 copies of the parts of their GP and other medical records that are relevant to whether they had the disability at the time of the events the claim is about. They may blank out anything that is clearly not relevant;

23.2 any other evidence relevant to whether they had the disability at that time.

24. The respondent must write to the Tribunal and the claimant by 30 April 2024 confirming whether or not it accepts that the claimant had a disability and, if so, on what dates. The respondent must deal with each impairment separately. If the respondent does not accept that the claimant had a disability on any relevant date, it must explain why.

6. On the 26/4/2024 the respondent wrote to the Tribunal to say that it had received the claimant's disability impact statement (page 60). The claimant had not however, provided the respondent with his medical records. As such, the respondent did not concede disability.
7. On the 8/6/2024 the claimant wrote to the Tribunal and the respondent and attached his medical evidence that he had been able to obtain at that point (page 209). What was attached, was a 'to whom it may concern' letter from a GP dated 31/5/2024 which said (page 213):

'I am writing to confirm that we are seeing Ryan for low mood and anxiety and he has recently started a trial of medication for this. We also saw Ryan for his anxiety and depression in 2016 and 2017. He has also been referred for autism and ADHD assessments Mr Shearwood initially saw us regarding concerns about autism in August 2023 and he was referred for autism specialist assessment in December 2023 and ADHD assessment in May 2024.'

8. In reliance upon that document, the claimant wrote on the 2/7/2024 (page 225):

'Now i have sent you my GP letter confirmation of my ongoing treatment for Autism, ADHD and depression and Anxiety . Why is the respondent still not conceding my disability?'

9. The respondent replied on the same day and requested that the case be listed for a public preliminary hearing to consider whether or not the claimant was disabled (page 226).
10. The claimant was then asked on the 17/7/2024 whether the issue should be decided at a preliminary hearing, or be determined at a final hearing (page 228).
11. Further correspondence was exchanged and on the 14/8/2024 Acting Employment Judge Khalil directed that the case be listed for a one day public preliminary hearing (page 234).
12. The claimant continued to take the view that he had supplied his disability impact statement and 'medical evidence' and that the issue of disability should no longer be in issue. This hearing was listed on the 29/8/2024 (page 241).
13. On the 4/9/2024 the claimant said that the respondent has still not provided the grounds for its refusal to concede he was disabled for the purposes of the EQA (page 242).
14. On the 2/10/2024 the respondent enquired of the claimant in respect of his GP's letter of the 31/5/2024 whether or not he had received the outcome of

the autism and ADHD assess referred for in December 2023 and May 2024 (page 247)?

15. On the 6/10/2024 the claimant responded that he was still on the waiting list for a formal diagnosis. He also referred to the respondent's failure to refer him to Occupational Health (OH) as part of the reason for him not having a diagnosis (page 248).
16. On the 16/10/2024 Employment Judge Corrigan required the Tribunal to contact the parties and directed the respondent to explain why it did not accept the claimant was disabled for the purposes of the EQA (page 252).
17. On the 18/10/2024 the respondent set out its response in a three-page letter (page 255).
18. It is understood that in the week prior to this hearing, the claimant disclosed parts of his GP records. They are: a document printed at 8:27am on 21/10/2024 which appears to show a list of text messages the claimant's GP surgery has sent to him (page 322). For example, on 4/7/2022 it records:

'Short message service text message sent to patient Dear firstname2>, Your opinion matters! We are reviewing some of our services & we'd love your views – click <https://forms.office.com/r/D7ZQZQB8fi>, thank you.'

19. This page of records overlays a page underneath, from which a heading 'Appointments' can be read and dates between 15/10/2024 and 10/10/2018 are shown. Two entries are redacted.
20. Another page of GP notes are provided (page 315). Those notes seem to have been printed on 8:27am and on 8:30am on 21/10/2024. Again the top page overlays the second page (printed at 8:27am). The bottom page, appears to be the same document shown on page 322 above.
21. From what can be ascertained from the top page, there is a list of 'appointments' ranging from 15/10/2024 to (in reverse order) 10/10/2018. There is very little detail provide, as a snap shot selection:

19-Mar-2024	16:50	Total Triage	Total Triage (Dr)
30-Jan-2024	09:45	2022 Mixed GP am AR-regular	Mabey (Dr)
01-Aug-2023	15:40	Trainee Afternoon 20mins (AR)(14:00-16:30)	Moss (Dr)
18-Aug-2022	17:20	AP GP mixed afternoon PACT- (AR)	Holwell (Dr)
31-Jan-2022	17:20	AP GP mixed afternoon – (AR)	Mabey (Dr)
01-Sep-2021	12:30	Social Prescriber Remote Working	Hawley (Dr)

22. The fourth and final column also contained the doctors' first name and it is not necessary to reproduce them here.
23. There were also three documents added to the end of the bundle, which as far as can be ascertained were: the first session of the Stress management course on 28/9/2021 via Teams (page 339); a email(?) from Psychiatry UK referring to the claimant being on the waiting list for an ASD (autism) assessment dated 29/4/2024 (page 340); and re-sending the meeting link for the Stress Management group, via Teams on 28/9/2021 (page 341). Pages 339 and 341 appear to refer to the same meeting.
24. The claimant did not refer to these documents in his disability impact statement and only referred to the document on page 339 fleetingly in his evidence. The documents did not however enlighten the Tribunal in respect of the claimant's claim to be disabled due to ASC.
25. The GP records cannot be relied upon as they are simply incomplete. They have been selectively disclosed and they are not accepted as evidence. If perhaps the claimant had disclosed them earlier and had he requested an extension of time to provide them, it may have been possible for him to correct the error and to disclose the full records. Furthermore, it would have been necessary for him to disclose the actual records, rather than an edited screen shot of them.
26. The net result is that the claimant was in breach of EJ Heath's Order to provide any medical evidence upon which he relied by the 16/4/2024 (paragraph 23 page 184). There is no record of any application to extend that time limit or to rely upon documents supplied late (a letter of 31/5/2024 provided to the respondent on the 8/6/2024 (page 209) and the very limited and unacceptable GP records).
27. The GP records were printed on the 21/10/2024, some six months after the date Ordered by EJ Heath and only two days prior to this hearing.
28. The relevant period was identified by EJ Heath as March 2020 to April 2023 (paragraph 22.2 page 183).
29. During this period, the claimant had approximately 12 appointments with OH, although he did not attend all of them. He was absent from work during the period 14/6/2021 and the claimant agreed he was off for about a year. This was due to injury following a van accident. The claimant did not raise ASC with OH and in any event, it is not OH's role to diagnose him. Had he raised ASC with OH it may be that he would have been signposted to obtain a diagnosis.
30. The OH reports referred to back and knee pain. This is also referred to in the MED3 sickness certificates. Those medical certificates record that the claimant was assessed by a GP on: 14/6/2021; 21/6/2021; 6/7/2021; 20/7/2021; 3/8/2021; 17/8/2021; 20/9/2021; and 26/10/2021. These dates were all within the relevant period.

31. The respondent referred to the fact the claimant had not disclosed his medical records and that he does not have a diagnosis of ASD or any other neurodivergent condition.
32. The fact is that despite all of the OH consultations and the assessments by the GP there is no reference at all to ASC during the relevant period. The claimant was provided with the opportunity to rely upon his medical records and he did not do so. The nearest the claimant can get to any medical evidence is a letter dated 31/5/2024 which refers to him being referred for autism and ADHD assessments, but that letter goes on to say that the claimant *'initially saw us regarding concerns about autism in August 2023 and he was referred for autism specialist assessment in December 2023 and ADHD assessment in May 2024'* (page 213).
33. That referral post-dates the relevant period.
34. In fact, the claimant was informed by his line manager on 8/4/2022 that he cannot self-diagnose neurodiversity and he was referred to his GP. He did not refer himself, according to the evidence which he provided, until August 2023.
35. It is fair to say that it does not appear that the claimant has understood the process of establishing he is disabled for the purposes of the EQA. Nor does he appear to have understood that the burden of proof is upon him and that he needs to satisfy that burden. Despite the steps he needed to take being set out by EJ Heath in the Order of 5/3/2024 and the respondent pointing out what the claimant was required to provide.
36. The claimant's understanding appears to be, and this is evidenced in his correspondence; if I say I am disabled by reason of ASC, that should be accepted and there is no more to it than that.

The Law

37. Under s.6 EQA the definition of disability provides:

(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.

38. Under schedule 1

PART 1 DETERMINATION OF DISABILITY

...

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.

(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.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

39. Satisfying the Tribunal that a claimant's condition amounts to a disability for the purposes of the Equality Act 2010 is not a particularly onerous burden. It does however require that some relevant medical evidence relating to the material time is before the Tribunal and some evidence, in this case of the particular adverse effects on the claimant's ability to carry out day-to-day tasks. A list of the symptoms of the condition is not relevant. The claimant has to establish how his impairment (ASC) has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

40. The claimant had previously been referred to the Equality Act 2010 Guidance: on matters to be taken into account in determining questions relating to the definition of disability by EJ Heath.

Conclusions

41. There was no medical evidence in respect of ASC at the relevant time.

42. The claimant has not therefore satisfied the burden of proof to establish by means of medical evidence and information in respect of adverse effects on his ability to carry out day-to-day tasks, that he was disabled at the relevant time. That information was not forthcoming.

43. The claims under the EQA are therefore dismissed as the claimant was not a disabled person at the relevant time.

44. A separate Order for Directions will be made in respect of the remaining claims which progress to the final hearing.

Approved by
Employment Judge Wright
Date 23/10/2024

11 November 2024
Sent to Parties.

Notes

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>