



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr T O'Neil

v

Four 04 Packaging Limited

**Heard at:** Watford (CVP)

**On:** 28 November 2021

**Before:** Employment Judge Smeaton

**Appearances**

**For the Claimant:** Ms E Stuart-King (counsel, acting on a direct access basis)

**For the Respondent:** Ms Denton (counsel, instructed by Rradar)

## JUDGMENT

1. The Claimant was disabled within the meaning of s.6(1) Equality Act 2010 at all material times.

## REASONS

### Introduction

1. By a claim form dated 6 November 2020, the Claimant, Mr O'Neil, brings claims of disability discrimination (sections 15, 19 and 20-21 Equality Act 2010 ("EqA 2010")), race discrimination (s.13 EqA 2010), harassment (s.26 EqA 2010) and victimisation (s.27 EqA 2010).
2. The claims are denied by the Respondent.
3. By order dated 19 August 2021, Employment Judge Loy listed the matter for an open preliminary hearing to consider whether the Claimant was disabled within the meaning of s.6(1) EqA 2010 at the material time and, potentially, whether the Respondent had knowledge (actual or constructive) of the alleged disability at the time of the alleged discriminatory acts.

4. The material time is said to be between November 2019 and June 2020.

Hearing and preliminary discussions

5. The preliminary hearing took place over one day and was conducted remotely via the Cloud Video Platform (“CVP”). Mr O’Neil appeared represented on a direct access basis by Ms Stuart-King. The Respondent was represented by Ms Denton.
6. At the outset of the hearing I confirmed that the parties could hear and see me. I was satisfied that everyone could participate effectively in the hearing and that it was suitable to be dealt with via CVP.
7. Ms Stuart-King indicated that Mr O’Neil may need some assistance locating and reading any documents. I agreed that his son, Jamie O’Neil, could assist in that respect so long as he did not seek to answer questions or prompt Mr O’Neil in any way. Ms Stuart-King also asked that questions be kept short and simple.
8. I was provided with the following documents:
  - (a) An agreed bundle of 235 pages;
  - (b) A schedule of loss dated 30 September 2021;
  - (c) Four witness statements submitted on Mr O’Neil’s behalf;
  - (d) One witness statement submitted on behalf of the Respondent;
  - (e) An email dated 27 October 2021 from the Respondent’s solicitor; and
  - (f) A joint application to vacate the hearing dated 26 November 2021.
9. On 27 October 2021, the Respondent applied to increase the listing of this hearing from 3 hours to one day. In its application, the Respondent referred to the number of witnesses to be called and raised concerns about the matter being dealt with within the existing time limit.
10. That application was repeated in a joint application made by the parties on 26 November 2021. Both parties considered that the existing time limit was insufficient and asked for the matter to be re-listed for one day.
11. Unfortunately, that application was not considered before the matter came before me.
12. On the morning of the hearing, I informed the parties that I was able to extend the listing to one day because the matter listed for 2pm had been taken out of my list. Both parties applied for the matter to be adjourned and re-listed notwithstanding that extended time estimate.
13. Ms Stuart-King indicated that Mr O’Neil would like the opportunity to go back to the assessor from the Indigo Dyslexia Centre who had provided a report on his and to ask him to specifically address the possibility that Mr O’Neil could be malingering. She said that she had made contact with the assessor on 26<sup>th</sup> November (the Friday before the hearing) but had not yet heard back.

14. She also noted that one of Mr O’Neil’s witnesses, his son Kane O’Neil, was having difficulty joining the hearing. I proposed dealing with his evidence via telephone. Both parties agreed that, whilst not ideal, we could proceed in that way.
15. Ms Denton agreed that the matter ought to be adjourned. She asked for it to be re-listed for two days given the number of witnesses attending. She also asked for the issue of knowledge to be considered at the preliminary hearing and indicated that the Respondent would wish to call a further witness, Ann Harrison, on that issue.
16. Having considered the submissions of both parties, and having consulted the listings department to find out when a two-day hearing could be heard, I refused the joint application to adjourn. I gave reasons orally at the time which were, in brief, as follows:
  - (a) The hearing was initially listed for 3 hours. Both parties asked in writing for the hearing to be extended to one day. That extended listing can now be accommodated;
  - (b) It is not proportionate to list the matter for more than one day. The issue for determination can be confined to whether or not Mr O’Neil was disabled at the material time, with knowledge left for determination at the final hearing;
  - (c) That issue is a relatively straightforward one. The key evidence will come from Mr O’Neil and can be dealt with within one day;
  - (d) A two day hearing cannot be listed until June 2022;
  - (e) Malingering is a matter of credibility. Witness statements have been produced from five individuals and an expert report has been produced (“the Indigo Report”). There is ample evidence before me to make a determination on that issue;
  - (f) The issue of malingering could have been addressed in the Indigo Report. It is common for experts to be asked to consider the possibility of whether an individual could be exaggerating or feigning their symptoms. No such questions were posed here;
  - (g) Kane<sup>1</sup> is the least significant of the witnesses relied on. His evidence, to a large extent, simply confirms that said by his brother, Jamie. His evidence can be taken via telephone. It would not be proportionate to adjourn the hearing in order to allow him to attend via video.
17. After a break, I heard evidence from Mr O’Neil and his two sons. I was also provided with a witness statement from Mr O’Neil’s friend, Marie Kiddell. She did not attend to give evidence. Accordingly, I was only able to place limited weight on her evidence.
18. I also heard evidence from Mr Harrowven, on behalf of the Respondent. Mr Harrowven is the Respondent’s Health, Safety, Environment and Quality (“HSEQ”) Manager. He also has responsibility for HR matters.
19. At the end of the evidence, I heard oral submissions from Ms Denton and Ms

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<sup>1</sup> I have referred to Mr O’Neil’s sons by their first names in order to avoid confusion with the Claimant.

Stuart-King.

20. I reserved my decision, which I now give.

### The law

21. The burden of proof is on Mr O’Neil to demonstrate, on the balance of probabilities, that he was disabled within the meaning of the EqA 2010 at the material time.

22. Under s.6 EqA 2010:

(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.

23. In considering s.6 EqA 2010, the Tribunal should ask itself four questions (Goodwin v Patent Office [1999] ICR 302):

- (i) Did C have an impairment (mental or physical) at the material time;
- (ii) Did the impairment affect his ability to carry out normal day-to-day tasks;
- (iii) Was the adverse effect substantial; and
- (iv) Was it long-term (i.e. had it lasted, or was it likely to last, at least 12 months).

24. Schedule 1 to Part 1 EqA 2010 contains further provisions relevant to the assessment of whether a person is disabled. Further guidance is provided in the ‘EqA 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (“the Guidance”) and in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission (“EHRC”) (“the Code of Practice”).

25. Appendix 1, paragraph 6 to the Code of Practice makes clear that the term ‘mental impairment’ is intended to cover learning disabilities.

26. Although the EqA 2010 does not contain a list of normal day-to-day activities, the Guidance (paragraph D3) provides that such activities are “*things people do on a regular or daily basis for example 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*”.

27. ‘Substantial’ for this purpose means more than minor or trivial (s.212 EqA 2010). The focus must be on what a person cannot do, or can only do with difficulty, not what they are able to do.

28. For the purpose of determining whether an impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities, the effect of ongoing medical treatment on the impairment is ignored (paragraph 5(1) schedule 1 EqA 2010).
29. In Paterson v Comr of Police of the Metropolis [2007] IRLR 763, [2007] ICR 1522, EAT, the Claimant was a police officer who suffered from dyslexia. He was found to be a disabled person by the Employment Appeal Tribunal ('EAT') (reversing the decision of the Employment Tribunal below). An expert had recommended he be allowed additional time to undertake the examinations necessary to achieve promotion. The EAT found that the activities of carrying out assessments or doing examinations were 'normal day-to-day activities', as were reading and comprehension. The EAT had regard to the ECJ judgment in Chacón Navas v Eurest Colectividades SA C-13/05, [2006] IRLR 706, [2007] All ER (EC) 59 and considered how the Claimant's professional life was affected when assessing the question of whether normal day-to-day activities were impaired.
30. As set out in the guidance at paragraph B10, "*In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.*"
31. By paragraph 2(1) of Schedule 1 to the EqA 2010, the effect of an impairment will be long term if it 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 a person's life. This must be determined by reference to the date of the alleged discriminatory act, not with hindsight at the Tribunal hearing (paragraph C4 of the Guidance).
32. By paragraph 2(3) of Schedule 1 to the EqA 2010, the impairment is treated as continuing if its substantial adverse effect on normal day-to-day activities is likely to recur. For this purpose, "likely" means that it "could well happen" (Boyle v SCA Packaging [2009] ICR 1056).

### Findings

33. It is not in dispute that Mr O'Neil suffers from dyslexia and that this amounts to an impairment. The first element of the Goodwin test is therefore satisfied.
34. It is also not in dispute that, if I find the impairment to have a substantial adverse effect on Mr O'Neil's ability to carry out day-to-day activities, that effect would be long-term (the final element of the Goodwin test).
35. Using Ms Denton's language, the crux of the issue is whether any effects on Mr O'Neil's ability to carry out day-to-day activities caused by his dyslexia are substantial.

36. The Respondent's position, in summary, is that Mr O'Neil's evidence is unreliable. Its denial of the Claimant's disability turns on matters of credibility. Ms Denton points to what she maintains are exaggerations in Mr O'Neil's evidence and submits that he has not discharged the burden of proof.
37. Having heard directly from Mr O'Neil, I find his evidence on the core elements of his claim to be disabled to be credible and consistent.
38. Mr O'Neil was assessed by Martin Parsonage and Ian Jenkinson from the Indigo Dyslexia Centre on 20 April 2021. Mr Parsonage and Mr Jenkinson have relevant qualifications and experience and their competence to comment on Mr O'Neil's dyslexia was not challenged by the Respondent.
39. In the Indigo Report that followed, the following points were noted:
- (a) Mr O'Neil has dyslexia;
  - (b) He has weaknesses in reading, spelling, phonological processing and short-term auditory memory and demonstrated rather extensive difficulties with literacy and numeracy;
  - (c) He has strengths in visual reasoning which have enabled him to compensate for his difficulties to a degree;
  - (d) He has consistently experienced difficulties with literacy, and specifically to interpret certain words accurately and fluently, to remember the content of the text and to read at an efficient speed;
  - (e) He has an inconsistent knowledge of certain words;
  - (f) He had some difficulties with recognising and manipulating certain sounds which causes difficulties when attempting to interpret unfamiliar words;
  - (g) He struggled with letter formation;
  - (h) His difficulties with reading will have an impact upon his ability to access texts required throughout his life;
  - (i) His difficulties with spelling will have an effect on his ability to compose written work.
40. Those conclusions were not directly challenged in any meaningful way by the Respondent. On the basis of those conclusions alone, it is clear that Mr O'Neil's dyslexia has a substantial adverse effect on his ability to carry out day-to-day activities such as reading, writing and comprehension.
41. Ms Denton maintains that, notwithstanding what is written in the Indigo Report, the evidence overall is unreliable. She submitted that Mr O'Neil's evidence paints a vastly more severe picture than that in the Indigo Report which undermines the evidence more generally.
42. I do not agree. In his statement, Mr O'Neil explains that he has struggled his whole life to read, write and communicate. He gives plausible examples in his statement of how this affected him as a child. That evidence is supported by his children, who recall that he was unable to read them stories when they were little. Jamie explains that by the time he was in year 3 at school (7-8 years old) he could read better than his dad. That evidence is consistent with the Indigo Report.

43. Kane recalls that their mother used to help their dad with reading and writing and that, since his parents split up, he and his brother have stepped in to help him.
44. Ms Denton suggested that Kane's evidence on this was inconsistent because in oral evidence he suggested that he had been helping his dad read ingredients on a recipe or items in the newspaper since he was a young child.
45. I do not accept there is any such inconsistency. Kane clarified in evidence that whilst he did help his dad as a child, that assistance has increased since his parents split up, as would be expected.
46. I accept that Mr O'Neil has substantial difficulties with activities such as reading newspapers and recipes.
47. Kane gave a further example of his father needing assistance when applying for his immigration status to be recognised under the Windrush scheme. He explained that he and their family friend, Marie Kiddell, had had to help him with the paperwork. Ms Denton submitted that this was inconsistent with Kane's oral evidence that he recommended that his dad access support from the Citizens Advice Bureau ("CAB"). Again, I do not accept there is any such inconsistency. There is nothing inconsistent with Kane advising his dad to seek assistance from the CAB whilst also assisting him himself.
48. I accept that Mr O'Neil has substantial difficulties with activities such as reading, understanding and filling out application forms.
49. In his written evidence, Mr O'Neil maintains that he has difficulty shopping, banking and using the online system to book GP appointments. Ms Denton challenged this evidence. In summary, she submitted that the evidence was exaggerated and that, for example, Mr O'Neil was choosing to use in-branch bank services because he was used to doing so, rather than because he was unable to use telephone banking. She submitted that telephone banking wouldn't pose a problem to someone with difficulties reading.
50. This is an over-simplification of the effects of his dyslexia on Mr O'Neil. The Indigo Report makes clear that it is not a simple matter of having difficulty reading or writing. His dyslexia also affects his verbal memory and verbal processing speed. As set out in the report, Mr O'Neil has difficulties in retaining certain auditory sequential information in the short-term and sustaining concentration. I accept that this makes it difficult for him to use services such as telephone banking.
51. Even if there is some element of exaggeration to Mr O'Neil's written and oral evidence in this respect, or there is an element of personal preference interacting with the difficulties caused by his disability, I remind myself that it is perfectly possible for a witness to be exaggerating about certain matters in order to bolster what is otherwise a credible claim. I do not accept that any such exaggerations detract from the core of Mr O'Neil's claim which is

supported by credible witness evidence and the Indigo report. Even if I were to discount the evidence given by Mr O'Neil in respect of shopping, banking and GP appointments, I still accept that he has substantial difficulties with day-to-day activities as set out above.

52. Turning to the impact of Mr O'Neil's dyslexia at work. Mr O'Neil was employed by the Respondent as a warehouse operative. His role involved receiving stock from suppliers, putting it away (referred to as 'locating it') and getting it out to match up with order (referred to as 'delocating it').
53. As part of his role, Mr O'Neil was required to use two IT systems; Horizon and Opsys, which together form the Respondent's stock control system. That system records all transactions in and out and records where stock is located within the Respondent's 35,000 foot warehouse.
54. The evidence provided by Mr Harrowven, in support of the Respondent's case, is in essence that Mr O'Neil did not experience anything like the difficulties at work that he now claims to have done. Mr Harrowven lists 20 other members of staff who he maintains he has spoken to and asserts that all reported to him that they were unaware that Mr O'Neil suffered from dyslexia or that he had any material difficulties with reading or writing.
55. Mr O'Neil does not accept that. He and his son, Jamie, who also works for the Respondent, maintain that everyone knew he had problems with reading and writing.
56. Quite understandably, the Respondent has not called all of those members of staff to give evidence. The result of that, however, is that the assertions cannot be directly tested. In any event, even if correct that other members of staff were not aware of the extent of the difficulties Mr O'Neil claims to have had with reading and writing at work, that does not fundamentally undermine his claim.
57. Mr O'Neil gave detailed evidence at the hearing before me explaining how he managed to carry out his tasks notwithstanding the difficulties he faces. It appears that he has developed coping strategies at work to assist him in performing his role, including relying on others for assistance.
58. The first example of this is Mr O'Neil's attendance at a health and safety course shortly after he joined the Respondent. Mr O'Neil explained that he struggled to complete the test at the end of the course. He maintained that he spoke to Mr Harrowven about his difficulties either at the beginning of, or during, the session and was told to get someone else to fill it out for him or to copy the person next to him.
59. Mr Harrowven denies this conversation. Mr Harrowven and Ms Denton point to the inconsistencies in the Claimant's own evidence as to when exactly he claims to have had this conversation with Mr Harrowven and the further inconsistency with Jamie's evidence on this point.



60. I do not need to reach a finding on whether Mr O'Neil had this conversation with Mr Harrowven as alleged. Irrespective of whether it took place or not, I accept that Jamie filled out the form for his dad. This is abundantly clear by comparing Mr O'Neil's form with Jamie's. The handwriting on both forms is identical. It is different to that on other forms said to have been filled out by Mr O'Neil. It is clear that Jamie filled out the form for his dad. The fact that he did so supports Mr O'Neil's claim that he had difficulty filling out the form himself. Those difficulties are also supported by the Indigo Report
61. I accept that Mr O'Neil struggled at work with understanding and completing forms required for basic training.
62. Turning to his day-to-day tasks at work, Mr Harrowven points to the fact that Mr O'Neil was able to sign and date delivery notes, checking them against what was received and putting the items away at the appropriate location. His position is that, if Mr O'Neil had really struggled as much as he now alleges, he would not have been able to perform this element of his role effectively.
63. That is answered by Jamie and Mr O'Neil in their evidence.
64. Although Jamie worked a different shift to his dad, he explained in evidence that he took extensive steps to assist his dad carry out his job. He knew that his dad would not be able to read the Respondent's job plan on the computer, so would print it off and write down the relevant information in simple terms. He would use diagrams rather than words. He would also do as many of the tasks that involved reading, writing and comprehension as he could during his shift, including labelling, leaving tasks such as unloading and clearing up for his dad once he started his (later) shift. His dad would sometimes leave items for him to log onto the computer system. This was possible because most of the deliveries arrived during the early shift.
65. Jamie's evidence was that his dad used to call him even when he was not at work.
66. Mr O'Neil also explained that he relied heavily on another member of staff, Kavit Mashru, and on the delivery drivers themselves, who would tell him the relevant information and show him where to sign.
67. Mr O'Neil maintained that his difficulties were exacerbated during the COVID-19 pandemic. This was because two individuals in his team were moved from the team or left, meaning that the workload increased and because deliveries became more frequent during the late-shift, meaning Jamie and others were unable to deal with as many of them. This is entirely consistent with the chronology of events and the increasing performance issues raised with Mr O'Neil during the COVID-19 pandemic.
68. There was a dispute in the evidence about whether Mr O'Neil's role had become more difficult because of the introduction of a computer system. Mr Harrowven maintained that the computer system had been in place since before Mr O'Neil had started, so that Mr O'Neil's evidence on this issue was

not reliable. What became clear in oral evidence, however, is that Mr O'Neil's claim was that when he first started he used to use a paper system, writing things down and relying on others (mainly Jamie) to update everything on the computer but that this became harder to do as time went on.

69. The Respondent does not accept these explanations. It has produced holiday records showing that there are many occasions when Jamie was not at work and could not have assisted his father. Jamie explained in his evidence that his dad used to call him regularly on his phone for assistance, even when he was on annual leave.
70. Mr Harrowven maintained that deliveries were not confined just to the morning shift and that it could not have been possible for Mr O'Neil to leave all reading/writing work to his son. This was not Mr O'Neil's evidence. His evidence was that Jamie, together with others, assisted him and that he was able to carry out some tasks himself. In effect, he drew on the support from others, his experience, and his own abilities to make things work. Those systems and coping mechanisms allowed Mr O'Neil to carry out his job. When that system failed, however, or the workload changed, the difficulties were exacerbated.
71. I accept the evidence of Mr O'Neil and Jamie as plausible, consistent and credible. I accept that Mr O'Neil had substantial difficulties in carrying out those elements of his role that required reading, writing and comprehension such as filling out forms.
72. In light of the above, I accept that Mr O'Neil's dyslexia affected his ability to carry out normal day-to-day tasks (the second element of the Goodwin test) and that that adverse effect was substantial (the third element of the Goodwin test).

### Conclusions

73. On the basis of my findings above, I find that Mr O'Neil was disabled within the meaning of s.6 EqA 2010 at the relevant time.
74. All elements of Mr O'Neil's claim therefore proceed to a final hearing. Case management directions have already been made in respect of that hearing and I was not invited to make any further orders.
75. I have not made findings on the issue of knowledge, which remains an issue for the final hearing.

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Employment Judge Smeaton

Date: 22 December 2021

Sent to the parties on: 30/12/2021

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For the Tribunal Office

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