



EMPLOYMENT TRIBUNALS

Claimant: Ms N C Momah

Respondent: Secretary of State for Justice

Heard at: East London Hearing Centre (via Cloud Video Platform)

On: 1 December 2022

Before: Employment Judge Brewer

Representation

Claimant: In person

Respondent: Ms J Grey, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The claimant was not a disabled person within the meaning of section 6 Equality Act 2010 at the material time.
2. The following claims are hereby dismissed:
 - a. direct disability discrimination,
 - b. discrimination arising from disability,
 - c. harassment related to disability,
 - d. failure to make reasonable adjustments and
 - e. victimisation.
3. The claimant's claim for 'other payments' is dismissed on withdrawal.

REASONS

Introduction

1. In this claim the claimant claims, among other things, various forms of disability discrimination. The respondent does not accept that the claimant met the definition of disability at the material times.
2. For the purposes of this open preliminary hearing, I asked the claimant whether she required any adjustments having first explained how the hearing would proceed and the claimant confirmed that she did not require any adjustments beyond my request to Ms Grey make sure that her questions were short.
3. At a case management hearing before Employment Judge Frazer on 6 July 2022, it was decided that there should be a preliminary hearing to do a number of things including to determine whether the claimant was disabled within the meaning of section 6 Equality Act 2010. That part of the hearing was to proceed as an open or public preliminary hearing to be followed by a case management hearing.
4. Prior to the preliminary hearing before EJ Frazer, the claimant had been required to provide and had provided a disability impact statement. She had also been required to provide relevant medical or other records in support of her claim to be disabled, but as it transpired, she provided very limited documentation as discussed below.
5. At the preliminary hearing before EJ Frazer, the parties were given permission to provide further witness statements for the open preliminary hearing but neither party provided such further evidence. Therefore, I had before me a bundle of documents running to 141 pages and I was provided with a written skeleton argument by Ms Grey.
6. The claimant gave oral evidence and relied upon her disability impact statement as her witness evidence in chief. She was cross examined by Ms Grey, and I asked her one or two questions. At the end of that part of the hearing I reserved my decision on the disability question as we had a number of other case management issues to go through.

Issues

7. The sole issue I was required to determine was whether the claimant met the definition of disability in section 6, Equality Act 2010 at the material time.

Law

8. I set out here a summary of the law.
9. Section 6 of the Equality Act 2010 (“EqA”) provides that a person 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 their ability to carry out normal day-to-day activities.
10. The EqA defines a 'disabled person' as a person who has a 'disability' —(S.6(2) EqA). The burden of proof is on the claimant to show that he or she satisfies this definition.
11. Although the definition in S.6(1) is the starting point for establishing the meaning of 'disability', it is not the only source that must be considered. The supplementary provisions for determining whether a person has a disability are found in the Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128.
12. In addition, the Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') under S.6(5) EqA. The Guidance does not impose any legal obligations but courts and tribunals must take account of it where they consider it to be relevant — paragraph 12, Schedule 1, EqA.
13. Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which has some bearing on the meaning of 'disability' under the EqA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.
14. The requirement to 'take account' of the Guidance or Code applies only where the tribunal considers them relevant, and they must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County Council** EAT 0197/20 the EAT noted that where '*consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance*'.

Material time for establishing disability

15. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination) see **John Grooms Housing Association v Burdett** EAT 0937/03 and **McKechnie Plastic Components v Grant** EAT 0284/08).
16. I note that evidence of the extent of someone's capabilities some months after the act of discrimination may be relevant where there is no suggestion that the condition has improved in the meantime (**Pendragon Motor Co Ltd t/a Stratstone (Wilmslow) Ltd v Ridge** EAT 0962/00).

17. In **All Answers Ltd v W** 2021 IRLR 612, CA, the Court held that, following **McDougall v Richmond Adult Community College** 2008 ICR 431, CA, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently.

Physical or mental impairment

18. In **Rugamer v Sony Music Entertainment UK Ltd and another case** 2002 ICR 381, EAT, the EAT suggested the following definition of physical or mental impairment under the DDA: *'some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition'*. And in **McNicol v Balfour Beatty Rail Maintenance Ltd** 2002 ICR 1498, CA, the Court of Appeal held that 'impairment' in this context bears *'its ordinary and natural meaning... It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects.'* It would seem, therefore, that the term is meant to have a broad application.
19. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.
20. The EAT said that the words used to define disability in S.1(1) DDA (now S.6(1) EqA) require a tribunal to look at the evidence by reference to four different questions (or 'conditions', as the EAT termed them):
- a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')
 - b. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
 - c. was the adverse condition substantial? (the 'substantial condition'), and
 - d. was the adverse condition long term? (the 'long-term condition')?
21. These four questions should be posed sequentially and not together (**Wigginton v Cowie and ors t/a Baxter International (A Partnership)** EAT 0322/09).
22. The approach in **Goodwin** was approved in **J v DLA Piper UK LLP** [2010] ICR 1052 (paragraph 40). It was said at paragraph 38 of that judgment:

“There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant’s ability to carry out normal day-to-day activities has been adversely affected – one might indeed say “impaired” – 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 a condition which has produced that adverse effect — in other words, an “impairment”. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred.”

Substantial adverse effect

23. To amount to a disability the impairment must have a ‘substantial adverse effect’ on the person’s ability to carry out normal day-to-day activities — S.6(1)(b) EqA. If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities but that effect is likely to recur, it is to be treated as continuing to have that effect — paragraph 2(2), Schedule 1.
24. In **Goodwin** (above) the EAT said that of the four component parts to the definition of a disability in S.1 DDA (now S.6 EqA), judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

‘What the Act is concerned with is an impairment on the person’s ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be “yes”, yet their ability to lead a “normal” life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be “no”. Those might be regarded as day-to-day activities contemplated by the legislation, and that person’s ability to carry them out would clearly be regarded as adversely affected.’

25. This approach reflects the advice in Appendix 1 to the EHRC Employment Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that ‘a person *avoids* doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation’ — paragraph 9.
26. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link.
27. In determining whether an adverse effect is substantial, the tribunal must compare the claimant’s ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. It is important to stress this because the Guidance and the EHRC Employment Code both appear to imply that the comparison should be with what is considered to be a ‘normal’ range of ability in the population at large. Appendix 1 to the EHRC Employment Code states: ‘*The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people*’ — paragraph 8.
28. In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered (see paragraphs B1– B17). These include the time taken by the person to carry out an activity (paragraph B2) and the way in which he or she carries it out (paragraph B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.
29. The cumulative effects of an impairment are also relevant. An impairment might not have a substantial adverse effect on a person in any one respect, but its effects in more than one respect taken together could result in a substantial adverse effect on the person’s ability to carry out normal day-to-day activities.
30. The Guidance states that where a person has more than one impairment but none of the impairments considered in isolation has a substantial adverse effect on normal day-to-day activities, account should be taken of whether the impairments together have such a substantial adverse effect (see paragraph B6).
31. Paragraph 5(1) of Schedule 1 to the EqA provides that 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means ‘*could well happen*’ (**Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)** 2009 ICR 1056, HL).
32. In **Aderemi v London and South Eastern Railway Limited** [2013] ICR 591, the EAT held that the Tribunal:

“has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which

are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.”

Day to day activities

33. Appendix 1 to the EHRC Employment Code states that ‘normal day-to-day activities’ are activities that are carried out by most men or women on a fairly regular and frequent basis. The Code says:

‘The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition’

paras 14 and 15.

34. The Guidance thus emphasises that the term ‘normal day-to-day activities’ is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, ‘normal’ should be given its ordinary, everyday meaning (see paragraph D4).
35. The EAT in **Paterson v Commissioner of Police of the Metropolis** 2007 ICR 1522, EAT, concluded that ‘normal day-to-day activities’ must be interpreted as including activities relevant to professional life.
36. The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are 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 also 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 (see paragraph D3).

Long term

37. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is 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 the life of the person affected.

Findings of fact

38. References below are to pages in the bundle unless otherwise stated.
39. The claimant started work in the civil service on 29 September 2014. She remains employed currently as HR performance manager.
40. The claim form which was presented on 3 October 2021 [2 – 13] states expressly that the claimant's claims are from the period 18 August 2020 (in fact the claim form refers to 2021 but it was agreed that this was a typographical error). Thus, for my purpose the material time is between 18 August 2020 and June 2021 which is the date of the last act complained of by the claimant.
41. The claimant attended university undertaking a degree course in Accounting and Business Information Systems. She obtained a 2:2. The claimant undertook a competency-based assessment for joining the civil service at which she was obviously successful.
42. Both in her claim form and in her disability impact statement [84 – 90] the claimant says that she had encountered various incidents concerning her ethnic background, gender and disability before August 2020 but that these are not matters which she complains of in this case.
43. The order requiring the claimant to provide a disability impact statement made it clear that the claimant was to say what impairment she relies upon, giving relevant dates and expressly setting out which day-to-day activities she says were substantially impaired by the disability.
44. The disability impact statement runs to 7 pages and 32 paragraphs.
45. In the claim form the claimant relies on what she refers to as an undiagnosed learning disability as the disability for the purposes of this case.
46. Although it is not precisely clear, in the disability impact statement the claimant seems to be relying upon dyslexia and indeed at the hearing it became clear that this was the disability she was now in fact relying upon.
47. The claimant has never been diagnosed as dyslexic.
48. I shall return to the claimant's disability impact statement below but before then it is useful to look at what other documentation she has provided in support of her claim.
49. In the Occupational Health (OH) Report of 29 January 2021 [117], it is reported that the claimant said that she was experiencing issues with reading and writing at that point in time, but also that she had managed in other roles since 2014 and it was her then current role, that which she started in August 2020 which she was finding challenging. The claimant also said that she had long-standing issues with reading writing and her memory as well as information processing but that in some way this came to light only since August 2020 when her role changed.

50. In her oral evidence there was some explanation of this because the claimant said that although she had the difficulties referred to in the OH Report, these did not affect her unless and until she was subject to a certain level of stress and that she was not subject to such stress in her previous roles. However, she said that because of the difficulties she was having with her manager from August 2020, in her then new role, she was being subjected to stress and that stress in some way, which the claimant could not explain, exacerbated her dyslexia.
51. There is a workplace assessment report from an organisation called Lexxic [120 – 133] in the bundle. That report was made on 19 April 2021, and it confirms that the claimant had not been diagnosed with it with a specific learning difficulty or neurological condition and that she reported that her main difficulties in her role currently were the volume of writing, the length of meetings, wording emails and reading pre-meeting papers. The report also says that the claimant displays what it refers to as “similar traits to dyslexia or dyspraxia”.
52. The claimant did undergo a check based on the British Dyslexia Association (BDA) Adult Checklist [138]. This essentially requires the claimant to consider a number of questions and then circle one of four responses. The questions ask essentially whether the person taking the checklist has difficulty doing various things and then they are asked to say whether that difficulty is rare, occasional, often or most of the time. Those answers are given weighted scores depending on the question and response. The report says that the claimant scored 77 and that although the checklist is not diagnostic, that is to say it is not conclusive of a diagnosis of dyslexia, research has shown that those who recorded scores of more than 60, if diagnosed, would be diagnosed as moderately or severely dyslexic. Having said that, the report goes on to say, “Please note that this should not be regarded as an assessment of one's difficulties”. There is a further difficulty in relying upon this checklist in that we do not know what questions the claimant answered in what ways and the claimant said she does not have a copy of the answers she gave. That matters because it is not possible to assess what the claimant's areas of difficulty was said to have been. I also note that the checklist was completed in October 2022 and that the claimant is embroiled in litigation against her employer, which is no doubt quite stressful. For those reasons the checklist result is not in my judgment reliable material from which to draw conclusions in relation to the period August 2020 to June 2021.
53. Finally, the claimant has provided two letters from her GP practise [136 and 137]. The first letter says that the claimant was suffering from work related stress which has been a problem since 2015 and that she was referred for psychological therapy in 2015, took antidepressants for a period and was currently undergoing investigations regarding a new diagnosis of hypertension. The letter also states that the claimant's “current health conditions” include dyslexia with a date of 25 September 2021. The fact of the matter is however that all of the claimant's evidence is that she has never had a diagnosis of dyslexia, so it is difficult to say how this appears in this letter and indeed why it is referred to in what is headed as a letter of support.

54. The second letter is also headed 'letter of support'. Both letters are dated 16 June 2022, and both are signed by the same GP. The second letter does not refer to dyslexia.
55. This then takes us back to the claimant's evidence set out in her disability impact statement and the oral evidence she gave at the hearing.
56. The claimant said that since starting at the respondent she has suffered with work related stress, anxiety and depression. She said that in order to escape this she changed jobs several times within the respondent but that she keeps being bullied and discriminated against. The claimant's disability impact statement goes on to describe her attempts to move away from the role in which she suffered at the hands of her manager during the material time of this claim. She describes how she is getting on with her present team and she discusses her relationship with her new manager.
57. It is not until paragraph 10 of her impact statement that the claimant talks about moving to the future finance team from the management accounting team in August 2020. The claimant explains why she moved and then talks about the incidents she says she was exposed to.
58. It is not until paragraph 22 that the claimant refers to the impact of the treatment she says she suffered. The claimant says that the treatment has had an effect on herself and her children and that when she goes into the office she gets a lot of calls from them because on one occasion they witnessed her having a panic attack on a Teams call with her manager. The claimant says that she has issues sleeping, she has nightmares and is always restless at night. She says that she has been given a monitor to monitor her heart and her blood pressure.
59. The claimant also says that she is very tired in the mornings and has difficulty waking up, if she is not at work she is at home alone, does not speak to anyone and she just wants to be on her own. The claimant says that she does not shower, change her bedding or let anyone into her room because it is untidy. She says that she is always tearful and has a feeling of hopelessness.
60. In her oral evidence, and in contradiction to what is in the claim form and the disability impact statement, the claimant said that she did not have any problems in previous roles, that is to say prior to August 2020. The claimant also suggested that her problems stemmed from a mix of stress and dyslexia. She said, in answer to a question for me, that she had always had a learning difficulty, that she had coped with that but when stressed she could not cope. When she was asked what day to day activities were adversely affected, she said only that she did not read at church but that she could think of nothing else.

Discussion and conclusion

61. I remind myself that the questions I must answer are as follows:
 - a. did the claimant have a mental and/or physical impairment? (the 'impairment condition')

- b. did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')
- c. was the adverse condition substantial? (the 'substantial condition'), and
- d. was the adverse condition long term? (the 'long-term condition')?

Did the claimant have a mental impairment?

62. The impairment the claimant says she has which amounts to a disability is dyslexia. There is no evidence from which I could conclude that the claimant is dyslexic. What can be said is that on the BDA Adult Checklist the claimant is said to have scored 77 which is a suggestion that if she was to be diagnosed as dyslexic then that would be moderate to severe. But as the checklist states, even that score does not give an indication of the difficulties any particular person may have as a result of the dyslexia. In this case the evidence is that the claimant got on with her work perfectly well, without difficulty, until August 2020 when she moved to her then new team. The claimant says that she coped previously but that the stress she was under in her new role made her not able to cope. The claimant did not actually refer to any coping strategies and I understood her evidence to be not that she struggled in the same way with for example reading and writing in her previous role but used coping strategies to deal with that, rather that the purported dyslexia did not previously have an impact, or a substantial impact, because she was not under stress.
63. Even if we ignore the label dyslexia and use the perhaps broader term learning disability, the issue is the same because the claimant has never had a diagnosis that she has a learning disability, it is her belief that she has such a disability and she has now given a label to that belief - dyslexia.
64. As well as the evidence that the claimant was not impaired in her previous roles, I also have the evidence in the bundle. The claimant drafted, albeit she says with some assistance from the Citizens Advice Bureau, the claim form, and she herself drafted not just the disability impact statement but also the responses to the requests for further particulars of both her claim for disability discrimination and her claim for race discrimination. The claimant has conducted her own advocacy at two preliminary hearings, and she seemed to me to have no particular difficulty representing herself both in the sense of responding to questions from Ms Grey and me, and also in understanding what was taking place and what was required from her in particular when we went through the issues and discussed all of the different types of discrimination claims she was seeking to make along with the details of those claims.
65. The most I can conclude from the evidence I have seen is that on the basis of responses she gave on a dyslexia checklist the claimant showed signs consistent with moderate or severe dyslexia but without wishing to labour the point, the BDA are very clear that the checklist is not a diagnostic tool, it does not constitute an assessment of an individual's difficulties, it may be indicative that a problem might exist.

66. For the above reasons I am not able to conclude that the claimant did have either dyslexia or a learning disability at the material time.

Did the impairment affect the claimant's ability to carry out normal day-to day activities?

67. Even if I am wrong about that, and the claimant did meet the impairment condition, in my judgement the claimant does not meet the adverse effect condition.
68. The claimant's description about the impact of her purported disability in her disability impact statement is completely about the impact of her treatment by her line manager not about the impact of any mental impairment on her day-to-day activities, although on another view there is quite a lot of information on what the claimant says about the impact of the stress and anxiety she says her treatment put her under. It seems to be fairly clear from the claimants disability impact statement, and from her oral evidence, that even if she does have a learning disability, that does not in and of itself have any or certainly not a substantial adverse effect on her ability to carry out day-to-day activities unless and until she is also subject to a certain level of stress and therefore in my judgement the evidence shows that in and of itself, any learning disability or dyslexia does not have a substantial adverse effect on the claimant's ability to carry out dates day activities.
69. For either or both above reasons I find that the claimant was not a disabled person for the purposes of section 6 EqA at the material time and it is not necessary for me to consider the remaining Goodwin questions.

**Employment Judge Brewer
Dated: 2 December 2022**