



EMPLOYMENT TRIBUNALS

Claimant: Mr S Alexander

Respondent: Estate of D B Roberts t/a Gwyn Jones Funeral Directors

Heard at: Cardiff and video (public) **On:** 5 December 2023

Before: Employment Judge R Brace

Representation

Claimant: Ms L Nixon (Lay representative)

Respondent: Mr A Griffiths (Counsel)

RESERVED JUDGMENT

1. At the relevant times the Claimant was not a disabled person as defined by section 6 Equality Act 2010 because of anxiety and depression, high blood pressure or dyslexia.
2. The complaints of unfavourable treatment because of something arising in consequence of disability and/or failure to make reasonable adjustments are therefore dismissed.

Written Reasons

1. This was a public preliminary hearing, heard remotely by CVP to determine:
 - a. Whether the Claimant was at the relevant times a disabled person for the purposes of s6 Equality Act 2010;
 - b. The Claimant's amendment application.
2. The ET1 in this claim had been filed on 24 February 2022 [3] and on 25 May 2022, Judge Jenkins had issued disability directions for the Claimant to confirm the impairments relied on, provide medical evidence relied on and a disability impact statement.
3. On 21 July 2022, a preliminary hearing on case management had taken place before Judge Ryan [34]. At that preliminary hearing, Judge Ryan had warned the Claimant that his claims of disability discrimination could be struck out if he failed to comply with further disability orders Judge Ryan made, including but not limited to provision and disclosure of his medical records and impact statement.

4. Judge Ryan had also confirmed with the Claimant that his claims as pleaded were:
 - a. discrimination arising from disability (s.15 EqA 2010) in relation to his dismissal on 30 November 2021 and;
 - b. failure to comply with the duty to make reasonable adjustments in relation to the Respondent's disciplinary procedure (S.20/21 EqA 2010).
5. He also directed that a public preliminary hearing be listed to consider disability and amendments to the claim that were apparently being sought by the Claimant and as set out in §4.2.1.1 and §4.2.1.2 of his case management order.
6. That preliminary hearing was originally listed for December 2022, but sadly the Respondent passed away and there was a subsequent stay in the proceedings pending the Grant of Probate resulting in a year long delay before this preliminary hearing was listed for today.
7. It was agreed that the Claimant is relying on the following 'impairments':
 - a. Anxiety and depression;
 - b. High blood pressure; and
 - c. Dyslexia.
8. At the outset of this hearing, there was discussion of how I would deal with the amendment application from the Claimant to add further claims of failure to comply with the duty to make reasonable adjustments. After discussions with both parties' representatives and particularly as the Claimant's representative today indicated that she would have difficulties in making submissions on both disability and amendment, I determined that I would consider any amendment application after I had first made a determination on the issue of disability, as that application would not be necessary if the Claimant was unable to establish that he was a disabled person to be able to bring any disability discrimination complaint.
9. However, the time at which to assess the disability, i.e. whether there is an impairment that has a substantial long term 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**).
10. In that regard, the period of time that was relevant for determining whether the Claimant had a particular disability for the purpose of the disability complaints that currently are brought is from 7 July 2021 (when there was an interaction between the Claimant and Louise Rowlands which gave rise to a disciplinary process being instigated,) through to 30 November 2021 (when the Claimant was dismissed with pay in lieu of notice).
11. The material time was earlier however for the purposes of any additional claims sought to be included by amendment. The Claimant indicated that those adjustments should have been made by:
 - a. Late June 2021, for the amendment at §4.2.1.1; and
 - b. January 2021, for the amendment at §4.2.1.2.
12. It was agreed that when determining disability, I would therefore consider the period of time both from 7 July 2021 to 30 November 2021 and the period of time from January 2021 to 30 November 2021, and that if the Claimant was successful in demonstrating that he was a disabled person at those material times, I would then

consider submissions on amendment. Due to the lateness of the completion of the evidence on disability, I reserved this decision and the amendment application was not heard today. Separate directions have been sent to the parties to get this case ready for the remaining unfair dismissal claim.

13. I had before me a 324 page preliminary bundle (“Bundle”) and references to the hearing Bundle appear in square brackets [] in this reserved judgment and written reasons. The Bundle contained the Claimant’s undated Disability Impact Statement [42].
14. I also had a written statement from Carole Louise Rowlands, known as Louise Rowlands, joint executor of the estate of her late father, David Brian Roberts t/a Gwyn Jones Funeral Directors, the Respondent in these proceedings.
15. Both witnesses were subject to questioning from the other parties’ representative and from the Tribunal.
16. Findings of fact are made on the evidence before me made and based on balance of probabilities.

Law

17. The Equality Act 201 (“EqA”) provides that a person has a disability if he or she has a ‘physical or mental impairment’ which has a ‘substantial and long term adverse effect’ on his or her ‘ability to carry out normal day to day activities’. Supplementary provisions for determining whether a person has a disability is contained in Part 1 Sch 1 EqA which essentially raises four questions:
 - a. Does the person have a physical or mental impairment?
 - b. Does that impairment have an adverse effect on their ability to carry out normal day to day activities?
 - c. Is that effect substantial?
 - d. Is that effect long term?
18. Although these questions overlap to a certain degree, when considering the question of disability, a Tribunal should ensure that each step is considered separately and sequentially (**Goodwin v Patent Office** [1999] IRLR (EAT)). In **Goodwin** Morison P, giving the decision of this Court, also set out very helpful guidance as to the Tribunal’s approach about the determination of the issue of disability. At paragraph 22 he said: “*The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question.*”
19. Appendix 1 EHRC Employment Code states that there is no need for a person to establish a medically diagnosed cause for their impairment, what is important is to consider the effect of the impairment and in **J v DLA Piper UK LLP** 2010 ICR 1052, EAT, Mr Justice Underhill observed that in reaching conclusions, tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant’s ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings.

20. In **Igweike v TSB Bank plc** 2020 IRLR 267, the EAT observed that there was no rule of law that a tribunal could not address the impairment condition before addressing the substantial and long-term conditions. What mattered was not the order in which a tribunal discussed its conclusions, but whether it erroneously failed to infer from the evidence that there was an impairment and/or whether it had erroneously failed to find that any such impairment had a substantial long-term effect on day-to-day activities.
21. The EqA 2010 Guidance states; *'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'* (D3).
22. The EqA 2010 Guidance (D3) indicates that normal day-to-day activities can include general work. The EAT in **Paterson v Commissioner of Police of the Metropolis** [2007] IRLR 763 concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life. It emphasized that the phrase is to be given a broad definition that can include irregular but predictable activities that occur in professional life.
23. Furthermore, a non-exhaustive list of how the effects of an impairment might manifest themselves in relation to these capacities, is contained in the Appendix to the Guidance on matters to be considered in determining questions relating to the definition of disability. Whilst the Guidance does not impose any legal obligations, tribunals must take account of it where they consider it to be relevant.
24. The requirement that the adverse effect on normal day to day activities should be considered a substantial one is a relatively low threshold. A substantial effect is one that is more than minor or trivial (s.212 EqA and B2 Guidance).
25. Para 5 Sch. 1 Part 1 EqA provides that an impairment is treated as having a substantial adverse effect on the ability of the person to carry out normal day to day activities if measures, including medical treatment, are being taken to treat or correct it and, but for that, it would likely to be the effect. In this context, likely is interpreted as meaning 'could well happen'. The practical effect is that the impairment should be treated as having the effect that it would have without the treatment in question (B12 Guidance).
26. The question of whether the effect is long term is defined in Sch. 1 Part 2 as
 - a. Lasting 12 months;
 - b. likely to last 12 months;
 - c. likely to last the rest of the person's life.
27. Again, the Guidance at C3 confirms that in this context 'likely' should be interpreted as meaning it could well happen. The Guidance (C4) also clarifies that in assessing likelihood of the effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything which took place after will not be relevant in assessing likelihood.
28. Finally, the burden of proof is on the Claimant to show he satisfied this definition. 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.

Facts and Conclusions

29. The Claimant was at the relevant times a 54/55-year-old male, employed by the Respondent, an individual operating a family business of funeral directors. The Claimant had commenced employment with the Respondent in 1990 and had been married to the Respondent's daughter and sister of Louise Rowlands, Tracey Alexander, a marriage that had ended by the date of his dismissal. The specific dates of the beginning and end of that relationship were not directly in evidence but it appeared likely that this relationship had been lengthy, with Louise Rowlands confirming that she had known the Claimant since 1987, and that the marriage had likely ended at some point after 2019, the Claimant's medical records confirming that as at 2019 the Claimant was still living with his wife and daughter.
30. The medical records provided by the Claimant were voluminous and date back to 1984 [47-218]. The Claimant's representative confirmed that all medical records disclosed by the Claimant had been included in the Bundle. The records reflected medical treatment the Claimant had received for a range of physical conditions. Very few of the records were relevant however for the purposes of determining whether the Claimant was disabled by reason of the impairments relied on despite the Claimant having been given further opportunity to provide relevant documents by Judge Ryan to do so over a year ago.
31. Indeed, the only records that were relevant were the Claimant's fit notes from 6 August 2021 [219-224] and the extracts from the Claimant's GP notes as at July 2022 [215-218], a date post-dating the termination of the Claimant's employment.
32. The Claimant had been asked by the Respondent to attend an occupational health adviser in August 2021 to assess whether he was fit to participate the disciplinary and grievance processes. The Claimant did not give his consent for such a referral and therefore no evidence from such an adviser exists. The Claimant was challenged on whether the reason he had refused to consent was because it would have demonstrated that none of the conditions now relied on impacted his day to day activities. The Claimant rejected this suggestion, but provided no explanation of why he had refused to give his consent.

Depression and anxiety

33. The Claimant gave live evidence that his anxiety had started in May 2021, but he admitted that he had not attended his GP for anxiety and depression again after 2021 and that by 2022 his attendances at his GP related to treatment for joint pain and arthritis only.
34. The Claimant also accepted that the notes that he had disclosed did not reflect that he had told his GP at some point that had suicidal thoughts, a matter which he had raised in live evidence.
35. The Claimant's GP record of 26 July 2022 indicated that on 6 August 2021, a GP had recorded the Claimant as having 'anxiety with depression' at that point [215].

No other medical records existed in relation to this impairment save for fit notes and reference to medication.

- a. Both anxiety and depression were referred to in the fit note from the Claimant of 6 August 2021 [219] as well as the fit notes of 20 August 2021 [220] and again, on what appears to be a fit note from August/September 2021 [222]. The subsequent fit note of 16 October 2021, referring not to anxiety or depression, but to hypertension [223]. The fit note of 15 November 2021 referring only to 'low mood'.
 - b. That GP record also recorded that the Claimant had a medication review on 13 October 2021, when pain relief medication only appears to have been discussed. Whilst that record indicates that as at July 2022, the Claimant was on 100mg of the anti-depressant Sertraline, there was no medical evidence of how long the Claimant had been on such medication. The Claimant had given evidence however, which was not challenged and which I accepted, that he had been prescribed 50mgs of the anti-depressant Sertraline by his GP in August 2021, and that this dosage had increased to 100mg by January 2022.
36. The Claimant also accepted that any anxiety and depression was linked to his reliance on alcohol and the breakdown of his marriage and by November 2021, what was keeping him off work, was alcohol abuse.
37. The Claimant's evidence and submissions on how long the Claimant's depression and anxiety had lasted were, to an extent, contradictory. On one hand, the Claimant gave live evidence that he still suffered depression implying that it had continued beyond the date of his dismissal but, in submissions, Ms Nixon told me that the Claimant had suffered from anxiety and depression from July 2021 up to December 2021/January 2022.
38. I was satisfied, on the basis of the Claimant's medical record, that the Claimant had demonstrated that he had a mental impairment of anxiety and depression from around July/August 2021 and, on the basis of the Claimant's written evidence, that he had been on medication for this impairment from 6 August 2021.
39. I then considered whether the Claimant had demonstrated any adverse impact of any anxiety and depression on his day to day activities and whether such impact could be said to be 'substantial', keeping in mind the threshold of what is 'substantial' is more than minor or trivial.
40. The activities relied on as being impacted included that he was unable to work from August 2021 and those activities set out in §6-10 of his Impact Statement where he spoke of:
- a. needing to be prompted to get up and wash;
 - b. not being motivated to cook for himself, relying on cold foods and microwaveable meals;
 - c. not being able to leave his flat on his own and relying on his family to shop for him;
 - d. not going out much, only going out on his own to the doctors and to undertake a food shop;
 - e. not doing hobbies, such as socialising in the pub, gardening and DIY, anymore.

41. I found that the Claimant's ability to attend work, a day to day activity, had been adversely impacted by his anxiety and depression from around 6 August 2021, when he had been too unwell to attend work
42. With regard to the other activities referred to in his witness statement, the Claimant was not challenged on needing to be promoted to get up and wash, but was challenged on the other activities listed.
43. Within the Bundle were screen shots of social media posts of photographs the Claimant had posted, which included posts:
 - a. From July 2021, of the Claimant's flat and DIY projects [289-297, 301];
 - b. From July 2021 – December 2021, of the Claimant out socialising and/or drinking [297, 298, 304-310];
 - c. From August 2021, of meals being cooked [299];
 - d. From November 2021, of the Claimant out shopping [302].
44. On cross-examination, the Claimant had maintained that his depression and anxiety had stopped him from doing DIY, that it had been his brother in law that had been painting and that he had been drinking whilst holding the ladder for his brother in law and that it had been his partner that had been cooking, not him. He also maintained his evidence that he was unable to go outside, but in contradiction to that evidence accepted he had gone out over the Christmas period with his cousin.
45. Whilst I accepted that social media posts do not always present the true picture of the reality of someone's life, I was concerned that the Claimant that he had been less than candid about the extent that his anxiety and depression had impacted on his day to day activities. In coming to this conclusion, I took into account the lack of medical evidence from the Claimant regarding the seriousness of the depression and anxiety and that the Claimant himself admitted that he was also dependent on alcohol over this period. It was also not possible to separate out the impact of the anxiety and depression on the Claimant's day to day activities, whoever caused, and the impact of his alcohol dependency.
46. Whilst I accepted that it was likely that the Claimant did have very low moments, such that it could be said that the impact on day to day activities during such periods was likely to be 'substantial', the Claimant had not proven that his anxiety and depression had adversely impacted the Claimant in the way that he had described for more than a limited period which, I concluded, had ended by around the end of October 2021, when at that point, other factors and only 'low mood' had been stated as reasons for his work absence and not anxiety and/or depression. I was not persuaded that after November 2021 the Claimant had been unable to leave his flat to socialise and shop was, and as a consequence from this time was also, more likely than not, able to engage in his hobbies of DIY and gardening if he had chosen.
47. On the face of it, the length of time that the depression and anxiety had impacted his day to day activities would therefore not be of a sufficient length of time to meet the 'long term' aspect of the s.6 Equality Act 2010 definition in that the substantial adverse effects had not, at the date of dismissal, lasted 12 months, nor could it be said that they were likely to last 12 months at any point from August 2021.
48. However, I was mindful of the need to consider the deduced effects i.e. whether without the medication, the effects would have continued to have been substantial

and to a point whereby it could be said that they would be long term or likely to last 12 months. I concluded on balance that it could not be said that this could well happen.

49. Whilst I accepted that the Claimant had an increased dosage of his anti-depressant in the January of 2022, this was after the Claimant had been dismissed. I did not consider that the Claimant had demonstrated that, but for the medication that he had been taking from August 2021, that the adverse impact of his anxiety and depression could well have lasted 12 months at any point up to his dismissal on 30 November 2021.
50. I therefore concluded that the Claimant had not demonstrated that he was a disabled person at any material time by reason of anxiety and depression.

High blood pressure

51. The Respondent accepts that the Claimant has or has had high blood pressure.
52. I found that from around October 2021, the Claimant had high blood pressure, the Claimant's fit note of 4 October 2021 [222] indicating 'hypertension under titration of treatment', which I took to mean as the Claimant had high blood pressure at that time and was receiving medication for that condition which was under review. This was repeated in the fit note of 16 October 2021 [223]. I also found that the Claimant was still suffering high blood pressure by the date of the termination of his employment, his fit note of 15 November 2021 also indicating hypertension as well as 'stress, low mood and alcohol abuse' [224].
53. The Claimant had not provided any evidence however on what impact, if any, such a condition had on any of his day to day activities, before or after medication, with or without medication. The Claimant's representative was reminded in submissions, when speaking of the Claimant's high blood pressure symptoms, whether she wished to remind me of what impact the hypertension had on the Claimant's day to day activities. She did not.
54. I was therefore unable to conclude that there was any impact on the Claimant's day to day activities. Likewise, even accepting that at some point, the Claimant had commenced taking blood pressure medication, I was unable to make any findings on what, if any, what impact there would have been on the Claimant's day to day activities without that medication.
55. On that basis, the Claimant has not proven that he was a disabled person by reason of high blood pressure at any material time in any period up to 30 November 2021, being the date of dismissal.

Dyslexia

56. Whilst the Claimant said that he had been diagnosed with dyslexia when he had been at school 44 years old, he provided no evidence of that diagnosis despite having had two opportunities and over a year to provide such evidence. I was not persuaded by his oral evidence that he had been diagnosed, that he had dyslexia.
57. The Claimant had however given evidence in his witness statement that he struggled to read and write, which he said could cause him to be quite disorganised and confused when reading documents, papers or emails. In live evidence, the

stated that he chose not to read papers or recipes, evidence that was contradicted by the live evidence from Louise Rowlands, which was that the Claimant did buy magazines. I was therefore not persuaded that the Claimant had proven to me that he did not read or indeed that he struggled to read.

58. Whilst knowledge was not being determined today, I did permit questions on knowledge as this was relevant to the issue of whether the Claimant had the impairment relied on.
59. On cross-examination, the Claimant admitted that he had not told the Respondent, his father-in-law, or Louise Rowlands, his sister in-law, that he had dyslexia. He gave live evidence, not included in his Impact Statement, that he had told Louise Rowlands that he struggled with reading. I did not accept that evidence, preferring the evidence of Louise Rowlands, that she had not been told by him that he struggled. I also accepted her evidence that dyslexia had never been mentioned to the wider family, including her sister and niece, the Claimant's ex-wife and daughter, or that he had disclosed that he struggled to read or write. I considered that if the Claimant had been so disclosed, it was probably that his family would have been told and would have been aware of this fact. They were not and this led me to conclude that it was more likely than not that he had not been so diagnosed or assessed.
60. On cross-examination, the Claimant also confirmed that there had been no impact on his life as a result of reading and writing and organisational difficulties, until he had been asked in 2021 to read out a poem or bible verse to family members at funerals, something which he had referred to as something that he 'did not like' and would 'struggle' doing, in his witness statement.
61. When encouraged by me during submissions to focus on what day to day activities were impacted, the Claimant's representative spoke of the Claimant spending money on things that were irrelevant, having to ask for hard copies of documents in this litigation and matters not 'sinking in'.
62. Whilst it is possible that the Claimant does have the impairment of dyslexia, and may very well find reading a struggle and not something that he enjoys, particularly if he has to do so aloud in front of others, this was insufficient for me to find or infer that on balance of probabilities, the Claimant had an impairment of dyslexia.
63. Even taking the Claimant's case on its highest, and accounting for the fact that the Claimant is a litigant in person, I was not persuaded that the Claimant had provided any evidence of reading, writing or organisational difficulties that could lead me to a finding that the Claimant had any physical or mental impairment that had a substantial impact on day to day activities.
64. The Claimant had therefore not proven that he was a disabled person by reason of dyslexia at any material time.
65. On the basis that the Claimant has not proven that he was a disabled person at any time, by reason of anxiety and depression, high blood pressure and/or dyslexia, all of his disability discrimination complaints: of unfavourable treatment because of something arising in consequence of disability and/or failure to make reasonable adjustments, are therefore dismissed.

Case Numbers: 1600251/2022

Employment Judge R Brace

Date 11 December 2023

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 12 December 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche