



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000056/2022

Held at Edinburgh on 21 April 2023

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Employment Judge W A Meiklejohn

15 **Mr C Thacker**

**Claimant
Represented by:
Mr D Stevenson,
CAB representative**

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Bridgend Farmhouse

**Respondent
Represented by:
Mr J Knox, Trustee**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Employment Tribunal is that the claimant was, at the relevant time for the purpose of his claim, disabled within the meaning of section 6(1) of the Equality Act 2010, and his claim may proceed to a final hearing.

REASONS

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1. This case came before me for an open preliminary hearing to determine whether, at the material time for the purposes of his complaints (1 November

ETZ4(WR)

2021 up to and including 30 June 2022), the claimant was a person possessing the protected characteristic of disability by reason of dyslexia. The claimant was represented by Mr Stevenson. The respondent was represented by Mr Knox, accompanied by Mr M Heriot, also a Trustee.

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Procedural history

2. There had been two previous closed preliminary hearings (both before Employment Judge d'Inverno) for the purpose of case management. The principal outcomes of the first preliminary hearing on 9 November 2022 were Orders (a) identifying the complaints brought by the claimant and his assertion that he possessed the protected characteristic of disability by reason of his dyslexia, (b) requiring the claimant to provide a disability impact statement and further particulars of his claim, (c) allowing an amendment to the claim and giving the respondent the right to answer this, (d) requiring the claimant's representative to prepare a list of issues and (e) fixing a further preliminary hearing for 14 February 2023.

3. The claimant having duly provided his impact statement (55) and further particulars (27), and the claimant's representative having prepared a list of issues (28), the principal outcomes of the second preliminary hearing on 14 February 2023 were Orders (a) relating to the list of issues, (b) fixing the present open preliminary hearing to determine the issue set out in paragraph 1 above, (c) fixing a final hearing for 19, 20, 21, 22 and 23 June 2023 and (d) dealing with exchange and production of documents for the present hearing and the final hearing.

Evidence

4. I heard oral evidence from the claimant. I had a bundle of documents extending to 65 pages to which I refer above and below by page number.

5. Mr Knox produced statements from Ms I Frost and Mr W Golding, both of whom were involved at the time of the claimant's appointment. While I noted these,

I considered that they were of minimal evidential value because (a) the claimant did not have an opportunity to cross-examine Ms Frost and Mr Golding and (b) their statements related more to the respondent's knowledge of the claimant's dyslexia rather than whether it constituted a disability for the purpose of the Equality Act 2010 ("EqA").

Findings in fact

6. The claimant described the impact of his dyslexia. He said that his dyslexia "jumbles thoughts" and that things on a page, such as writing or numbers, would "move". At school he struggled with basic arithmetic and word recognition. His dyslexia was formally diagnosed following a session with an educational psychologist, Dr A Archbold, in July 2010. Dr Archbold's Diagnostic Assessment Report (35-42) was produced.

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7. The following are extracts from Dr Archbold's report -

Reading

Reading single words is significantly below the level expected from oral ability, and the time taken is also slower than average.

Cris's reading comprehension skills are adversely affected when the reading level is complex....

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Spelling

Spelling single words from dictation is also significantly weaker than would be predicted from Cris's level of overall functioning....

Cris continues to have difficulty with spelling many frequently used words. Double consonants also present problems. Proof reading is extremely difficult as he cannot identify his errors.

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Writing

Cris's handwriting is untidy in appearance and not easily legible.

10 *Cris's assessment included a short free writing task. The results were an average of 20 words per minute which is slow for an able student in higher education. There were several spelling errors and poor legibility.*

Speed of copying...is also slow for a University student.

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8. The conclusion section of Dr Archbold's report stated as follows -

20 *Cris has a distinctive dyslexic pattern of strengths and difficulties in his profile, but with excellent verbal ability. His dyslexic difficulties include working memory and speed of processing. These factors will adversely affect his performance in examinations and in assessed written work unless specific arrangements are in place.*

25 *Cris's dyslexic difficulties are in the moderate range, relative to his ability level, with difficulties affecting reading, spelling and structuring written work. His dyslexic difficulties will have a significant effect on the speed of written expression, spelling both for individual words and in continuous writing, and the formulation, organisation and expression of written ideas and information.*

Cris's dyslexia will have a significant effect on certain aspects of cognitive functioning under exam conditions. This includes the inefficiency of retrieval and organisation of information and ideas and a much increased risk of errors. In general terms there is much greater difficulty in doing full justice to knowledge, skills and understanding of exam subjects, than for non-dyslexic students.

9. The claimant said that Dr Archbold's report was accurate (in terms of how he was affected by his dyslexia). In relation to Dr Archbold's conclusion the claimant said *"That's my life"*. I regarded this as confirmatory that the difficulties experienced by the claimant, because of his dyslexia, as described by Dr Archbold had continued. They existed during the relevant period for the purpose of these proceedings.

10. The claimant also spoke to an Assessment Report dated 7 September 2010 (43-51) which related to an application he had made for a Disabled Student's Allowance. This supported various adjustments and the provision of certain equipment and software to assist the claimant.

11. While the difficulties encountered by the claimant in relation to his dyslexia were described with reference to his studies at University, the claimant said that he experienced similar difficulties while working for the respondent and his previous employer, and also outside of work. He described himself as *"verbally....very good"* and referred to his use of Dragon dictation software to produce documents.

12. In his impact statement the claimant said this -

"I have difficulties every day with my condition because I do not always act as expected by reason of becoming easily confused and having a poor short term

memory, difficulties reading quickly particularly with black print on white, and difficulties with writing which is often illegible.”

- 5 13. The claimant was asked under cross-examination about some of the factors listed in the Appendix to the Secretary of State’s Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (the “Guidance”). He readily accepted that he did not have difficulty with any of the factors which related to physical activity. He said that he had, or sometimes had, difficulty with some of the factors including loss of interest (in the sense of getting distracted), understanding verbal instructions and reading or understanding written material.
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Submissions

- 15 14. Mr Stevenson stressed that the legal basis for disability was that found in the EqA. He argued that the claimant met the statutory definition. He had significant difficulty with reading and writing. These were normal day-to-day activities.
- 20 15. Mr Knox acknowledged that the claimant had disclosed his dyslexia at interview but submitted that the claimant’s dyslexia was not sufficiently serious to bring him within the statutory definition. He suggested that the claimant was being vexatious by bringing this claim, and that to find the claimant to be disabled would fly in the face of common sense.

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Applicable law

16. The definition of disability is found in section 6(1) EqA-

30 *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
5 to carry out normal day-to-day activities.*

17. This is supplemented by Schedule 1 EqA which provides as follows -

2. Long-term effects

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(1) The effect of an impairment is long-term if -

(a) it has lasted for at least 12 months,

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(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected....

5. Effect of medical treatment

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*(1) An impairment is to be treated as having a substantial adverse effect on
the ability of the person concerned to carry out normal day-to-day activities
if-*

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

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

18. Section 212(1) EqA includes the following -

“substantial” means more than minor or trivial....

5 **Guidance**

19. The Guidance (at section A2) says this about the EqA definition of disability -

This means that, in general:

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- *the person must have an impairment that is either physical or mental*
- *the impairment must have adverse effects which are substantial*
- 15 • *the substantial adverse effects must be long-term*
- *the long-term substantial adverse effects must be effects on normal day-to-day activities*

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*This definition is subject to the provisions in **Schedule 1***

All of the factors must be considered when determining whether a person is disabled.

25 20. At section A5 the Guidance says this -

A disability can arise from a wide range of impairments which can be:

.... developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia

- 5 21. In relation to “normal day-to-day activities” the Guidance (at section D3) includes the following -

10 *In general, day-to-day activities are things people do on a regular 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*
15 *instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or shift pattern.*

Discussion

- 20 22. I approached the question of whether the claimant was, at the relevant time, disabled by reason of his dyslexia by looking at each of the elements of the statutory definition in section 6(1) EqA.

- 25 23. Firstly, did the claimant have an impairment? It was not in dispute that he was dyslexic. That dyslexia could be a mental impairment was recognised in the Guidance. That it was a mental impairment of the claimant’s was confirmed by Dr Archbold’s report. She referred to his dyslexia having “a significant effect on certain aspects of cognitive functioning”.

24. I noted that Dr Archbold made this comment with reference to exam conditions. However I also noted, and accepted as credible, the claimant's comment "*That's my life*". This indicated that the conclusions reached by Dr Archbold still held good. The claimant continued to suffer "*dyslexic difficulties*". I found
5 that he did have a mental impairment.
25. Secondly, did the impairment have adverse effects which were substantial? The reference to the claimant's "*dyslexic difficulties*" confirmed that he experienced effects which were adverse. He had issues with reading, spelling
10 and writing. Dr Archbold referred to the claimant having "*much greater difficulty in doing full justice to knowledge, skills and understanding*". Again, this was said with reference to exam subjects, but I accepted the claimant's evidence as confirmatory of his continuing to experience such difficulty.
- 15 26. I reminded myself that "*substantial*" meant more than minor or trivial. As a matter of common sense, I did not consider that having issues with reading, spelling and writing could be classed as minor or trivial. Accordingly I was satisfied that this element of the statutory definition was met.
- 20 27. Thirdly, were the substantial adverse effects long-term? The answer to this was clearly yes. The claimant had experienced the effects of his dyslexia since his school days. He had been given a formal diagnosis in 2010. It was sufficient to satisfy this element of the definition that the impairment had lasted for more than 12 months.
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28. Lastly, given that there were long-term substantial adverse effects, were those effects on normal day-to-day activities? This was the main area of challenge by the respondent. I understood their position to be that they did not dispute the claimant's dyslexia, but questioned whether this actually impacted
30 adversely on his ability to carry out normal day-to-day activities.
29. In his statement, Mr Golding referred to the claimant stating that he possessed "*excellent written and verbal communication skills*". Ms Frost referred to the claimant saying that "*he was fine with the amount of reporting required, that he*

likes writing reports and that he enjoys the process, even though it can be laborious and repetitive". Ms Frost went on to refer to notes taken by another interviewer at an earlier meeting where the claimant was recorded as saying that he *"hates report writing and finance"*.

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30. In answer to questions from me at the hearing, the claimant said that he had *"always been a bit ashamed"* of his dyslexia and that he had *"tried to be normal"*. He said in relation to social activities *7 bluff it"* and indicated that he did not want anyone to see it (ie his dyslexia).

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31. It was apparent from his evidence that the claimant was able to address his difficulty with spelling and writing by using appropriate software. He also referred to using a mobile phone application to enable him to remember things. The claimant gave his evidence confidently which supported his own description of his verbal communication skills. I considered that the claimant was able to present himself in a way which masked his dyslexia. In those circumstances, it was unsurprising that the respondent's view was that his dyslexia was mild and did not adversely affect his ability to undertake normal day-to-day activities.

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32. I found that the technological means adopted by the claimant to deal with the difficulties which his dyslexia would otherwise cause him came within the meaning of *"other aid"* in paragraph 5(2) of Schedule 1 EqA. As such, they were *"measures"* for the purpose of paragraph 5(1). This meant that the claimant's ability to carry out normal day-to-day activities had to be judged without the benefit of those measures. That was the effect of the phrase *"but for that"* in paragraph 5(2).

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33. I was satisfied that, but for his use of Dragon dictation software, the claimant would have difficulty in writing reports. But for his use of the spellcheck facility, he would have difficulty in spelling words correctly. Even with that facility, he had difficulty with the use of words such as *"from"* and *"form"*. I noted an example of this at section 15 of his ET1 claim form (12). The claimant's

difficulties with writing and spelling were effects which his dyslexia had on his ability to carry out normal day-to-day activities.

- 5 34. I was also satisfied that the claimant's dyslexia impacted adversely on (a) his ability to read and (b) his short term memory, both of which were aspects of normal day-to-day activities. In relation to reading, I accepted as credible the claimant's evidence that he continued to experience the difficulty identified in Dr Archbold's report. In relation to short term memory, I accepted the claimant's evidence that that this would affect him adversely but for his use of
10 a mobile phone application.

Decision

- 15 35. For the reasons set out above I found that the claimant was, at the relevant time for the purposes of his claim, disabled within the meaning of section 6(1) EqA because of his dyslexia. His claim may proceed to the final hearing already listed.

20 **Employment Judge: W A Meiklejohn**
Date of Judgment: 08 May 2023
Entered in register: 09 May 2023
and copied to parties