



EMPLOYMENT TRIBUNALS

Claimant: Mr L Devello-Waters

Respondent: Lidl Great Britain Ltd

Heard at: Bristol **On:** 20th / 21st January 2022

Before: Employment Judge P Cadney

Representation:

Claimant: In Person

Respondent: Ms C Jennings (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

The claimant was a disabled person within the meaning of s6 Equality Act 2010:-

- i) At all material times by reason of dyslexia / learning disability;
- ii) From 16th July 2020 by reason of a musculoskeletal lower back condition.

Reasons

1. By a claim presented on 11th December 2020 the claimant originally brought claims against the current respondent and three individual respondents. Following a case management hearing before EJ Bax the claimant withdrew the claims against the individual respondents and has limited his claims to those of discrimination arising from disability, failure to make reasonable adjustments, harassment, and victimisation, as set out in the agreed List of Issues. The case is set down for final hearing to determine liability only on 4th-15th July 2022.
2. The claimant has appeared in person assisted by his wife Ms Zowie Devello-Waters. He has also been assisted by Stephenson's Solicitors under the Legal Help Scheme which does not provide for representation at hearings. They have however provided written representations on his behalf (for which I am grateful)

and which I have taken into account. Disability is not conceded in respect of any of the conditions relied on and EJ Bax directed that today's hearing be listed to determine whether the claimant was a disabled person within the meaning of s6 of the Equality Act 2010 by reason of the claimed disabilities of :

- i) A chronic back condition;
- ii) Learning difficulties/dyslexia;
- iii) Anxiety (see paragraph 4 below).

Disability

- 3. A disabled person means an individual who has a "physical or mental impairment" which has a "substantial and long term adverse effect on the ability to carry out normal day to day activities". In this context "substantial" means more than minor or trivial; and long term means lasting or likely to last for twelve months or more.
- 4. A more general summary of the overall structure of the law is set out below and specific points relevant to this case are dealt with in relation to the individual issues:

The Relevant Law

Section 6 of the Equality Act provides as follows:

*a person (P) has a disability if-
P has a physical or mental impairment, and
the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

Schedule 1 to the Equality Act 2010 contains further clarification on the matters to consider when determining disability and provides in so far as is relevant:

Long-term effects

*2 (1) The effect of an impairment is long-term if—
it has lasted for at least 12 months,
it is likely to last for at least 12 months, or
it is likely to last for the rest of the life of the person affected.*

If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

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

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

Effect of medical treatment

5 (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— measures are being taken to treat or correct it, and but for that, it would be likely to have that effect.

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

The Equality and Human Rights Commission Guidance (“the Guidance”) was issued in accordance with s.6(5) EQA and by virtue of section 12(1) to Schedule 1 a Tribunal must take it into account when determining whether a person is a disabled person.

The meaning of impairment is dealt with at A3 of the Guidance which provides:

“the term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness.”

Thus ‘Impairment’ in s.6 EQA 2010 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’ (McNicol v Balfour Beatty Rail Maintenance Ltd 2002 ICR 1498, CA) The term is meant to have a broad application.

In Rugamer v Sony Music Entertainment UK Ltd [2002] ICR 381, EAT, the Employment Appeal Tribunal 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’.

The meaning of ‘substantial adverse effect’ is considered at section 212(2) EQA 2010 and paragraph B1 of the Guidance which provides “a substantial effect is one that is more than a minor or trivial effect”.

The Tribunal’s focus, when considering adverse effects upon day-to-day activities, must necessarily be upon that which claimant maintains he cannot do as a result of his physical or mental impairment” (see Aderimi v London and South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591).

In that context, the appendix to Schedule 1 of the Equality Act 2010 includes examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These include “a total inability to walk, or inability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue, and persistent distractibility or difficulty concentrating.”

Conversely the guidance indicates that the following factors would not reasonably be regarded as having such an effect: “experiencing some tiredness or minor discomfort as a result of walking unaided from a distance of about 1.5 kilometres or 1 mile; inability to concentrate on a task requiring application of several hours.”

Day-to-day activities include normal day-to-day activities and professional work activities, even if there is no substantial adverse effect on activities outside work or the particular job (see Igweike v TSB Bank Plc [2020] IRLR 267). In conducting that assessment, the tribunal should disregard the effects of treatment (see Guidance at sections B12 to B-17).

The Guidance addresses recurring or fluctuating effects at C5. Examples of how to address episodes of such conditions as depression, or conditions which result in fluctuating symptoms are given at paragraphs C6, C7 and C 11; they provide:

C6. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long term.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the “long-term” element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.

C11. If medical or other treatment is likely to permanently cure condition and therefore remove impairment so the recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those are facts. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stops, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.

In order to determine whether a claimant has a disability the tribunal should consider four questions (see Goodwin v Patent Office [1999] ICR 302, EAT):-

- i) did the claimant have a mental and/or physical impairment? (the ‘impairment condition’)*
- ii) did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’)*
- iii) was the adverse condition substantial? (the ‘substantial condition’),*
- iv) and was the adverse condition long term? (the ‘long-term condition’).*

Appendix 1 to the EHRC Employment Code states that ‘There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause’ — para 7.

This endorses the decision in Ministry of Defence v Hay 2008 ICR 1247, EAT, where the EAT held that an ‘impairment’ under S.1(1) DDA could be an illness or the result of an illness, and that it was not necessary to determine its precise medical cause.

It will not always be essential for a tribunal to identify a specific ‘impairment’ if the existence of one can be established from the evidence of an adverse effect on the claimant’s abilities — J v DLA Piper UK LLP 2010 ICR 1052, EAT. Similarly, it is not always necessary to identify an underlying disease or trauma where a claimant’s symptoms clearly indicate that he or she is suffering a physical impairment — College of Ripon and York St John v Hobbs 2002 IRLR 185, EAT

Anxiety

5. The importance of “anxiety” as potential disability has fallen away. In discussion with parties it was agreed that all of the claims now being pursued were based on the back condition and/or the learning disability/dyslexia. There is in fact no claim for which a finding that “anxiety” is a disability is necessary, and both parties agreed that in the circumstances it was not necessary for me to determine whether the claimant is or was a disabled person by reference to it as there is no claim based on it.

Back Condition

6. The claimant’s case is that he has suffered sporadic back pain since 2018 which he originally sought to manage using over the counter pain medication. The first specific event which led to him seeking medical advice occurred on 16th May 2019. The diagnosis in the GP records is “? Disc ? muscle spasm”. The next incident occurred on 19th March 2020 when he attended the GP his back having again gone into spasm the day before. From July 2020 there are regular monthly reviews. It is then referred to again on 1st December 2020 on review when it is described as a “long term issue” and “simple LBP” (low back pain). On 27th April 2021 again on review it is described as long standing low back pain with two years’ worth of symptoms and for which he is receiving physiotherapy. On 17th May 2021 he was referred for an MRI scan following “long standing back pain for the last two years” The result of the report was that no specific cause was found and the conclusion was reached that the cause of the problem was muscular.
7. There are two Occupational Health reports, the first dated 14th January 2021. In it the claimant describes continuing to suffer “intermittent low back symptoms which can vary in severity from mild to severe spasms in his low back area”. There were no symptoms suggesting sciatica or prolapsed disc. During severe spasms he needs help from his wife with daily activities. He avoids heavy lifting or repetitive bending. He struggles to lift his one and two year old children, and lifts only light shopping bags. He avoids standing or sitting for long periods and would take a break every hour when driving long distances. The opinion is that given the length of the symptoms and the severity described during spasms that the relevant disability legislation would apply to the back condition. In the event

that ongoing exercise and physiotherapy did not resolve the problem an MRI scan may be required.

8. The second report is dated 4th October 2021 and confirms that situation has remained much the same with the MRI scan having shown no specific cause for the low back pain which was thought to be muscular in origin.
9. In his Impact Statements the claimant contends that since 16th May 2019 he has been unable to fully engage in day to day activities and that he has suffered back pain every day since that time. He describes having severe flare ups on one or two occasions each month lasting between one and five days during which he is severely incapacitated with the pain being “debilitating” and preventing me from doing anything”. Even between flare ups he is limited in and requires varying degrees of assistance from his wife to dress, attend to personal hygiene, shop, cook or do housework. He is not able to engage with his young children, stand for any significant length of time, or lift heavy objects. He takes painkillers of varying strength depending on the severity of the pain on a daily basis, wears a medical brace and attends physiotherapy.
10. His wife has also provided a statement which supports the claimant’s account.
11. Claimant’s case - The written submissions lodged on his behalf assert the primary case that he was a disabled person within the meaning of s6 Equality Act 2010 from 16th May 2019. Firstly as of that day he had symptoms sufficient to have a substantial effect on normal day to day activities. Secondly, he had been suffering from symptoms of lower back pain, albeit of a lesser degree of severity for many months since 2018. Even if the condition was not long term in that it had not lasted for twelve months at that point it was likely to do so given that it had already lasted for some months. The Guidance stipulates that an event is likely to happen if it ‘could well happen’ (see para C3). (This definition of the word ‘likely’ reflects the House of Lords’ decision in *Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL.*) Alternatively it should be regarded as a recurring condition given that it did in fact recur in March 2020.
12. He contends that from that point he clearly had the physical impairment of lower back pain of muscular origin. It had a continuous effect on his ability to carry out normal day to activities although that effect fluctuated and was at its most severe during the once or twice monthly spasms. The effect was long term I that at the very least it was likely to last more than twelve months (in the sense that it could well happen) given that he symptoms had been present for any months prior to the first spasm and there was no reason to suppose that it would spontaneously resolve at any point in the relatively near future.
13. There is no specific alternative case advanced that the claimant became a disabled person at a later date in the event that the tribunal concludes that he was not a disabled person as at 16th May 2019.
14. The Respondent’s case - The respondent does not dispute that on the evidence before the tribunal that the claimant is now, judged on the information available today, a disabled person within the meaning of the Equality Act 2010 and has

been for approximately a year. However it submits that the question for the tribunal is to assess the issue as at the time of the alleged acts of discrimination and on the information then available. On that basis it submits that the claimant does not fulfil the statutory definition until the end of 2020 or the early part of 2021. It makes the point that the evidence contained in both the claimant's Impact Statements are clearly accounts of the symptoms he was suffering in 2021 when they were written; and that the written submissions essentially adopt the process of retrospective analysis looking back from the vantage point of 2021/2022 and the information now available. It submits that to approach this case in the way advanced by the claimant of asking whether the claimant was a disabled person as at 16th May 2019 based on the information available today is an error of law. In essence the respondent's case rests on three propositions (discussed in greater detail below):

- i) The medical evidence does not support the account given by the claimant above and should be preferred as more accurate;
 - ii) The retrospective analysis advocated by the claimant is an error of law;
 - iii) Judged against the medical evidence the claimant does not satisfy the definition of disability until late 2020 early 2021
15. The respondent contends that the medical and other records do not support many of the claimant's contentions. In terms of the onset of the symptoms the claimant's case is that they began in 2018 and were sufficiently intrusive for him to have to take paracetamol / ibuprofen on a daily basis and that the episode on 16th May 2019 was the most significant episode of a problem that had first manifested itself at some point in the previous year and had been effectively continuous from that point. The respondent relies on the entry in the GP records for 19th May 2019 which reads in part "*.. pain started suddenly, normally fit and healthy, no previous back problems..*", and submits that this actively contradicts the claimant's assertion of any previous problem.
16. Similarly they rely on the fact that although one of the claimant's claims is for the failure to make reasonable adjustments to his duties at that point; that the claimant had one week's sickness absence following 16th May 2019. After that he had no sickness absence attributable his back despite continuing on unadjusted duties between then and 19th March 2020; and did not attend his GP in respect of his back during that period.
17. Similarly the entry for 19th March 2020 describes his back as going into spasm the day before and that he has "*struggled with pain since*". There is no reference to the earlier episode or of any continuing problem between May 2019 and March 2020. If the claimant's account is correct this episode is the most serious of a series of frequent spasms in his lower back lasting at least some ten months and possibly eighteen months to two years and yet there is no mention of this at all in the medical record.
18. The entry for 16th July 2020 describes that "*recently he has been getting low back pain. Finds that when he is having to do lifting the back is playing up more if he isn't working then he finds that the back is a lot easier.*" Again they point to

the fact that there is no reference to the claimant having had continuous low back pain for some two years at the point but describes it as occurring “*recently*”, and fluctuating depending on when he is having to do lifting; neither of which matches the claimant’s account of permanent symptoms for two years with frequent episodic flare ups.

19. The respondent makes the general point that the GP records are the best evidence the tribunal has as to the symptoms at any particular time as these are necessarily contemporaneous accounts of what the claimant was telling the GP at the time, and are therefore the most reliable source of information available.
20. 16th May 2019 - Taking the possible dates at which the claimant may have become disabled within the meaning of the Equality Act 2010 the first is the 16th May 2019 which is the point from which he asserts he was disabled. The respondent firstly contends that there is no evidential support for the contention that there were any back problems prior to 16th May 2019 and that the claimant himself is recorded as denying any earlier difficulties in the GP records. On the medical evidence the claimant had on 16th May 2019 a discrete self-contained episode of the sudden onset of lower back pain which required no more than one week’s absence from work and in respect of which there is no evidence of any recurrence until March 2020. In these circumstances it is not possible to say that judged as at 16th May 2019 that the condition was long term, in that had necessarily not lasted for twelve months if this was the first episode of back pain; and there is no evidence from which it could be concluded at the time that it was likely to do so and/or that it would recur.
21. 19th March 2020 - The next potential date is 19th March 2020. Once again however the medical records describe a discrete episode of lower back pain/spasm for which he was prescribed pain relief. Once again the respondent submits that self-evidently the impairment had not lasted for a year. At that point there is no evidential basis from which it could reasonably have been concluded that it was likely to last for more than twelve months. Indeed the likeliest conclusion would be that it would not do so but would follow the pattern of the earlier episode in May 2019 and resolve in a short time. In terms of the likelihood of recurrence there was no evidence at that point that the two episodes were symptomatic episodes of an underlying condition as opposed to discrete and unconnected episodes of back pain. As a result there is no evidence from which the tribunal could conclude either that the episode was likely to last more than twelve months and/or likely to recur.
22. 16th July 2020 - The next date is 16th July 2020. This is the first reference in the medical records to any ongoing problem. The description is that “*recently he has been getting low back pains. Finds that when he is having to do lifting etc then the back is playing up more. If he isn’t working then he finds the back is a lot easier.*” The respondent repeats the point that this does not support the contention that there had been any earlier ongoing problem. If the onset of the low back pain is recent it necessarily cannot have been present for some two years by that point. Equally it is not possible from this to conclude that the effect on day today activities was substantial or that the impairment had lasted, and/or was likely to last for twelve months or recur.

23. Thereafter the respondent points to the fact that in October 2020 the claimant completed a Musculo-skeletal questionnaire in which he is asked to describe how the symptoms have affected him in the previous two weeks. He describes the symptoms and their severity with in most cases a handwritten annotation “during flare ups”. However a second undertaken approximately a year later in September 2021 describes the symptoms without any equivalent caveat.
24. In consequence the respondent submits that the overall picture is of a discrete episode of back pain in May 2019 followed by a second in March 2020. By July 2020 the claimant was having back pain on lifting at work and by October 2020 was having the symptoms described in the questionnaire during spasms. By the time the claimant came to write his first Impact Statement in May 2021 his symptoms were as described which the respondent has not challenged. In effect it accepts that on the basis of the medical and other documentary evidence the symptoms of the impairment reached the level to meet the statutory definition of disability at some point between October 2020 and May 2021, but not before.

Conclusions

25. In my judgement the respondent is correct in its analysis that the contemporaneous documentation including the in particular the GP records are the best evidence available as to the effect of the impairment. I accept that on the basis of that evidence that as at the dates of the incidents in May 2019 and March 2020 that the claimant does not satisfy the statutory definition at either point as I cannot find on the evidence at either point that the impairment was long term in that there is insufficient evidence that it had lasted for twelve months and/or was likely to last for twelve months and/or recur.
26. However in my judgement the position changed earlier than the point contended for by the respondent at some point after October 2020. By 16th July there had been two episodes of low back spasm sufficient to require time off work and during which the effect on normal day to day activities was substantial. The claimant had by that point attended his GP with complaints of ongoing pain on lifting which necessarily indicated, or at least suggested, some underlying back condition. In my view it follows that from that point that here is evidence from which it could be concluded that the impairment was likely to last for more than twelve months or was likely to recur (in both cases in the sense that it could well happen).
27. It follows that in my judgment the claimant does satisfy the statutory definition of disability from 20th July 2020.

Learning Disability /Dyslexia

28. There is no dispute that the claimant suffers from dyslexia and/or a learning disability (the terms are effectively used interchangeably in the documentation); nor that it was long term in that he has had the condition all of his life. The respondent therefore accepts that there is an impairment and that it was long term However, it contends that there is no evidence, or no sufficient evidence

that had any or any sufficient substantial adverse effect on normal day to day activities to bring the claimant within the ambit of s6 Equality Act .

29. The primary evidence in relation to the condition is a report from Allyson Edwards dated 20th August 2021. The diagnostic outcome is that the claimant “Has a profile of dyslexia and there is a clear impact on his literacy.”, dyslexia being defined as “A learning difficulty that primarily affects the skills involved in accurate and fluent word reading and spelling” and that “characteristic features of dyslexia include difficulties in phonological awareness, verbal memory and verbal processing speed.” As a result the claimant is able to read familiar everyday words accurately but has difficulty reading words that are more complex; and his spelling is poor. Accurate reading and spelling are a challenge and he experiences difficulty in his verbal and visual processing speeds and needs more time to process information effectively. In childhood the claimant was statemented with special educational needs and he continues “to experience issues with his memory, concentration and his ability to organise himself, and is reliant on his wife to manage everyday asks that involve literacy.
30. This would appear to provide compelling evidence of a lifelong disability. However whilst the respondent does not challenge the report or any of its findings it relies essentially on one piece of evidence from which it invites the tribunal to conclude that there is no substantial effect on normal day to day activities. The evidence, which is not in dispute, is that the claimant did not require any adjustment to fulfil his day to day role for the respondent as a stock picker. If all of the fundamental tasks within his role were capable of being performed without adjustment the respondent contends that the evidence does not support a finding that there is a substantial effect on normal day to day activities and invites me to conclude that the assistance provided by the claimants wife in respect of everyday tasks involving literacy is more a question of ease and convenience than necessity.
31. The claimants evidence is that all of his work instructions were received orally primarily via headset and that his day to day work did not involve any requirement for literacy. It does not therefore undermine the proposition that he has difficulties at least with literacy which go far beyond ordinary differences in ability. He does not accept that his wife’s assistance with day to day activities involving literacy is simply a preference but a necessity. If it were not a necessity he would do it himself.
32. I accept the claimant’s evidence and in my judgment the report clearly provides sufficient evidence of a lifelong impairment with substantial effects on normal day to day activities to conclude that at all at all material times the claimant was disabled by reason of the dyslexia/learning disability.

CASE MANAGEMENT ORDERS

Listing the hearing

33. The case will remain listed for the following hearings

- i) A final hearing listed for hearing for **ten days** commencing on **4th July 2022** as set out in the previous case management orders.
- ii) A Catch up TPH is listed for **7th June 2022 at 12.00 noon** as set out in the previous case management orders.

List of Issues

1. The parties shall agree a final List of Issues reflecting the decision above no later than **18th February 2022**.

Employment Judge P Cadney
Dated: 24 January 2022

Judgment sent to parties: 27 January 2022

FOR THE TRIBUNAL OFFICE