



EMPLOYMENT TRIBUNALS

Claimant: Mr K Meaden
Respondent: Davies Crane Hire Ltd
Heard at: By video On: 12 January 2022
Before: Employment Judge R Harfield

Representation:
Claimant: Ms C Collins (Counsel)
Respondent: Mr M Jackson (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the claimant was a disabled person at the material times.

REASONS

Introduction

1. The claimant presented a claim form on 4 August 2020 bringing complaints of unfair dismissal and disability discrimination. The claimant says his disability is dyslexia. The respondent filed an ET3 response form denying the claims. A case management hearing took place on 2 February 2021 where EJ Ryan identified the issues in the case and made case management orders. At a further hearing on 21 July 2021 EJ Sharp directed there would be a public preliminary hearing to decide whether the claimant was a disabled person at the material time required for the purposes of his disability discrimination claim.
2. I had before me a preliminary hearing bundle extending to 70 pages. References in brackets [] a reference to the page number in the bundle.

I heard evidence from the claimant. I received oral submissions from both parties. The oral submissions are incorporated by reference below.

The legal principles

3. The nature of the respondent's legal arguments requires me to set out a more detailed background to the legal history relating to the definition of "disability" than would ordinarily be the case.
4. The law protecting against disability discrimination first came onto the statute books in 1995, through the Disability Discrimination Act 1995. The Act introduced the definition of disability, that has remained in place since. Namely, a mental or physical impairment that has a long term and substantial adverse effect on the ability to carry out normal day to day activities. Like its successor, the Equality Act 2010, the concept of disability in the Disability Discrimination Act applied to fields other than employment.
5. At the time the Disability Discrimination Act was introduced there was no EU dimension to disability discrimination law. The EU dimension arrived through a Council Directive in 2000 ("Establishing a General Framework for Equal Treatment in relation to Employment and Occupation"). Unlike the UK domestic law, the Framework Directive was focussed on employment matters alone. The Directive led to some amendments being made to the Disability Discrimination Act in 2003, but the law relating to disability discrimination in England and Wales has from the outset always been wider than its EU counterpart.
6. In UK domestic law, the disability discrimination provisions later moved to be governed by the Equality Act 2010. Under section 6 of the Equality Act the core test remains that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long term adverse effect on his ability to carry out normal day to day activities. Under section 212 "substantial" means more than minor or trivial.
7. Under paragraph 2 of Schedule 1, an effect of an impairment will be long term if it has lasted for at least 12 months, or is likely to last for at least 12 months or the rest of the person's life.
8. When assessing the impact on ability to carry out normal day to day activities, the focus is on what a disabled person cannot do or can only do with difficulty, rather than on things the person can do: Goodwin v Patent Office [1999] ICR 302. However, depend on the facts of a case, what a claimant actually can do may throw significant light on the question of what he cannot do: Ahmed v Metroline Travel Limited UKEAT/0400/10.

9. The effect on the individual of the disability has to be compared with how he would carry out the activity if the individual did not have the disability: Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763,
10. Under section 6(5) Equality Act a tribunal must take account of the “Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability” (“the Guidance”) to the extent the tribunal thinks relevant. Under Section 14 Equality Act 2006, the Equality and Human Rights Commission has also issued a Code of Practice which under section 15 which must again be taken into account where it appears to the tribunal to be relevant. The Code and Guidance are not to be construed as if statutes and must always give way to the statutory provisions if, on a proper construction, they differ from the Code or Guidance. If an answer under the statute is clear, it may not be necessary to consider the Code or Guidance: Elliott v Dorset County Council.
11. The Guidance has been updated and amended over the years since the Disability Discrimination Act came into force. In its original form in 1996 it said:

“C2 The term “normal day-to-day activities” is not intended to include activities which are normal only for a particular person or group of people. Therefore in deciding whether an activity is a “normal day-to-day activities” account should be taken of how far it is normal for most people and carried out by most people on a daily or frequent and fairly regular basis.

C3 The term “normal day-to-day activities” does not, for example, include work of any particular form, because no particular form of work is “normal” for most people. In any individual case, the activities carried out might be highly specialised... Impairments which affect only such an activity and have no effect on “normal day-to-day activities” are not covered.”
12. By May 2006 the Guidance had been updated. The Disability Discrimination Act originally had a list of set capacities, one of which had to be affected if an impairment was to be treated as effecting a normal day to day activity. That list of set capacities has since been removed from the legislation. The 2006 Guidance said:

“D4. It should be noted that the list of capacities set out in D1 above is not a list of day-to-day activities. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here. In general, day-to-day activities are things people do on a regular or daily basis, and examples including 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.”

13. The 2006 Guidance went on to say:

"D7 Normal day-to-day activities do not include work of any particular form because no particular form of work is 'normal' for most people. In any individual case, the activities carried out might be highly specialised. For example, carrying out highly delicate work with specialised tools may be a normal working activity for a watch repairer, whereas it would not be normal for a person who is employed as a semi-skilled worker. The Act only covers effects which go beyond the normal differences in skill or ability..."

D9. However, many types of work or specialised hobby, sport, or pastime may still involve normal day-to-day activities. For example: sitting down, standing up, walking, running, verbal interaction, writing, making a cup of tea, using everyday objects such as a keyboard, and lifting, moving or varying everyday objects such as chairs.”

14. In July 2006 the European Court of Justice handed down a decision in Chacon Navas v Eurest Colectividades C-13/05. The ECJ noted that the Framework Directive did not define what was meant by the term “disability”. The ECJ said that the concept must be understood as referring to *“a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.”*

15. Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763, concerned a senior police officer who discovered late into his career and life, when preparing to take exams to become a superintendent, that he suffered from dyslexia. The dispute was about whether carrying out exams or assessments, for the purposes of promotion, was properly to be described as a normal day to day activity.

16. In Paterson it was held, taking the UK domestic law on its own, that carrying out an assessment or examination was a normal day to day activity as was the act of reading and comprehension. The Employment Appeal Tribunal also held the decision in Chacon Navas meant *“we must read section 1 of the 1995 Act¹ in a way which gives effect to European Community Law. We think it can be readily done, simply, by giving a meaning to day-to-day activities which encompasses the activities which are relevant to participation in professional life. Appropriate measures must be taken to enable a worker to advance in his or her employment.*

¹ The predecessor to the Equality Act 2010

Since the effect of the disability may adversely affect promotion prospects, then it must be said to hinder participation in professional life.”

17. In Chief Constable of Dumfries &Galloway Constabulary v Adams [2009] UKEAT/0046/06 the Employment Appeal Tribunal said:

“We take from the court's [the ECJ's] use of the term "professional life" is that when assessing, for the purposes of section 1 of the DDA, whether a person is limited in their normal day-to-day activities, it is relevant to consider whether they are limited in an activity which is to be found across a range of employment situations. It is plainly not meant to refer to the special skill case such as the silversmith or watchmaker who is limited in some activity that the use of their specialist tools particularly requires, to whom we have already referred. It does though, in our view, enable a Tribunal to take account of an adverse effect that is attributable to a work activity that is normal in the sense that it is to be found in a range of different work situations. We do not, in particular, accept that "normal day-to-day activities" requires to be construed so as to exclude any feature of those activities that exists because the person is at work, which was the essence of the first ground of appeal. To put it another way, something that a person does only at work may be classed as normal if it is common to different types of employment.

18. The current version of the Guidance says:

D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples including 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 instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

...D10 However, many types of specialised work-related or other activities may still involve normal day-to-day activities which can be adversely affected by an impairment. For example they may involve normal activities such as: sitting down, standing up, walking, running, verbal interaction, writing, driving, using everyday objects such as a computer keyboard or a mobile phone, and lifting, or carrying everyday objects, such as a vacuum cleaner.”

19. In Sohbi v Commissioner of Police of the Metropolis [2013] UKEAT/0518/12, difficulties making an application to be a police officer (due to dissociative amnesia) was found to amount to a substantial

adverse effect on a normal day to day activity which related to the claimant's active participation in professional life. The Employment Appeal Tribunal expressed concern whether applying to be a police officer, was a one off activity, and not a day to activity. The Employment Appeal Tribunal, however, considered itself bound by the observations in Paterson that carrying out an assessment or an examination was a normal day to day activity and concluded that the fact an activity is performed only intermittently does not make it any the less a day to day activity. The Employment Appeal Tribunal also considered itself bound by the ECJ authorities and held that despite the language used in the domestic legislation, "*a person must be regarded as a disabled person if their condition has a substantial and long-term adverse effect on any activity of theirs which relates to their effective participation in professional life.*"

20. The Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061 was a case about perceived disability and whether a belief about whether the claimant was incapable of performing front line police duties was a belief about the claimant's ability to carry out "normal day-to-day activities." It was argued that front line policing activities were not "normal" but were akin to highly specialised activities. The argument was rejected on the basis that policing duties for which good hearing was relevant (the claimant's condition) were normal day to day activities. The Court of Appeal in the course of their decision, noted Chacon Navas, the subsequent ECJ case of Ring, and Paterson and approved the phrase "*normal day-to-day activities should be given an interpretation which encompasses the activities which are relevant to participation in working life.*" (I should observe that much of the case law referred to above relates to police officer cases, but that appears to be a matter of coincidence, and the principles from the caselaw apply to all employment cases.)
21. Under paragraph 5 to Schedule 1, if measures (such as medical treatment) are being taken to treat or correct an impairment, and the person would suffer a substantial adverse effect on their ability to carry out normal day to day activities without the measure/medical treatment, then the impairment is treated as having a substantial adverse effect.
22. In the seminal disability discrimination case of Goodwin v The Patent Office [1998] The Employment Appeal Tribunal said:

"What the Act of 1995 is concerned with is an impairment of 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. Furthermore, disabled persons are likely, habitually, to play down the effect that their disabilities have on their daily lives. If asked whether they are able to cope at home, the answer may well be 'Yes', even though, on analysis, many of the ordinary day-to-day tasks were done with great difficulty due to the person's impaired ability to carry them out. ..."

23. Paragraphs B7-B10 of the Guidance deal with the "effects of behaviour"/coping strategies and says:

"B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. ...

B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty...

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will

sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.”

24. In Elliott it was said: *“where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity. This part of the guidance is concerned generally with avoidance of things that are not a component of normal day-to-day activities. The provisions also make clear that if a coping strategy may breakdown in some circumstances, such as when a person is under stress, it should be taken into account when considering the effects of the impairment.”*

Findings of fact

25. I make the following findings of fact. These are findings of fact for the purpose of determining whether the claimant was a disabled person at the material time. They are not findings of fact about the detail of what has happened in the claimant’s employment with the respondent, as that is a matter for the full merits hearing, where evidence will also be heard from the respondent’s witnesses.
26. I have a statement signed by the claimant’s parents which explains that the claimant had difficulties within writing from his first attendance at primary school in Northern Ireland. The respondent did not seek to cross examine the claimant’s parents on the content of their joint statement. The claimant’s parents say the claimant had trouble holding a pencil and forming letters. His writing was untidy and difficult to read. He did not like to read on his own. In school he struggled to read and lost interest quickly, refusing to read any more. At a parent’s evening they were told of his difficulties progressing with reading and was given help with a remedial teacher. The claimant’s parents state that over the next few years the claimant did manage to reach the next stage of reading levels but writing and reading remained difficult for him. After a few years in school the claimant was tested for dyslexia and a statement was produced confirming this. The claimant then had further support in school.
27. In 1992 the family moved to Cyprus and the claimant was again given assistance with his dyslexia in the Armed Forces school he attended. When the family returned to the UK, the claimant attended school in Whitland, and the dyslexia statement was again handed over and the claimant given support, but the certificate was then lost by the school. At page [41] of the bundle there is an undated teacher’s report for English, where it is said *“Despite his learning difficulty he will tackle all written tasks with confidence and enthusiasm.”*

28. The claimant left school in 1998 with 8 GCSEs. He got E grades in English. He went on to college and obtained a GNVQ Level 2 in motor vehicle maintenance.
29. Prior to working for the respondent, the claimant had various periods of employment as a HGV driver, forklift driver and pilot driver. He started working for the respondent in 2007.
30. There are two statements from the claimant in the bundle. The first is a short form, handwritten document that was then typed up [58 – 63]. The second is a document that the claimant dictated and was then typed [54 – 57].
31. The respondent says in their amended ET3 response that the handwritten statement is so poorly written and in contrast to the documents the claimant completed on a daily basis in work, that it has been exaggerated to induce the sympathy of the Tribunal. They say the documents the claimant completed in work were to a good standard and did not indicate any difficulties with writing, reading or processing instructions. They say that the claimant attended many toolbox talks and signed to say he understood each one and therefore he does not have difficulties with processing instructions.
32. The respondent says in their ET3, that the claimant was sent a message on almost a daily basis confirming work instructions which he confirmed he understood and did not say that he would require assistance due to his dyslexia. The respondent in their ET3 says that the claimant undertook a significant amount of training and certification successfully and without additional assistance or any indication he required additional support. They say the claimant operated the programming of a computer in order to operate the cranes. This involved inputting information from duty charts. The claimant had to use a digital tachograph to monitor his time on a daily basis.
33. The claimant says, and I accept, that to have dyslexia does not mean he has a low IQ. He also has strengths in pictographic and practical skills. He finds it easier to follow diagrams than to read text and he finds that if someone physically shows him how to do something then he can pick it up quite easily. The claimant chose to go down an employment route that he knew would not generate too much paperwork and make use of his practical skills such as truck driving and crane driving.
34. Crane operating systems are pictographic in design and the job input factors are calculated by a computer programme which he can operate.

35. The claimant does, however, have difficulties with reading and writing. He cannot read large amounts of text. He has no great problem reading a sentence or two and can possibly read a paragraph or two. But after that, the words blur in front of his eyes, and he cannot understand the text. He finds this frustrating, it affects his self-esteem, and he stops reading.
36. The claimant has not read a book since leaving school, and says he never really read a book in school. He does not buy newspapers as he cannot read them. His daughter is an autistic person, and he cannot help her with her own reading or writing. This affects the claimant's self-esteem as a parent. He cannot read a story of any length to his daughter. He will pick out short stories that are easy for him to read, or pick a story that he knows; so if he loses the text he can tell the story from memory and pretend he is reading from the book. It upsets him. He feels he is cheating his own child.
37. The claimant cannot follow subtitles on the television as they move too fast for him to be able to read. He has difficulties playing video games as he cannot read the missions fast enough to understand the instructions. This affects his relationship with his daughter who loves to play computer games.
38. The claimant has to read things more than once to try to get the information out of the document. For example, if he gets a letter from the bank or from an agency, he will read them several times to ensure he understands what they say. Often he will ask a family member to read it to check that he has read and understood it correctly. He has never booked a holiday as he cannot read the brochures or small print and so they are read out to him by a family member.
39. Sometimes if the claimant is asked to sign a document, he will not read it but instead ask what it says. If the person reads it out or explains what it is for, he will then sign it. He worries about getting caught out one day. When the claimant was divorced, he could not read the paperwork, and he did not read it or question it. In these tribunal proceedings the claimant's uncle reads the paperwork for him and reads it out or explains what it says. The claimant says there is a large portion of life that he cannot enter or has been taken away when compared with now a normal person would live their life.
40. The claimant finds it very hard to read joined up writing as he struggles with the shape of the letters.
41. The claimant struggles with spelling. His difficulties with conventional spelling and grammar are apparent from the handwritten statement he produced. In the bundle is a handwritten statement that the claimant

- completed in work in June 2010 [50] about an incident in work. It contains non conventional spelling and grammar and with sentences not always fully formed. The claimant said in evidence, which I accept, that he wrote the statement over the course of a weekend, writing a paragraph at a time.
42. The claimant finds it hard to spell words which are not spelt like they sound. He gets confused by words which appear to be the same but which are different. When the claimant sends a text message to someone or writes something down, whether handwritten or on a screen, he will think that the text looks correct and makes sense. The claimant will think he is using the right words with the right spelling but it is the wrong word and meaning. Recipients will sometimes say they do not understand what he is saying or that what he is written is wrong. The claimant is left feeling frustrated when to him the text is there in front of them. He will avoid using emails as they can become too wordy, and he has found out that spellchecker is not fool proof.
 43. The claimant will use WhatsApp and dictate messages, and then blame any spelling errors on predictive text. He has been told that even on short messages he will get words wrong or miss them out completely. He cannot do a crossword as he cannot spell the answers.
 44. The physical act of writing hurts the claimant's hand. He gets pain in his hand and arm when he writes. He can normally write a paragraph, albeit, he says, with poor spelling. After that his hand and arm start to hurt and the pain affects his concentration and he has to stop. The longer he writes the worse his handwriting becomes, and he struggles to combine words to form what he wants to say. He ends up using words that are inappropriate or wrong. He says when under stress that also exacerbates these difficulties.
 45. The claimant adopts coping strategies where he tries to write in as short form as possible. He also avoids doing tasks or jobs which require a lot of reading.
 46. The claimant's day to day work was not dominated by paperwork because he was carrying out practical tasks. The claimant does, however, struggle when faced with a volume of paperwork, new documents, or unfamiliar forms. He will ask for assistance with unfamiliar forms. He did not complete his own application form when applying for employment with the respondent.
 47. The claimant said, and I accept, that on a day to day basis he had to complete three main forms and that the forms have been largely the same throughout his career. He has found that as the forms became more familiar to him, he found them easier to complete. There is an example

- vehicle defect report at [52] where the claimant has ticked or given other responses to checks of various parts of a work's vehicle. The claimant said it was a form that he had used since 18 on a daily basis as the processes in being a lorry driver had not really changed since the day he took his test.
48. At [53] there is an example of a mobile crane daily check and weekly inspection report completed by the claimant where again the claimant has to confirm his daily and weekly checking of aspects of the crane and record any defects. The claimant said in evidence, and I accept, that when he had his induction on the crane, the form had been talked through with him by the instructor on the two week course, several times. He was walked round the crane and showed what to check. It then became a daily form for him. He says if he was shown how to do something he could pick it up quickly and if he was doing the same forms everyday he became able to complete them through repetition. With a familiar form he completes day in and day out, the claimant knows what order the questions are in without looking at the words.
 49. When working on a job in work, there would be a written method statement and a risk assessment. The claimant was not, however, required to read these. The supervisor would verbally go through the job, the method statement and the risk assessment with all the workers in a toolbox talk. The claimant would then sign agreement that he had attended and understood the toolbox talk before the job was started.
 50. The claimant said, and I accept, that most of the forms he had to regularly complete in work had originated with someone talking him through the form. He said, if he was faced with a form that he had not been talked through in training he would ask another member of the team for help reading it through.
 51. The claimant would, however, struggle in work with tasks that require reading unfamiliar material or completion of non-familiar paperwork. The handwritten statement at [50] from 2010 came about because the claimant was facing a disciplinary allegation about not being where he should have been in work. He initially filled in some paperwork at the bottom of a form, but was told it did not make sense and he struggled to communicate what had happened. It led to the requirement to produce the witness statement at [50] which, as already stated, took the claimant about a day and a half to complete (with breaks), writing a paragraph at a time.
 52. Also in about 2010, there was an oil refinery shut down, and the claimant was tasked with filling in various packs of paperwork and read tool box talks. The claimant was supposed to read them through and sign them. He was struggled to do so. The claimant raised his difficulties. It is not a

matter I need to determine for this preliminary hearing, but the claimant says he was initially threatened with disciplinary action and was told he had to prove he was not a danger to himself or others. He says that HR then intervened, and spoke with the Dyslexia Association, and thereafter he was sent company documents on green paper to make them easier to read.

53. The claimant says that his condition has also affected relationships in the workplace. He says that in the past managers have got angry with him when it took him longer to understand a task and he was not as quick as others. He feels that people think that he is thick and do not have time for him and he feels he is not part of a team. He says he has been called a thick bastard or mocked for being slow. He says that managers have taken the mick out of him by saying "Don't panic, Don't Panic" (a reference to Lance Corporal Jones, in Dad's Army).
54. There is no diagnosis of dyslexia in the claimant's GP records. The claimant has not in the course of this litigation been able to obtain a dyslexia report from a consultant due to the NHS waiting list and the prohibitive cost of a private referral.

Discussions and Conclusions

55. At the outset of the hearing the respondent said they did not dispute the fact of the claimant's dyslexia but disputed that it had a substantial adverse effect on his ability to carry out normal day to day activities, and in consequence, that such a substantial adverse affect was long term (because of the challenge to substantiality).
56. The claimant's dyslexia has a more than minor or trivial effect on the claimant's ability to read. He cannot read a book, or a newspaper, or a travel brochure, or follow subtitles or written instructions when playing a computer game. He cannot read a bedtime story to his daughter, or play computer games with her, or help her with her school work. He struggles with reading formal correspondence and will have to reread it and ask for help. In work the impact is more limited because of the line of work the claimant has specifically chosen due to the impact of his dyslexia, and because of strategies he has in place. The claimant tends to work with the same forms day in, day out which he has learned through repetition. He struggles to read unfamiliar paperwork albeit that does not present itself in work that often.
57. In my judgment, the ability to read, in itself, is a normal day to day activity and in the claimant's case is substantially adversely effected. It is identified as a normal day to day activity in the Guidance and by the Employment Appeal Tribunal in Paterson. But in any event, the ability to

read a book or a newspaper, or general correspondence we all receive in life, or to read to or help your children with school work are all normal day to day activities in respect of which the claim suffers a substantial adverse effect. I return to the position in respect of work activities, below.

58. The claimant's dyslexia has a more than minor or trivial effect on the claimant's ability to write. The claimant struggles with spelling and with the meaning of words he selects. He struggles with conventional grammar and sometimes with forming complete sentences. The claimant has difficulties writing more than a paragraph at a time, and the act of handwriting causes him physical discomfort.
59. In my judgment, the ability to write, in itself, is a normal day to day activity that in the claimant's case is substantially adversely effected. It is identified as a normal day to day activity in the Guidance. In any event, the claimant's difficulties hamper his ability to make himself understood and to participate in social interactions. The claimant's situation is an example of the point made by the EAT in Goodwin that disabled people often adjust their lives and circumstances to enable them to cope. The claimant has adopted a lifestyle which limits the amount that he has to write. He does not tend to send emails. He uses WhatsApp, where he will dictate and blame predictive text for any errors. Nonetheless his social communications result in him being misunderstood. In an era of email, text, WhatsApp, and other social media, the act of being able to communicate socially with those around you, in the content you wish, and to be able to do so without the worry of being misunderstood or embarrassed is a normal day to day activity. I return to the position in respect of work activities, below.
60. The respondent's position is that none of this matters. The respondent's position is that the line of EU and domestic case law culminating in Coffey means that there has to be a substantial adverse impact on working or professional life. The respondent says to identify a substantial adverse impact on normal day to day activities outside of work is not enough or is irrelevant. The respondent says that there is no substantial adverse impact on the claimant's working life. The respondent says that the impact on the claimant in work is minor and covered by a reasonable coping strategy adopted by the claimant in having to go through a form a couple of times before being able to use it going forward through repetition. They point out that the training the claimant received on form filling, or oral toolbox talks were the same training that was given to everyone. They say that any other paperwork demands on the claimant were very rare and cannot amount to a normal day to day activity.

61. I do not agree with the respondent's legal analysis. The respondent's argument is that the definition of disability in section 6 of the Equality Act has to, in the employment sphere, be read in line with EU jurisprudence. Their argument is that this means the test of disability in the Equality Act is limited to, or must include, establishing a substantial adverse effect on activities relating working/professional life because that is how it was defined by the ECJ in Chacon Navas. I do not, however, accept that this is how the principles of statutory interpretation work. There is nothing stopping a member state, as we were at the time, "gold plating" domestic law, and granting domestic rights wider than EU law requirements. When national courts apply domestic law they are bound to interpret it, so far as possible, in light of the wording and purpose of the directive concerned, in order to achieve the result sought by the directive. If that European directive result is achieved, the minimum EU rights are effectively secured. It does not prevent domestic law also operating more generously.
62. As set out above, the Disability Discrimination Act/Equality Act model of disability was a domestic construct pre-dating the EU Framework Directive. As the legislation and the original Guidance shows it was always built around the notion of requiring a substantial adverse effect on the ability to carry out normal day to day activities that squarely included in its ambit domestic activities such as eating and drinking, carrying shopping, or following a list of domestic tasks. D4 in the May 2006 version of the Guidance likewise firmly had in its sights non-work activities such as watching television, getting washed and dressed and taking part in social activities. That domestic model of disability of course applied to fields outside of the employment sphere, for example in the provision of services, education, planning, housing etc.
63. Chacon Navas was concerned with defining the meaning of "disability" in the Framework Directive that has none of the above heritage. It was dealing with an EU model that was looking only at employment and occupation and hence its focus upon effective participation in professional life. In Paterson the EAT acknowledged that the domestic definition of disability (now in section 6 Equality Act) had to be read by giving a meaning to day to day activities which encompasses activities which are relevant to participation in professional life (whilst stating that was already the domestic law position in any event). That was needed in Paterson because the claimant was largely a high functioning individual, and (unlike the claimant in this case) the impact of his dyslexia only really bit in his working life, as opposed to his domestic life, when taking promotion assessments. The EAT was, however (if necessary at all), reading out and expanding the domestic test to include activities that related to participation in professional life, so as to achieve the purpose of the EU

Framework Directive, it was not, reading down or limiting the domestic test to just that or introducing it as a necessary base requirement. Hence the use of the phrase “encompasses” professional life activities, rather than using terminology which would say the activities must solely be or necessarily include working life activities.

64. Moreover, there is not to my knowledge, any principle of statutory interpretation that would require Paterson to be read as limiting the section 6 definition of disability so that there *must* be a substantial adverse effect on normal day to day working life activities. To comply with EU law and Chacon Navas does not require that. As already stated, a member state is at liberty to offer more generous domestic rights if it chooses to do so. The wider definition of disability has always been there domestically and there has been no legislative changes narrowing the test. In short, a claimant can establish disability demonstrating a substantial and long term adverse effect on professional life activities, but is not obliged to do so. That secures the purpose of the EU Framework Directive. I do not understand the Court of Appeal decision in Coffey to have changed this position at all.
65. I would, in any event, find that the claimant did experience a substantial adverse effect on working life activities. The claimant’s ability to communicate effectively when asked to prepare a written account in 2010 was hampered. The claimant was unable to communicate what happened in his first attempt and this resulted in him spending large parts of a weekend writing a statement, bit by bit. This is a substantial adverse effect on the ability to write and to communicate. Applying Sohbi, an activity that is infrequently undertaken in the workplace can and should still be considered to be a normal day to day activity where it relates to effective participation in professional life. Being able to communicate your position, and to participate in what potentially could have led to formal disciplinary proceedings (even if they did not ultimately materialise), does form part of effective participation in professional life. The same principles apply to being presented with a new form to complete that the claimant was unfamiliar with.
66. The claimant, in work, was also unable to absorb large amounts of paperwork when given written toolbox documents to read in 2010. Again, this was a substantial adverse effect on his ability to read workplace documents and absorb instructions and therefore, even if an infrequent occurrence, was a bar to the claimant’s effective participation in professional life.
67. I do not find this is a situation whereby the claimant adopted coping or avoidance strategies that altered the effects of the impairment to the

- extent they were no longer substantial. The claimant had coping and avoidance strategies in place domestically and in work by limiting his reading and writing. He would ask for assistance. In work he could largely survive because he was filling in the same forms time and time again on repetition. Notwithstanding this I have already found above that even with copying and avoidance strategies there was still an adverse effect on the carrying out of normal day to day activities. I would also find in any event that the claimant's avoidance strategies were not strategies it would be reasonable to expect the claimant to adopt such as to find he ceased to become a disabled person. They were strategies adopted to avoid the physical pain of writing, and to avoid substantial social, work and familial embarrassment, including with the claimant's own child. They were also strategies which would cease to work in certain circumstances, for example, when faced with an unfamiliar form, or paperwork to read, or a request for a written account. If those coping strategies were taken away there would be a further substantial adverse effect on normal day to day activities of reading, writing, and communicating in the claimant's domestic life, family life, social life and working life and his exposure to embarrassment in those spheres.
68. I also have to assess the position cumulatively. Overall I am satisfied that the claimant's dyslexia has, and had at the relevant time, a more than minor or trivial adverse effect on his ability to carry out normal day to day activities. Standing back and looking at it I would also observe that such a conclusion is on fours with the purpose of "disability" in the Equality Act. Here, in my judgment, we have a claimant who, to an extent, has parts of everyday life closed down to him. He does not have unrestricted access to a large part of everyday life that many of us would take for granted, such as the joy of reading a book to yourself or a child, or to feel there are unrestricted educational or career paths open before you to explore, or to be able to communicate freely without fear of making a mistake, being misunderstood or being found out, and feeling embarrassed. Whether the claimant has actually been subjected to disability discrimination in work in the substantive claim as brought, is a different question to the test of disability in itself and is, of course, a matter for the full merits hearing.
69. Dyslexia is a lifelong condition, and the respondent did not dispute the issue of "long term" save to the extent the respondent argued if there was no substantial adverse effect then it could not be a long term substantial adverse effect. I therefore find that the claimant was a disabled person by reason of dyslexia.

70. It was not suggested to me by either party that Brexit and the European Union (Withdrawal) Act 2018 affects the analysis in this case and I have therefore applied EU law principles as I understand them to be.

Employment Judge R Harfield

Dated: 16 March 2022

JUDGMENT SENT TO THE PARTIES ON 21 March 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche