



EMPLOYMENT TRIBUNALS

Claimant

Respondent

DONALD BRISCOE

v

STOKE-ON-TRENT COUNCIL

OPEN PRELIMINARY HEARING BY REMOTE VIDEO HEARING

Heard at: **Birmingham Employment Tribunal**

On: **8 September 2020**

Before

Employment Judge McCluggage

Appearances

For the Claimant

In person

For the Respondent

Ms Gardiner (counsel)

JUDGMENT

- 1) The Claimant is a contract worker under section 41 of the Equality Act 2010 and not an employee.
- 2) The Claimant was at material times “disabled” within the meaning of the Equality Act 2010 because of the condition of dyslexia.

REASONS

Introduction

1. The claimant was at material times a locum social worker providing services for the respondent council. He worked for the respondent from 18 July 2018 to 18 April 2019. There is no dispute that he was dismissed by the respondent. He alleges that the dismissal and possibly other incidents of his employment constitute unlawful disability discrimination.
2. On 20 March 2020, Employment Judge Wolfenden ordered a preliminary hearing to determine whether the claimant was a disabled person within the meaning of the Equality Act 2010 ("EQA"), and further, whether he was an employee within section 83 EQA or a contract worker under section 41 EQA.
3. The claimant has conceded that he was a contract worker not an employee.
4. The issue of disabled status remains contested by the respondent.
5. This hearing proceeded by way of CVP video hearing. The hearing went reasonably if not completely smoothly after audio issues were sorted out. I am confident that both parties had their cases heard and understood fully. In particular the claimant's oral evidence progressed smoothly. I received closing submissions within interference. The claimant was asked whether he required any reasonable adjustments during the hearing. He told me that he was used to the court environment as part of his job and would raise any problems when they arose. In the event, he did not do so.
6. For purposes of the hearing I received into evidence:
 - a. A 61 page bundle;
 - b. The claimant's witness statement dated 24 April 2020 together with oral evidence;

Facts

7. After hearing oral evidence and submissions I found the following facts:

7.1 The claimant was a contract worker for the respondent with his employer being an employment agency called Liquid Personnel.

7.2 The claimant has experience of working with a variety of local authorities as a social worker. In recent years he has been doing locum work.

7.3 The claimant was diagnosed with dyslexia in 1993 when he was undertaking his Diploma in Social Work at Derby University.

7.4 At the outset of the hearing, the respondent accepted that the claimant has the impairment of dyslexia and that the impairment was long-term, that is, had lasted for more than a year.

7.5 The claimant's dyslexia as he describes it is characterized by difficulties in performing written, reading and organisational tasks.

7.6 In his further particulars dated 22 July 2020 the claimant says that when writing he experiences the following difficulties:

- Spelling difficulty;
- Difficulty proof-reading his own work;
- Written tasks take him "considerably longer";
- He needs to read over writing repeatedly to ensure accurate comprehension;

7.7 In his witness statement, the claimant says that he has issues with "information management due to problems with my short-term memory".

7.8 In his further particulars the claimant was asked about a series of day to day activities, and he stated that the following were *not* very difficult for him: shopping, cooking, reading a book though it would take him longer, watching television, researching on the internet, writing a letter or email, using a mobile telephone and driving such as reading road signs.

- 7.9 In further questions, the claimant answered “not really” in answer to questions as to whether he was easily distracted, whether he had problems with concentrating or remembering appointments, times, names, numbers and lists.
- 7.10 The only documentary evidence corroborating the claimant’s dyslexia was an “Assessment for Access to Work Support” dated 24 February 2009. This was consistent with the claimant’s report that he had difficulty with written and reading tasks, organisational tasks and information management. It adds that he has distractibility in noisy environments. It was said that it would take the claimant longer to produce reports of the required standard and he would miss deadlines and there was some impact on the quality of reports.
- 7.11 I accepted the claimant’s description of his issues in his further particulars and his witness statement. I also accepted the claimant’s oral evidence that in terms of how dyslexia affected his day to day life, he had substantial difficulties with short-term memory. Thus, if he was taking an order for tea from his colleagues orally, he would forget the information given. He would have to write down what was asked of him. Retaining information given to him orally was generally a challenge. For example, if he went to a meeting and was given information, he would forget that information unless verified by an email. If going shopping he would need to write things down. He could have some difficulty visiting an address if visiting a family as he was at risk of recording the details incorrectly. Writing a letter could take him an hour. However, when challenged he said this would not be ‘difficult’ because ‘it was what he had to do’.
- 7.12 To seek to mitigate this difficulty, the claimant would take notes. He would usually have his mobile telephone with him and could manage shopping, for example, by making a list or using his phone. He would use a post-it for a post-code to put in his vehicle sat-nav to mitigate his difficulty with addresses. He would use a spell-checker when using a computer. He would have to re-read or listen to text he had written 2 or 3 times, but listening was easier than reading when doing so.

Law

8. Section 6(1) of the EQA reads:

- (1) 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 to carry out normal day-to-day activities.

9. Paragraph 5(1) and (2) of Schedule 1 to the EQA reads:

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—

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

10. Section 212(2) of EQA states that “substantial” means “more than minor or trivial”. This is a modest threshold.

11. I remind myself that the burden is on the claimant to establish that he falls within the statutory definition of disability.

12. The focus on ‘normal day to day activities’ can involve occupational activities as the European Court of Justice found in Chacon Navas v. Eurest Colectividades SA [2006] IRLR 706. The applicability of this approach in domestic legislation is affirmed by Chief Constable of Norfolk v. Coffey [2019] EWCA Civ 1061, which held that day to day activities encompasses activities relevant to participation in working life.

13. I take into account the Equality Act Guidance which provides assistance on making the judgement call as to whether the statutory definition applies in any case. The Guidance states in its introduction which I find to be an accurate summary of its significance that it:

"does not impose any legal obligations in itself, nor is it an authoritative statement of the law. However, Schedule 1, paragraph 12 to the Act requires that an adjudicating body which is determining for any purpose of the Act whether a person is a disabled person, must take into account any aspect of this guidance which appears to it to be relevant...."

Analysis

14. Thought not a complicated case, it is a difficult case owing to fairly limited evidence illuminating the factual background against which I must make an assessment of the effect of the claimant's impairment.
15. In absence of medical evidence or recent assessment of the effect of the claimant's dyslexia he would usually have a more challenging task in persuading me of the nature of the impairment.
16. When, however, the diagnosis of dyslexia is not challenged and there is no impugment of the claimant's credibility, I am entitled to simply evaluate the claimant's evidence. There is little a clinician or psychologist could add to that. There was no suggestion that the effect of the claimant's dyslexia had materially changed since the Access to Work Report in 2009.
17. I found the claimant entirely honest and straightforward. This was shown by the fact that in answer to the respondent's email queries he did not seek to overplay the effect of his dyslexia on his life but answered 'not really' to many of the questions.
18. I do not however find that his 'not really' answer is a definitive statement that the claimant's issues are trivial, but are rather a reflection that he has adjusted to his issues and gets on with day to day life and also challenging professional obligations.
19. I conclude that tasks of retaining oral information from meetings, writing reports and reading documents at work are in the nature of 'day to day activities'. Whilst they may more usually arise in the occupational context in the claimant's case (and many peoples' lives) rather than in his private life, they are sufficiently commonplace to fall within the range of activities that may lead to a finding of disability. They are not specialised workplace activities as envisaged by paragraphs D8 and D9 of the

Guidance. They are more similar to preparing invoices and recording daily takings in a job, as envisaged by paragraph D10 of the Guidance.

20. So the remaining question is whether the effect on the claimant's activities is more than minor or trivial.
21. The respondent's argument, attractively and concisely argued by Ms Gardiner, was that the claimant had a sufficient coping strategy by using a pen and paper or his mobile telephone and this mitigated his difficulties as to make them minor. My attention was drawn to p56 of the guidance and the illustrative list of insufficient factors, which included 'minor problems with writing or spelling'.
22. However, my conclusion is that after the range of the claimant's difficulties are accumulated, it is proper to regard his overall level of impairment as more than minor or trivial. I am entitled to accumulate the disadvantage: see paragraphs B4 & B5 of the Guidance.
23. Despite his coping strategies, the difficulties in short-term memory and impairments with reading and writing have a negative impact in his life such that the claimant cannot work efficiently like work colleagues without more than minor changes to ordinary ways of working. While using his telephone or post-it notes may mitigate the effect, I still conclude that the significant additional time taken to read and write and remove errors was more than minor or trivial.
24. This is a finely balanced decision on the facts, but I conclude that the claimant was a disabled person at material times.
25. For the avoidance of doubt, I do not find that the claimant's impairment incorporates inherently producing poor quality or insufficient reports or writing in the course of his work. It is merely that producing adequate documents would take him a relatively lengthy time compared to a non-disabled colleague and would prove a more challenging exercise. It is for the tribunal hearing engaged in the final hearing to determine whether there is a causal link between the impairment and the issues for which he was dismissed by the respondent and whether it was sufficiently accommodated.

Case no 1306159/2019

Employment Judge McCluggage

05/10/2020