



EMPLOYMENT TRIBUNALS

Claimant: Mr Elliott

Respondent: Dorset County Council

Heard at: Southampton

On: 20 December 2019

Before: Employment Judge Rayner

Representation

Claimant: Mr Probert (Counsel)

Respondent: Mr Wyeth (Counsel)

JUDGMENT

1. The Tribunal find that the claimant is not a disabled person within the meaning of section 6 Equality Act 2010.
2. The claimant's claim for discrimination on grounds of disability is therefore dismissed.

REASONS

1. The case was listed for a one day preliminary hearing in person to determine the following matters:
 - a. Whether or not the claimant was disabled within the meaning of section 6 Equality Act 2010 at the material times by reason of the mental impairment of autism and Asperger's syndrome;
 - b. whether or not any of the claimant's complaints in respect of disability discrimination and/or unfair dismissal had little reasonable prospect of success and if so whether a deposit order should be made in respect of any of them.
2. Oral reasons having been given at the hearing, written reasons were requested by the claimant on the question of disability only.

3. Following judgement on the question of disability a deposit order was made in respect of the unfair dismissal only and a separate order with reasons has been sent to the parties.
4. In his claim dated 6th of February 2019 the Mr Elliott, the claimant, alleges that he was unfairly dismissed and that he was discriminated against on grounds of disability. He relies upon a recent diagnosis that he is on the autism spectrum and that he has Asperger's syndrome.
5. I have heard evidence under oath from the claimant and I have also been referred to and read his disability impact statement. I have been presented with a bundle of documents of 137 pages, which includes medical reports and I have been provided with a skeleton argument for the claimant.
6. I have heard oral submissions from Mr Probert on behalf of the claimant and from Mr Wyeth on behalf of the respondent. I am grateful to both of them for their clear and concise submissions and to Mr Elliott for his straightforward evidence.

Findings of Fact

7. The claimant worked for Dorset County Council as a Geographical Information Systems Manager. His employment started on 3 September 1984 and was terminated on 30 September 2018 by reason of redundancy.
8. The respondents defence to the claims sets out that in July 2018 the respondent published a directorate wide change management proposal to restructure the environment and economy directorate in which the claimant's role was situated. The claimant's role was one of a number which was to be deleted. The respondent defends the claims of disability discrimination but also asserts that the claimant was not a disabled person at the material times and in any event that the respondent had no knowledge and could not reasonably be expected to know of the claimants disability he was disabled .
9. I have not been asked to determine the question of knowledge of disability at this hearing.
10. The claimant was diagnosed with an autism spectrum disorder and Asperger's syndrome late in life. The medical report of 29 May 2019, states that Mr Elliott has been diagnosed with Asperger's syndrome and that he is on the autism spectrum. He therefore has a mental impairment. Since the diagnoses was in 2019, he will have had the impairment throughout his life and I do not understand that to be an issue which is disputed in this case.
11. Mr Elliott has had a long and successful career both at Dorset County Council and as a retained firefighter specialising in wild fires. At the point of redundancy he had over 30 years continuous employment. From the evidence that I have heard and the documents that I have seen, it is clear to me that he has been successful in both roles.
12. During the early part of 2018 the claimant's line manager raised concerns over time recording with the claimant on a number of occasions. In July 2018

the claimant was invited to investigatory meeting to take place on 24 July 2018.

13. The claimant had been on management leave, or suspension and when he returned to work on 20 August 2018 the claimant sent an email to his manager in which he stated the first time that he may be suffering with undiagnosed autism.
14. The investigation was paused and the claimant was referred for an occupational health assessment.
15. The claimant was then referred to the community adult Asperger's service(CAAS) with a request diagnostic assessment possible autism spectrum condition.
16. The clinical assessment report dated 29 May 2019 was written following that referral from occupational health. David Ozanne wrote in the report that he was of the opinion that Mr Ali Elliott *meets the criteria for a diagnosis of an autism spectrum disorder. Furthermore He has been diagnosed with Asperger's syndrome.*
17. During the assessment process Mr Elliott described a number of traits including
 - a. how his daily life is planned, orderly and sequential with familiar tried and trusted routines
 - b. worrying that everything will become chaotic if he cannot follow this routines;
 - c. finding it difficult to cope with changes of plan strong values about being on time
 - d. a preference of fact and dislike for vagueness taking people very literally
 - e. intolerance of variation to established policy or procedures although it is noted that Andrew pointed out quite reasonably that this is consistent with health and safety and fire prevention requirements
 - f. being bothered by minor details like items been out of kilter
 - g. difficulty playing any game that involved imaginative play;
 - h. a preference for recreation and learning in a practical environment
 - i. a long-standing interest in wildlife
 - j. the capacity throughout his life or periods of intense study and investigation
 - k. enjoyment of disassembling and reconstructing mechanical and electronic devices
 - l. capacity spending long periods of time his own company pursuing interests even if this involves staying up late
 - m. neglecting other needs such as sleep or claiming reimbursement for additional hours or taking holidays
 - n. the dislike for ever being under occupied.
18. Mr Ozanne noted that in many ways this logical style of thinking and procedural fidelity has been good for Andrew because it is valued in complex organisations particularly those with health and safety in a place of prominence.

19. He goes on to note that Mr Elliott works seriously and worked long hours and conduct can become engrossed in tasks and that sometimes is released in getting to attend to his own or others' needs. It is suggested that this impacted on some relationships.
20. Mr Elliott had provided a disability impact statement for purposes of this hearing. He sets out a number of characteristics such as *he is not an active listener; he makes poor eye contact and can seem uninterested or aloof; he does not always understand social rules and can appear insensitive friendly cannot read fiction considers his to honest is a sensitive to sounds smells and taste does not know what others are thinking*. Mr Elliott also refers to many of the matters which Mr Ozanne summarised in his report which are referred to above.
21. In answer questions from the respondent the claimant accepted that he had worked for many years in a position of authority, involving the management of others. He accepted that in his wider work he often attended and spoke at conferences. He confirmed that as a result of these conferences and other events he has dealt with questioning on numerous occasions from the public.
22. He was asked specifically about the South Downs conference and explained that this had not been on occasion when he had needed to answer questions from the public. He also confirmed that he had not been prevented from travelling overseas to conferences where again he had attended the purposes of speaking and giving presentations at meetings. He accepted that this involved him having to become acquainted with new individuals.
23. He said that he will often chose not to take part in social events at conferences and in other situations but would prefer for example, to go away and work on his own away from others. He explained that in some circumstances loud and noisy environments can be difficult for him but he does not say that he cannot go out, but that he prefers to avoid these environments.
24. I accept that Mr Elliott did not enjoy the social aspects of these conferences and would often prefer to spend time on his own or in his hotel room rather than socialising in the bar. I accept that he distinguishes between people who he would describe as friends those with whom he has formed acquaintances. He accepted that he had formed making new acquaintances some of whom he had remained in contact with by social media.
25. I have been referred to medical reports which set out characteristics which are relied upon. The impacts upon the claimant which are referred to in the clinical report produced as a summary by David Ozanne a nurse specialist within the community adult Asperger's services are broadly the same.
26. I accept that the claimant's own assessment of personality traits as he defines them are set out at page 129 – 130 of the bundle and in his ET1 and I accept that they are a fair and true reflection of the claimant's assessment of his ability and the restrictions upon him.

27. Looking at the matters set out I note that the claimant refers to being emotionally reserved to the point of being unemotional and unresponsive with difficulty processing other people's emotions, being unflinchingly honest and struggling to assimilate verbal and non verbal communication.

The legal principles

28. The legal test that I must apply is set out in Section 6 of the Equality Act. The first part of that test is that the claimant must have a physical or mental impairment and the second that the impairment has a *substantial and long term adverse effect on the claimant's ability to carry out normal day-to-day activities*. It is accepted before me that the claimant has an impairment, it is not accepted that the effect of that impairment on the claimant's ability to carry out normal day-to-day activities is a substantial one.

29. I accept that the term "day-to-day activities" can include any or all of the matters set out in the various guidance. Matters which are not set out in the guidance because it is non exhaustive can and do include day-to-day activities which are carried out in the course of professional life and I have therefore considered all of those factors.

30. I have also been referred to the Code of Practice on employment 2011 for the meaning of disability and I note the guidance at paragraph 8 in particular which states:

"A substantial adverse effect is something which is more than minor or trivial. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

31. Paragraph 9 of Appendix 1 states:

"Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue, substantial social embarrassment or because of a loss of energy and motivation."

32. Paragraph 10 states:

"An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities but it may still have a substantial adverse long-term effect on how they carry out those activities. For example, where impairment causes pain, fatigue in performing normal day-to-day activities the person may have the capacity to do something but suffer pain in doing so. Or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat a task over a sustained period of time."

33. I have also been referred to the guidance on matters to be taken account in determining questions relating to the definition of disability from the guidance

of the statutory code of 2011 and in particular, that part which deals with the meaning of substantial adverse effect. I note that it states:

“that the requirement that an adverse effect on normal day-to-day activities should be a substantial one and that this reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people in that respect reflecting the guidance previously quoted.

A substantial effect again is one that is more than minor or trivial and factors to be taken into account include the time it takes a person to carry out an activity, the way in which an activity is carried out and the cumulative effect of the impairment.”

34. I have therefore looked at the evidence before me by considering the factors that are set out within the guidance I have been referred to.

35. In paragraph B7:

“The effects of the behaviour are considered and it is noted that account may be taken of how far a person can reasonably be expected to modify his or her behaviour, for example, by use of coping or avoidance strategies to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, for example, coping strategies might alter the effect of an 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 avoidance strategy, there may still be an adverse effect and an example is given of somebody who avoids eating foods to which they have an allergy.”

36. I have also taken account of the principles set down described in case law and the four part test about whether or not the impairment affected the claimant’s ability to carry out normal day-to-day activities whether that effect was substantial and whether it was adverse in a long-term sense. Again, in this case, the question of whether in impact is long-term is not as I understand it in issue. The focus is on whether the effect is substantial.

37. I have also taken into account the guidance from ***Goodwin v The Patent Office*** [1999] ICR 302 in which the Employment Appeal Tribunal stated;

“What the act is concerned with is an impairment on 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 difficulties. In order to constitute an adverse effect, it is not the doing of the act which is the focus of the attention but rather the ability to do or not to do the acts. Experience shows that disabled persons often adjust their lives in circumstances to enable them to cope with themselves. 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.”

38. I have been referred to the case of Chacon Navas v Euresdt Colectividades SA c-13/05 [2006]IRLR 706 ECJ by the claimant and in particular the definition of disability as a limitation which results in particular physical or mental psychological impairments and which hinders the participation person concerned in professional life.
39. I have also been referred to and taking account of **Danmark C-355/11/[2013]IRLR 571**; **Kaltoft v Kommunernes landforening [2015]IRLR 146** and **Daouidi v Bootes Plus SL c-395/15 [2017] IRLR 151**.
40. From these and other related judgements and as stated above I accept that participation in professional life is part of day-to-day activities for the purposes of determining disability.
41. I remind myself that I must consider what the claimant cannot do and not focus on what he can do.

Conclusions

42. Mr Probert for the claimant has referred me to a number of matters that he broadly described as cognitive functioning and he submits that the claimant suffers an adverse effect which is substantial because he finds it difficult, for example, to cope with a range of factors. These might include coping with change; the need to take people literally or the fact that he does take people literally, his black and white thinking, his preference for things to be unequivocal and his dislike of breaking of rules and a tendency to have a preoccupation with minor details; to be overly pedantic and to work very long hours. Mr Probert gave the example of the claimant finding it difficult to stop work in the evenings.
43. He has also referred me to the claimant's own evidence as well as medical evidence in which reference is made to the claimant sometimes being obsessive about work and working very long hours and the fact that his wife would sometimes tell him that he must not work beyond midnight.
44. I conclude from the examples given to me that the claimant is sometimes affected by some or all of the examples of cognitive function. The question that I must consider is whether or not the impact on the claimant's ability to carry out ordinary day-to-day activities is substantial.
45. At its highest point, Mr Elliott's description of how his impairment adversely impacts upon him in terms of socialising and meeting people outside work, was that he often felt nervous and apprehensive, particularly before speaking at a conference and needed to adjust his behaviour in order to deal with this. He needed to mentally prepare to speak or to meet people in these situations.
46. For example, the claimant is not prevented from going to cafes and restaurants with his family for example and I conclude that he is not unable to do those things but that he sometimes has to make effort in order to deal with them.

47. I find that whilst the claimant's ability to carry out some day-to-day activities is sometimes adversely affected by his impairment, in all the instances which I have been referred to and about which I have heard evidence, and the instances that I've been referred to of the claimant's adjustments to his own behaviour, are those which are reasonable for him to make and are not substantially different from those that many other people who are not disabled make on a regular basis.
48. The effect of the claimant's reasonable adjustments to his own behaviour and attitude are that his impairment ceases to have any significant adverse impact on his ability to either do every day daily tasks or importance in this particular case to carry out his professional obligations and work.
49. Mr Elliott is dedicated to his work and he has been successful over many years in it. He has also followed a second successful career as a wild firefighter outside of this daily workplace. There is very little evidence of any activity which the claimant either cannot do all which he finds significantly harder or substantially adversely affected by his impairment.
50. Whilst Mr Elliott reports that he does not find it easy to speak in public or to socialise for example and whilst he clearly has to prepare mentally for doing these things, he clearly is not prevented from doing them or substantially adversely impacted when he does them.
51. He is also on his own evidence not somebody who find it substantially harder to do these things than others do. Many people find public speaking and socialising difficult and many people adjust their behaviour in order to manage these occasions.
52. Although there are impacts on Mr Elliot resulting from his impairment, they are minor ones and ones which he is easily able to manage on a day-to-day basis with his own modifications and coping strategies. I find that that these are adjustments that it is reasonable for the claimant to make to his own behaviour.
53. The adjustments and the coping mechanisms are no more than would be expected among any other member of the population who does not have the impairment and do not support a finding that Mr Elliott is suffering any *substantial* adverse impact.
54. I have reminded myself again, that in this context substantial means more than minor and more than trivial. I have looked at those things which Mr Elliott cannot do or which he finds harder to do and find as fact that in each instance where the claimant may find matters harder and that whilst on occasions he may be obsessive and he may need a routine and that he does adapt his behaviour and adopt coping strategies, any adverse impact upon him is minor.
55. I conclude that the claimants ability to carry out a range of day-to-day activities whilst clearly affected from time to time was not at any time a substantially adversely affected. I find that the adverse impact on Mr Elliott was no more than minor. This is both in respect of individual matters as set

out in the ET1 or the medical reports or in respect of the combined effect of those matters ever

56. I therefore find that Mr Elliott was not disabled within the meaning of the Equality Act 2010 at the material times.

Employment Judge Rayner
24 January 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE