



EMPLOYMENT TRIBUNALS

Claimant: Miss R Sayadsarvari

Respondent: Cramlington House Limited

Heard at: Newcastle CFCTC **On:** 11 September 2024

Before: Employment Judge Arullendran

Representation:

Claimant: In person

Respondent: Ms Helen Hogben (counsel)

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claimant did not at the material time have a disability as defined by section 6 of the Equality Act 2010. All of the claims are dismissed.

Reasons

1. The issues to be determined at this public preliminary hearing were set out at paragraph 3 of the case management orders made by Employment Judge Loy at the hearing on 26 June 2024. Those issues were agreed between the parties as follows:

1.1 Did the claimant have ADHD?

1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

- 1.5 Were the effects of the impairment longer term? The Tribunal will decide:
 - 1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
 - 1.5.2 If not, were they likely to recur?
2. I was provided with a joint bundle of documents consisting of 465 pages, the majority of which were not referred to by the parties.
3. The claimant failed to produce a witness statement in accordance with paragraph 12 of the case management orders made on 26 June 2024. I gave permission for the claimant to give oral evidence at this hearing and no objections were raised by the respondent on this point. The claimant adopted the documents that pages 74 to 82 of the hearing file, which she produced in response to orders to provide a disability impact statement, as her evidence in chief at this hearing.
4. I made reasonable adjustments for the claimant on the basis that she claimed to have ADHD which affected her ability to effectively take part in the hearing. The reasonable adjustments were to repeat questions to the claimant if she indicated a lack of understanding and the ability to request breaks throughout the hearing and the ability for the claimant to stand and move around the hearing room without seeking prior permission if she felt jittery or fidgety. The claimant did not request any breaks and she did not stand up or move around during the hearing, nor did she exhibit any signs of being jittery or fidgety throughout the hearing.
5. The claimant refused to read out the wording of the affirmation at the time she was being sworn in. The reasons she gave for not reading the words from the card provided by the Tribunal was that her ADHD made it difficult for her to read. The affirmation was read out to the claimant which she then repeated.
6. It was agreed between the parties and the Tribunal that if the claimant was unable to read any document in the hearing file the relevant extract would be read out to her prior to being asked any questions on the matter. I am grateful to respondent's counsel who agreed to treat the claimant as a vulnerable witness in accordance with the Equal Treatment Bench book and the Guidance on Vulnerable Witnesses given by the President of the Employment Tribunals. The claimant was able to read the documents put to her in cross-examination and she was able to read, without any assistance, the issues set out in the case management orders at the time she made her closing submissions. The claimant did not indicate during the hearing that she could not read any of the documents or that she required anything to be read out to her.
7. The findings of fact in this matter had been made on the balance of probabilities, taking into account the oral evidence of the claimant and the documents referred to by the parties in evidence and closing submissions. In addition to the extracts from medical records referred to by the parties, I have read the medical report written by Dr Kirsty Lowe which is produced at pages 370 to 403 of the hearing file.

8. The reference to page numbers set out in this decision refers to the pages in the hearing file.

The facts

9. The claimant has claimed on her ET1 form that she has ADHD. She claims to have received a diagnosis of ADHD in 2011, although she says she experienced symptoms from the age of 2.
10. The claimant experienced behavioural difficulties as a child and throughout her schooling relating to her concentration, memory, lack of interest, excessive physical movements, excessive talking, unpredictable moods and excessive anger. However, the claimant was not diagnosed with ADHD as a child.
11. As an adult, between June and August 2023, the claimant had difficulty with multitasking as she would often get bored with an activity unless it was something that she particularly enjoyed, such as sport. The claimant claims that she experienced inattentiveness and fidgetiness but this is not corroborated in the medical reports of Dr Lowe or Dr Rao and the claimant's own evidence in cross-examination was that she only experienced these effects if she became frustrated or anxious but when asked how often this would happen, the claimant was unable to give an estimate of the frequency and said it happened "quite a lot".
12. The claimant claims that she forgot to attend some clinical appointments between June and August 2023 but this is not supported by her medical records. The claimant claims to have missed 3 or 4 appointments but did not give the dates she alleges to have missed the appointments. However, the claimant will not open any letters or read any correspondence when it arrives at her home because she refuses to read it, which she attributes to her ADHD. When asked by the Tribunal what the difficulties were with reading, the claimant said it was the spelling and when she has raised this issue with her doctors they have suggested that it might be dyslexia but the claimant has not been assessed for this. The claimant explained that when she tries to read she stutters and gets agitated and, for these reasons, she will not read to her children. When asked by the Tribunal if the claimant experiences any difficulties with reading to herself, the claimant stated that she does not read anything and if she receives any letters she puts them to one side.
13. The claimant has mood swings and gets frustrated and anxious which leads to her shouting and swearing. When asked how often this happens the claimant stated that it was "not that much" and went on to explain that if someone tells her to read the letters she has received in the post and she does not want to she becomes agitated.
14. The claimant admits to speaking out of turn and being rude to others which she attributes to ADHD and in evidence she said that she experiences high and low emotions but that she rarely gets upset because she keeps everything inside. She described keeping things to herself and not talking to people because she does not trust others. When asked how often she might explode, the claimant

said it would happen quite a lot in response to her mother and children and she described this is happening 2 to 3 times a month depending on how stressed she felt. The medical evidence from Dr Lowe and Dr Rao attribute this conduct to the claimant's personality rather than ADHD. The claimant was not taking any medication at the time of her employment with the respondent and she reported to the adult ADHD team on 8 June 2022 that the medication did not help her with emotional regulation and only helped her with her focus (page 153). The claimant maintained at this hearing that the main issues she experiences is with her focus rather than any of the other symptoms which she has described.

15. The claimant sought help from her GP as an adult on several occasions arising out of a number of life events involving anger and physical assaults. She was referred to a consultant psychiatrist, Dr Rao, who assessed the claimant on 17 May 2011. The doctor concluded "it was hard to arrive at a definitive conclusion regarding [the claimant's] diagnosis. Although there were elements to suggest that she might fit the criteria for ADHD" (page 288).
16. The claimant received some treatment on a sporadic basis from 2011 onwards, although she missed several appointments with her consultant. The claimant was referred to Dr Rao again in September 2016 and a further assessment was carried out on 14 September 2016, the results of which are set out in the letter at pages 315 to 319. The claimant's main issue was her mood swings and she told the psychiatrist that she wanted to receive help with her anger. The psychiatrist carried out a full assessment, which included obtaining a history from the claimant's mother who stated that her impression was that the claimant did not have ADHD. Dr Rao concluded that "There was no increased fidgetiness, agitation or aggression in [the claimant's] behaviour. ... She does not meet the criteria for adult ADHD. Most of her difficulties seem to be related to her personality structure, which consists of lability in her mood, impulsivity in the context of changeable moods, poor self-identity, difficulties with emotional regulation, explosiveness and relationship difficulties."
17. The claimant underwent a review with Dr Coombe on 22 November 2021 at the adult ADHD services and a copy of the outcome letter is reproduced in the claimant's medical records at pages 128 to 131. At page 128 the doctor states "Following [the claimant's] assessment with myself in 2019, it was agreed to offer her a tentative/working diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and a trial of treatment. She was commenced upon Xaggitin XL 18 mg. ... I am not in a position to provide a formal assessment of other comorbid mental health disorders. However I have held rather frank and unambiguous conversations with [the claimant] about her presenting with overarching traits of Cluster B Personality Difficulties". It was noted by the duty worker at the adult ADHD team on 8 June 2022 that the claimant had reported that the ADHD medication did not help her with emotional regulation and only assisted her with her focus (page 153).
18. The claimant attended a 4-hour appointment in 2021 with a Consultant Clinical and Forensic Psychologist, Dr Kirsty Lowe, as part of court proceedings and a report was produced by Dr Lowe acting as an expert witness with the ensuing

professional duties to the court. The claimant has not produced the full report from Dr Lowe in the hearing file as the first 33 pages of that report are missing. Dr Lowe had sight of all of the claimant's medical records, including hospital, GP and counselling records, at the time of the assessment. Dr Lowe records in her report that there were conflicting reports regarding the diagnosis of ADHD (page 390). She states at paragraph 10.25 "I did not observe inattentive or hyperactive impulsive symptoms during my 4-hour assessment of [the claimant], during which time she also completed 2 psychometric assessments and I concur with the Consultant Psychiatrist, Adult ADHD Service, who noted on 14.09.16 "she does not meet the criteria for adult ADHD. Most of her difficulties seem to be related to her personality structure, which consists of lability in her mood, impulsivity in the context of changeable moods, poor self-identity, difficulties with emotional regulation, explosiveness and relationship difficulties"." Dr Lowe states at paragraph 10.27 (page 391) "It is my opinion that [the claimant] is invested in having a diagnosis for her presenting problems, as this enabled her to minimise her contribution to them." She goes on to find at paragraph 10.42 (page 395) "I am of the opinion that [the claimant] had limited insight into the presenting problems ... and she has a tendency to attribute responsibility for her actions to others or to having ADHD."

19. The claimant relies on the document at pages 463 to 464 dated 21 June 2024 which purports to have been written by the ADHD duty worker at the Adult ADHD Service, although no name has been provided for the author. The claimant claims to have obtained this letter from the adult neurodevelopmental services for the purposes of this litigation to confirm that she has been diagnosed with ADHD. The first paragraph of this document contains a number of gaps and syntax and grammatical errors, such as the gaps between the words "diagnoses" and "Attention" and the use of the words "was not taken any medication during the dates of employment, This ...". This paragraph also refers to ADHD being a disability under "federal law".
20. The claimant claims that she obtained the letter at page 463 because her "consultant" was absent on holiday at the time she was trying to obtain the relevant medical evidence for these proceedings. The claimant says that she then obtained a further letter from her "consultant" after obtaining the letter from the ADHD duty worker and she refers to the letter at pages 461 to 462, however it is notable that this document is dated 26 April 2024 which is some 2 months before the letter which purports to be from the ADHD duty worker.
21. With reference to the document at page 461, this appears to be a further copy of the letter at pages 459 to 460 from Philip James which is also dated 26 April 2024 and bears a striking resemblance to the document at page 461 with some changes and additions to the second version of the letter. Although the claimant has referred to the author of this letter as being her "consultant", she accepted in cross-examination that Philip James is a community nurse practitioner and a non-medical prescriber. The claimant also stated in cross-examination that she had made changes to the letter from Philip James dated 26 April 2024 (pages 461 to 462) in order to highlight or emphasise certain aspects of the document. The additions to the second version of the letter dated 26 April 2024 are highlighted in blue and red. Notably, there is an addition to the second version

of the letter stating that employers are required to make reasonable adjustments under the Equality Act 2010 “which the employer did not comply with.”

The law

22. Section 6 of the Equality Act 2010 (EqA) provides:

“(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.
...”

23. In considering what amounts to an impairment, its effect is what is of importance rather than the cause, as set out in paragraph A4 of the Guidance on the Definition of Disability 2011.

24. For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, that they have a mental or physical impairment which has a long-term and substantial effect on their ability to carry out day-to-day activities.

25. The Employment Appeal Tribunal (EAT) gave guidance in J v DLA Piper UK LLP [2010] ICR 1052 in relation to how to approach the issue of whether someone has an impairment. The EAT noted it was good practice in every case for Tribunals to look at the issue of whether someone has an impairment separately from the question of whether it has an adverse effect on their ability to carry out normal day-to-day activities. However, that did not mean that Tribunals should rigidly adhere to that approach, and in some cases (particularly if it involves resolving difficult medical questions) it is appropriate to firstly consider whether the claimant’s ability to carry out normal day to day activities has been adversely affected. Where the answer is yes, in most cases a Tribunal can infer that the claimant was suffering from a condition which has produced that adverse effect, namely an impairment.

26. In Walker v SITA Information Networking Computing Ltd EAT 0097/12 the EAT reiterated that the EqA does not require the focus to be on the cause of an impairment. The EAT noted, however, that the absence of an apparent cause for an impairment, while not legally significant, may be evidentially significant. Where an individual presents as if disabled but there is no recognised cause of that disability, it is open to a Tribunal to conclude that that person does not genuinely suffer from it

27. In Khorochilova v Euro Rep Ltd UKEAT/0266/19 the question arose as to whether the claimant was 'disabled' within section 6 of the EqA. She claimed to have 'mixed personality disorder' but this was only evidenced by a seven-year-old medical report (prepared for another purpose) which fell short of a diagnosis and her statement that she suffered from being 'somewhat obsessive' and 'perfectionist behaviour'. The Tribunal held that she was not disabled because (1) she had not established a mental impairment and (2) in any event there was

scant evidence of the necessary adverse effect on normal living. Choudhury P accepted that 'personality disorders' can cause problems here because, on one view, everyone has personality traits and some can be 'problematic' without being an impairment for statutory purposes, however there will be cases where such traits do cross the difficult border into impairments. Where it is difficult to apply this distinction, it might well be appropriate to adopt the suggested course in J v DLA Piper of considering the adverse effect first and then going back to the impairment issue in the light of the finding on effect, but the Tribunal was entitled to go straight to the question of impairment.

28. In JC v Gordonstoun Schools Ltd [2016] CSIH 32, Ct Sess (Inner House) (an education discrimination case), the Court of Session upheld a first-tier Tribunal's decision that M, a boarding school pupil with ADHD, was not disabled for the purposes of the EqA. She went about her day-to-day activities in an 'entirely normal fashion', as evidenced by the fact that she was able to live in a boarding school and go on cinema outings without any special considerations. Her ADHD did impact on her social skills, but the effect was not substantial — they were still 'in the normal range, albeit at the low end of that range'.

Discussion and Conclusions

29. The starting point in this matter is the list of issues which was agreed between the parties and recorded by Employment Judge Loy at the hearing on 26 June 2024, as set out at paragraph 3 at page 61 of the hearing file. The first issue is whether the claimant had ADHD at the time she complains about being subject to discrimination in the workplace by the respondent, i.e. between June and August 2023. I note that this is not a claim where the claimant is alleging that she has a generalised mental impairment which did not have a specific diagnosis. The claimant's case is very clearly put that she has a specific diagnosis of ADHD and the claimant is not relying upon any other form of mental impairment. This issue was clarified and recorded after 3 separate preliminary case management hearings where the issues were discussed with the claimant and an Employment Judge.
30. Applying the relevant law to the facts I find that the claimant has never received a formal diagnosis of ADHD from a relevant medical practitioner who is qualified to make such a diagnosis. At best, the claimant was offered a tentative or working diagnosis of ADHD in 2019 after consultation with Dr Coombe and it was agreed that she would receive a trial of treatment consisting of Xaggitin XL 18mg (page 128). There appeared to be much stronger indications that the issues experienced by the claimant related to her personality (page 128) but the claimant has been adamant at this hearing that she does not have a personality disorder. Whilst the claimant has continued to take the medication on a sporadic basis since 2019 that, in itself, does not constitute a formal diagnosis of ADHD as there may be reasons why medical practitioners might agree to continue with a treatment regime where the patient is reporting some benefits, even if they did not have ADHD. Applying the guidance in Walker and J v DLA Piper, although there is no requirement for a formal medical diagnosis, the lack of diagnosis in this case is evidence I must take into account in the round. The difficulties the claimant complains of relate to her choices and

emotional responses to situations she finds herself in, such as choosing not to read and getting frustrated with family members. Looking at all the evidence in the round, I find that the claimant did not have a mental impairment caused by ADHD between 21 June 2023 and 9 August 2023 and, therefore, she did not meet the definition of disabled as set out in section 6 of the Equality Act 2010.

31. For completeness, had I found that the claimant had an impairment as a result of ADHD between 21 June 2023 and 9 August 2023, I would find that this did not have a substantial adverse effect on her ability to carry out day-to-day activities. In particular, the evidence presented by the claimant at this hearing was insufficient to demonstrate, on the balance of probabilities, that she experienced difficulties with her attention span or ability to concentrate at the relevant time. The assessment carried out by Dr Lowe in August 2021 recorded that the claimant was able to take part in a 4-hour assessment and the doctor did not observe any inattention or hyperactive impulsive symptoms (page 390). The claimant's own evidence at this hearing was that she chose not to read, as opposed to attempting to read and then giving up because of any difficulties arising from difficulties with attention or her ability to concentrate. In respect of the alleged inability to multitask, the claimant's own evidence was that she would not finish a task if she did not like it but was able to finish a task if she liked what she was doing, such as sport. The claimant did not present any evidence about how she was unable or found it difficult to complete a task that she was not interested in, how the alleged ADHD purported to prevent her or made it difficult for her from completing a task or how frequently she experienced the inability to or difficulty in completing the task. The claimant did not present any evidence about how the alleged fidgetiness she experienced at the relevant time prevented her from carrying out day-to-day activities and I note that neither Dr Lowe or Dr Rao reported observing any fidgetiness in the claimant during their assessments of her. Whilst I accept that the claimant does experience anger and speaks out of turn, the claimant has not presented any evidence at this hearing that demonstrates this conduct is as a result of having a mental impairment related to ADHD. She has sought to dispute the findings of Dr Rao and Dr Lowe that this conduct is related to her personality, but the claimant has failed to produce any evidence at this hearing to demonstrate that either medical practitioner was not qualified to make their observations and findings or that anything amiss had occurred during the consultations which would have led to incorrect findings. In all the circumstances, I find that the alleged impairment did not have a substantial effect on the claimant's ability to carry out day to day activities.
32. In relation to the medical evidence produced by the claimant after commencing these proceedings in the Employment Tribunal, which can be seen at pages 459 to 464 of the bundle, I treat this evidence with caution and give it little or no weight on the grounds that the claimant accepted in cross-examination that she had altered the letter written by Philip James at pages 461 to 462 and I note that there are several differences between that version of the letter and the one produced at pages 459 and 460. There are several syntax and grammatical errors in the letter at pages 463 to 464 which call into question the veracity of that document which, when coupled with lack of identification of the author and their qualifications, lead me to treat this document with caution. The claimant's

evidence in respect of the dates of these letters was inconsistent with the actual documents themselves in that the claimant maintained she had received the letter from the duty worker before receiving the letter from Mr James, however the letter at page 463 is dated 21 June 2024 and the letters at pages 459 and 461 are dated 26 April 2024 and this is another reason to treat the claimant's evidence with a degree of caution. In any event, Philip James is a community nurse practitioner and neither he nor the duty worker appear to be qualified to make a diagnosis of ADHD and I do not accept that any of these letters are sufficient to demonstrate the claimant had an impairment arising from ADHD which had a substantial adverse effect on her ability to carry out day-to-day activities.

33. As the first two issues in the list of issues to be determined at this hearing have been answered in the negative, I have not made any findings in respect of the remaining issues listed at 1.3 to 1.5.2, above.
34. The claimant did not meet the definition of disabled as set out in section 6 of the Equality Act 2010 between June and August 2023. As the only claims she has brought against the respondent in the Employment Tribunal relate to claims of disability discrimination under the Equality Act 2010, all the claims fall to be dismissed because the claimant was not disabled at the material time.

Employment Judge Arullendran

Date: 25 September 2024

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