



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr W Hibbert

**Respondent:** Fortitude Nicsa Global Ltd

**Heard:** Via Cloud Video Platform in the Midlands (East) Region

**On:** 3 February 2022

**Before:** Employment Judge Ayre

**Representatives:**

**Claimant:** Miss A Pitt, counsel

**Respondent:** Miss W Miller, counsel

## JUDGMENT AT PRELIMINARY HEARING

The judgment of the Tribunal is as follows:

1. The claimant is disabled by reason of borderline personality disorder.
2. The claimant is disabled by reason of dyslexia.
3. The application to amend the claim is refused.

## REASONS

### Background

1. On 7<sup>th</sup> January 2021 the claimant presented a claim to the Employment Tribunal. The claim includes complaints of unfair dismissal, disability

discrimination, for holiday pay and for other payments. The respondent defends the claim. It denies all of the allegations made by the claimant and says that the claimant was fairly dismissed for some other substantial reason.

2. In the claim form the claimant referred to having borderline personality disorder (bipolar) but made no mention of dyslexia.
3. There was a Preliminary Hearing before Employment Judge Clark on 31 March 2021, which the claimant did not attend. The claimant's reasons for non-attendance were accepted by Employment Judge Blackwell at a further Preliminary Hearing on 5 July 2021.
4. Employment Judge Clark made an order for the claimant to provide written confirmation of the nature of the impairment relied upon in support of his disability discrimination claim, a 'disability impact statement' and any medical records relevant to the question of disability.
5. In correspondence with the Tribunal, Mr Freitas referred to the claimant having dyslexia. On 1 July 2021 the claimant made an application to amend the claim to include Dyslexia as an additional disability.
6. During the preliminary hearing before Employment Judge Blackwell on 5 July 2021, at which the claimant was represented by Mr Freitas, the discrimination claim was identified as being one made under section 15 of the Equality Act, with the unfavourable treatment being the claimant's dismissal.
7. Mr Freitas clarified, on behalf of the claimant, that the claimant was not relying upon bipolar disorder as an impairment. He did however want to apply to amend the claim to include allegations of disability discrimination in relation to dyslexia, and specifically allegations of a failure to make reasonable adjustments in the dismissal process.
8. Employment Judge Blackwell made an Order that, if the claimant wishes to make an application to amend his claim to include allegations of disability discrimination based on dyslexia, then he should do so by 6 August 2021.
9. On 10<sup>th</sup> August 2021 Mr Freitas made an application to amend the claim to include an additional ten paragraphs alleging both discrimination arising from disability and a failure to make reasonable adjustments prior to and during the claimant's dismissal, and to add a new alleged disability, dyslexia.

### **The Proceedings**

10. I heard evidence from the claimant and there was an agreed bundle of documents running to 243 pages.
11. Miss Pitt indicated that she would also like to call the claimant's friend, Mr Freitas, to give evidence in relation to the application to amend, and specifically in relation to his understanding of the claimant's claim.

There was no witness statement for Mr Freitas, and the respondent objected to him giving evidence. I decided, on balance, not to allow the claimant to call Mr Freitas to give evidence. Mr Freitas' correspondence with the Tribunal could be relied upon and any points relating to it made in submissions.

12. During the hearing I became concerned for the claimant's welfare. He was clearly distressed and appeared to find it difficult to concentrate. We took regular breaks to enable him to rest and recover. He was supported during his evidence by a friend, Richard Freitas, who found and read documents for him. At the claimant's request, and with the respondent's agreement, Ms Katy Upton, the claimant's former wife, turned off her camera because seeing her caused the claimant great distress.

### **The Issues**

13. The issues that fell to be determined at the Preliminary Hearing today were as follows:

- a. Was the claimant, at the material time, disabled by reason of borderline personality disorder;
- b. Was the claimant, at the material time, disabled by reason of dyslexia;
- c. Should the claimant's application to amend the claim be allowed; and
- d. Case management orders to prepare the case for final hearing.

14. At the start of the hearing the representatives told me that they had not understood from the Orders made ahead of the hearing that the question of whether the claimant was disabled by reason of dyslexia would be considered at today's hearing. The claimant said that he was relying upon dyslexia both in relation to the claim as originally pleaded and in relation to the amended claim.

15. Both parties agreed that the question of whether the claimant was disabled by reason of dyslexia would be considered at today's hearing also, and that we would hear evidence from the claimant on that issue.

### **Findings of Fact**

#### Application to amend

16. The claimant was employed by the respondent as Director of Sales until 12 October 2020 when he was dismissed with immediate effect.

17. On 7<sup>th</sup> January 2021 the claimant presented a claim to the Employment Tribunal. He referred in the claim to being disabled by reason of borderline personality disorder (bipolar). He subsequently clarified that

he was not relying upon bipolar disorder as an alleged disability. There was no mention in the claim form of dyslexia.

18. During a Preliminary Hearing on 5 July 2021 the claimant indicated that he wished to apply to amend the claim to include new allegations of discrimination and a new alleged disability, dyslexia. He was ordered to make any application to amend by 6<sup>th</sup> August 2021.

19. On 10<sup>th</sup> August 2021, four days after the deadline set out in the Tribunal Order, the claimant applied to amend his claim. The amendments sought were substantial, running to an additional ten paragraphs and including new allegations of fact and law.

20. The new allegations went back as far as January/February 2019, involved a number of different individuals and were numerous. They were entirely separate to the original allegations of discrimination.

21. In a letter sent to the Tribunal [p.53-4] Mr Freitas wrote:

*"I have been a friend of Mr Hibbert's for many years and have always known he struggled with spelling...I only became aware of Mr Hibbert's profound dyslexia/dyscalculia during the late stages of our discussions regarding his divorce and dismissal..."*

*Mr Hibbert's has suffered from dyslexia complicated by dyscalculia from an early age. He was first diagnosed at 11 years of age, a diagnosis that was confirmed during his time serving in the army and on several later occasions..."*

#### Borderline personality disorder

22. The claimant has had poor mental health for many years. He finds it hard to concentrate and described his mood as "*like a rollercoaster*". He is taking medication to help control his moods and is in receipt of Personal Independence Payments for his borderline personality disorder.

23. He frequently suffers from intrusive thoughts and has difficulty sleeping. He relives the events of the day over and over at night. This causes him to become anxious and he struggles to fall asleep and to stay asleep. At times he does not sleep for several days. The lack of sleep then affects his concentration the following day.

24. The claimant has poor self esteem, poor body image and a difficult relationship with food. He feels uncomfortable eating in public and is worried that others will consider him to be eating too much and to be fat. At times he makes himself sick after eating.

25. As a result of his borderline personality disorder the claimant finds confrontation difficult and becomes agitated and aggressive. He has suicidal thoughts 6 or 7 times a day and has attempted suicide. At times is unable to go out of the house, to bathe or to dress himself.

26. The claimant has taken and continues to take various medication to help control his conditions. At times he has chosen not to take any medication because he thought the medication wasn't working and was concerned that it was causing him to put on weight. The medicine he takes includes sertraline and amytryptaline to control his moods, codeine for his pack pain and diazepam and zopaline to help him sleep.

27. The claimant described his conditions as having been ongoing since 2011 or 2012, although he has only received a formal diagnosis of borderline personality disorder more recently.

28. The claimant suffered an accident in August 2011 which was described as the 'index accident'. A court psychiatric report was prepared in January 2015. That report referred to the claimant as having a "*pre-existing history of psychiatric disorder*" and records the claimant has having poor sleep, recurring anxious dreams, persistent symptoms of anxiety, depression, intrusive thoughts, paranoid ideas, suicidal thoughts, very poor concentration, anger and irritability.

### Dyslexia

29. The claimant struggles to read and to write. When reading he is only able to pick out certain words and negative words jump out at him. When reading a newspaper, he normally just looks at the pictures and big words. If he tries to read a document, he sometimes cannot understand what he is reading, or the information contained in the document. He tends to misunderstand and misinterpret the content of documents. He is unable to follow a recipe unless someone reads out the detailed instructions and measurements.

30. The claimant has developed coping strategies and has avoided doing paperwork in the past. He asks friends and colleagues to read and explain documents to him, as he understands information better when listening to it. He avoids dealing with financial matters as he struggles to understand figures.

31. The claimant is unable to write a letter or to fill in a form. He relies on others to fill in forms and applications for him. Mr Freitas has constructed a CV for him to help him find alternative work.

32. His dyslexia has had an impact on his ability to read and write since he was a child.

## **The Law**

### Disability

33. The burden of proving disability lies with the claimant. Section 6 of the Equality Act 2010 ("**the EQA**") defines disability as follows:

"(1) A person (P) has a disability if –

- (a) *P had 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.*
- (2) *A reference to a disabled person is a reference to a person who has a disability."*

34. Paragraph 5 of Schedule 1 to the EQA sets out the so-called 'deduced effect' that must be used when determining questions of disability, namely that:

*"(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 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."*

35. In May 2011 the Secretary of State issued guidance under section 6(5) of the Equality Act: "Guidance on matters to be taken into account in determining questions relating to the definition of disability". The Tribunal "*must take account of such guidance as it thinks is relevant*" when deciding questions of disability (Para 12 of Schedule 1 to the EQA).

36. In *Goodwin v Patent Office [1999] ICR 302*, Morison J stated that four questions should be considered when deciding whether an individual is disabled:

- e. Did the claimant have a mental or physical impairment?
- f. Did the impairment affect the claimant's ability to carry out normal day-to-day activities?
- g. Was the adverse impact substantial?
- h. Was the adverse impact long term?

37. The EAT has subsequently suggested, in *J v DLA Piper UK LLP [2010] ICR 1052* that there is no need to consider the impairment question in detail, and that:

*"In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues."*

38. In *Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 664* the EAT defined impairment as:

*"...some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition.*

*The phrase ‘physical or mental impairment’ refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally.”*

39. A mental impairment no longer needs to be a clinically well-recognised illness, and it is not necessary for the cause of the impairment to be established (*McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA Civ 1074*).

40. Section 212(1) of the EQA defines ‘substantial’ as “*more than minor or trivial*”.

#### Amendment to the claim

41. The Tribunal has a general discretion whether to allow amendments to a claim or response as part of its general case management powers. When deciding whether to exercise its discretion to allow an amendment, the Tribunal should seek to do justice between the parties, having regard to the circumstances of the case.

42. In *Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650, NIRC* Sir John Donaldson stated that the key principle for the Tribunal when deciding whether to allow amendments to the claim is that the Tribunal must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it.

43. In *Selkent Bus Co Ltd v Moore [1996] ICR 836*, Mr Justice Mummery, then President of the EAT, referred to the following factors as being relevant:

- (i) The nature of the amendment, ie whether it is (a) an administrative one such as the correction of clerical mistakes, (b) the addition of factual details to existing allegations and/or the addition or substitution of other labels for facts already pleaded to or (c) the making of entirely new factual allegations that change the basis of the existing claim;
- (ii) Time limits, and in particular whether the amendment sought includes allegations that are out of time. If they are, the Tribunal will have to consider whether to extend time; and
- (iii) The timing and manner of the application. Has there been a delay in making the application, and if so what was the reason for that delay? Has there been new evidence which has come to light?

44. The list set out above is not exhaustive and the Tribunal can take account of such other factors as it considers relevant in a particular case.

#### **Submissions**

Claimant

45. Miss Pitt submitted that, in deciding the question of disability, the focus should be on the impact of the claimant's impairments on his ability to carry out normal day to day activities, rather than on a medical diagnosis.
46. The claimant's lack of sleep and intrusive thoughts have an impact on his day to day activities. He finds it difficult to concentrate on simple tasks, is unable to bathe, locks himself in his room and does not want to engage. His lack of self-worth and weight issues make it difficult for him to go out. As a result, he lacks social interaction and struggles to cope with social situations.
47. The focus should be on what the claimant cannot do or can only do with difficulty. The evidence shows a substantial impairment going back to 2011 which flares up and down but which is always there.
48. Turning now to the dyslexia, Miss Pitt submitted that it is not a condition that develops over night but is, by its very nature, long term. It causes the claimant to have difficulty concentrating. He can't read a newspaper and wouldn't read a book. He avoids paperwork and documents and can't understand a document unless it's read out for him. His lack of ability to understand, read and write documents has an adverse impact on his ability to carry out normal day to day activities, in her submission.
49. In relation to the application to amend, Miss Pitt conceded that the application was made out of time. The reason for that was that the claimant was focusing on one thing, his borderline personality disorder, and omitted to give instructions to Mr Freitas on dyslexia.
50. There would, she argued, be hardship to the claimant if the application to amend was not granted, as he would lose the opportunity to pursue this element of his claim. She acknowledged however that if the application to amend were allowed, the respondent would have to defend a second claim and may incur additional cost.
51. The practicality is that, given the claimant's state of health, it may be difficult to conclude the case in the three days currently allocated. She accepted that there would be hardship to both parties if the final hearing could not go ahead in May 2022 as currently listed. The reason for the delay however is the claimant's disability, which caused him difficulty in pulling together his case at the outset.
52. Miss Pitt expressed the view that 5 days would be needed for the final hearing if the new allegations were to be permitted.

Respondent

53. On behalf of the respondent, Miss Miller submitted that allowing the amendment to the claim would result in the length of the final hearing being extended to 8 days.
54. Mr Freitas has been a long term friend of the claimant and was aware of the claimant's spelling issues. It would therefore not have been



unreasonable for the question of dyslexia to arise earlier if the claimant is so impaired that Mr Frietas has to read his letters to him. It would, therefore, have been reasonable for the amendment to have been presented earlier than seven months after the ET1 was filed.

- 55.** The amendment includes new claims and is not just a relabeling of existing claims. It asserts an entirely new disability and different legal claims. The impact of allowing the amendment would be to cause inordinate delay in the final hearing, further cost to the respondent, and the involvement of additional witnesses.
- 56.** When carrying out the balancing exercise it would not be just in the circumstances to allow the amendment, which would extend the length of the trial and have a substantial impact on the trial date.
- 57.** In relation to disability, she argues that the difficulty is that the claimant has had several different diagnoses, including depression, OCD, bulimia, childhood and adult trauma, alcohol dependence and anxiety. There is no particular report showing a diagnosis of borderline personality disorder.
- 58.** It is, in her submission, difficult to identify what impact on day to day activities comes from which condition. For example, poor sleep could be caused by alcohol dependence. It has not been established that the borderline personality disorder causes impairments – there is no expert evidence showing the causal link.
- 59.** Miss Miller also queried whether the impact on the claimant's ability to carry out normal day to day activities was substantial, given that in 2019 he was not medicating. The Tribunal must take account of how far someone can reasonably be expected to modify their behavior to reduce the impact of the impairment, and this may mean that the impact is no longer substantial.
- 60.** It is not clear what impairment prevents the claimant from sleeping or which causes the intrusive thoughts. It is clear that the claimant is able to exercise and to do some things. His coping mechanisms reduce the impact of his impairments on him so that they are no longer substantial.
- 61.** The medical records make no mention of a diagnosis of dyslexia, and the claimant's evidence on the issue is contradictory in her view. The claimant was for a time the sole director of the respondent and was able to function during that time.

## **Conclusions**

Disability: borderline personality disorder

- 62.** I have no hesitation in finding that the claimant was, at the relevant time, disabled by reason of borderline personality disorder ("**BPD**").
- 63.** The claimant clearly has a mental impairment, which has affected him over a period of many years, going back to 2011. This is apparent not

just from the claimant's evidence, but also from the medical report prepared in January 2015. It is not necessary for that impairment to have received a formal diagnosis from the outset. The focus is instead on the impact of the impairment on the claimant's ability to carry out normal day to day activities at the time of the alleged discrimination.

64. I am satisfied on the evidence before me that the impairment has an impact on the claimant's ability to carry out normal day to day activities. The claimant is at times unable to go out of the house, or to dress or bathe himself due to a lack of motivation.

65. His social interaction and his relationship with food are also affected. He finds it difficult to eat in public and often avoids interaction with other people.

66. He regularly has intrusive thoughts and his sleep is disrupted. At times he does not sleep for days. He has poor concentration, feels suicidal and becomes aggressive and agitated when confronted.

67. He is in receipt of Personal Independence Payments. Although that in itself does not determine the question of disability it is, in my view, a relevant consideration.

68. Taking account of the statutory Guidance on the definition of disability, I am satisfied that the impact of the claimant's mental impairment on his ability to carry out normal day to day activities is more than minor or trivial, and is therefore substantial.

69. The Appendix to the Guidance contains examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day to day activities. These include:

- a. Difficulty in getting dressed, for example due to low motivation,
- b. Difficulty eating, for example because of the effect of an eating disorder,
- c. Difficulty going out of doors
- d. Persistent general low motivation
- e. Frequent intrusive thoughts
- f. Persistent distractibility or difficulty concentrating.

70. The claimant experiences all of these to a greater or lesser degree.

71. I have, in reaching my decision, taken account of the fact that there are things that the claimant is able to do, such as exercise, and that the claimant has developed coping strategies to help him manage his condition. I have reminded myself however that the focus should not be on what the claimant can do, but rather on what he cannot do or can only do with difficulty.

72. I am not persuaded by Miss Miller's submissions that the claimant's coping strategies such as exercise reduce the impact of his impairment on him such that it is not substantial. I find that the impairment does have a substantial adverse effect on the claimant's ability to carry out normal day to day activities despite his coping strategies.

73. I am satisfied that the impact of the impairment meets the 'long term' requirement, in that it has lasted for substantially in excess of twelve months.

74. The claimant is therefore disabled by reason of borderline personality disorder.

Disability: dyslexia

75. The claimant's dyslexia is also an impairment. It affects his ability to read, to concentrate and to write. The claimant can not read newspapers, books or documents properly. He can read some words but not all, and often misunderstands the contents of written documents.

76. As a result of his dyslexia the claimant is unable to fill in forms or to write letters. He asks others to read documents to him and to fill in forms or complete other paperwork on his behalf. He cannot follow a recipe unless someone explains it to him.

77. The statutory Guidance suggests that "*Persistent and significant difficulty in reading or understanding written material where this is in the person's native written language, for example because of a ...learning disability*" and "*difficulty concentrating*" are factors which it would be reasonable to regard as having a substantial adverse effect on normal day to day activities.

78. Reading newspapers, writing letters and filling in forms are in my view normal day to day activities. The claimant finds these activities very difficult. The impact of his dyslexia on day to day activities is substantial – it cannot be said that it is merely trivial.

79. The impact is long term, as the claimant has had dyslexia since childhood.

80. I therefore find that the claimant is also disabled by reason of dyslexia.

Application to amend the claim

81. The claim was presented to the Tribunal on 7<sup>th</sup> January 2021. It is a detailed and well written document, containing lots of facts. It specifically pleaded a complaint of disability discrimination. It also contained relevant information and referred to the ACAS Code of Practice, which suggests a degree of legal understanding and knowledge by the person writing it.

82. The application to amend the claim was not made until 10 August 2021, more than seven months later (although it was mentioned during the Preliminary Hearing on 5 July).

83. I accept that the claimant was going through a difficult time following the breakdown of his marriage and the loss of his employment, His life

was in turmoil and he was suffering ill health, having to face a lot of issues. He has however been very fortunate to have the constant and considerable support of Mr Freitas, who is to be commended for the amount of help and assistance that he has provided to the claimant. It was Mr Freitas who prepared the claim form on the claimant's behalf.

84. Considering the *Selkent* factors, the nature of the amendment is a key consideration. The amendment sought is substantial and amounts in many ways to an entirely new claim. It cannot be said that it is merely a relabeling of an existing claim. The amendment contains a large number of new facts and allegations, and new heads of claim.

85. The new allegations that the claimant seeks to make are considerably out of time, some dating back to the start of 2019. Time limits exist for an important reason of public policy, namely achieving finality in litigation.

86. It would not in my view be just and equitable to extend the time limit in a case such as this. All of the facts that the claimant relies upon in the new allegations were within his knowledge at the time he presented his original claim and there is, in my view, no good reason why they could not have been included in that claim. This is not a case in which new evidence has come to light, but rather the claimant has thought back over facts that were already within his knowledge.

87. I have considered the balance of injustice and hardship were I to allow or refuse the amendment. If I were to allow the amendment there would be a much longer hearing, significant additional costs, and a long delay (of almost a year) before the final hearing of the case. It may be difficult for the respondent to adduce evidence on allegations dating back 3 years – or possibly 4 years by the time of any delayed final hearing.

88. If I were to refuse the amendment, the claimant still has claims for disability discrimination arising out of the dismissal, and for unfair dismissal. Those are, in financial terms, the most significant part of the allegations. The claimant would, in effect, be losing out on the opportunity of an additional award for injury to feelings.

89. The practical consequences of allowing the amendment are, in this case, substantial. The hearing length would be doubled, and the final hearing would be postponed by many months.

90. For the above reasons, the balance of hardship and injustice favours refusing the application to amend the claim. It is hereby refused.

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Employment Judge Ayre

25 February 2022

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JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE