



EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: BT Plc

Heard at: Manchester

On: 11 April 2022

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person.

Respondent: Mr Ward (solicitor)

JUDGMENT having been given at the hearing and written reasons having been requested by the Respondent at that hearing in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This Preliminary Hearing was held to determine whether the claimant had a disability (“Disability Issue”). The respondent accepts that the claimant has an impairment as he has an Autistic Spectrum condition. He has Asperger’s Syndrome which I refer to below as “the Condition.”
2. The respondent also accepts that the condition has some impact on the claimant’s ability to carry out normal day to day activities. However, it disputes that impact is substantial.
3. The parties had agreed a file of documents for use at this preliminary hearing. References below to page numbers are to the page numbers in this this file.

Findings of Fact

4. The claimant was diagnosed with the Condition in 2010. This diagnosis was the result of a detailed assessment by a specialist NHS service called The

Sheffield Asperger Syndrome Service. The diagnosis helped to explain various behavioural traits that the claimant recognised in his life up until then. A copy of the diagnosis report is at pages 222 to 232. I accept the findings recorded in this diagnosis report and the descriptions I note at 5 below, provided by the claimant at the time of the assessment and recorded in the report.

5. For the purpose of determining the Disability Issue I note (and accept) as follows.

5.1 the condition affects the claimant in social communications and social interaction; it causes him to speak directly or bluntly and can come across as rude. He makes direct observations for example correcting people when he considers they are wrong and does so in a way which appears argumentative.

5.2 When engaging with people, particularly people unfamiliar to him he finds it manageable as long as it is well rehearsed and not in big groups. Reference is also made in the report to eye contact and facial expressions impacting social communications and social interaction.

5.3 The Condition affects the claimant's thinking, logic and decision making. He sees issues in a fixed way as either right or wrong, unable to engage in flexibility of thought. This makes him appear as stubborn and brings him into conflict with others when he considers that his view on an issue is correct and others do not share that view.

5.4 The Condition causes unusual sensory experiences for the claimant when confronted with loud or high-pitched sounds and bright lights.

6. Whilst not specifically referred to in the 2010 report I also accept the following having considered the claimant's own evidence and the medical records that were included in the bundle.

6.1 the claimant's description of his mind is that it is over active and sometimes becomes overloaded so that he does not have what he described as the bandwidth to deal with other matters such as a social interaction, I accept this is part of the impact the Condition has on his thinking and decision making.

6.2 The claimant suffers from sleep-deprivation. I accept this is an effect of the Condition as explained below.

6.3 The claimant also suffers from anxiety requiring medical treatment and prescribed medication. I also accept that to be an effect of the Condition. The level of the anxiety experienced by the claimant varies according to medication and other factors such as the extent of sleep deprivation and of course the particular circumstances in which the claimant finds himself. I accept that the claimant experiences high levels of anxiety when meeting new people and that this has an adverse impact on his social interaction with those people. The prescribed medication reduces the anxiety. Without the medication the claimant would experience much higher levels of anxiety and this would impact more significantly (and

adversely) on his day to day activities, particularly social interaction, his over-active mind and sleep.

7. In November 2017 the claimant was assessed by the respondent's Occupational Health Advisor. Neither party disagreed with the assessment and I find that it accurately summarises the condition and to some extent its impact on the claimant. The assessment is at page 238 of the bundle. It refers to a *"lifelong neurological disability called Asperger's syndrome which affects how he perceived the world and his interaction with others. It is a permanent part of his psychological make up."* Also notable is the OH opinion that the claimant has difficulties with communication and social interaction and that these are worsened when required to work in an office environment. It also noted a potential reasonable adjustment of home working.
8. Whilst the OH report did not specifically refer to this, I accept the evidence provided from the claimant himself that some office environments are worse than others for him. An open plan environment with noise where the claimant does not have a desk against the wall, a combination of social interaction difficulties and the over sensory experiences the noise and the light caused by the condition would make that type of environment worse than an adjusted environment. I accept that without some adjustments to the working environment the claimant's communication, thinking and social interaction would be adversely affected when working in a busy, open-plan office.
9. The claimant's working environment also appears to have been something that was explored or started to be explored with the BT Passport Report which is at page 249. This advised that home working with business travel as required, may be a reasonable adjustment.
10. The claimant gave evidence about sleep deprivation. In 2017 he attended a Sleep Disorder Clinic at Preston Hospital. A referral letter was provided dated 8 January 2018 (although the actual date of this must be 8 January 2019 as it refers to medical GP reports up to 3 January 2019). I note from the claimant's GP records that the claimant was seen in the Sleep Disorder Clinic on 31 July 2019 and discharged on that date. By that stage it is apparent from the medical records that the claimant had developed serious physical health issues including bleeding and abdominal pain that required operative treatment and it may be that the urgency of these may have overtaken matters and provided new medical priorities. The records before the Tribunal do not include any communication from the Sleep Clinic itself. I accept though that sleep deprivation is brought on by the condition and I base this on observations in the GP referral letter of 8 January 2018(2019) referred to above as well as the claimant's own evidence. I note the following extract from the referral letter: *"This young man with Apspergers is really struggling with his sleep. He has always had chronic insomnia and due to his aspergers and high intellect he struggles to relax and slow his brain down."*
11. I also note references in the medical records to poor sleep from 2015 and the significant amount of medication prescribed to the claimant to assist with sleep over long periods since then.

12. I also accept that the claimant's thinking process which in turn causes sleep disorder then leads to anxiety. I accept a direct link between the Condition and the anxiety that the claimant endures, particularly where the claimant's sleep has been adversely affected. The claimant's medical records make clear that he has suffered from anxiety over a significant period and that has been sufficiently serious to have been prescribed medication also over a significant period to control the impact of this. The claimant's sensory experiences are particularly enhanced when he is deprived of sleep and suffering from anxiety. As already noted, the enhanced sensory experiences are a symptom of the Condition. At their worst the claimant is unable to engage with public transport, particularly busy and noisy transport such as the London Underground.
13. Mr Ward rightly referred to the relevant time (for the purposes of determining the Disability issue) as being between March 2020 and February 2021 ("Relevant Time"). I note that there is reference to three months' prescription of Melatonin in September 2019 and January 2020 but nothing according to the medical records from then over the Relevant Time. However, I also note the following:-
- a. In September 2020, a reference in the medical records to providing the claimant with links to deal with anxiety;
 - b. a reference in the medical records to anti-anxiety medication (Propranolol) and Diazepam being on repeat prescription (see page 262).
14. The information in the file of documents includes information about other conditions. The claimant has had something of a complex medical history in addition to the Condition and the effects of the Condition. The claimant suffered a range of physical issues in 2019, particularly gastric related issues. He also has a long-term Asthma condition. I have not taken account of these. The claimant's serious physical health conditions are likely to have had some adverse impact on sleep and anxiety. However, I note that the claimant's struggles with anxiety and sleep deprivation, both pre-dated the serious physical issues of 2019.

The Law

15. I am grateful to Mr Ward for his written submissions which includes a well-researched section on relevant law.

Disability

16. The claimant claims he has a disability for the purposes of section 6 Equality Act 2010 (EQA). Section 6 provides as follows:-
- (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.*

17.S212(1) of the EQA defines “substantial” as meaning “*more than minor or trivial.*”

18.The word “substantial” in this context was considered in the decision in Paterson v. Commissioner of Metropolitan Police UKEAT/0635/06). See particularly paragraph 27 of that decision.

19.I have also considered:-

- (a) Part one of schedule one to the EQA (Schedule) regarding the definition of disability.
- (b) The Secretary of States guidance on matters to be taken into account in determining questions relating to the definition of disability. (Guidance)
- (c) The EHRC Employment Code

20.I note from the materials above and from relevant case law:-

- a. That I am to apply this definition at around the time that the alleged discrimination took place; **Cruickshank v. VAW Motorcast Limited [2002] ICR 729;**
- b. That I should apply a sequential decision-making approach to the test (see for example **J v. DLA Piper [2010] WL 2131720**) (“DLA Piper”) addressing the following in order
 - did the claimant have a mental and/or physical impairment? (the ‘impairment condition’)
 - did the impairment affect the claimant’s ability to carry out normal day-today activities? (the ‘adverse effect condition’)
 - was the adverse condition substantial? (the ‘substantial condition’), and
 - was the adverse condition long term? (the ‘long-term condition’).
- c. That the appendix to the Guidance includes a non-exhaustive list of factors that would be reasonable to regard as having a substantial adverse impact on normal day to day activities. This list includes:-
 - Difficulty entering or staying in environments that the person perceives as strange or frightening;
 - Behaviour which challenges people, making it difficult for the person to be accepted in public places;
 - Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions.
 - Persistent distractibility or difficulty concentrating.
 - Compulsive activities or behaviour, or difficulty in adapting after a reasonable period to minor changes in a routine.

- d. The same appendix also includes a non-exhaustive list of factors that would not be reasonable to regard as having a substantial adverse impact on normal day to day activities. This list includes:-
- Some shyness and timidity
 - Inability to concentrate on a task requiring application over several hours.
- e. That when applying the Guidance, I should consider the effect that an impairment has on a person's professional (working) life. See for example the judgment of Judge David Richardson in **Banaszczyk v. Booker Limited UKEAT/0132/15** where he states (para 47)
- "It is to my mind essential, if disability law is to be applied correctly, to define the relevant activity of working or professional life broadly: care should be taken before including in the definition the very feature which constitutes a barrier to the disabled individual's participation in that activity"*
- f. Paragraph 2(2) of the Schedule provides as follows: *"if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if it is likely to recur."*

Conclusions

21. There are references in the medical information to the condition of Asperger's syndrome being recognised generally as a disability. The claimant has the Condition, but that of course only addresses the first of the four-stage test in J -v- DLA Piper. The Condition is not one which automatically meets the definition of disability in section 6 EQA.
22. There is no dispute here that the Condition had some adverse effect on the ability to carry out normal day to day activities. The dispute between the parties is whether the adverse effect was substantial.
23. I have set out in the findings of fact above, the adverse effects that the Condition had. I am satisfied that the Condition caused these adverse effects in the Relevant Time.
- a. Sleep, I am satisfied that the sleep disorder is a symptom of the Asperger's condition as it affects the claimant. The claimant has had significant difficulties with sleeping, without the intervention of medication. Sleep is a day to day activity and the effect of the Condition on this day to day activity is substantial. Even if (as is not clear) the claimant was not prescribed medication specifically targeted at improving sleep at the Relevant Time, I find that the claimant's long-term struggles with sleep are such that the substantial adverse effect on the claimant's sleep was likely to recur. As such I must treat the substantial adverse effect as continuing, throughout the Relevant Time.

- b. Communication and social interaction. The Condition causes difficulty in the claimant's communications with others, particularly where the claimant meets new people. See paragraphs 5.1 – 5.3 above as well as the opinion of the OH adviser quoted at 7 above. This difficulty amounts to more than shyness and timidity. I am satisfied that the impact on the claimant's day to day activities of communication and social interaction is substantial.
- c. The claimant's thinking, application of logic and decision making. The claimant sees things in a binary way with a reduced ability to make compromises. (see particularly 5.3 and 7 above). As with sleep, the claimant's decision making and thinking process are adversely affected by an over stimulated mind. These are day to day activities. The adverse effect on them is substantial.
- d. The claimant's susceptibility to intolerance to over sensory experiences such as certain noises or bright lights, particularly where the claimant is in a state of higher anxiety (see 5.4 above). This adversely impacts on his ability to work in a busy, open plan office and to travel on busy public transport. The Condition therefore has a substantial adverse effect on these activities which were regular activities in his working life, subject to any reasonable adjustments made.
- e. Anxiety. I am satisfied that the struggle with anxiety over long periods is a symptom of the Condition as it affects the claimant. Anxiety increases the adverse impacts on the day to day activities noted at a. to d. above.

24. The claimant had a disability throughout the Relevant Time.

Employment Judge Leach
11 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 May 2022

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