



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Bond

Respondent: Mrs Lesley Burgoyne

HELD AT: Manchester (remotely, by CVP) **ON:** 21 March 2022

BEFORE: Employment Judge Ainscough

REPRESENTATION:

Claimant: In person

Respondent: Mr Sutton (Litigation Consultant)

JUDGMENT having been sent to the parties on 20 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a preliminary hearing to decide if the claimant's daughter, was a disabled person for the purposes of section 6 of the Equality Act 2010.
2. The claimant has brought claims of disability discrimination, breach of contract and unlawful deduction from wages.
3. I considered a bundle of 148 pages. I did not consider a witness statement prepared by the respondent. It was agreed the respondent's representative would deal with the issues the respondent had about the medical evidence submitted by the claimant in cross examination of the claimant and subsequently in submissions.

Relevant Legal Principles

4. Section 6 of the Equality Act 2010 provides:

“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"

5. I also considered Schedule 1 of the Equality Act 2010 – Determination of Disability.

6. The Code of Practice on Employment 2011 states at paragraph 6:

"the term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities".

7. Paragraph 7 states:

"there is no need for a person to establish a medically diagnosed cause for the impairment. What it is important to consider is the effect of the impairment, not the cause."

8. The Statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011 states at paragraph A5 that autistic spectrum disorders and dyslexia can be impairments from which a disability can arise.

9. Paragraph A4 states:

"whether a person is disabled for the purposes of the Act is generally determined by references to the effect that an impairment has on that person's ability to carry out normal day to day activities."

10. Paragraph E2 states that children aged six and over are subject to the normal requirements of the definition, save for the child's age is a factor when considering the normal level of achievement.

11. Paragraph B1 states that:

"substantial effect is one that is more than a minor or trivial effect."

Relevant Findings of Fact

12. The claimant's daughter is 11 years old and has dyslexia, autism and anxiety.

13. The relevant period was from 21st February 2020 when the claimant started her employment with the respondent until the 8 April 2020 when the claimant's employment ended.

14. At the time the claimant worked for the respondent, the claimant's daughter was 8 years old.

15. On 24th November 2021 the claimant's daughter was diagnosed with Dyslexia.

16. On 23rd December 2021 the claimant's daughter was discharged from the Child and Adolescent Mental Health Service because the claimant's daughter was on the Autism Spectrum Condition pathway.

17. In February 2022 the claimant's daughter was diagnosed with Autism Spectrum Disorder. It was the view of the Speech and Language Therapist that the claimant's daughter had difficulties from a young age.

Submissions

Respondent's submissions

18. The respondent submitted that the medical evidence provided by the claimant was not conclusive. The respondent questioned the qualification of the Therapist who diagnosed Autism.

19. The respondent asserted that the claimant did not tell the respondent that her daughter was a disabled person during the interview because at that point in time there had been no diagnosis of any conditions.

20. The respondent contended that the claimant's daughter has been diagnosed with Autism and Dyslexia two years after the claimant's employment ended and submitted that the claimant's daughter was not disabled during the relevant period.

21. The respondent submitted that the claimant's evidence about the effect of the conditions on the normal day to day activities of the claimant's daughter were in fact descriptions of normal childhood behaviour and not that caused by a disability.

Claimant's submissions

22. The claimant submitted that her daughter has been disabled since she was born.

23. The claimant contended that it took over three years to obtain the Autism diagnosis because her daughter had to attend a number of other assessments, including the Child and Adolescent Mental Health Service, before she was referred to an Autism specialist.

Discussion and Conclusions

Physical or mental impairment

24. A mental impairment can include a wide range of impairments, and in particular learning disabilities. The claimant relied upon her daughter's conditions of dyslexia, autism and anxiety as the associated disability for the purposes of the claim.

25. The medical evidence provided by the claimant was obtained in the last six months. The claimant gave evidence that it has been difficult to obtain the assessment and to achieve a diagnosis.

26. The author of the Child and Adolescent Mental Health Services report queried whether the claimant's daughter suffered from a mental health condition. However, the report also made reference to the claimant's daughter being on the Autism Spectrum Condition Pathway, which assesses, diagnoses and supports children with social communication difficulties. The purpose of the report was to inform the GP

that whilst the claimant's daughter was on the Pathway, the claimant's daughter would not benefit from CAMHS intervention. I understood the report to be stating that an Autism diagnosis may be more likely than a mental health condition diagnosis.

27. I concluded that, at the relevant time, the claimant's daughter had a mental impairment.

Substantial and adverse effect on normal day to day activities

28. The phrase "substantial and adverse effect" means "more than minor or trivial". It goes beyond more than differences in ability. The claimant gave evidence that there was a stark contrast between the behaviour of the claimant's daughter and her sibling that amounted to more than a difference in ability. The suggestion that the claimant's daughter was merely a badly behaved child was misconceived.

29. I have considered the effects of the impairments on the claimant's daughter's normal day to day activities at the time the claimant was employed by the respondent. The lack of diagnosis at the time the claimant was employed by the respondent does not impede me from doing this.

30. The claimant gave evidence about the day-to-day functioning of her daughter at the relevant time and about the impact that the impairments had on the following activities:

- Sleeping – the claimant's daughter was anxious at night and didn't sleep which impacted on her ability to get up for school;
- Social Interaction – the claimant's daughter was violent towards her sister and broke things in the house; the claimant's daughter was often late for school and when the claimant took her daughter out of the car she was often crying and swearing at other children at school. The claimant's daughter didn't want to leave the house. The claimant's daughter struggled to make friends and preferred the adult company of the teachers.
- Personal care – the claimant's daughter was able to wash herself and brush her hair but wouldn't shower as she didn't like the feel of the water on her skin. The claimant's daughter used the bath but couldn't be left unattended as she would often launch herself over the bath. The claimant's daughter wouldn't brush her teeth because the toothpaste was spicy. The claimant's daughter didn't like to wear clothes and was often naked after she returned home from school.
- Ability to hold a conversation – the claimant described her daughter as having her own language and the claimant often did not know what her daughter was saying.
- The claimant's daughter was on the Special Educational Needs register at school and was approximately 3 years behind her peers.

31. A therapist from Axia prepared the report in which the claimant's daughter was diagnosed with Autism. Axia is a specialist company specifically instructed to

assess for Autism. The Therapist who made the diagnosis was adequately qualified to make that diagnosis.

32. In the report the Therapist believed that the claimant's daughter's difficulties with similar day-to-day activities had existed since birth. The Therapist listed the difficulties as: social communication, social interaction, flexibility of thought and unusual sensory experience.

33. I concluded that, at the relevant time, the impairment had a substantial and adverse effect on the normal day to day activities of the claimant's daughter.

Long Term

34. The Axia Therapist believes the claimant's daughter has had difficulties from an early age.

35. The claimant conceded that she did not mention her daughter's disability in her application for employment with the respondent. This does not correlate that the claimant's daughter was not disabled at the time that the claimant worked for the respondent.

36. The claimant gave evidence that she did not want to refer to the difficulties she had caring for her daughter because she did not want the respondent to be deterred from her employment.

37. I concluded that, at the relevant time, the substantial and adverse effects of impairments on the normal day to day activities of the claimant's daughter had existed since birth and were therefore long term.

Conclusion

38. The claimant's daughter was, at the relevant time, a disabled person for the purposes of section 6 of the Equality Act 2010.

Employment Judge Ainscough

Date: 1 July 2022

REASONS SENT TO THE PARTIES ON

5 July 2022

FOR THE TRIBUNAL OFFICE

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