

EMPLOYMENT TRIBUNALS – AND HOW TO NEGOTIATE THEM

Melanie Jameson (2016 for Patoss newsletter)

Those of us who provide support in the workplace are well aware of the problems faced by employees with dyslexia and related SpLDs. We see them cope by developing and deploying an array of coping strategies which require extra resources of energy.

In my experience there are two situations in particular which can cause employees with SpLDs to 'come unstuck': changes in working practices (such as new administrative systems or the wholesale changes that accompany a company buyout) and personnel changes – especially the line manager. When this happens the problem areas that accompany SpLDs can become visible, causing stress and difficulty. Some employees believed that disclosing an SpLD would jeopardise their getting the job in the first place so have never informed their employers and not been able to explore possible entitlements as someone with an SpLD.

Workplace difficulties

Organisation, time-management, absorbing large amounts of information at speed and report writing emerge as the principal problem areas for staff with SpLDs. They may be disadvantaged by particular aspects of the job for which they have no compensatory strategy. Some people are working in demanding professional roles, compensating well for their personal areas of difficulty, but lack the flexibility to adapt quickly to change and new requirements; this can lead to the threat of disciplinary measures and stress-related illness. Others face bullying or harassment in the workplace and are criticised for every fault, however minor. A combination of workplace difficulties can escalate into warnings leading to formal processes.

On the other hand, employees with disabilities may decide that their treatment in constitutes harassment or constitutes disability discrimination. An issue that frequently arises is the employer's failure to make 'reasonable adjustments' in line with the Equality Act (2010). These might comprise a quiet place to work, accessible documentation and/or assistive technology.

Grievances and disciplinary procedures

Employment disputes break down into two areas:

- grievances (when the employee makes a complaint)
- disciplinary procedures (when the employer is unhappy about some aspect of your work)

In the latter case, after informal and formal warnings, the formal process usually entails a letter, laying out the complaint against the employee, and then a meeting, to which s/he is allowed to bring a companion. Sometimes both processes are underway simultaneously.

Of course, having an SpLD is not a defence if the requirements of the job have not been fulfilled. But if the employer has failed to make reasonable adjustments, despite being informed of disability-related difficulties, and/or ignored recommendations from Access to Work, then the employee might have a case.

I always recommend that attempts should be made to sort out concerns at the earliest possible stage, before the situation escalates into formal proceedings. Furthermore, an Employment Tribunal will always look at how both sides have already tried to resolve the dispute before proceeding to a claim.

The 'Issues & Strategies' approach

Ever since I first encountered SpLD-related workplace difficulties (whilst running an Adult Dyslexic Support group in the 90s) I have promoted an approach which presents employees with SpLDs as willing and able to demonstrate that their difficulties at work can be resolved. This process requires the support of a tutor or friend as note taker as the employee goes through the problem areas. The next stage is a discussion on how these difficulties could be overcome. Rather than listing 'Problems' and 'Solutions' which suggests that it is all the fault of the employee for causing these problems, the approach is one of **Issues & Strategies**. A real-life example, available for adaptation to individual circumstances can be downloaded from my website: www.dyslexia-malvern.co.uk/resources (Workplace section).

This format can be used to send as a letter; if there is no result it may have to be backed up by an official letter from an SpLD charity or specialist (as in the example). I have also used this template to help an individual prepare for a meeting with management. It was circulated in advance of the meeting and used to direct the meeting towards a positive outcome. How can a manager find fault with someone who is clearly acknowledging difficulties that have arisen and proposing ways to overcome them?

When attending such a meeting, whether formal or informal, it is advisable for people with SpLDs to bring a trusted colleague, a helper or Trade Union Rep for support and to take notes, rather than relying on the secretarial services that report to the manager. They may also request the use of a dictaphone but should be aware that this may restrict the discussion.

Trade Union support

A colleague of mine who works in the area of Employment and Dyslexia always advises people with SpLDs to join a Trade Union (TU) just in case they might need its organisational support at some stage. It is no good leaving membership until difficulties arise at work. A good TU representative can also assist in areas such as helping with disclosure of a Specific Learning Difficulty, by acting as a mentor or an intermediary.

The role of Acas

If this 'in-house approach' does not work out, the next option is to consider going to Acas, which provides an impartial mediation service in workplace disputes. An important change, since May 2014, is that it is now a legal requirement for both parties to engage with Acas to try and reach a successful resolution before it is possible to proceed to an Employment Tribunal.

This process, referred to as *Early Conciliation*, is fully explained on the Acas website www.acas.org.uk. It involves a number of stages described below, with the

overarching aim of reaching a fair settlement rather than proceeding to an Employment Tribunal.

STAGE 1 - Request submitted for Early Conciliation on the notification form. Ensure that all details are correct – a careless mistake could lead to the claim being thrown out by a tribunal.

STAGE 2 – Acknowledgement of the form, followed by an explanatory phone call

STAGE 3 – Phone call from the Acas Conciliator to explain the next steps; if the employee agrees, contact is made with the employer.

[STAGE 4] Both parties are then contacted.

STAGE 5 – If the claimant decides not to proceed, an Early Conciliation certificate is issued and the case is closed

STAGE 6 – the Conciliator talks through issues with both sides either over the phone or through a meeting, chaired by the Conciliator (who remains impartial throughout). This is the time to look carefully at all options and proposals.

Back to STAGE 5 – if the matter is not resolved, the Early Conciliation process is brought to a close and the certificate is issued. The unique reference number this contains must be quoted when submitting a claim to the Employment Tribunal.

STAGE 7 – successful resolution: what has been agreed is recorded on a COT3 form, signed by both parties. No further tribunal claim relating to the disputed matter will now be possible.

All these stages are subject to time limits (known as limitations). Great care must be taken over complying with these deadlines, checking the official information on Employment Tribunals for the latest information. Where someone fails to comply with the time limits they risk having their claim denied. The issue of deadlines and extensions is very relevant for the majority of people with SpLDs who describe themselves as having 'poor control over time'. Entering the Early Conciliation process pauses the time limit on presenting a claim to the Employment Tribunal.

Tribunal fees

Tribunal fees are no longer payable - a very welcome legal decision since bringing a disability discrimination claim had fallen into the higher of the two fee bands and the fee remission process was complicated.

There is no doubt that the introduction of fees, together with the fall in legal aid, had been largely responsible for the drop in the number of cases that came before Employment Tribunals. However it is likely that the mandatory involvement of the conciliation service Acas has also reduced the number of referrals to Employment Tribunals.

Making a claim to an Employment Tribunal

Tribunal Hearings are by their nature stressful and demand painstaking and time-consuming preparation. Potential claimants are therefore advised to seek specialist advice about the tribunal process in advance, and the sort of evidence required in support of their claim. The websites at the end of this article and the Acas Early Conciliation process provide useful information.

In order to lodge a claim, form ET1 must be completed, including the unique reference number from the Acas certificate. Particular care should be taken with the question *Do you have a disability?* It is not enough to simply respond with “Yes” as I found out during a discussion with the President of the Employment Tribunal 18 months ago. I had sought a meeting with him because of the number of mismanaged Employment Tribunal cases that came my way, often leading to the next stage - the Employment Appeal Tribunal. These cases had often foundered due to the failure to make reasonable adjustments for claimants disabled by SpLDs during the tribunal process; this lack of provisions was even more damaging when they lacked legal representation. In one case the hearing had dragged on for several days until the dyslexic claimant could take no more. He walked away leaving the employer’s barristers to continue unchallenged. Needless to say the outcome was deeply unsatisfactory and included a heavy fine.

Back to the disability question on form ET1. The President outlined the four crucial pieces of information that would assist Tribunal judges rather than simply affirming that there is a disability

- 1) Name the condition *“I am dyslexic, dyspraxic etc.”*
- 2) provide date/s of assessment/s
- 3) Outline briefly how you are affected generally – rather than at work
- 4) State your needs as regards coping with the tribunal hearing and how they might be accommodated. Be specific, for example *“because of my condition, I may struggle to answer questions and to locate information referred to. I therefore wish to bring my sister to help me”*. Typical requests also include breaks to restore concentration, or the opportunity to study any new documentation quietly and without pressure.

Ensuring reasonable adjustments

The tribunal judge will go through the information provided on the ET1 form and EITHER gives a direction (i.e. an order in advance) on reasonable adjustments OR refers the matter for the tribunal to determine. The latter does not work well for the majority of people with SpLDs, who become understandably anxious without the reassurance that their needs will be met before they attend their hearing.

Claimants who are represented, should ensure that their solicitor has a clear statement of their needs and is prepared to handle this matter, getting back to their client with confirmation of what provisions will be in place. Those who are not legally represented, are strongly advised to write to their Employment Tribunal (by letter or email) or to phone them to check that their requests have been received. This is to ensure that they have not been accidentally overlooked - which can happen. Recommended reasonable adjustments documentation is discussed in the next section.

Sometimes the issues will be sorted out in a case management or directions hearing prior to the tribunal itself. This is the ideal solution and is recommended in judicial guidance laid out in the Equal Treatment Bench Book www.judiciary.gov.uk/publications/equal-treatment-bench-book/ which has a section on Specific Learning Difficulties. Less ideal is a case management session over the

phone; problems can then arise as people with SpLDs struggle to clarify their needs and make a note of what has been decided.

Documentation

A workplace assessment is helpful, in which problem areas and recommended reasonable adjustments are clearly laid out. Former educational reports (such as one for the purposes of Disabled Students Allowances) are useful in determining the nature and extent of SpLD difficulties but an educational environment is very different from the workplace. I have devised a template for an SpLD specialist to assist people in coping with the tribunal hearing. Headed 'Reasonable Adjustments / Accommodations', the document is arranged in three parts: a brief summary of previous assessments; a list of difficulties relating to the individual under the heading *Impact of Specific Learning Difficulties* and recommendations for accommodating these areas. The subheading 'Facilitating reliable evidence', a phrase which (resonates with judges!) might refer to rest breaks and the support of a helper. The role of stress on the tribunal participant is always worth highlighting.

<http://www.dyslexia-malvern.co.uk/goodpractice>

Attending an Employment Tribunal

Finally, we get to the Employment Tribunal itself. Whereas the court process is *adversarial* with a very heavy reliance on efficient language processing skills, the tribunal process (in theory at least) is designed to be *inquisitorial* and sort out grievances in a less confrontational way. If the employer has an impressive legal team the whole process can seem very intimidating, but the tribunal chair is trained to take this imbalance into account.

Legal aid for employment tribunals is now supplied by only two law firms; requests are submitted and considered via www.gov.uk/civil-legal-advice. Funding to bring a case may also be problematic; one way forward may be through talking out additional cover to home / contents insurance. Someone who has been through this process has advised that indemnity of at least £100,000 is required.

A tribunal claimant with an SpLD may think that their history of disability measures (such as special exam arrangements, Disabled Students Allowances, contact with the Disability Employment Adviser, Access to Work provisions, assessments - any or all of the above) establishes that their SpLD is reckoned to be a disability. They may be aware of the definition in the Equality Act 2010, namely '*A person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities*'.

Unfortunately, if the claim concerns the issue of disability (such as disability discrimination) the burden of proof will be upon the claimant to establish that they are a disabled person - unless the respondent readily concedes that this is the case. Even an expert report does not outweigh the role of the judge in determining disability.

A 'Reconsideration' and the Employment Appeal Tribunal

It may be possible for a Reconsideration – like a re-run – of the tribunal hearing if new information is supplied. But an appeal against a judicial decision can proceed in two situations only:

- (1) if it arises out of a new point of law OR
- (2) if there is a charge of *bias or misrepresentation*.

Information shared with me about appeals by people with SpLDs suggests that they usually appeal because they have experienced *bias or misrepresentation*. Case studies I have compiled include: situations where reasonable adjustments were not even considered; cases where the Specific Learning Difficulty was discounted (despite assessments that showed otherwise); and hearings lasting several days against well-represented employers whose legal team tried to discredit the claimant.

Taking the opportunity to sit in on a morning of Appeals, I was able to contrast the conduct of a case handled by the lawyer on duty and one in which RF, a severely dyslexic claimant (whom I had been supporting), struggled to present himself. In the first situation the claimant, a whistle-blower and clearly suffering from stress, was passive in the proceedings while the lawyers sorted out between them which areas were worth pursuing and which could be discarded as irrelevant. This was an efficient process where the two men communicated 'in legalese'. The 'dyslexic case' could not have been more different as RF tried to make his points.

Making a Complaint

The various routes to lodging a complaint depend on the agency involved. If the complaint is about judicial conduct in an Employment Tribunal, you are directed towards either the Regional Employment Tribunal Judge or the President of the Employment Tribunal or the Judicial Complaints Investigation Office - the complaint will be forwarded to the most appropriate channel.

OFFICIAL GUIDANCE www.justice.gov.uk/tribunals/employment.
www.justice.gov.uk/about/hmcts/tribunals
www.justice.gov.uk/tribunals/employment-appeals

Acas www.acas.org.uk Tel 0300 123 11 22

Disability Rights UK <http://disabilityrightsuk.org/>

Business Disability Forum www.businessdisabilityforum.org.uk
Tel 020 7403 3020 Email enquiries@businessdisabilityforum.org.uk

Citizens Advice Bureau (search for Employment Tribunal) www.adviceguide.org.uk
Some CABs have a trained Employment Adviser

DIAL UK (the Disability Information and Advice organisation) now works with Scope
www.scope.org.uk or the link www.scope.org.uk/support/disabled-people/local-advice/
Free advice Tel 0808 800 3333

Trade Union Congress www.tuc.org.uk