

Dyslexia and the importance of assessing the effect of disability on giving evidence

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[*Habib v Dave Whelan Sports Ltd t/a DW Fitness First \[2023\] EAT 113*](#)

The Facts

1. The Appellant was Ms Habib. She brought a discrimination case against the Respondent, the nature of which was not really relevant to the decision of the EAT. Credibility was a key issue however. The Tribunal found that the way the Appellant gave evidence led them to believe that she was not always being truthful and that her recollection was sometimes unreliable. Her claims were dismissed.
2. The Appellant was dyslexic and argued in her appeal that the Tribunal failed to take her condition into account when assessing her credibility. She had expressly said at Tribunal that the dyslexia had affected the way she gave evidence, but the Tribunal do not appear to have accepted this.
3. Although the Tribunal had made adjustments for the Appellant's dyslexia during the hearing itself (eg allowing her to have assistance), it did not make reference to the Presidential Guidance on vulnerable witnesses or the Equal Treatment Bench Book ('ETBB') when making its decision.

The ETBB and the Presidential Guidance on vulnerable witnesses

4. The ETBB is a lengthy (547 page) document, available for download at <https://www.judiciary.uk/about-the-judiciary/diversity/equal-treatment-bench-book/>. It is designed for Judges and contains very helpful guidance on a great deal of issues, including how to best deal with disabilities, cultural differences and other issues of equality and diversity.
5. It contains sections on how best to manage specific conditions at Court, one of which is dyslexia. It goes on to explain that dyslexia, amongst other specific learning difficulties,

may include difficulty in remembering what has just been said and coping with compound questions. It notes that these problems may lead to concerns of untruthfulness.

6. The Presidential Guidance on vulnerable witnesses (<https://www.judiciary.uk/wp-content/uploads/2013/08/ET-Presidential-Guidance-on-Vulnerable-Parties-and-Witnesses-22-April-2020.pdf>) is a much shorter document, providing general advice on dealing with vulnerable witnesses in the Employment Tribunal, and encouraging all involved to be on the lookout for possible vulnerability so that it can be dealt with justly.

The EAT Decision

7. In short, the EAT found that if a witness has a disability such as dyslexia that is causing obvious difficulty at a hearing, then it is incumbent upon the Tribunal to examine the circumstances further. This may be by means of expert medical evidence, or at the very least, referring to and consulting the Equal Treatment Bench Book ('ETBB').
8. The Court held that a Tribunal must make reasonable adjustments to allow effective participation in the hearing. That means identifying the specific barriers which a condition might cause. In turn, that requires some sort of evidence or analysis.
9. The EAT's conclusion was that the Tribunal had failed to set out anything amounting to an analysis relating to the specific learning difficulty (dyslexia) of the witness. This was of particular concern as the Tribunal had relied on the way in which the Appellant gave evidence to doubt her credibility and the matters it criticised were matters which might arise from dyslexia. This made the hearing unfair and the whole claim would have to be reheard.
10. It also noted that '*there is always a danger in relying, simply, on demeanour as a guide to truthfulness or not of evidence*'.
11. The EAT advised that if there is a party without representation or (as was the case here) with intermittent representation, then case management orders should make clear that evidence should be produced if a condition will require adjustments at the hearing. This might not be expert evidence and could be a witness statement or pre-existing medical records.

What does this mean for future hearings?

12. It is important to note that the EAT specifically said that a Tribunal could be entitled to come to the conclusions it did on credibility, but only if it provided more of an analysis of how dyslexia may have affected the position. It certainly was not suggesting that Tribunals can never make findings of credibility against individuals with dyslexia, just that more care and analysis needs to be undertaken.
13. Anecdotal evidence is that the ETBB and the Presidential Guidance on vulnerable witnesses are not regularly referred to in all employment claims involving disabled witnesses. This case is a timely reminder that not only is there guidance available but that it is important to make reference to it.
14. A disability can potentially lead to a whole spectrum of observations that could be otherwise associated with a lack of credibility – hesitation, not answering a question, failing to remember, getting mixed up. Other matters such as cultural differences could also lead to observations detrimental to the witness. A Tribunal that fails to consider whether these matters could be due to something other than untruthfulness is likely to be vulnerable to appeal.
15. Looking at the guidance is not just important for those representing vulnerable or disabled claimants. This case makes clear that it is also in the interests of respondents to draw the Tribunal's attention to the guidance, so that a proper analysis can be made, thereby potentially avoiding an appeal.
16. Submissions on credibility can be difficult as it may be difficult to pin down exactly why a witness comes across as untruthful. Of course, everyone should have in mind the possibility that a disability or a cultural difference may lead to a certain impression. It is important to exclude those possibilities, and avoid generalised submissions on 'demeanour', focussing on the detail of what was actually said.
17. It is also in the interest of all parties to identify any disability related issues that might affect the giving of evidence at an early stage and ask the Tribunal to give the opportunity to that witness to provide evidence. This step, in addition to making reference to the ETBB in submissions, should reduce the chance of appeal and rehearing.
18. The ETBB is in any event an extremely useful document for how to deal sensitively and appropriately with numerous groups of people, for example, litigants-in-person, trans people, the socially excluded, those subject to cultural stereotypes and those with different

types of disability. It should be a first port of call if there is any concern or question about witnesses being disadvantaged due to any protected characteristic.

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4 September 2023



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