



EMPLOYMENT TRIBUNALS

Claimant: Mr E Patel
Respondent: The Gym Ltd
Heard at: Leicester
On: 25 January 2018
Before: Employment Judge Ahmed (sitting alone)

Representation
Claimant: Mr Stefan Liberadzki of Counsel
Respondent: Ms Heather Platt of Counsel

JUDGMENT

1. The judgment of the tribunal is that the Claimant was at all material times 'a disabled person' within the meaning of Section 6 and Schedule 1 of the Equality Act 2010.
2. The application for a deposit order is withdrawn.

REASONS

1. This preliminary hearing is the second substantive preliminary hearing in this case following that held on 19 October 2017 which dealt with the Claimant's employment status.
2. This hearing was convened to determine the issue of whether the Claimant was at all material times a disabled person within the meaning of section 6 and Schedule 1 of the Equality Act 2010 ("EA 2010"). The application for a deposit order which was also to be the subject of this hearing was withdrawn.
3. In coming to my decision on the disability issue, I have taken into consideration the Claimant's impact statement, the documents in the agreed bundle and the oral submissions made by Counsel on both sides, to whom I am grateful. I have also taken into consideration the so-called "Guidance" (that is the "*Guidance on matters to be taken into account in determining questions relating to the definition of disability*") issued by the Secretary of State under the EA 2010.

4. Mr Patel sustained a head injury on 31 March 2016 at work when a large metal vent fell on his head. He has since brought a claim for personal injury. Liability has been admitted in that action but quantum has not yet been agreed. A medical report obtained for the purposes of those proceedings from Dr E Mikfekr, a Consultant Neurologist at the Spire Hospital Leicester, is included in the bundle for this hearing. Dr Mikfekr undertook an examination of the Claimant on 25 May 2017. His report of 8 June 2017 is the only report before me for the purposes of this hearing. Dr Mikfekr was not called as a witness by either party. The following passages are extracted from his report:

“The Claimant had a brain scan on 19 May 2016 which showed no abnormalities or bleeding or fractures of the skull”.

.....

On examination today the Claimant conducted a normal conversation with me throughout and I did not feel he had any cognitive impairment whatsoever. However, he complained bitterly of memory problems and lack of concentration. Neurological examination did not reveal any focal neurology. He was slightly unsteady on his feet when he undertook tandem-walk but I did not feel that he had ataxia.

.....

In my opinion, on the balance of probabilities, this gentleman sustained a mild to moderate head injury on 31 March 2016 as a result of the index accident. The symptoms which followed after the head injury were all in keeping with mild concussion.

.....

Post-concussion symptoms usually subside within 3 – 6 months. However in some cases symptoms can continue intermittently for longer.”

5. In his impact statement and in his oral evidence, Mr Patel confirms that he still suffers from headaches, nausea and memory loss though full memory is expected to return. He states that he is unable to retain new information at times, that he suffers from confusion and unable to think clearly or at times to be able to focus on matters in hand. He suffers from a feeling of disorientation, loss of balance and co-ordination along with dizziness, feeling lethargic and with little or no energy. He has at times fallen asleep in front of people mid-conversation. He suffers from anxiety which has affected his sleep. He often wakes up during the night for no apparent reason.

6. Mr Patel further states that he suffers from mood swings having highs and lows which lead him to become frustrated very quickly. He often senses a loss of composure which impacts upon his personal relationships. He states that he can become emotional and anxious. He is frustrated by a lack of energy given his former role as a Personal Trainer. There are days when finds himself bedridden through sheer exhaustion and fatigue and the insomnia which has been prevalent since the accident.

7. At the time of the accident, Mr Patel was undertaking a Diploma course at Loughborough University. This was a pre-cursor to him beginning a degree

course which he had planned to start in the Autumn of 2016. However, Mr Patel found he was unable to fully concentrate and did not feel that he had the level of concentration and memory retention needed to complete the course. He has decided not to pursue the degree course for the time being.

8. Mr Patel was unable to undertake his duties at the Respondent on and off after the accident and following the termination of his employment. He was offered work at another gym but felt unable to pursue it immediately and had to postpone it until he felt able to do so.

THE LAW

9. Section 6 of EA 2010, so far as is relevant, states:

- “(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.”

10. Paragraph 2 of Schedule 1 to the EA 2010, so far as is relevant, deals with the question of what is ‘long-term’ and states:

- “The effect of an impairment is long-term if—
- (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) 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 that effect is likely to recur.”

11. Paragraph B1 of the ‘Guidance’ deals with what is meant by ‘substantial adverse effect’ and states:

“The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. ...”

12. Paragraph B4 of the Guidance deals with the cumulative effects of an impairment and states:

“An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.”

13. In the Appendix to the Guidance there is a non-exhaustive list of factors which it would be reasonable to take into account in determining substantial adverse effect. These include:

- persistent general low motivation or loss of interest in everyday activities;

- frequent confused behavior, intrusive thoughts, feelings of being controlled, or delusions;
- persistent distractibility or difficult concentrating.

THE ISSUES

14. The issues in relation to the question of disability are as follows:

16.1 whether the Claimant's impairment (concussion) was such that it had a substantial adverse effect on his ability to carry out normal day to day activities;

16.2 whether the substantial adverse effect should be defined as 'long-term'.

CONCLUSIONS

15. Miss Platt rightly concedes that the Claimant has suffered from a physical and/or mental impairment. It is unnecessary for me to categorise it as one or the other although if it was to do so I would find that what Mr Patel suffers from is a mental impairment.

Substantial adverse effect

16. "Substantial" means "more than minor or trivial".

17. The Guidance makes it clear that adverse effects can include taking longer to carry out activities or having to do them in a different way as well as being unable to do them altogether. Cumulative effects on multiple activities can amount to an overall substantial adverse effect, even if they do not when taken in isolation.

18. It is clear that the Claimant's condition has included amnesia, confusion, feeling mentally and physically slow, forgetting short-term what he has done and struggling to complete daily tasks.

19. On 8 June 2016, almost 3 months after the accident, the Claimant's GP recorded that the Claimant's symptoms were "ongoing as previous". The Claimant's GP felt it appropriate to refer the Claimant to a Neurologist. The referral letter highlights amnesia, disorientation, poor concentration and an inability to recognise faces.

20. I take into account the fact that the Claimant was only working very limited hours with the Respondent yet in the period after the accident he was unable work even those limited hours. He was deemed unfit for work for 4 weeks from 8 June 2016. For the remainder of his time with the Respondent he was only fit with significant adjustments to his tasks and hours.

21. I do not accept the suggestion that the Claimant is being untruthful or has exaggerated his symptoms. I find his evidence to be credible. When he says that he falls asleep in front of people mid-conversation, I take that to mean that he is not entirely engaged in the conversation and finds himself drifting off. He has

noticed that happening only after the accident. I am satisfied that the Claimant suffered from amnesia something he mentioned to his GP at a time when he would not know of the importance of doing so.

22. In coming to my decision, I take into account the following factors:

22.1 I consider it unlikely that the Claimant would have continued to consult his GP if his condition was minor or trivial, had substantially improved or if he had fully recovered.

22.2 I accept that with head injuries, it is not inconceivable that symptoms which did not manifest themselves immediately after the accident might do so later. That explains why some matters which the Claimant complained of several weeks or months after the accident were not those which he had mentioned earlier.

22.3 The Claimant was unable to complete his relatively short working week with the Respondent. He had no attendance problems before the accident. It is not suggested that the Claimant is someone who would be off work lightly and there is no evidence of a history of sporadic or poor attendance. I am satisfied that the effects of the impairment were such that the Claimant was unable to avoid missing work. This was his only source of income and had it not been for the difficulties he was experiencing, I am confident that the Claimant would have gone to work.

22.4 The Claimant abandoned his proposed degree course at university. I am sure this is a decision he would not have made lightly given the impact on his long-term career prospects. I accept that the Claimant felt his level of concentration was such that he reasonably felt he would not succeed in his studies at that time and was therefore not worth the significant financial investment. Mr Patel only passed the latter stage of his Diploma with some difficulty because of effects of the accident. I accept his evidence that he was permitted to re-do an assignment because of the difficulties he was experiencing. There is nothing to suggest that the Claimant was having any difficulties with his studies prior to the accident.

23. In conclusion, I am satisfied that the Claimant has suffered from some memory loss, an inability to retain information and loss of concentration all of which have affected his normal day to day activities such as sleep, interaction with others and communication and that the adverse effects were more than minor or trivial.

Long-term

24. The question of what constitutes long-term is set out in Schedule 1 of EA 2010. The difficulty in this case is that at the material time, that is the date of the date of the alleged discriminatory act (20 September 2016) only 6 months had elapsed. It is therefore necessary for me to determine the question of long-term by reference to whether the effect of the impairment was likely to last for at least 12 months as at 20 September 2016.

25. In **Boyle v SCA Packaging Ltd [2009] ICR 1056**, the House of Lords held

that “likely” in this context means “could well happen”. The question therefore is whether it could well happen that the impairment would last for 12 months as at the material time.

26. In my view, the effect of the impairment was indeed ‘long-term’ as defined for the following reasons:

- 26.1 By September 2016, six months had passed since the start of the impairment and the adverse effects were not only ongoing but showed no signs of coming to an end. Miss Platt accepts that the condition would have continued for a few months after the accident but she submits that the condition would have ceased to have any material effect by the Summer of 2016.
- 26.2 The Claimant’s condition had shown no real signs of improvement and was such that the Claimant’s GP had referred him to a Neurologist on 8 July 2016. The Claimant was still awaiting an appointment as at 20 September;
- 26.3 In early August 2016, the Claimant told his GP that he was struggling with a return to work and beginning to get his old symptoms back;
- 26.4 On 17 August 2016, the Claimant still complained of insomnia leading to tiredness and continuing concussion symptoms;
- 26.5 The position in September 2016 was that the Claimant had been referred to a specialist (a Neurologist), he had abandoned his planned degree course, delayed taking on a new job and was signed off work again. It is unlikely his GP would have referred him if the condition was nearing the end.

27. In those circumstances, I am satisfied that as at 20 September 2016 the impairment was such that it was likely to continue for 12 months.

28. In the circumstances the decision is that the Claimant was a disabled person at the material times and is entitled to pursue his complaints of disability discrimination.

29. Directions and Orders as to full merits hearing are given separately.

Employment Judge

Date: 6 April 2018

JUDGMENT SENT TO THE PARTIES ON

07 April 2018

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FOR THE TRIBUNAL OFFICE

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