



EMPLOYMENT TRIBUNALS

Claimant: Mr P Harris

Respondent: Bury College

Heard at: Manchester

On: 18 April 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr K Harris (Claimant's Father)

Respondent: Ms A Del Priore (Counsel)

JUDGMENT

At the material time the claimant was not a disabled person by reason of a mental impairment in the form of problems with his short-term memory, and therefore all his complaints of disability discrimination are dismissed.

REASONS

Introduction

1. By a claim form presented on 4 June 2018 the claimant brought complaints of unfair dismissal and disability discrimination arising out of his employment with the respondent as a Catering Technician between August 2017 and April 2018, when he was dismissed for having failed satisfactorily to complete his probationary period. His claim form made clear that the problems he experienced at work which he believed led to dismissal resulted from difficulties with his short-term memory following a period of illness due to sepsis. That infection was contracted following an operation for the purposes of a long-term condition of hydrocephalus, for which purposes the claimant has to live with a shunt inserted in his brain which periodically needs to be replaced or repaired.

2. The response form of 19 July 2018 accepted that the claimant was a disabled person by reason of hydrocephalus, but it did not accept that he was disabled by reason of sepsis or short-term memory problems resulting from it. It pointed out that

the claimant had had only ten weeks off work and that any substantial adverse effect had been short-term. It also denied any disability discrimination.

3. The case came before me at a preliminary hearing on 22 August 2018. I dismissed the unfair dismissal complaint because the claimant had not been employed for two years. The disability discrimination complaints were clarified. They were recorded in Annex B to my Case Management Order. There were three complaints of a breach of the duty to make reasonable adjustments in relation to the way in which the performance management process was conducted during the probationary period, and one complaint that the decision to dismiss the claimant amounted to discrimination arising from disability.

4. All these complaints depended upon the claimant having been a disabled person at the material time, which was between 27 November 2017 when he returned to work and 22 March 2018 when the decision to dismiss him was taken. As a consequence, with the agreement of the parties I ordered that the question of whether he was a disabled person be determined at a preliminary hearing, since if it went against the claimant that would be the end of the case.

5. The matter came before Employment Judge Ross to determine that issue on 22 January 2019. It could not proceed that day because the claimant was not present due to illness. It was adjourned to today.

6. It was also ordered that the preliminary hearing should determine whether the respondent knew or ought reasonably to have known that the claimant was a disabled person, but we agreed that I would determine the disability issue first of all. As it turned out it was not necessary for me to hear the evidence from the respondent's witness which went only to knowledge.

7. The evidence before me consisted of a bundle of documents to which I will refer by page number in the bundle completed for the hearing in January 2019, and a witness statement from the claimant together with his oral evidence on oath.

Relevant Legal Framework

8. This claim was brought under the Equality Act 2010. Section 6 defines a disability as follows:

“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.”**

The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

9. The word “substantial” is defined in section 212(1) as meaning “more than minor or trivial”.

10. There are some additional provisions about the meaning of disability in Schedule 1 to the Act. Paragraph 2 provides that the effect of an impairment is long-

term if it has lasted for at least 12 months or is likely to last for at least 12 months, and that

“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. Under paragraph 5 of Schedule 1,

“an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.”

12. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). The current version dates from 2011. I took account of paragraphs C1 – C11.

Relevant Findings of Fact

13. This section of the Reasons summarises the facts relevant to my decision. Any disputes of fact which were crucial to the decision will be addressed in the discussion and conclusions section.

Background

14. The claimant was born in 1978. As a baby he contracted meningitis which left him with hydrocephalus, which requires a ventricular shunt in his brain. The shunt has to be replaced every few years. The NHS website recognises that hydrocephalus can affect memory.

15. In July 2014 the Consultant Clinical Neuropsychologist, Dr Berry, prepared a report which confirmed that the claimant had been referred in the previous year in relation to memory difficulties. These had arisen following a shunt revision in March 2012. It described the claimant having become aware after that shunt procedure of memory difficulties in forgetting planned arrangements and recent events, as well as content of conversations. However, the report recorded that he worked as a chef and went on to say:

“He does not regard his memory difficulties as interfering with work, having a good knowledge of the various recipes. Difficulties arise with the ordering of food and producing the right dish for a specific table, but he has found a way around this by referring to a written note.”

Summer 2017

16. In July 2017 the claimant applied for a role with the respondent as a Catering Technician. His application form and a personal details form both indicated that he was not disabled. I accepted his evidence that he had not thought of himself as a disabled person.

17. Around that time he had to have a shunt removal procedure. In the past his experience had been that he recovered within a couple of weeks and was much

improved. He was able to start work on 23 August 2017 and carried on for three or four weeks without any issues.

September – November 2017

18. In early September, however, he became seriously ill and was admitted to hospital. It turned out he had sepsis. A further brain operation was needed. He was certified unfit for work for four weeks on 13 September (page 135) and then again until 18 November by a fit note on 6 October 2017 (page 136).

19. I accepted the claimant's evidence about the effect on him of his memory problems in the period after his treatment for sepsis. They were set out in his written statement. He required assistance in normal day-to-day activities such as shopping. When shopping he needed to have a list or someone with him to remind him what he actually wanted. He needed assistance in getting clothing ready for the next day. When preparing food and cooking he needed support as at times he would forget actions. For example, he would forget that he had toast under the grill or a teabag in the pot. He also needed reminding when he was running a bath because he would forget to turn it off.

20. On 16 November his GP confirmed (page 138) that he was able to return to work on a phased basis, and this was confirmed in a fit note of the same day (page 137).

Occupational Health Report 23 November 2017

21. An Occupational Health referral was made which resulted in a report dated 23 November 2017 (pages 146-147). The report confirmed impairment of memory recall and the use of lists to help with it. It said:

“He is likely to struggle with demands under pressure such as multi-tasking, complex problem solving, maths and money related tasks. This should improve with time and I suggest that he is assessed with this when he feels ready to do so to demonstrate to himself and you that his capabilities have improved. This should allay any concerns on either side.”

22. He was confirmed as fit for work with a phased return.

23. The claimant returned to work on 27 November 2017. Arrangements were made into the New Year for his duties to be phased.

Occupational Health Report 18 December 2017

24. There was a review by Occupational Health resulting in a report of 18 December at page 148. It said:

“Mr Harris reports that his cognitive abilities have improved since his return to work but he is still experiencing some impairment and fatigue...Mr Harris states that he is managing at work. He states that he is less reliant on lists and is not aware of any difficulties in the workplace. I suggest that Mr Harris continues with a phased return to work. He is aware of the importance of continuing with exercise and mentally challenging tasks to rebuild his physical and cognitive abilities.”

Occupational Health Report 17 January 2018

25. There was a further Occupational Health assessment in mid-January 2018. The report appeared at pages 149-151. It included the following passage:

“After the procedure he experienced some issues with motor ability and cognitive function. He tells me that his short-term memory was greatly affected after this time.

On examination today, Philip describes no further issues or complications. He is not experiencing any headaches, vision difficulties, movement issues, and his memory and concentration appear to have returned to normal.”

26. Under the heading “Fitness to Work” the report said:

“Following on from the assessment today, I can advise that Philip is fit for work without any adjustment or restriction. He describes some concentration and memory affect after his admission, but this is not evident now. He feels he can carry out all aspects of his job role, including managing money on tills.”

March - April 2018

27. Because of concerns about performance issues there was a meeting with Mr Hodgson and Mr Aspa on 8 March 2018. The notes appeared at pages 153-154. There was a discussion about various performance concerns which it is not necessary to relate here. The claimant was asked if he needed any further training or support and said not. He was asked if there was anything that would prohibit him from being able to meet targets and did not raise anything. The position was to be monitored. Subsequently his employment was terminated.

After Dismissal

28. The claimant challenged the dismissal by way of an appeal. In an email of 19 April sent on his father’s email account he said that the sepsis had caused him problems with his short-term memory but he thought the issue would improve.

29. In fact in September 2018 the claimant was referred back to the consultant. Because of the known problems the GP referred him on very quickly. A report from the Consultant Neurosurgeon, Mr Thorne, dated 28 September 2018 appeared at page 49. It recorded that the claimant was really struggling with his short-term memory and was sending himself texts so he could remember what he had been asked to do or what he had decided to do. He was referred for further assessment.

Submissions

30. At the conclusion of the evidence I had a brief oral submission from each side on the question of whether the claimant was a disabled person.

31. For the respondent Ms Del Priore submitted that any substantial adverse effects were confined to a relatively short period from September 2017 and had gone by the time of the Occupational Health report in mid-January 2018. There was no medical evidence of any substantial adverse effects after that or that such effects were likely to continue or to recur. The claimant's own evidence in cross examination had been that the substantial effects he described in his witness statement arose only after the sepsis. The medical evidence from 2014 fell short of establishing a

substantial adverse effect then, but in any event there was nothing in that report to indicate that such problems were likely to recur. Even though they appeared to have been connected to a shunt revision in 2012, there was no medical evidence that they were likely to recur each time a shunt revision took place. It seemed to be the sepsis in 2017 which caused the short-term significant difficulties. The definition of disability was therefore not met.

32. For the claimant Mr Harris submitted that there had been memory problems noticed by those around the claimant even if he was not aware of them himself. It was clear that there had been substantial adverse effects after the sepsis in September 2017. In reality those problems had been ongoing and there had been a struggle recently with the claimant forgetting things. He reminded me that the NHS definition recognises that memory problems may be associated with hydrocephalus. It had been clear the claimant was a disabled person by reason of hydrocephalus and these problems were a consequence of that. He submitted that the definition of disability was met.

Discussion and Conclusions

33. The issue was whether the claimant was a disabled person by reason of short-term memory problems in the period between November 2017 and March 2018. It was accepted that he was a disabled person in that period by reason of hydrocephalus but his case in these proceedings, as confirmed in Annex B to the Case Management Order from August 2018, was based on the impact on him at the work of the memory issues, not of the hydrocephalus itself.

34. The legal definition of a disabled person has three main requirements. The first is that there must be a mental impairment. It was common ground that the claimant did have a mental impairment in the form of short-term memory problems. The second is that that mental impairment must have a substantial adverse effect on day-to-day activities in the relevant period. It was accepted that a substantial adverse effect had been experienced in the relevant period. The respondent did not dispute that such an effect had arisen in September 2017.

35. That third requirement was at issue in this case: whether the substantial adverse effect was long-term. It has to be the substantial adverse effect which is long-term, not the underlying condition which causes the impairment. The burden was on the claimant to show that he met this element of the definition.

36. Under paragraph 5 of Schedule 1, the Tribunal must ignore any medical measures taken to treat or correct the impairment. As the impairment was short term memory problems, it was not appropriate for me to assess the claimant as he would have been if he had no shunt in his brain. That was not a measure taken to treat memory problems.

37. The adverse effect could have been considered long term in three different ways. I considered each in turn.

Already Lasted 12 Months?

38. The first question was whether during the relevant period (November 2017 to March 2018) the adverse effect had already lasted for 12 months or more.

39. I considered this question but found as a fact that it had not done so. I accepted the claimant's evidence of how he was affected by the memory problems after the sepsis. However, it was clear to me from the claimant's own evidence that this period represented a marked change in the effect of his memory difficulties on his day-to-day life. Prior to that he was able to pursue his career in catering with some success, and of course able to do his job with the respondent for the first few weeks without any apparent difficulties. I accepted the claimant did have some memory issues even prior to the sepsis in September 2017 but I was satisfied that they fell short of having a substantial adverse effect on his day-to-day activities. The substantial adverse effect had not already lasted for 12 months by the time of dismissal, let alone the earlier events.

Likely to Last 12 Months?

40. I therefore considered the second question, which was whether in the relevant period the substantial adverse effect was likely to last for 12 months or more.

41. "Likely" in this sense means "could well happen": see **SCA Packaging v Boyle [2009] ICR 1056** and paragraph C3 of the Code. This has to be assessed in the light of the information available at the time, not with the benefit of hindsight.

42. The medical evidence at the time was limited to the Occupational Health advice. The report of 23 November 2017 said that the memory problems should improve. The report of 18 December 2017 confirmed that they had improved and that the claimant was continuing to rebuild his cognitive abilities. Perhaps most importantly, by 17 January 2018 the Occupational Health advice was recording that the memory had returned to normal and that no effect was evident.

43. No doubt this report recorded what the claimant himself was saying at the time. The account that he was effectively "back to normal" by mid-January 2018 was consistent with his previous experience of shunt procedures where after a relatively short period he would find himself functioning as he was before he had gone downhill.

44. Putting that together, I was satisfied that on the information available at the time the substantial adverse effect which occurred between September and (at the latest) the middle of January 2018 was not likely to last for 12 months or more; on the evidence available it was likely to be a short-term problem of a few months at most.

Likely to Recur?

45. The third question was whether the substantial adverse effect was likely to recur. Once again my task was to assess in the light of the information available at the time whether a recurrence was "likely" in the sense that it "could well happen".

46. I accepted that the NHS information about hydrocephalus suggested that memory problems can be associated with it, but there was no medical evidence to that effect for this particular claimant. His own case (as put in his claim form and in his email of 19 April 2018 about the appeal) was that the memory problems were due to the sepsis. He did not say that they were a recurring feature of the hydrocephalus itself or of shunt procedures. There was no evidence showing that

significant memory problems would be a consequence of each shunt revision, and there was no basis for thinking that sepsis, an unfortunate and serious complication, was itself likely to recur and cause further memory problems.

47. As a result, I concluded that on the information before me the claimant had not established that the substantial adverse effect he experienced from September 2017 to January 2018 was likely to recur and therefore that it should be treated as continuing.

Summary

48. For those reasons I concluded that in the period between November 2017 and March 2018 the claimant did not meet the definition of a disabled person on account of the mental impairment of short-term memory problems. The substantial adverse effect he experienced was not “long term” within the meaning of the legislation.

49. The claims he brings in these proceedings were dismissed.

Employment Judge Franey

7 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 May 2019

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