EMPLOYMENT TRIBUNALS

Claimant: Mr S Bible

Respondent: Stateside Foods Limited

Heard at: Manchester (in public, by CVP)

On: 1 February 2021 and 2 March 2021 (in chambers)

Before: Employment Judge McDonald (sitting alone)

Representatives
For the claimant: Mr B Harwood (Lawyer Consultant)
For the respondent: Mr J Warnes (Solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint that he was wrongfully dismissed in breach of contract is dismissed on withdrawal.

2. The claimant is not a disabled person for the purposes of section 6 of the Equality Act 2010 by reason of a mental impairment in the form of memory and cognition problems resulting from post-concussion syndrome and his claims of disability discrimination based on that disability fail and are dismissed.

3. The claimant's claims of disability discrimination based on being a disabled person by reason of a physical impairment in the form of blindness in one eye due to wet macular degeneration will proceed to a final hearing.

REASONS

Introduction

1. By a claim form dated 19 May 2019 the claimant brought claims of unfair dismissal, wrongful dismissal and disability discrimination against the respondent. The claim related to an incident at work on 22 October 2018 which led to the claimant being dismissed on 13 February 2019. His appeal against that dismissal was rejected on 11 March 2019.

2. The claimant's claim is that he was at the relevant time a disabled person within the definition in s.6 of the Equality Act 2010 ("the 2010 Act") by reason of (i) a physical impairment in the form of blindness in one eye due to wet macular degeneration, and/or (ii) by reason of a mental impairment in the form of memory and cognition problems resulting from post-concussion syndrome.

3. At a case management hearing on 27 September 2019 Employment Judge Franey (as he then was) ordered that there should be a preliminary hearing to decide (among other matters):

"Whether between October 2018 and the date of the decision to reject his appeal the claimant was a disabled person by reason of a physical impairment in the form of blindness in one eye due to wet macular degeneration and/or by reason of a mental impairment in the form of memory and cognition problems resulting from post-concussion syndrome."

4. That preliminary hearing was originally due to take place on 16-17 January 2020 but was postponed for various reasons. There were further case management hearings on the 16 January 2020, 13 May 2020 and 4 June 2020 and a postponement request from the respondent was granted on 7 September 2020. Ultimately the preliminary hearing to decide whether the claimant was a disabled person was re-listed to take place on 1 February 2021.

5. By 1 February 2021 when I conducted that preliminary hearing, the respondent had conceded that the claimant was a disabled person for the purposes of the 2010 Act by reason of a physical impairment in the form of blindness in one eye due to wet macular degeneration. However, it did not concede that he was also a disabled person by reason of a mental impairment in the form of memory and cognition problems resulting from post-concussion syndrome.

Preliminary matters

6. As the Code V above indicates, the preliminary hearing was held by remote video link using CVP (Cloud Video Platform). There was an electronic bundle of documents in three parts consisting in total of 94 pages ("the Bundle"). References to page numbers in this judgment are to the numbered pages in the Bundle. The claimant's Disability Impact Statement was at pp.33-36. There was also an expert report dated 28 January 2021 produced at the respondent's instruction by Dr Dougall McCorry M.D. F.R.C.P, Consultant Neurologist and Honorary Senior Lecturer, University Hospital Birmingham N.H.S. Foundation Trust ("Dr McCorry").

The claimant's son sitting next to him during evidence

7. At the start of the hearing, I had to decide whether it was appropriate for the claimant's son, Mr A J Stuart, to sit next to him while he was giving evidence. Having heard submissions from Mr Harwood and Mr Warnes I decided it was. I gave oral reasons for that decision and set the ground rules to be followed when the claimant was giving evidence. They are set out in my Case Management Order dated 4 February 2021. I am satisfied that there was no communication or collusion between Mr Stuart and the claimant during the claimant's evidence which was the main concern expressed by Mr Warnes for the respondent.

The wrongful dismissal claim

8. Mr Warnes confirmed that the respondent accepted the claimant was entitled to 12 weeks' notice and that that sum had now been paid to the claimant. Mr Harwood confirmed that the amount due had now been paid and that the wrongful dismissal claim was therefore resolved. As agreed by the parties, I have included in this judgment a dismissal of that claim on withdrawal.

The outcome of the hearing and further directions

9. Having made the preliminary ruling recorded above, I heard oral evidence from the claimant and from the respondent's expert, Dr McCorry. I heard oral submissions from Mr Harwood and Mr Warnes but there was not enough time for me to deliberate and deliver judgment. I therefore reserved my decision.

10. Mr Warnes indicated that he would welcome the opportunity to make written submissions. Since I was reserving my decision I directed that the parties should file any written submissions they wished to make to supplement their oral submissions by **11 February 2021**. They each then had an opportunity to reply to the other party's submissions in writing by **18 February 2021**. Both parties provided written submissions and Mr Harwood also provided a brief, one-page reply to the respondent's submissions. I have not set out the oral or written submissions in full but have taken them into account in reaching my conclusions. I deliberated in chambers on 2 March 2021. I apologise to the parties for the delay in finalising this judgment.

Issues

11. The issue to be decided (as identified in Employment Judge Franey's order amended to take into account the respondent's concession in relation to the claimant's visual impairment) was:

> Whether between October 2018 and the date of the decision to reject his appeal the claimant was a disabled person by reason of a mental impairment in the form of memory and cognition problems resulting from post-concussion syndrome."

12. The incident which the claimant says triggered his post-concussion syndrome ("PCS") was on 22 October 2018. The respondent rejected the claimant's appeal against dismissal on 11 March 2019 (para 6 of the claimant's claim form at p.17). The "relevant time" during which I must decide whether the claimant was a disabled

person by reason of post-concussion syndrome ("PCS") is therefore 22 October 2018 to 11 March 2019.

13. The relevant case-law (set out at paras 60-73 below) makes it clear that in deciding the overall issue I need to decide:

a. Whether the claimant has an impairment which is either mental or physical?

b. Whether the impairment affects the claimant's ability to carry out normal day-to-day activities?

c. Whether that adverse effect substantial?

d. Whether the adverse effect was long-term?

14. As to issue d. above, any adverse effect of PCS could not have actually lasted at least 12 months (para 2(1)(a) of Schedule 1 to the 2010 Act ("Schedule 1")) because any impairment did not happen until 22 October 2018 and the relevant time the case is about ended on 11 March 2019. For the adverse effect to be long term in this case it would therefore have to be likely to last at least 12 months (para 2(1)(b) of Schedule 1). In deciding that issue the question I must ask myself is whether viewed at the time and without the benefit of hindsight, the substantial adverse effect of the impairment was likely (i.e. "could well have") to last at least 12 months

Evidence and Findings of Fact

<u>The claimant's disability impact statement</u>

15. The claimant had provided a disability impact statement (pages 33-36). Paragraphs 9-21 of that impact statement dealt with the effect of PCS. The claimant did not in his statement provide specific details of the effects of the PCS on his normal day-to-day activities at the relevant time, only a series of bullet points. Paragraphs 16-19 of his statement dealt with the position as at the date of the statement, which was 5 December 2019 and so not evidence I can take into account as it post-dates the relevant time I am considering.

16. The claimant's evidence in that statement (paragraph 10) was that at the relevant time he suffered from the following symptoms:

- Short-term memory loss;
- Severe constant headaches;
- Poor concentration;
- Confusion;
- Stammering when talking;
- Low mood;
- Constantly tired and sleeping more than usual.

17. In terms of the effect which the claimant said that the symptoms had on his day-to-day activities, these were set out at paragraph 12 of his statement. They were:

- Loss of confidence in himself and his abilities so that he does not want to go out alone;
- Feeling easily confused, resulting in the need to have the simplest things explained to him in detail and slowly;
- Feeling socially isolated because of the lack of confidence in himself;
- Often feeling fatigued and sleepy which affected his ability to concentrate and organise tasks in a fast or efficient manner. This led to feelings of frustration and anger;
- Low mood causing him to be irritable and less patient;
- Needing to be reminded of things that had not long occurred given his short-term memory loss; and
- A stammer in his speech.

18. I found the evidence in the disability impact statement limited and unspecific. The claimant did not supplement that in his oral evidence.

19. I accept Mr Warnes's submission that in giving his evidence the claimant did not display any obvious signs of the symptoms he referred to. However, that does not assist me in assessing the position during the relevant time. It does give me confidence, however, that the claimant was not inhibited by a disability in terms of his ability to give relevant evidence.

The documentary evidence

20. The claimant's statement (para 11) said that all the symptoms in paragraph 10 were "recorded by the respondent's Occupational Health practitioner and the medical evidence which has been disclosed to the respondent". I found the reports provided by Healthwork (the respondent's Occupational Health Service) of most relevance to the issue I need to decide. That was because the claimant attended face to face meetings with that service during the relevant times.

21. There was relatively little other medical evidence in the Bundle relevant to the issue I needed to decide. The Bundle did not include copies of the claimant's GP records which might be usual in this case. The claimant had resisted the respondent's application for a third-party disclosure order in relation to the GP at the preliminary hearing on 16 January 2020. There was reference in a previous preliminary hearing to the claimant having difficulty obtaining his medical records from his GP. Employment Judge Leach in a hearing on 4 June 2020 decided that the claimant had made all reasonable efforts to obtain them. Nonetheless, they were not before me and therefore I cannot take them into account.

22. The only evidence I have as to the claimant's appointments with the GP are contained in a two-page letter/report from Dr Stafford which was provided on 14 January 2020 for the purposes of these proceedings (pp.84-85) and so post-dates the relevant time. Because they all post-date the relevant time, I discuss Dr Stafford’s letter, Dr McCorry’s report and the report of an appointment of 8 April 2019 the claimant had with Dr J Vicini of Salford Royal NHS Foundation Trust dated 8 April 2019 together at paras 44-59 below.

23. I set out below my findings in narrative form. I then deal with the post relevant time medical evidence and then set out my findings of fact relevant to the issues I need to decide.

<u>22 October to 5 November 2018 – tripping incident and aftermath</u>

24. On the morning of 22 October 2018, the claimant tripped over a waste bag at work. An ambulance was called to the workplace and an initial head injury assessment carried out (p.74). The ambulance crew noted that the claimant was standing outside waiting for the ambulance, that there was no injury evident, no vomiting and no visual disturbance. The claimant was complaining of a headache and his colleagues reported a brief loss of consciousness when he fell. The ambulance crew noted that the claimant provided information readily and without hesitation and that he was laughing and joking with the crew and was alert and orientated. He was given Paracetamol and because the ambulance was busy they asked him to make his own way to A & E.

25. A colleague drove the claimant to Royal Bolton Hospital (“the Hospital”). He was assessed as having a mild head injury. He did not meet the criteria for an Xray or CT scan and was discharged without further investigation having been given a Head Injury Advice leaflet and advice on “red flag” symptoms he should look out for (pp.69-73).

26. The claimant was signed off sick by his GP from 23 October 2019 until his dismissal (p.85). There were no fit notes in the Bundle.

27. At 12.21 on 24 October 2018 the claimant returned to the Hospital’s Emergency Department with concussion symptoms. He still did not meet any criteria for a CT scan of his brain. There were no further investigations carried out and the claimant was advised to continue with his painkillers and to rest/take as much fluids as possible. He was not given any stronger painkillers due to the risk of sedation in concussion. The report from the Hospital to the claimant's GP at the Stonehill Medical Centre dated 24 October 2018 (page 45) recorded “Post concussion syndrome” under the heading “Diagnoses”.

28. The claimant returned to his GP a number of times in the next few days and on 1 November 2018 the Hospital carried out a CT scan the result of which were “unremarkable”, showing “no evidence of acute parenchymal haematoma or ex vacuo collection” (p.75). Dr McCorry in his report (para 3.3) commented that this was a “normal scan”.

<u>6-7 November 2018 - The First Occupational Health Meeting and Report</u>

29. On 6 November 2018 the claimant attended a face to face meeting with Katy Thompson, a clinician with Healthwork. His wife attended the meeting with him. He reported at that meeting that he was still having headaches and memory issues, that he was bad tempered and sleeping a lot, with poor concentration. He reported the outcome of his CT scan on 1 November 2018 and also said that on his second visit to A & E he had done the "heel to toe test" but could not do it. He confirmed he had then stopped taking co-codamol. Ms Thompson advised to contact his GP if he felt no better.

30. In her handwritten notes of the meeting (pp.48-49) under the heading "Social History and Day to Day Activities", Ms Thompson reported the claimant as saying his sleeping was excessive, he was not going out alone as he was not confident and had been advised by his GP not to drive. He said that he was "just going out for shopping/hospital appointments", "minimum going out and just little trips".

31. In the section of the notes headed "Physical examination", Ms Thompson recorded that the claimant "seemed to take a while to answer questions sometimes". He also kept rubbing his head, indicating a headache. She noted, however, that even though the claimant took a little extra time he always answered appropriately to questions and was able to answer all questions that he was asked.

32. Ms Thompson advised the claimant to meet the Health and Safety Officer to do an incident report about the incident on 22 October 2018. The claimant and his wife were happy to do so.

33. In her typed report to the claimant's line manager, Robert Coar, on 7 November 2018 (pp.50-51), Ms Thompson confirmed that the ongoing symptoms the claimant was experiencing meant he was not fit for work. As he had been advised to contact his GP if his symptoms did not start to resolve, she had advised the claimant to ring his GP surgery that day to arrange an appointment.

34. Ms Thompson also gave a brief prognosis in terms of concussion, advising that "most people feel normal again after a few days or weeks but some people can take longer to recover. [The claimant's] symptoms do seem to be in keeping with those of concussion and should no other causes to symptoms be identified by the GP I would be hopeful that the ongoing symptoms will resolve in the coming weeks".

<u>The Healthwork review on 13 November 2018</u>

35. On 13 November 2018 Ms Thompson carried out a paper review of the claimant's case (page 52). This was because Mr Coar (the claimant's line manager) had asked her whether the claimant was fit to attend "meetings". Because that was not a question she had been asked to answer in her 7 November report, Ms Thomson reviewed her notes from the meeting on 6 November 2018. She concluded that the claimant would be fit to attend any meetings required and be able to answer questions himself or by instructing a representative to do so. That was based on the fact he had given appropriate answers to questions at their meeting on 6 November 2018. Ms Thompson also noted that there were "no cognitive impairments present" which would indicate that the claimant was unable to distinguish right from wrong. The report did suggest, however, that the claimant be provided with support at the meetings, additional time to process information if needed and regular breaks.

36. The background to Mr Coar’s request was that on 6 November 2018 the claimant had attended an investigation meeting into the incident on 22 October 2018. At that meeting the respondent says that the claimant admitted that he had seen the waste bag and walked past it a number of times before he tripped over it. The respondent relied on that admission in part to support the decision to dismiss the claimant. The claimant’s case is that he did not remember what was said at that meeting because of the effects of PCS.

The Healthwork meeting on 27 November 2018 and report on 28 November 2018

37. On 27 November 2018 there was a further face to face meeting between the claimant and Healthwork. The handwritten notes of that meeting were included in the bundle (pages 53/54) together with a typed-up report dated 28 November 2018 (pages 55 and 56). The meeting was again conducted by Katy Thomson. At the meeting the claimant reported that he had had a further meeting with his GP and that his GP had wanted a second opinion. The opinion from the GP was that he might have post-concussion syndrome and he had been advised to wait longer but have regular reviews and that they would refer him to a neurologist if there was no improvement. There was no specific timeframe on when that would be done. The claimant reported that there were ongoing symptoms and he was no better, and if anything was worse. His sleep pattern, he reported, had now changed and he was not sleeping instead of oversleeping. He referred to anxiety relating to an ongoing disciplinary matter and that he would not attend the hearing because he could not defend himself due to his ongoing symptoms. The new symptoms included reduction in confidence and an increased forgetfulness.

38. At that meeting the claimant reported that the GP had prescribed diazepam and mirtazapine. He was taking diazepam up to three times a day and taking mirtazapine for headache and to help him sleep. He was not sure of the dosages he was taking.

39. Ms Thomson said that she “noticed a difference today”. She was “finishing his sentences as he couldn’t find the words and he seemed to struggle to articulate at times”. Ms Thomson queried whether that was due to the diazepam or whether it was a new symptom. Ms Thomson had concerns that the claimant would not be able to reply to charges in a disciplinary, and therefore considered that he would be unfit at the time to undergo any disciplinary proceedings. The typed version of the report states that “[The claimant] has been advised he has post-concussion syndrome”. It records the claimant's ongoing symptoms as being severe headaches, confusion, memory issues and poor concentration, but also struggling to sleep and personality changes such as a loss of confidence. The claimant did also report an increased amount of stress and anxiety which he feels exacerbates ongoing symptoms. He reported that “this relates to an ongoing disciplinary process which he was due to have a related meeting for last week but was unable to attend and still feels this is the case”. Ms Thomson noted that new medication was being implemented to help in the management of ongoing symptoms.

40. Ms Thomson, in response to the specific questions about changes since the last appointment, noted that the claimant has “reported some new symptoms and there has also been a change in medication, he is now taking strong medication to provide a calming effect and this is causing increased tiredness, a known side effect”. She did also report that “having seen [the claimant] myself previously I did

notice a change in that on a number of occasions I had to complete his sentences as he could not find the correct words and he struggled to articulate at times. This could be due to the medication changes or the alteration in symptoms". In response to the question "what is actually preventing [the claimant] from working?" she said that that was "the ongoing symptoms of what is thought to be post-concussion syndrome". In terms of the prognosis, Ms Thomson gave generic answers explaining that concussion is an injury to the brain that can occur after a minor head injury but that, "post-concussion syndrome is a complication of concussion and a collection of symptoms that people develop after concussion. The symptoms within the condition include those in which [the claimant] has been experiencing. In general, symptoms usually resolve within three months following the injury but for some the symptoms can last longer, but rarely a year or more". She concluded by saying that the claimant was not fit for work and also unfit for any "investigation or disciplinary meetings" because of her concerns about the claimant's ability to complete sentences and be articulate. She therefore considered that she could not confidently say that the claimant would be able to reply to questions or charges within the disciplinary process, and it is for that reason that she considered him unfit.

The Healthwork meeting and report of 11 December 2018

41. At the next appointment face to face on 11 December 2018 the claimant reported that he "woke up and felt well". He said that his short-term memory was not 100% but the concussion had gone. There was a 6-7 pain scale for headaches, which was constant, but he was sleeping well 7-8 hours. There was an improvement in symptoms with only the ongoing headaches and short-term memory loss causing difficulties. He was no longer on diazepam although he was on other drugs for back pain and other physical problems that he has. In terms of the disciplinary action the claimant reported that he was "in a better place to deal with this now". In the handwritten notes (pages 57 and 58) Ms Thomson noted that there were "no communication issues today. Answered all questions without problems or stalling, attended alone for the first time. Know right from wrong and understands charges therefore fit to attend a meeting". The contents of the handwritten notes were reflected in the typed report (pages 59 and 60). The report stated that "most symptoms appear to have now resolved but he does report some ongoing short-term memory loss and headaches". It noted that he had been advised by his GP to have a further rehabilitation period of a month before returning to work and noted that would take him to 2 January 2019.

42. Ms Thomson reported that the "previous medication that was causing tiredness has been stopped but he continues to take alternatives to help with the above symptoms". In terms of returning to work, the report noted that because there were ongoing symptoms and due to the nature of his role (i.e. he was completing a safety critical task of driving and manual handling along with supervising staff), Ms Thomson advised that he should be reviewed by the Occupational Health Physician ("OHP") to determine his fitness for the full role so that all appropriate adjustments could be made on his return. She said that a return to work date of 2 January was sensible and achievable, allowing a further period of time for improvements and rehabilitation. In addition, the report confirmed that given the improvements that had been made since her previous assessment on 27 November 2018 she considered the claimant was now fit to attend any required meetings linked to the disciplinary and investigatory process. She noted that the claimant was "able to communicate

and recite information without problems (at the meeting) but he has reported ongoing short-term memory issues at times", so she suggested that he take regular notes during any meetings and that regular breaks were given.

The claimant's medication

43. The claimant's evidence was that he was initially put on various medication including co-codamol, mirtazapine, ibuprofen and diazepam. His evidence is that he stopped taking co-codamol in November 2018 (so a month or so after the incident which he says triggered the post-concussion syndrome). He stated that in April 2019 the mirtazapine dosage was doubled "to help with my memory confusion and headaches" (paragraph 14 of his statement). However, Dr McCorry's evidence in cross examination was that mirtazapine is prescribed for anxiety and as an anti-depressant rather than for headaches. The claimant was also referred to CBT sessions and attended ten of those. That was the maximum number of sessions available on the NHS and they ended in June 2019.

Medical and expert evidence post-dating the relevant time

Dr Vicini's report

44. At pages 46-46a was a letter from Dr J Vicini of Salford Royal NHS Foundation Trust dated 8 April 2019 to the claimant's GP. Dr Vicini is a "Specialist Doctor in Neurology". The letter related to an appointment on 8 April 2019 at 9.50am, the reason for attendance being given as "loss of consciousness". In terms of diagnosis, the letter records:

"Post-concussional syndrome;

Syncope?

Background of anxiety and depression;

Obstructive sleep apnoea, intolerance to CPAP."

45. It also confirmed the claimant's current medication including mirtazapine. In terms of actions for the GP, Dr Vicini advised the GP to increase the mirtazapine from 15 milligrams to 30 milligrams at night. In the section of the letter headed "Assessment" Dr Vicini referred to the incident at work in October 2018. He recorded that "since then, his mood has been low, his anxiety has increased, his sleep pattern has deteriorated with prominent sleep onset insomnia". Dr Vicini also noted that the claimant "has been complaining of right frontal and left parietal headache, of moderate to severe intensity (5-10 out of 10), not associated with photophobia, phonophobia or nausea, perhaps only occasionally with the last one. The headache occurs daily". The letter reported that, "On two occasions [the claimant] has had un-forewarned episodes of loss of consciousness, during which he lies atonic for a couple of minutes and recovers with some disorientation for ten minutes. During the episodes he does not have any abnormal movements, he does not bite his tongue and he does not have urinary incontinence".

46. In terms of the examination, Dr Vicini recorded that the only positive finding was right amaurosis and gave his opinion that a CT brain scan from Bolton Hospital

on 1 November 2018 was "unremarkable". Dr Vicini's opinion was that "the patient seems to be suffering from a post-concussional syndrome and the persistence of chronic daily headache with a preceding trauma merits performing an MR brain. I have advised to increase the dose of mirtazapine to 30 milligrams at night. There is very likely a significant interaction between his OSA and post-concussional syndrome because both affect mood and sleep". Dr Vicini said that he would report back with the result of the MR brain scan but that "I have discharged him from my clinic in the meantime".

GP report from Dr Stafford

47. The claimant's GP had provided a report (pages 84-85). This took the form of a letter to the claimant's representatives from Dr A J Stafford of the Stonehill Medical Centre. The letter is dated 14 January 2020. The first three paragraphs deal with the claimant's visual impairment. The claimant's head injury in October 2018 is dealt with in paragraphs 4 through to 7 of the letter. Dr Stafford reports that from reviewing the claimant's medical records it would appear that the claimant sustained a head injury in October 2018 ("reported to have fallen at work and banged head"). The letter goes on to say, "This head injury was apparently associated with a transient loss of consciousness at the time of injury. [The claimant] had a normal CT brain scan performed at this time (November 2018)". The fifth paragraph refers to the claimant's appointment with Dr Vicini, in April 2019 and encloses a copy of Dr Vicini's report from pp.46-46a. Dr Stafford notes that, "[The claimant] was diagnosed with post-concussional syndrome and discharged from Neurology Clinic following a normal MRI brain scan". Dr Stafford notes that the claimant was last seen by the GP in relation to these associated problems in August 2019, and at that stage he was "also reporting poor memory, poor taste, slow speech and ongoing intermittent (though less frequent) headaches".

48. The final paragraph of the report noted that the claimant had been certified by the GP as not medically fit for work during the period October 2018 to February 2019, but that "we are unable to comment as to whether he would have been fit for interview or disciplinary during this time". There are no copies of the relevant fit notes or other GP records attached to the report other than the copy of Dr Vicini's report (pp.87-88), a letter relating to his visual impairment dating from 2005 (p.86) and the report of a diabetic eye test from February 2019 (p.88).

Dr McCorry's report and oral evidence

49. Dr McCorry MD, FRCP is a Consultant Neurologist at the Queen Elizabeth Hospital NHS Foundation Trust in Birmingham. He offers a general neurology service as well as specialist expertise in epilepsy and headaches. He was instructed by the respondent to provide a report for the purposes of these proceedings. His report was dated 28 January 2021. He had not interviewed the claimant because there was insufficient time to arrange an appointment. His report was therefore based on consideration of the documents in the Bundle. He notes that the medical records are incomplete with no GP records so he reserved his right to alter his views should they become available (para 4.1).

50. In his opinion, the head injury suffered by the claimant on the 22 October 2018 was a "mild head injury". He noted the query over loss of consciousness, and variations in reporting as to the length of loss of consciousness that occurred at the

time of the incident and that "the symptom of headache and nausea within the emergency department, which would support concussion". He could "state with confidence" that the injury did not carry a current risk of elevated epilepsy and would not cause any long-term cognitive effects through organic brain damage. He could "state with confidence that any cognitive symptoms presently reported are not a result of organic brain damage" (para 4.2).

51. In this case, Dr McCorry noted that there was documentation of symptoms compatible with concussion, and "the ordinary pattern of recovery would have been concussive symptoms such as headache, impaired concentration and nausea, to occur over a period of days or weeks, before recovery". In Dr McCorry's opinion, "post-concussion syndrome" as a diagnostic label is unhelpful and is not terminology he would use within his medical legal practice because it implies that the claimant's previous and current symptoms relate to the brain injury. While in this case he could say with confidence that any ongoing symptoms were not due to brain damage, if the claimant has "enduring cognitive symptoms, or claiming an enduring post-concussion syndrome, then unfortunately, this would be a matter for a neuropsychologist or psychiatrist to determine if such psychological symptoms are related, or not, to the index injury" (4.3).

52. Dr McCorry was instructed by the respondent to "state whether, as at the period 22 October 2018 to 8 February 2019 inclusive, the Claimant suffered from [PCS], and if so, whether the effects of that condition were substantial. Please note in this connection "substantial" means more than trivial." His opinion was that:

> "there seems to be consistency of reporting of headaches, to the emergency department on the day of attendance, in the occupational therapy assessment, and to the neurologist after February 2019. Therefore, while I would ordinarily expect the symptoms of concussion to improve within days or weeks, I would accept that the narrative indicates a post-traumatic headache was experienced, and was unpleasant. Such headaches are well recognised, they poorly relate to the severity of the injury, and the presence of pain would affect other aspects of daily life. This could mean that concentration is impaired. This could cause anxiety or effects on mood, particularly if there was a pre-injury vulnerability for psychiatric ill-health. Although, without the full medical records I cannot comment further. It is my interpretation of the records that the headache experienced was more than trivial, and it is my interpretation that it was likely substantial. I however, respect the fact that this is an interpretation of the medical records, and this can be considered a matter for the court. It is also based upon the assumption that the claimant is providing an accurate and honest account of his symptoms. It is my view, that the presence of unpleasant or intrusive headaches could impact upon an individual's ability to carry out their day-to-day activities, including work." (Para 4.4).

53. Dr McCorry's oral evidence was consistent with his written report. In particular, he confirmed that in the absence of any evidence of organic brain injury in the claimant's case he would expect the concussion symptoms of nausea and headache to improve within days or weeks. He could not rule out the headaches reported by the claimant being a post-traumatic effect of the incident on 22 October 2018 deriving from a psychiatric rather than organic brain injury. His opinion was that constant headaches at severity 6-7 could impact on an individual's ability to carry out

their day to day activities. The caveat was that Dr McCorry had not had a consultation with the claimant nor viewed his complete medical history.

Findings of fact relevant to adverse effect

54. Taken as a whole, the evidence of an impairment having an adverse effect on the claimant's day to day activities in this case was thin. The claimant's evidence in his disability impact statement provided little specific evidence. As I have said, I found the notes and reports of the 3 Healthwork meetings of most assistance.

55. Based on those I find that by 6 November 2018 when the first Healthwork meeting took place, the claimant was taking a little extra time to answer questions put to him by Ms Thompson but responding appropriately to those questions. Any adverse effect on his ability to concentrate was not enough to prevent Ms Thompson suggesting (and the claimant and his wife agreeing) that the claimant should meet the Health and Safety Officer to discuss the incident on 22 October 2018. Any adverse effect was not significant enough to prevent Ms Thompson on 13 November 2018 confirming he was fit to attend meetings at work. She did, however, say he was not yet fit for work. There was enough of an adverse effect for her to recommend that the claimant at those meetings be provided with support, extra time to process information and regular breaks. In terms of other activities, at 6 November 2018 the claimant was going out but only on "little trips" and was not going out alone. He was not driving on the advice of his GP. He reported he was oversleeping.

56. By 27 November 2018, I find based on Ms Thompson's observations that there was a greater adverse effect on the claimant's day to day activity. He was struggling to articulate, could not find the correct words and Ms Thompson had to complete his sentences for him. The change was enough to lead to Ms Thompson saying that he was no longer fit to attend any investigatory or disciplinary meetings. The claimant reported increased forgetfulness and a lack of sleep. However, he also reported that he was on more medication including diazepam and mirtazapine. He was still reporting headaches. He was also reporting anxiety though I find that was substantially arising from the ongoing disciplinary process.

57. By 11 December 2018 the adverse effect on the claimant's memory and concentration had reduced. His short-term memory was improving although not 100%. He was experiencing headaches at intensity of 6-7 and they were constant. However, Ms Thompson's assessment was that most of the symptoms had been resolved with only some short term memory loss and headaches remaining. Dr McCorry in his evidence suggested that a constant headache at level 6-7 would lead to adverse effects in terms of ability to carry out day to day activities including work. However, the Healthwork report confirms that a return to work on 2 January 2019 (after a further month to recover) would be "sensible and achievable" (p.59). That reports notes that "[the claimant] is keen to return to work as soon as possible". There is no suggestion that the claimant objected to the assessment that he would be ready to return to work in a month. Given Dr McCorry did not observe the claimant at the relevant time while Ms Thompson did, I give her assessment more weight. I do not accept that by 11 December 2018 the claimant's headache were having as substantial a debilitating effect on the claimant as Dr McCorry suggested a 6-7 headache would have. Ms Thompson's view was that the adverse effect of the headache and other symptoms on the claimant were reducing at an extent which meant that he would be fit for work within a month.

58. Mr Warnes submitted that the claimant overstated any adverse effect on his day to day activities. I find there is some merit in that submission. Although there was some evidence that at the 27 November 2018 Healthwork meeting the claimant was finding it difficult to articulate and complete his sentences there was nothing in any of those reports or the medical evidence to substantiate the claimant's claim that he "need[ed] to have the simplest things explained to him in detail and slowly" nor was there any evidence of a stammer.

59. In summary, I find that the claimant's memory problems, problems concentrating and articulating his thoughts were at their worst around the end of November 2018. At their worst it meant the claimant was not able to organise and articulate his thoughts sufficiently to respond to questions put to him by Ms Thompson. However, the situation had significantly improved by 11 December 2018 when he had no such difficulty and every indication that improvements in terms of underlying symptoms would continue.

Relevant Law

The Meaning of "disability" in the 2010 Act

60. Section 6 of the 2010 Act, so far as is relevant, provides:

> **"(1) A person (P) has a disability if-**
> **(a) P has a physical or mental impairment, and**
> **(b) The impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities.**
> **…"**

61. Section 212(2) of the 2010 Act provides that an effect is "substantial" if it is more than minor or trivial.

62. Paragraph 2 of Schedule 1 to the 2010 Act defines "long-term" in this context. It provides:

> **"(1) 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,**
>
> **(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…"**

63. For paragraph 1(a) of Schedule 1 to the 2010 Act to apply, the effect of an impairment must have lasted for at least 12 months at the time when the alleged discriminatory act (or acts) took place (**Tesco Stores v Tennant UKEAT/0167/19**).

64. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the 2010 Act is to be assessed as at the time of the alleged discriminatory act

(or acts) took place: see (**McDougall v Richmond Adult Community College [2008] ICR 431, Court of Appeal)**. The same applies to the assessment of whether the effect of the impairment is likely to last for 12 months under paragraph 2(1) of Schedule 1 (**Singapore Airlines Ltd v Casado-Guijarro [2013] 9 WLUK 65, EAT**).

65. In cases to which paragraph (1)(b) of Schedule 1 of the 2010 Act applies the correct question for the Tribunal is whether viewed at the time and without the benefit of hindsight, the substantial adverse effects of the impairment were likely to last at least 12 months. That is a decision to be reached having regard to all the contemporaneous evidence, not just that before the employer. In reaching that decision the Tribunal is not concerned with the actual or constructive knowledge of the employer (**Lawson v Virgin Atlantic Airways Limited UKEAT/0192/19/VP**). However, it is an error law for an Employment Judge to take into account subsequent events in making that assessment.

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66. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the 2010 Act**.**

67. "Likely" in this context means something that "could well happen", and is not synonymous with an event that is probable: (**SCA Packaging Ltd v Boyle [2009] ICR 1056, Supreme Court)**.

68. The Secretary of State's Guidance on Matters to Be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) ("the Guidance") http://odi.dwp.gov.uk/docs/wor/new/ea-guide.pdf gives guidance to help a Tribunal decide whether an impairment has a substantial effect on normal day to day activities. At paragraph D.2 and D.3 of the Guidance it explains what "normal day to day activities" means:

> **"**D.2**. The Act does not define what is to be regarded as a 'normal day-to-day activity'**. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.
>
> D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern."

69. When assessing whether the effect of the impairment is substantial the Tribunal has to bear in mind the words of section 212(1) of the 2010 Act which confirm that it means more than minor or trivial. The 2010 Act does not create a spectrum running smoothly from those matters that are clearly of substantial effect to

those matters that are clearly trivial. Unless a matter can be classed as within the heading "trivial" or "insubstantial" it must be treated as substantial (**Aderemi v London and South-Eastern Railway Ltd [2013] ICR 591**).

Relevant evidence and correct approach

70. The burden of proving disability is on the claimant.

71. The definition of disability requires a Tribunal to decide four questions (**Goodwin v Patent Office [1999] ICR 302**):

a. Does the claimant have an impairment which is either mental or physical?

b. Does the impairment affect the claimant's ability to carry out normal day-to-day activities?

c. Is that adverse effect substantial?

d. Is the adverse effect long-term?

72. These four questions should be posed sequentially and not together – (**Wigginton v Cowie and ors t/a Baxter International (A Partnership) EAT 0322/09)**.

73. It is good practice for Tribunals to state their conclusions separately on each of the questions. However, in reaching those conclusions, Tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings. (**J v DLA Piper UK LLP [2010] ICR 1052, EAT)**.

Discussion and conclusions

74. In applying the law to my findings of fact I start with the second of the Goodwin questions. That approach was recommended in DLA Piper in cases, such as this one, where the existence of an impairment is disputed.

Was there an adverse effect on the claimant's ability to carry out normal day-to-day activities?

75. I find that during the period 22 October 2018 to 11 December 2018 the claimant did have difficulty in taking in information and organising and articulating his thoughts because he was experiencing headaches, poor concentration and impact on his short-term memory. I find that by 11 December 2018 the adverse effect was reducing although would have continued to some extent for the whole of the relevant time. I find that is a normal day to day activity (see para D19 of the Guidance).

Was the adverse effect substantial?

76. I find that the effect was substantial during the period 22 October 2018 to 11 December 2018. That is certainly the case on or around 27 November 2018 when the second Healthwork meeting took place. At that point the impact was sufficiently substantial that Ms Thompson did not think the claimant was fit to attend investigatory or disciplinary meetings. However, I also find it was "substantial" for the remainder of that period. Although Ms Thompson did report on 13 November 2018 that the claimant was able to attend meetings she did so with the caveat that the claimant should be given additional time to process information, support and regular breaks. That in my supports a conclusion that although the adverse effect was not as substantial as it was on or around the 27 November 2018 it was still more than "minor or trivial". I find that by 11 December 2018 the effect was significantly reduced and so "minor or trivial" and not substantial.

Was the adverse effect long-term?

77. The substantial adverse effect was not long term. I have found that it lasted from 22 October 2018 to 11 December 2018. Even if I am wrong about that, and the substantial adverse effect lasted throughout the relevant time, it would have lasted for less than 12 months.

78. I have therefore considered whether the adverse effect was "likely" to last for at least 12 months (Schedule 1 Para 2(1(b)). I have to assess that based on the information available at that time. That information is limited. However, it seems to me that it supports a conclusion that the adverse effect was not likely to so last. As at 11 December 2018 the claimant's own assessment was that matters were improving and Ms Thompson's view was that he would be fit for work by 2 January 2019. That was consistent with Ms Thompson's advice that post-concussion syndrome "usually resolves within three months following the injury but for some the symptoms can last longer, but rarely a year or more". The adverse effect was at its worst when the claimant was taking Diazepam and Ms Thompson's view was clearly that coming off that medication had already significantly improved matters.

79. Taking all those matters together it seems to me that it was not, when assessed at the relevant time likely (in the sense of "could well happen") that any adverse effect would last at least 12 months.

Whether the claimant have an impairment which is either mental or physical?

80. Since I have decided that the adverse effect was not long term, the claimant does not meet the definition of a disabled person within the meaning of 2.6 of the 2010 Act. In those circumstances it is not necessary for me to decide whether he had an impairment which gave rise to the adverse effect. Had I been required to do so I would have found that the claimant did have a mental impairment in the form of memory and cognition problems resulting from post-concussion syndrome. The medical evidence did not support the existence of a physical impairment in the sense of an organic brain injury and there was no psychiatric evidence provided to substantiate Dr McCorry's suggestion of post-concussion syndrome in the sense of a post-traumatic mental impairment. However, there was evidence of an impairment in the sense of impact on the claimant's concentration and memory and diagnoses attributing that to PCS.

Conclusion

81. The claimant's claim that he was a disabled person because of a mental impairment in the form of memory and cognition problems resulting from post-concussion syndrome reason of PCS fails. I have today made further case management orders as to the future conduct of the case which will be sent to the parties shortly. Any claims based on the claimant being a disabled person by reason of his visual impairment will continue because the respondent has conceded he falls within the definition in s.6 in relation to that disability.

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Employment Judge McDonald

Date 26 April 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
27 April 2021

FOR THE TRIBUNAL OFFICE

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