



EMPLOYMENT TRIBUNALS

Claimant: Mr N Birch

Respondent: VJ Technology Ltd

Heard at: London South (by video)

On: 20 April 2023

Before: Employment Judge G Cawthray

Representation

Claimant: In person, not legally qualified

Respondent: Ms. A Doble, Counsel

JUDGMENT having been sent to the parties on 5 May 2023 **11 June 2023** and written reasons having been requested by the Claimant 17 May 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The issue for determination at the hearing was whether the Claimant was disabled at the material time, being 16 June 2021, the date of the Claimant's dismissal.
2. That involves consideration of the following:
 - a) Does/did the Claimant have a physical or mental impairment, namely Post Concussion Syndrome?
 - b) If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?
 - c) If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - d) Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
 - e) Were the effects of the impairment long-term? The Tribunal will need to decide: Did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

Procedure

3. This hearing had been listed to take place following a case management preliminary hearing on 20 September 2022.
4. The Claimant represented himself at the hearing. Although his wife was present, she was also caring for a young child, and due to noise the Claimant's wife did not remain in the same room as the Claimant throughout the hearing.
5. The Respondent was represented by Ms Doble, Counsel.
6. I had been provided with an agreed Bundle amounting to 104 pages.
7. The Claimant had provided an Impact Statement. The Claimant affirmed and gave oral evidence. The Claimant was asked questions by Ms. Doble and myself.
8. I discussed with the Claimant whether he needed any adjustments to be made to the video hearing. The Claimant said he may need to take regular drinks of water and time to answer questions. I explained that we would take regular breaks but that any party could ask for a break if needed and that he could access water whenever he needed. I asked Ms. Doble ask questions slowly and clearly.
9. I discussed the issues for determination with the parties and explained the hearing process.

Findings of Fact

10. Set out below are my findings of fact based on the Claimant's Impact Statement, oral evidence and documentation in the Bundle.
11. The Claimant commenced employment with the Respondent on 24 February 2020 as a Purchasing Assistant. The role involved dealing with enquiries and obtaining quotes and was largely undertaken by email.

The injury

12. In April 2020, whilst setting up a home gym, a piece of metal equipment fell on the Claimant's head.
13. The Claimant attended A & E on 16 April 2020, was assessed at a distance, due to Covid arrangement at the time, and was not given any treatment.

Post-Injury events

14. At the time of his injury the Claimant was on furlough leave, as this injury was sustained in the early days of the COVID pandemic.

15. On 22 April 2020 the Claimant emailed the Respondent and informed it that he had suffered an injury and was suffering with concussion.
 16. The Claimant attended A & E on 30 May 2020, and the report notes the Claimant complaining of headaches and disorientation. The Claimant was examined.
 17. In oral evidence the Claimant described that at the time, which is accepted, that he was having trouble sleeping, felt a pulse in his head, was experiencing vertigo and trouble focusing and that paracetamol was not assisting.
 18. The report states, at 17:15:

“Post Concussion syndrome

Explained to patient most likely, symptoms can last for up to 3-6 months, patient feels that his symptoms are not getting better, d/w ED consultant, agreed for CT head, handed over to speciality doctors.”
 19. A CT scan was performed on the same day. The report, at 18:25 states:

“PT post CT reported as NAD. Patient relieved. Will continue to rest and take analgesics but is happy that there is no pathology to worry about or address.”
 20. In oral evidence the Claimant explained that he was told there was nothing that could be done and that the symptoms would go away without treatment.
 21. The Claimant attended A & E on 18 June 2020 with gastric issues. It is noted in the medical report *“has ahd [sic] 2-3 days, left side and all across chest hurts when breathehs [sic]”*.
 22. The Claimant was advised to take omeprazole when he has gastric issues and was informed his stomach complaints related to his regular use of painkillers, which he was taking for other symptoms.
- Communications with Respondent/managing work
23. The Claimant emailed the Respondent shortly after the injury and informed them that he was experiencing concussion.
 24. The Claimant’s furlough leave ended and he returned to work on 1 July 2020.
 25. The Claimant returned to work in the office between July 2020 until the second lockdown in November 2020. Thereafter, the Claimant worked from home.
 26. In April 2021 the Claimant wrote to the Respondent in regards to return to the office arrangements. The letter mentions various reasons for the Claimant not wishing to return to working in the office and details supporting his wife and child but also states:

“In all honesty, it is not just the virus situation that has given me a preference for working at home, most importantly, it is the improved productivity and less stressful environment that I have found extremely rewarding, particularly when suffering from either severe hayfever or post-concussion syndrome symptoms, both of which I have been medically diagnosed with and the additional help it has given my wife in terms of childcare (not during working hours but prior to starting work, at lunch time etc.)”

27. The Claimant was reluctant to add significant detail to his letter regarding the symptoms of Post Concussion Syndrome, which he found difficult to talk about, and he believed there would be a discussion about the matter.
28. The Claimant found working in the office more difficult. He found it harder to concentrate with colleagues talking, did not engage in social conversation in order to be able to focus on his work and had to use the public toilet 3 or 4 times a day when he was in the office to be sick. The Claimant found working from home more comfortable. He was able to reduce the lighting and background noise, could sleep at lunchtime and use his own bathroom if he needed to be sick.
29. The Claimant did not inform his employer he was having any difficulties completing his work, either whilst working in the office or from home.
30. On 3 June 2021 the Claimant provided the Respondent with some information about Post-Concussion Syndrome in an email exchange.
31. The Claimant was dismissed with immediate effect on 16 June 2021.

GP records/medical treatment

32. Prior to May 2021, the Claimant was not registered with a local GP. He had difficulties in registering with a local GP, having moved from a different area and due to the fact that the pandemic was ongoing and GP practices were full and busy.
33. In approximately December 2020/January 2021 the Claimant contacted an organisation called Headway. He spoke with them on a few occasions and they recommended that he join some support groups. The Claimant did this and he found it useful.
34. Following attending A & E in June 2020, the Claimant did not attend a GP or other medical provider until October 2021, after his employment had ended.

The Claimant's Symptoms

35. The Claimant sets out the symptoms of his Post-Concussion Syndrome in his Impact Statement. The symptoms commenced in April 2020 and continue to date. The symptoms are intermittent and varying.

36. *Hypersensitivity* - the Claimant wore sunglasses inside and out for a few months initially following the injury. In the first few months after his injury the Claimant couldn't use any screen devices other than for 10 minutes or so as he would get a headache. Following his return to work from furlough in June 2020 he did manage to work full-time on his computer. He did not ask for any adjustments to his role or kit. The Claimant still tries to reduce his screen time to avoid the onset of symptoms. The Claimant finds it difficult to engage in longer group conversations and difficult to concentrate on the telephone if there is background noise or movement.
37. *Sickness/nausea* – When working in the Respondent's office, which was between June 2020 and November 2020, the Claimant would be sick 3 or 4 times a day, whereas when working at home he would be sick less.
38. *Fatigue/insomnia* – When working for the Respondent the Claimant would sometimes sleep on his lunchbreak when working at home.
39. *Depression* – It is not clear if there has been a medical diagnosis of depression, there is no clear detail on symptoms, and I am unable to make a finding of fact in this respect.
40. *Difficulties with memory and brain fog* – When working for the Respondent the Claimant would wake up at approximately 6.00am in order to clear his head and experienced what felt like a hangover, although he ceased drinking alcohol, before being able to feel ready to start work at 8.30am.
41. *Anxiety* – the Claimant has lost confidence and become more anxious since his injury. The Claimant engages in less social activities.

Post-Dismissal Events

42. The Claimant had an MRI scan on 25 May 2022. In a letter from Dr Skiupokas, Neurology Locum Consultant, dated 23 August 2022 to the Claimant's GP he references "almost normal" appearances and to a follow up visit in neurology. This letter is dated 14 months after the Claimant's employment with the Respondent ended.
43. The Claimant's GP records do not show that any medication was prescribed for symptoms of depression or anxiety whilst the Claimant was employed with the Respondent. The Claimant was prescribed amitriptyline in June 2022 and citalopram in October 2022. These medications were prescribed 12 months and more after the Claimant ended working for the Respondent.
44. The following engagement with the Claimant's GP all took place after the Claimant's dismissal.

23 June 2021 – telephone consultation – referenced **** and fatigue after head injury and referred to counselling.

29 July 2021 – eConsult – migraines and given medication to treat headaches

- 1 October 2021 – telephone consultation - IBS symptoms – not taking omeprazole regularly.
- 2 December 2021 – telephone consultation - neurology referral – refers to the Claimant “*having vertigo, episodes of being spaced out, *** & headaches*”.
- 18 March 2022 – he requested an online consultation regarding hay fever problem
- 17 May 2022 – requests medical report
- 16 June 2022 – refers to amitriptyline
- 13 October 2022 – mixed **** and depressive order
45. On 22 March 2023 the Claimant’s GP wrote an open letter stating the Claimant had not suffered with symptoms prior to his head injury in April 2020.

The Law

46. I have had regard to section 6 of the Equality Act 2010, the Equality Act Guidance and the relevant case law. The Respondent directed me to *Richmond Adult Community v McDoogie 2008 CA*, *Anwar v Tower Hamlets College UKEAT/0091/10/2011* and *Condappa v Newham Healthcare Trust 2001 Eat 452 /2000* in submissions.
47. For the purposes of section 6 of the Equality Act 2010 a person is said to have a disability if they meet the following definition:
- “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.”*
48. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.
49. Further assistance on the definition is provided in Schedule 1 of the Equality Act 2010. The definition poses four essential questions:
- a) Does the person have a physical or mental impairment?
 - b) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - c) Is that effect substantial?
 - d) Is that effect long-term?
50. The term “substantial” is defined at section 212 as “more than minor or trivial”. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing.

51. Under paragraph 2(2) of Schedule 1 to the Equality Act 2010, 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 to have that effect if that effect is likely to recur.
52. Paragraph 2(1) of Schedule 1 explains: "(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, or (c) it is likely to last for the rest of the life of the person affected."
53. Likely should be interpreted as meaning "it could well happen" rather than it is more probable than not it will happen; see *SCA Packaging Limited v Boyle (2009) ICR 1056*.
54. A claimant must meet the definition of disability as at the date of the alleged discrimination - *Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729*. This position was again repeated by the EAT in *Alao v Oxleas NHS Foundation Trust [2022] EAT 135*, where Eady P held that when assessing the question of disability the Tribunal was "bound to have regard" to the position as at the date of the acts of discrimination in issue. A Tribunal must not take into account matters post the relevant period.
55. As to the effect of medical treatment, paragraph 5 of Schedule 1 provides:
56. "(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. (2) Measures include in particular medical treatment..."
57. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" ('the Guidance'). The guidance should not be taken too literally and used as a check list (see *Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19*).
58. In *Aderemi v London and South Eastern Railway Ltd [2013] ICR 591*, Langstaff P stated: "It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which the Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect on his ability, that is to carry our normal day to day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than trivial. In other

words, the Act itself does not create a spectrum running smoothly from those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading of “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other”.

Conclusions – applying law to facts

59. The following conclusions and analysis are based on the findings which have been reached above.
60. I have considered the facts, the law and the Guidance.
61. I considered the Guidance on matters to be taken into account in determining questions relating to the definition of disability.
62. The Guidance under each of the sections states that a section should not be looked at in isolation but in conjunction with the other sections. The sections are: A (the definition), B (substantial), C (long term) and D (normal day to day activities).
63. I note that it is important to consider whether the alleged effects on day-to-day activity, when taken together, could result in an overall substantial adverse effect, paragraph B4.
64. I also considered the Guidance given in relation to cumulative effects of an impairment in paragraph B6 and paragraph B9, where the Guidance stresses the importance of considering the things that a person cannot do or can only do with difficulty.
65. I have considered the guidance set out in *J v DLA Piper* in relation to approaching the issue of whether someone has an impairment. The EAT noted it was good practice in every case for tribunals to look at the issue of whether someone has an impairment separately from the question of whether it has an adverse effect on their ability to carry out normal day-to-day activities. However, that did not mean that tribunals should rigidly adhere to that approach, and in some cases (particularly if it involves resolving difficult medical questions) it is appropriate to firstly consider whether the Claimant’s ability to carry out normal day to day activities has been adversely affected. Where the answer is yes, in most cases a tribunal can infer that the Claimant was suffering from a condition which has produced that adverse effect, namely an impairment.
66. The Respondent’s position is that the Claimant is not disabled, the Respondent suggests that that Claimant’s symptoms were not substantial in June 2021, and that there is a lack of corroborative evidence to support what the Claimant says in his witness statement.
67. I considered the Claimant to be consistent and clear in answering the questions put to him, and as set out in the findings of fact above, noting that the period in question was during the pandemic.

Does/did the Claimant have a physical or mental impairment, namely Post Concussion Syndrome?

68. I find the Claimant did experience Post Concussion Syndrome, and was informed this was likely to be the situation in May 2020. Post Concussions Syndrome included various symptoms for the Claimant including hypersensitivity, headaches, nausea, fatigue and sleep issues, low mood, memory problems/brain fog and anxiety.

Did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

69. I have borne in mind that the relevant date for consideration is June 2021. I must have regard for matters as they were at the time of the alleged discrimination.

70. It is important to consider that substantial in this respect means more than a minor or trivial. I have considered the well-established principles in *Adermi*.

71. The Respondent relied on *Anwar v Tower Hamlets College UKEAT/0091/10/2011* to assert that something can be considered more than trivial yet still minor rather than substantial.

72. The Respondent also relied on *Condappa v Newham Healthcare Trust 2001 EAT 452 /2000* to assert that a Claimant carrying out normal day to day activities with some difficulty or pain does not mean that the definition of disability is met.

73. Normal day to day activities are things people do on a regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing.

74. I have found the Claimant did experience symptoms and challenges following his head injury and acknowledge the Claimant's view that Post Concussion Syndrome may not be presently widely known in the UK. I can appreciate that the months following the head injury would have been hard for the Claimant, especially during a pandemic.

75. However, the determination for me is a very specific one considering whether he meets the established definition at section 6 of the Equality Act.

76. The Claimant's GP records do not indicate any pattern of regular attendance to discuss management of symptoms from June 2020 until his dismissal. I understand this is against a background of a pandemic and being told there was no form of treatment.

77. Nevertheless, in considering what the Claimant was not able to do, I note that although the Claimant made some adaptations to enable him to manage normal day to day activities, the Claimant maintained working full time using a computer (indeed he worked in the office just some months after his injury from June 2020 when the Claimant says the symptoms were at the worst) and was able to travel to and attend work in an office environment. The Claimant was also able to assist his wife with childcare responsibilities and was not experiencing any symptom to such an extent that he felt it necessary to seek further medical support at the relevant times. I consider the adaptations, such as waking up early to feel awake for work and working in a quiet place free from noise to be reasonable. The Claimant was not unable to work, he returned to work in the office, and then later worked from home, but from November 2020 the period of working from home was initiated due to the second national lockdown. Although the Claimant found it difficult to engage in conversations whilst working on the computer, I do not consider this to evidence a substantial adverse impact. Many workers find it easier to concentrate in a quiet environment and to focus on one task at a time without talking.
78. I have determined that that the Claimant has not demonstrated that is any day to day activity that he could not do. The Guidance, in paragraph B9 stresses the importance of considering the things that a person cannot do or can only do with difficulty.
79. I do not consider the symptoms of the impairment to be **substantial**. Although the effects were not pleasant, for example, being sick, finding it difficult to focus with background noise and feeling groggy in the mornings and taking some time to feel awake and ready to work, there is no detailed evidence to support a conclusion that the effects were substantial at the relevant time, being June 2021, given he was able to work full time and maintain assisting his wife at home.
80. Accordingly, I concluded that there was no evidence provided to me, either from the Claimant or in documentary form, to support a finding that the Claimant's symptoms, separately or together had a **substantial** adverse impact on normal day to day activities in June 2021.
81. I considered also the fluctuating symptoms. Even when taking all the symptoms together at their worst, there is insufficient evidence that there was a substantial adverse effect on the ability to carry out normal day to day activities at the relevant time.

If not, did the Claimant had medical treatment, including medication, or take other measures to treat or correct the impairment? Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

82. I have concluded there was not a substantial adverse effect on day to day activities and also considered if there would have been an adverse effect without any treatment or measures, when looking at the relevant time.

83. The Claimant took self-prescribed pain killers.

84. He also took omeprazole occasionally for gastric issues. The gastric issues arose out of the Claimant taking painkillers.
85. The Claimant spoke with an organisation called Headway on several occasions and joined some online support groups.
86. I do not consider the absence of any of the above would have meant that the symptoms of Post Concussion Syndrome would be substantial.

Were the effects of the impairment long-term?

87. The Tribunal will need to decide:
- i. Did they last at least 12 months, or were they likely to last at least 12 months?
 - ii. If not, were they likely to recur?
88. The Respondent accepts the symptoms, the effects, were long term. As I have found the symptoms, the effects of the impairment were not substantial, I have made no detailed conclusions in this respect noting the acceptance by the Respondent.
89. I have concluded that even when taking all of the Claimant's symptoms together, at their worst, there remains insufficient evidence that when taken together her symptoms had a substantial adverse effect on his ability to carry out normal day to day activities. Accordingly, I conclude that the Claimant has not evidenced that he meets the definition under section 6 of the Equality Act 2010. I have determined that there is insufficient evidence for me to conclude that the symptoms of Post Concussion Syndrome had a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities at the point of the alleged discriminatory event.

Employment Judge G Cawthray

11 June 2023