



EMPLOYMENT TRIBUNALS

Claimant: Mr J Rocchi

Respondent: Octo Members Group Ltd

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT London Central (CVP)

On: 17 April 2023

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: Mr D Brown (Counsel)

For the respondent: Ms A Gumbs (Counsel)

JUDGMENT

1. The claimant is not a disabled person within the meaning of section 6 Equality Act 2010.
2. The claims for disability discrimination are accordingly dismissed.
3. The remaining claims shall proceed to the Final Hearing to commence on 16 October 2023.

REASONS

Background and the Issues for Determination at this Hearing

1. This is a claim for unfair dismissal (section 98 Employment Rights Act 1996 (ERA); protected disclosure: automatically unfair dismissal (section 103A ERA) and detriment (section 47B ERA): disability discrimination, failure to make

reasonable adjustments (sections 20 & 21 Equality Act 2010 (EQA); holiday pay and unlawful deduction from wages. There is Final Hearing (8 days) listed to commence on 16 October 2023.

2. There have already been two preliminary hearings in this case. A Case Management Hearing on 24 May 2022 with EJ Beyzade, which set out the List of Issues, and a further Preliminary Hearing dealing with amendment and other case management matter with EJ Elliott on 8 November 2022. At the second Preliminary Hearing, EJ Elliott also listed today's Open Preliminary Hearing (OPH) to determine whether the claimant is a disabled person within the meaning of section 6 EQA.
3. I confirmed the issues in dispute between the parties at the commencement of the hearing. The respondent accepted that the claimant had an impairment, namely a brain injury which resulted from an accident on late 29 June into the early hours of 30 June 2021. However, the respondent did not accept that this impairment caused substantial long-term adverse effects on the claimant's normal day to day activities.
4. The parties initially disagreed as to the "material times" during which this disability must be present; however, at the end of the hearing, in submissions, the parties effectively accepted that the relevant period was from 7 September 2021 (being the commencement of the disciplinary investigation into the claimant's conduct) to 19 November 2021 (being the date on which the respondent notified the claimant of its decision to dismiss him for alleged gross misconduct).

Conduct of the Hearing

5. The hearing was conducted remotely using CVP. The Tribunal had two electronic bundles: 1) a shorter bundle of 56 pages from the claimant containing medical records (CB) and 2) a longer bundle of 123 pages from the respondent containing essentially the same medical records but also including the pleadings and additional correspondence (RB). Page numbers in this Judgement and Reasons are to those respective bundles unless otherwise indicated. The claimant also gave evidence adopting his impact statement (of 17 April 2023) as his evidence in chief. The claimant was afforded reasonable adjustments in giving his evidence, as requested: regular breaks of 5-10 minutes every 30 minutes.
6. The Tribunal was assisted by oral submissions from both Counsel. The hearing concluded at 3.55pm and the decision was reserved.

Relevant Law

Section 6 EQA: “a person (P) is 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.”

Schedule 1, Part 1 – EQA : paragraph 2-“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.”

Guidance on Definition of Disability (2011): Part 2 - Section B meaning of “substantial adverse effect”-a substantial effect is one that is *more than minor or trivial*. Section C-long-term (see above)

7. The Tribunal was referred to the following authorities by Ms Gumbs: **Vietch v Red Sky Group Limited [2010] NICA 39**, which was of persuasive not binding authority and **All Answers Ltd [2021] EWCA Civ 606** (Court of Appeal). The **All Answers** case held that where the question is whether at the time of the alleged discriminatory acts the effect of an impairment is likely to last at least 12 months, *this must be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts* and not as at the date of the OPH. *The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did or did not last for 12 months.*

Findings of Fact

The Claimant’s Evidence

8. The claimant said that his impairment started when he had the accident on 29/30 June 2021. Following the injury, he had been unconscious for about 10 hours and remained in hospital for eight days. Upon discharge he was certified as unfit to work and referred to a head injury clinic for treatment (CB- page 6-7). Under the heading “Clinical Course: Diagnosis/Follow Up”, the Discharge Information Summary states that the claimant should attend the Head Injury clinic 6-8 weeks post discharge; attend a cheque with his GP and one week and require a minimum of four weeks of work and then a phased return. At that stage there is no indication from the medical records that the claimant has any impairment which is likely to last for more than 12 months.
9. In his impact statement, the claimant highlighted the following adverse effects caused by his head injury: loss of sense of taste and smell (which he said had still not returned); severe headaches; dizziness and disorientation and cognitive issues. The claimant was cross examined on each of these alleged effects.

Loss of taste and smell

10. The claimant accepted in cross-examination that he had Covid 19 prior to the accident, when he had lost his sense of taste and smell. However, he gave

clear evidence that he had fully regained both taste and smell prior to his accident in June 2021.

11. The claimant was then referred to his GP records (RB- pp 110-116). He accepted that in a telephone conversation on 19 July 2021 with his GP (at page 114) he had said that he still had no sense of taste or smell. The claimant was also referred to a Clinical Neuropsychological Assessment Report which referred to assessments on 12 October, for November and 16 November 2021 (CB pp10-15). This noted his loss of taste and smell and the fact that it impaired his enjoyment of food.
12. It was put to the claimant in cross-examination that after late 2021 he had made no further mention of loss of taste and smell in any medical records/discussion with his doctors. The claimant said that he still had no sense of taste or smell. He had been led to believe that this was “normal” for his type of injury; he said that no medical adviser had specifically asked him about continuing loss of taste and smell and therefore he had not raised it with them.
13. I find that on the evidence presented to the tribunal the claimant has shown that during the material period (7 September -19 November 2021) the claimant had lost his sense of taste and smell. Whilst this did not prevent the claimant from eating (which is a normal day to day activity) I accept that this would have impacted on the claimant’s enjoyment of his food/drink.

Severe Headaches

14. In his witness statement the claimant said he continued to suffer from “severe debilitating headaches, like migraines”. Currently the frequency of such headaches is about 3-4 times per month, but they are more frequent when he is under stress. The onset is unpredictable but can be brought on if the claimant works for five hours or more (the claimant did not say whether this was a continuous period of five hours or not).
15. The headaches normally last for 12-24 hours and the claimant treats them with paracetamol and Nurofen to manage the pain. During the headaches, the claimant’s is unable to read write or use screens of any type and generally has to lie down and stay still until the headache subsides.
16. The claimant was referred in cross-examination to the telephone conversation of 19 July 2021 with his GP (RB-114) which referred to the “headaches beginning to ease”. The claimant accepted this reference. However, he said that prior to that he had had constant headaches and that when he was in hospital, he had been taking morphine to relieve the pain. The reference to the headaches beginning to ease was a relative one in that the headaches were no longer constant and he no longer needed to take morphine to relieve them.
17. The claimant was referred to a telephone consultation with his GP on 9 August 2021 (RB-113) where he had said that he was getting bored at home and would like to be able to partially return to work. The claimant accepted this and said

that at this stage his headaches were “intermittent” which in itself was an improvement.

18. The claimant also said that he was a naturally optimistic person and that he wanted to move on. He still experienced the headaches, but the position had improved; he no longer needed morphine and could rely on non-prescription painkillers.
19. The claimant was also asked in cross-examination about whether the headaches were linked to fatigue. He said that he believed they were. The claimant was referred to the Neuropsychological assessment (dated 29 December 2021-CB 10) and it was put to him that there is no suggestion that the headaches were being caused by fatigue. The claimant said that the assessments which led to that report had been focusing more on the issue of his mental health and psychological state and he had not been specifically asked about headaches or fatigue and so had not necessarily mentioned them during the assessments.
20. However, I note that at page 11 there is a reference to “sleep, fatigue and pacing” when the claimant says that he gets a headache when looking at a screen for too long. This suggests that it would have been open to the claimant to raise issues relating to headaches even if no specific question had been put to him.
21. The claimant was also referred in cross-examination to a letter dated 3 March 2022 from Mr J Samarasekera (Consultant in Neurosurgery at Barts Hospital). Ms Gumbs explained that this was on an issue of credibility, and she accepted that the March 2022 date was outside the relevant period for the assessment of disability status. The claimant was referred to a reference that “his headaches have resolved, and he has no major neurological symptoms or concern”.
22. The claimant said that he had never himself used the term “resolved” it was all relative. His headaches were not as frequent as they had been and in that sense they had improved. The claimant also said that given his optimistic nature, he was perhaps painting a “rosier picture” than the actual reality. He said again that he wanted to move forward that he had a family to support and that he needed to get back to work for financial and practical reasons.
23. On the basis of the evidence given by the claimant and the cross references to his medical records over the relevant period I find that from 7 September – 19 November 2021 there are references in the claimant’s GP notes to “still having headaches following head injury”, for example on 9 November 2021 (RB-111). I accept the claimant’s evidence that over that period he was still experiencing severe headaches, although the frequency of those headaches had decreased.

Dizziness and disorientation

24. In his witness statement the claimant said that he experienced bouts of dizziness and disorientation both with and independently from his headaches. He said these persisted to date. The dizziness made it difficult for him to walk

and maintain his balance especially when walking downstairs. He would need to sit down and stay still until the dizziness abated, which usually took around two hours. The bouts of dizziness had been very frequent in the first three months following his accident but he now had them about every 10 days and they were more frequent during periods of stress. There was no medication used to manage the symptoms.

25. In cross-examination, the claimant accepted that his medical records showed no further reference to dizziness after 6 September 2021. However, he said that if he was not asked about dizziness, he would not offer up information about it.
26. The claimant was specifically referred to the Neuropsychological Assessment Report of December 2021 where again there was no mention of dizziness. The claimant said that he would not have been asked about it as the assessments focused more on mental health issues such as suicidal tendencies etc. it was put to the claimant that he had mentioned his loss of taste and smell and the fact that this made him depressed because of his loss of enjoyment of food and wine. The claimant said he had offered this up as he had been depressed about this fact, although he acknowledged that he had also said that he was pleased that he had lost weight as a result. The claimant repeated his evidence that he tended to see the positive side of everything and so had not wanted to appear to be sorry for himself.
27. The claimant repeated his desire to move on and to return to work to support his family and that this was why he was attempting to paint a “rosier picture” of his condition to his medical advisers.
28. I asked the claimant if he accepted that the assessment report did not record an accurate picture of his symptoms at the relevant time. The claimant said that it was relative: there had been some improvements; he had never said that matters were “resolved” but he did want to move on with his life, his financial situation was difficult as he had not been paid for over a year but he accepted that he was painting a better picture of his condition than the actual reality.
29. Given the evidence presented in the medical records and the oral evidence of the claimant, I find that there is insufficient evidence to show that the claimant suffered from dizziness and disorientation over the period 7 September-19 November 2021.
30. The claimant’s own admission was that he was not giving full and frank information of his condition to his medical advisers. He said that he wished paint, in his own words, a “rosier picture” to enable him to return to work. This raises questions as to the reliance which can be placed on the claimant’s medical records and as to his credibility generally. If the claimant was prepared to “skew” his evidence to achieve a desired result (namely to ensure a return to work for understandable financial/family reasons), this must, at the very least, raise some doubt as to the reliability of his oral evidence to the tribunal as regards his symptoms.

Cognitive issues

31. The claimant said in his witness statement that there had been a general slowing of his mental ability and that he struggled with decision-making and processing information. There were also “severe problems” which manifested itself as memory loss which was independent from the headaches and the dizziness. The claimant said he forgot simple things such as turning off the gas hob or taking keys out of the door after he had opened it. He constantly forgot appointments. He said this happened about three days per week.
32. The claimant was not prescribed any medication to assist with memory loss, but he and his family had adopted coping strategies to alleviate the effects. There was no evidence presented from any members of the claimant’s family in this regard. The claimant said that he had been fortunate enough to find a job where he could work flexibly which made it easier to take regular breaks and manage his condition.
33. The claimant said in cross-examination that there was medical evidence to show that he had raised issues with his decision-making ability. He specifically referred to CB-14, the neuropsychological assessment in December 2021 which referred to lower performance on some of the memory tests. However, I note that this assessment also states that the claimant’s general intellectual functioning is in the average range and that his abilities are relatively preserved. The report also states that the claimant did not report any difficulties about language or visuo-spatial functioning.
34. The claimant also referred to the section in this report on Executive Functions which was an umbrella term referring to the cognitive skills involved in decision-making. The claimant said that this showed problems with his cognitive skills. I note that the report states that the claimant scored within the average range on the ability to inhibit cognitive interference. The assessment also recorded that the claimant performed within the high average range on a timed test which required mental flexibility and performance management, although when the executive load increased the claimant performed in a borderline range.
35. The claimant was also referred in cross-examination to a reference which noted that his visual and verbal memory were relatively well-preserved, and the claimant acknowledged this, but said that his ability had lessened following the accident.
36. There was no reference to memory loss in the claimant’s GP records.
37. On the basis of the evidence presented to the tribunal, I find that the claimant has not shown to the requisite standard of proof that there was any substantial adverse effect on his cognitive abilities during the period 7 September-19 November 2021.
38. The claimant was not able to identify within his medical records any assessment which showed that as that the material times his condition was likely to last for 12 months or more. The claimant repeated his evidence that he

had tried to portray that he was much better than he actually was, because for financial reasons, he wanted to return to work as soon as possible, following his dismissal in November 2021.

39. He also reiterated that his medical advisers usually asked him about his state of mind as opposed to specific physical symptoms and that he only responded to the questions that he was asked. Whilst I accept the claimant's desire to move on and his generally optimistic temperament, I do not find it plausible that given the nature of his injury, the claimant would not have raised any specific physical symptoms if these had been substantial and were adversely affecting his normal day-to-day activities.

Medical Records

40. There were numerous references to the claimant's GP records and the Neuropsychological Assessment of December 2021 (see above).
41. The claimant also referred to a letter dated 14 October 2021 (CB-1) from Dr J Rowland (Principal Clinical Psychologist) at Merton Community Healthcare. This stated that the claimant was attending frequent appointments with the service and also that the claimant required reasonable adjustments in accordance with the EQA. Both parties accepted that this was not of itself evidence of the claimant's disability within the definition of the EQA. The letter gave no other information.
42. The claimant was discharged from the Merton Neuro Rehab Team on 24 January 2022. Whilst I note that this is outside the material times for the tribunal to consider, this letter does not refer to any of the symptoms (loss of taste/smell, headaches, dizziness, memory loss) which the claimant referred to in his oral evidence to the tribunal

Conclusions

43. The respondent has accepted that the claimant has an impairment, namely his brain injury following the accident in June 2021.
44. I have found that the claimant has not established to the requisite standard of proof that over the relevant period of 7 September to 19 November 2021 he suffered from dizziness or disorientation or any cognitive issues, such as to constitute substantial adverse effects on his normal day-to-day activities.
45. I have found that the claimant has shown that over the relevant period he suffered from loss of taste and smell and headaches, which did constitute a substantial adverse effect on his normal day-to-day activities, such as eating, reading, using a screen for any device, mobility, carrying out usual activities (as he was required to lie down during such headaches).
46. However, I have not been presented with any evidence which suggested that such substantial adverse effects were long-term. The claimant accepted that no medical evidence was presented on this point. Given my reservations (see above) as to the reliability of the claimant's own evidence, I am unable to make

a finding with regard to the long-term nature of this effect (namely whether it was likely to last for 12 or more). As I am required to do (**All Answers**) I assess this as the date of the alleged discriminatory acts (7 September to 19 November 2021).

47. The claimant is not disabled within the meaning of section 6 EQA. His claims related to disability discrimination are accordingly dismissed.

D Henderson
Employment Judge Henderson

JUDGMENT SIGNED ON: 24 April 2023

JUDGMENT SENT TO THE PARTIES ON

13/07/2023

FOR THE SECRETARY OF THE TRIBUNALS