EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Mears	**v**	The University of South Wales

PRELIMINARY HEARING JUDGMENT

Heard at: **Cardiff** **On: 22 August 2018**

Before: Employment Judge Emery

Appearances
For the Claimant: **Mr B Jones (Counsel)**
For the Respondent: **Mr O James (Counsel)**

PRELIMINARY HEARING JUDGMENT

The Claimant was disabled as defined by the Equality Act for the period of the Respondent's redundancy exercise, from June to August 2017.

REASONS

The Issues

1. The issue to be determined at this hearing is whether the claimant was disabled as defined at s.6 Equality Act 2010 during the material period set out in the claim – June 2017 to 9 August 2017. At the outset of the hearing, Mr James for the respondent clarified that the only issue in dispute on the issue of disability was whether the condition was "substantial" as defined by the Equality Act. Mr James stated that the respondent was on actual knowledge of her condition and he also stated that the respondent was no longer challenging the claimant's contention

that her condition was long-term.

2. Accordingly, the issue for me to determine at this hearing is:

    Did the claimant's impairment have a substantial effect on her ability to undertake normal day to day activities?

The Evidence

3. The claimant produced a disability impact statement and medical records from Occupational Health, her treating consultant, her GP and other medical records. The respondent does not accept that the claimant accurately records the effect of her condition in her statement, arguing that there is a significant material difference between the contents of her medical reports and her own self-assessment; it says the effects of her condition ceased being substantial in May 2017.

4. I heard evidence from the claimant. Prior to her giving evidence Mr Jones asked that she be allowed what he describes as an 'aide-memoir' of typed bullet points on the witness table while she is giving evidence. The reason – the claimant suffers, he says, from short-term memory issues and she wants to ensure that she makes all the relevant points in her evidence. Mr James objected, saying that he wishes to discuss broad issues in her evidence rather than specific dates, that the tribunal should be "cautious" before agreeing to such a request.

5. I determined that the claimant should be allowed to take her bullet-points with her to the witness table. I accepted that witnesses' evidence should be unscripted and from memory; however, if the claimant has difficulty recollecting events, and bullet-points may prompt, this would be of assistance to the claimant. I considered that this was an adjustment to the rules of evidence which should reasonably be made in the circumstances. In the event, I did not see the claimant referring to her aide memoir when giving evidence.

The Facts

6. I made the following findings of fact on whether the claimant's condition had a substantial effect on her ability to undertake normal day to day activities. I do not recite all the evidence I heard, instead confining my findings to those relevant to the issue.

7. The claimant suffered from a brain aneurism on 1 January 2017 which caused a sub-arachnoid haemorrhage which required emergency surgery on 2 January. The claimant was placed in an induced coma and spent seven weeks in hospital, the first two of which she was in a life-threatening condition. She had four surgical procedures, including surgery following a pulmonary embolism.

8. The claimant did not engage in Clinical Psychology services offered to her following her discharge from hospital, on her evidence because she was extremely unwell, she could not walk properly, she was struggling with her mobility and was attending hospital appointments 3 times a week. She was relying on family to drive her to hospital as she did not have the confidence to attend on public transport unassisted. She said that the Neuro Service visited her at home, suggesting group sessions, and "offering me things which at the time I did not want to engage with as I was still struggling with health."

9. The claimant said that her main treatment was via her neurologist, that she did not understand that the Community Neuro Service would be dealing with her neurological symptoms – that "they talked about coffee mornings and gardening club … they emphasised the support groups." I accepted the nature of her condition was such that to mid-2017 the claimant was unable to engage with the Community Neuro services available to her.

10. Following the claimant's discharge from hospital she attended outpatient appointments. On 8 March 2017 attended A&E because of severe headaches. She had breathlessness and issues with her right hand and arm. The claimant was receiving warfarin and stomach injections until June 2017 to prevent further blood clots. Her statement describes her continuing to receive prescribed medication for depression (citalopram, 40mg) and pressure headaches (cocodamol 30mg); the latter medication she describes being able to take only in the evening because of the effect that it had on her. She describes taking anti-depressants "I also get very depressed when I have had a bad day". She describes difficulty lifting due to lack of strength, and problems with her right hand which is "much worse" when she is tired. She describes difficulty reading books due to problems with her memory. She describes difficulties waking the dog, and only taking up limited housework during 2017.

11. An Occupational Health report dated 15 June 2017 describes pain in her neck and back, she has a stent in situ, and has found that bending and lifting causes headaches. The report says that she is unable to lift or carry "at present and I'm unsure how long this is likely to last". On permanent adjustments, the report says "unclear at this stage". The report suggests that the claimant is likely to be a disabled person as defined by the Equalities Act, referring to another medical condition which is also likely to be applicable (47-48).

12. On 24 July 2017, the claimant's GP wrote a report referencing intermittent headaches provoked by bending forward, that her memory and concentration "had improved … due to her significant brain injury and Grade 5 subarachnoid haemorrhage, I feel that special allowances and adaptions should [be] made for her for at least the next 6-12 months. She had a significant brain injury. I understand that [the claimant] was called for interview and I do not feel, as a General Practitioner, looking at her recent past medical history that she should have been placed under such a situation …" (51-52).

13. On 24 August 2017, an OH report it says that the claimant advised that "…she continues to have issues regarding her cognitive state i.e. she has to think about how to safely walk downstairs. … she continues to be short of breath … she is also having difficulty sleeping at times; has very poor focus and concentration... I would recommend a phased return to work…." (53-54). On her return to work, the claimant was given a car-parking space close to the office because of her reported difficulties walking.

14. An Occupational Heath report dated 11 January 2018 describes the claimant "can get tired and continues to get breathless on exertion." It describes two fingers bending spontaneously, interfering with typing, but she does other tasks; she occasionally gets tremors in her legs, and her legs and hands are worse when she is tired. Her concentration "is not as good as it was and she finds she can no long settle to read a book she also sometimes tends to forget words… but generally, she is doing very well". She was due to she her neurologist again in Mid-May 2017 8, because of her ongoing symptoms. The report describes her as likely to feel more tied and may continue to have issues with her concentration, "this is often the case after a brain injury" (41-2). The claimant's Consultant Neurosurgeon wrote a report on 6 June 2018. She refers to the claimant's "good recovery given her eventful admission" to hospital "however she does experience symptoms which are very common after a subarachnoid haemorrhage like fatigue and headaches. Patient also reports occasional word finding difficulties." The report says that the claimant did not undergo neuropsychological testing" to detect if there were mild cognitive deficits, as these reports are usually requested if there are significant impairments. The report stats "Given persistent headaches, fatigue and cognitive deficits after subarachnoid haemorrhage I feel that most patients like [the claimant] benefit from a gradual return to work process…. (57A).

Submissions:

15. For the claimant, Mr Jones referenced the test for 'substantial' adverse effect – a more than minor or trivial, effect on everyday activities. Several of the effects suffered by the claimant wold meet this test; she had mobility issues, she could not stand for any length of time and had difficulties with mobility and walking; getting around was a challenge. The headaches the claimant suffered were debilitating and serious and are consistent with the medical evidence. The consultant confirms that many of her symptoms are common following such emergency surgery. The claimant suffered a "constellation of difficulties" and is disabled within meaning of the Equality Act

16. For the respondent Mr James argued that a significant amount of the claimant's witness evidence is not supported by the medical evidence; that there is no evidence of concerns with memory or concentration, that the claimant did not in any event avail herself of medical treatment 0 a "cause of concern". The

Consultant's report at 57A was, he said, a generic report, referencing "most patients", not the claimant. The claimant has reported difficulties which are "in large part subjective and self-reported" that the treating medical records show a different picture. He argued that the tribunal can't be satisfied that there were substantial adverse effects, as this is not made out in treating clinical records.

17. In response, Mr Jones argued that the respondent had focused on a small part of the picture; the headaches for example, are consistent.

The Law

18. s.6 Equality Act 2010

    (1) A person (P) has a disability if—

    (a) P has a physical or mental impairment, and

    (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Conclusion on the evidence and law

19. I concluded that the claimant was a disabled person throughout June - August 2017. The OH reports from June 2017 onwards says the claimant cannot lift or carry, has difficulty walking, has issues with cognitive ability and she suffers from persistent headaches. The GP's report references a significant brain injury, the Occupational Health report in August 2017 describes difficulties with her concentration and issues with her cognitive state, including having to concentrate to work out how to walk down stairs safely. The claimant's witness statement describes the difficulties dealing with day to day activities, the adverse effects of a "bad day", the requirement for medication. In early 2018 the OH report again refers to difficulties with mental impairment.

20. I accepted that the claimant's witness statement and evidence at tribunal was broadly consistent with the medical evidence. I did not accept the respondent's contention that treating physician's records showed no evidence of disability. These records were, I found, written for a specific purpose, to discharge the clamant from that physician's treatment. Also, as the claimant's Consultant Neurosurgeon points out, many patients have significant ongoing symptoms after successful discharge, and I accepted the claimant's accont, backed up by the OH, GP and treating physician's report, that the effect on her during the relevant period was substantial, or more than minor or trivial. I accepted that throughout 2017 the claimant's impairment caused substantial adverse effects on her cognitive abilities – i.e. difficulties concentrating and memory issues because of the continuing effects of the brain aneurism and surgery – and that this constituted a disability. I also concluded that the physical impairments – the weakness with her hand and legs, including difficulties bending lifting and

carrying, difficulties walking, were substantial impairments on her ability to lift, carry and walk, and also constituted a disability.

Case Management Orders

21. The claim is to be listed for a **4-day** hearing to deal with liability and, if applicable, remedy. The parties are to agree joint days to avoid from January 2019 onwards and to write to the employment tribunal with these dates.

22. The claimant is to send a schedule of her losses to the respondent and to the Employment Tribunal by 5 October 2018.

23. The parties are to exchange lists of their relevant documentation by 5 October 2018. This includes the claimant's medical records relevant to liability and remedy; if medical records are not received in time the parties agree to liaise over an extension of time to serve medical records.

24. The parties are to request documentation from each other's list by 19 October 2018. The respondent agrees to prepare a bundle of agreed documents for the Hearing and provide a copy to the claimant by 16 November 2018.

25. The parties are to exchange witness statements three weeks before the Hearing.

26. The parties are to agree to List of Issues and provide the same to the Tribunal on the morning of the Hearing.

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Employment Judge Emery
Dated: 16 September 2018

Sent to the parties on:

18 September 2018

For the Tribunal Office