EMPLOYMENT TRIBUNALS

Claimant: Miss B. Smith

Respondent: Heart of England NHS Foundation Trust

Heard at: Birmingham **On: 21 November 2017 and 22 November 2017 (in chambers)**

Before: EJ Benson

Representation
Claimant: Mr T. Lovejoy, Legal Executive
Respondent: Mr A. Korn, Counsel

RESERVED JUDGMENT

The Claimant was a disabled person within Section 6 of the Equality Act 2010 by reason of a subarachnoid haemorrhage and the after-effect of fatigue from 6 June 2013 to the date of the Claimant's dismissal on 28/29 November 2016.

REASONS

Issues

1. The issue to be determined in this preliminary hearing is whether the Claimant was at the material time a disabled person within the meaning of Section 6 of the Equality Act 2010 as supplemented by Schedule 1. The material time for the purposes of this hearing was the date of the Claimant's dismissal namely the 28/29 November 2016. The actual date will be determined at the substantive hearing, but for the purposes of this application it does not matter whether it was the 28 or 29 November. It was agreed before Employment Judge Gilroy that the Claimant suffered from a subarachnoid haemorrhage, though the date was agreed to be 31 August 2012 which was the date the Claimant was admitted to hospital according to the medical records. The Claimant alleges that the subarachnoid haemorrhage and the subsequent after-effects amount to a disability. During the course of the hearing before me, the Claimant confirmed that the after-effects which she relies upon as amounting to a disability are that she has memory problems, mood swings, headaches and fatigue.

Evidence

2. I heard evidence from the Claimant, Miss Smith and was provided with a witness statement which sought to set out the impact the alleged disabilities had upon her normal day-to-day activities. I was referred to an agreed bundle of documents and was specifically asked to read a list of medical reports produced between 31 August 2012 and 16 December 2016. I was also referred to the sick notes provided by the Claimant's GP within the bundle at pages 91 to 127 and also the Claimant's medical GP records at pages 45 to 65. Both representatives provided me with outline written submissions which they expanded upon in oral submissions and copies of relevant case law which I refer to below. I was also provided with a chronology/reading list by the Respondent's Counsel, though much of that related to the substantive issues rather than this preliminary issue.

Findings of Fact

3. The Claimant was employed by the Respondent from the 29 June 2009 to the 28/29 November 2016 when the Claimant's employment was terminated. The Claimant was employed as a Healthcare Assistant in the Respondent's Chest Clinic.

4. On the 31 August 2012, the Claimant suffered a subarachnoid haemorrhage, she was admitted to hospital and spent some time in a coma.

5. The Claimant had a number of absences during her employment with the Respondent, the longer periods being between 13 June 2011 and 13 November 2011 (154 days) by reason of stress, 3 September 2012 to 2 June 2013 (273 days) by reason of the subarachnoid haemorrhage, 8 October 2013 to 28 September 2014 (356 days) by reason of stress/back pain and 31 December 2015 to the 28 November 2016 (334 days) by reason of stress related problems/stress at work'.

6. Following the subarachnoid haemorrhage, the Claimant remained in hospital until the 8 October 2012.

The GP records

7. The Claimant's medical records from her GP commence in January 2009 and cover the period prior to her haemorrhage in August 2012 and thereafter through to her dismissal in November 2016. From those records, both prior to and after the haemorrhage the Claimant had regular contact with her GP either via appointments, or telephone conversations and there were numerous opportunities to discuss any issues which were concerning her.

8. The GP records report the subarachnoid haemorrhage and subsequent reviews which took place after 12 October 2012, when the Claimant was discharged from hospital. On 4 April 2013 the Claimant reports that she feels better and has been recovering from the hemorrhage but does not feel able to return to the same job because of stress and her ability to cope with the workload.

9. Thereafter references in the GP notes are to a variety of matters including 'shoulder pain' in April and May 2013; 'low mood' in July 2013 and 8 November 2013 and from 7 October 2013 through to August 2014 'stress at work'; and from 7 December 2015 to the date of her dismissal, 'stress related problems/stress at

work'. During these periods there are references to reviews for her subarachnoid haemorrhage and other issues unrelated to her alleged disability.

Memory problems

10. After the Claimant came out of her coma, she can remember being visited by her family, but has no memory of other people visiting her, even though they had done so. Following her discharge from hospital, she spent some time in a wheelchair, but was able to walk about soon after returning home. In the months after her return from hospital, the Claimant found that she had forgotten a number of things that she formerly knew how to do. For instance, a few weeks after she was discharged, she went into Birmingham on her own and then realised she had forgotten how to get home and had to be collected. Her memory problems continued for some months after that incident. After her discharge from hospital she also relied upon her daughter to remind her to take her medication. Again, during the period immediately after her sub-arachnoid haemorrhage, she had also forgotten personal details such as her mobile phone passwords.

11. The medical records to which I was referred confirm that the Claimant was suffering from memory issues after her discharge from hospital. In her medical records there is reference on 25 October 2012 to the Claimant reporting that at times she struggled to remember some things. On 7 November again there is reference to the Claimant suffering from memory problems and forgetting things and then in a report dated 7 November 2012, Dr. R. Waheed confirmed that position when reporting to the Claimant's Consultant Neurosurgeon.

12. By 12 March 2013 the Respondent's Occupational Health Physician reported to the Respondent that having met with the Claimant, she confirmed that the Claimant reported 'no mobility problems, no concerns about her speech and no memory problems'. There is then no reference to memory problems within the medical records to which I was referred until a letter from the Claimant's GP dated 7 November 2014 which is addressed "To whom it may concern" which mentions that the Claimant had poor memory following the haemorrhage and goes on to say that the Claimant still has to get around by lifts and taxis to the required destination as she would not manage on public transport and needs help remembering to take her medication". There is no corresponding mention of this in the medical records on or around that date.

Headaches

13. The Claimant also suffered from headaches following the haemorrhage but she confirmed that these had largely gone away about the time that she returned to work in June 2013. The Claimant's headaches returned in December 2015 according to her evidence. Within the medical records, the references to headaches are first mentioned on 7 November 2012 when the Claimant was reported by her GP as 'feeling ok, with the occasional headache' and the next reference to headaches within the notes is 7 December 2015 when the Claimant attended at her surgery and reported stress issues at work with 'tension headaches'. She had two further visits to the GP on 21 December 2015 and 4 January 2016 and confirmed that 'her headaches were ok and that she had had no headaches whilst off work'. There is a final reference to headaches within an Occupational Health Report from Jacqueline Hughes the Occupational Physician on 5 May 2016. The Claimant did not explain how these headaches impacted upon her normal day to day activities.

Mood swings

14. The Claimant reported that since the haemorrhage she had suffered from mood swings, sometimes becoming very rapidly angry or tearful for no apparent reason. She advised that these were quite frequent after her discharge from hospital in 2012, though they had now improved. She reported they still occur, but more rarely, perhaps every month or so. There is no medical evidence to support the Claimant's contentions, nor has she provided any evidence as to how these mood swings impact upon her normal day to day activities.

Fatigue

15. After her discharge from hospital, the Claimant gave evidence that she suffered from frequent and sudden attacks of fatigue. When this occurred, she would suddenly feel very tired and have to go and lie down and that this could happen at any time. She was able to reduce the frequency of these attacks by making sure that she constantly kept active and moving. She found that if she sat down for any length of time or stopped moving, for example after meals, or stopped to have a cup of tea, she would be unable to stop her self immediately falling asleep.

16. She was able to return to work in June 2013 but found that after her return her fatigue became worse. She found that if she remained at work for extended lengths of time, she would fall asleep and that she could not work a full normal shift at work without having short breaks during the day to get up and walk about or to have some fresh air before returning to work. She also found that at the end of a working day, after she got home, she was completely exhausted and would fall asleep immediately only to wake in the early hours of the morning, being unsure whether it was morning or not and be unable to get back to sleep.

17. She found that the problems with fatigue were particularly bad at the end of a working week. After she stopped working in October 2013, having been signed off sick due to stress, her fatigue became worse and the episodes of fatigue and being unable to stay awake became more frequent again. She stated that this gradually improved, such that she was able to return to work in September 2014. The Respondent agreed to allow the Claimant to have extra breaks being 10 minutes in the morning clinic and 10 minutes in the afternoon clinic. She was able to work 30 hours per week and with the breaks allowed her to pace herself. Sometimes she did not feel the need to take breaks if she was busy working at a task she was familiar with. The Claimant states that she still has periodic episodes of fatigue, if she remains still for too long.

18. In evidence to the Tribunal, in response to questions asked by me, the Claimant explained that she was fine as long as she was kept busy at work and had a break as arranged. If however the clinic was quieter and she was sitting at a computer, she could fall asleep. She confirmed that this was still happening now and had done since September 2014 but as long as she had breaks she was ok. When she was at home she kept herself busy, but if she sits down, then she does get very tired. Her sleep pattern is disrupted and she wakes up in the middle of the night and then is not sure what time of the day or night it is and so gets up.

19. Prior to her haemorrhage the Claimant had reported to her Doctor on 21 October 2010 that she was tired all of the time. On 18 March 2011 she reported that she was feeling stressed all of the time and had 'poor sleep and appetite' and on 3 June 2011 that she was falling asleep recurrently during the day at work. She was referred to a Sleep Clinic. There is reference to sleep apnoea in

her medical records and there is further reference to this condition on 11 July 2011 where it reports that the Claimant is under investigation for tiredness and malaise. On 8 August 2011, 5 September 2011, and 17 October 2011 the Claimant indicates that she has 'poor sleep' – and 'sleep pattern disrupted', 'can't sleep at night' and finds herself staying in bed not wanting to do anything during the day. Further reference to sleep apnoea occurs on 16 August 2012 where the 'Claimant is sleepy in daytime' and 'has had sleep studies but not informed of results'.

20. Although it is clear that the Claimant did suffer from sleep problems as confirmed by the medical records prior to subarachnoid haemorrhage, she believes that her sleep problems have become worse and her GP had wanted to put her on medication to assist with sleeping, though she resisted it.

21. There is no mention of fatigue and tiredness within the GP medical records to which I was referred between the date of her haemorrhage and the Claimant's return to work in June 2013. Rather the gist of the medical records is that the Claimant had recovered remarkably well and that her progress was very good. When the Claimant returned to work she found work tiring and breaks were recommended in order to assist her during her working day. These were implemented. Her medical records indicate that on 15 July 2013, she was struggling with poor sleep pattern with early morning waking and was exhausted each evening. This was confirmed in her doctor's report of 13 August 2013. At this time, the Claimant was suffering from low mood and was prescribed anti-depressants which she indicates were helping. From 8 October 2013, the Claimant was signed off from work with stress and some reference to back pain.

22. During this period the Respondent continued to obtain Occupational Health Reports from the Occupational Physicians appointed by them. The Claimant also continued to have regular appointments with her GP in person and over the telephone as recorded in her records. The medical evidence however diverges as to the potential reasons for the Claimant's fatigue.

23. The GP medical records make reference to "poor sleep due to background worries – primary and secondary insomnia (7 October 2013), and 'poor sleep following personal bereavements' (19 August 2013)

24. The Occupational Health Reports however, make reference to the Claimant's functional capabilities following her subarachnoid haemorrhage as having been affected and 'she therefore requires some adjustment to her working patterns'. Further on 12 September 2013, a Dr Ratti confirms to the Respondent that the subarachnoid haemorrhage 'was treated neurosurgically and from a surgical perspective, she has done very well. However it is very common for individuals who had such a significant neurological problem to have a reduction in their functional capacity which is often long term. [The Claimant] who had returned to work and is currently working her normal 30 hours per week has acknowledged that she has had difficulties in maintaining an appropriate work-life balance, often crashing out when she gets home in the evening. Her tiredness has been accumulative, increasing towards the end of the week. [The Claimant] clearly has a genuine long term problems which require some adjustments.' This report was following the case conference with the Claimant and was in respect of adjusting her working hours.

25. On 14 October 2013, a Dr. Avi had been asked specifically to comment upon whether the requirement for a 10 minute rest break during the morning clinic and

afternoon clinic is long term and he comments that 'it is certainly a requirement for the foreseeable future and though it is possible that her stamina may improve over time, it is difficult to be definitive if this would occur'. The report was requested primarily in relation to the Claimant's absence by reason of stress at work.

26. On 6 February 2014 Dr Ratti provided a further report to the Respondent in respect of his view of the Claimant's flexible working application. He confirms that 'having had a subarachnoid haemorrhage can have a significant effect on an individual's stamina and overall functionality. Reviewing the specialist's correspondence received, she had a grade 4 subarachnoid haemorrhage and it was treated neuro-surgically. I believe her overall stamina and energy reserves are reduced long term and in my opinion, an application for flexible working is based upon a genuine medical condition and I would certainly support this.'
27. On 31 July 2014 Dr. Ratti provides a further report in which he comments that the Claimant's stamina is gradually picking up.
28. On the 12 February 2014, a different Doctor, Dr. Jacqueline Hughes again an Occupational Health Physician appointed by the Respondent reports to the Respondent that '[The Claimant] has found ongoing fatigue a problem. I note that this was mentioned in her previous occupational health letters. This can be an issue following a significant event like the brain haemorrhage she experienced. The duration can be very variable from person to person and can be persistent. In summary therefore, she has a chronic underlying condition. She has ongoing fatigue as a result of this'.
29. On 22 October 2015, Dr. Hughes again reports that the Claimant 'copes very well with her full range of duties provided she can pace herself'. '[The Claimant] reports that the fatigue she suffered following her subarachnoid haemorrhage has improved a bit over the years. She does however find it can be a problem at times and although she does not always take her comfort breaks, she does find on occasion that she needs them and would struggle to cope without the opportunity to take a brief break'.
30. On 5 May 2016, a further report from Dr Hughes comments 'fatigue following her subarachnoid haemorrhage has been an ongoing problem. I recommended comfort breaks continuing when I saw her previously in my clinic in October……I would recommend that her comfort breaks remain in place'. Within this and other reports from Dr. Hughes, she comments that the Claimant's 'cerebrovascular condition and ensuing fatigue would fall under the remit of the Equality Act, although ultimately this is a legal or tribunal decision'.
31. There is therefore a view from the Occupational Health Physicians, who when being asked to comment upon the Claimant's return to work, flexible working and rest-breaks confirm that in their opinion the Claimant's fatigue is related to the subarachnoid haemorrhage which she suffered in August 2012 and it will be an ongoing problem for her such that her overall stamina and energy reserves will be reduced long term. Her GP however does not record any references to the Claimant reporting fatigue relating to her haemorrhage, but rather within the records relates it to her difficulties in sleeping and further from the records it appears that she had a pre-existing sleep apnoea condition.

Law:

32. The definition of disability is contained in the Equality Act 2010 at section 6. It states that:

    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

Section 212(1) defines "substantial" as more than minor or trivial.

33. Schedule 1 of the Act provides supplementary provisions, including at paragraph 2(1)

The effect of an impairment is long term if-

(a) It has lasted for 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.

And at 2(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 treated as continuing to have that effect if that effect is likely to recur.

34. Paragraph 5(1) of Schedule 1 states that an impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:

(a) Measures are being taken to treat it or correct it; and
(b) but for the measures, the impairment would be likely to have that effect.

35. Further, Schedule 1 provides the power for guidance to be issued and that a Tribunal must take account of such guidance as it thinks relevant. The guidance which has been issued is the Guidance on Matters to be taken into account in determining questions relating to the Definition of Disability (2011). I have also had regard to the EHRC Code of Practice on Employment (2011) Appendix 1 in so far as it relates to the matters which I must decide.

36. The activities affected must be "normal". The Equality Act 2010 Guidance states at paragraph D3 that 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.

37. At paragraph C5 of the Guidance it states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. (In deciding whether a person has had a disability in the past, the question is whether a substantial adverse effect has in fact recurred.) Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term'.

38. The Guidance further states at paragraph C2 that the cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect.

39. I have also had regard to the decision of the EAT in Goodwin v Patent Office 1999 ICR 302 in which guidance was given as to the proper approach to adopt when applying the provisions relating to disability. Although this case related to the Disability Discrimination Act 1995, the approach is one which can be adopted in determining section 6 of the Equality Act 2010. The four questions which I must address sequentially are:

    (1) Did the claimant have a mental and/or physical impairment?
    (2) Did the impairment affect the claimant's ability to carry out normal day to day activities?
    (3) Was the adverse condition substantial?
    (4) Was the adverse condition long term?

40. During the submissions of Mr Lovejoy and Mr Korn, they made reference to various authorities as set out in their written and oral submissions. I have considered the references to this case law and taken account of it where relevant.

Decision:

41. In determining whether the Claimant was at the time of her dismissal a disabled person within the meaning of section 6 of the Equality Act 2010, I now proceed to consider the questions in Goodwin separately and sequentially in relation to each of the Claimant's impairments. I note that I should in doing so consider the cumulative effect where relevant.

Did the claimant have a mental and/or physical impairment?

42. Having considered the medical evidence, I accept that the Claimant had an impairment being the subarachnoid haemorrhage and its after-effects, specifically fatigue, memory problems, mood swings and headaches.

Did the impairment have or had an adverse effect on the Claimant's ability to carry out normal day-to-day activities?

Subarachnoid Haemorrhage

43. At such time as the Claimant was suffering the immediate after-effects of the haemorrhage, she was in a coma and hospitalised and the effect on her normal day-to-day activities was clearly adverse and substantial.

Mood Swings

44. Based upon my findings above, I am not satisfied that any mood swings that the Claimant was suffering from had any adverse affect on her day-to-day activities. There is little evidence that she suffered from these other than comments made by family members to her and some vague evidence which she provided to me. There is no real medical or other evidence to substantiate that any such moods swings impacted upon her day to day activities.

Memory

45. The further after-effect that the Claimant refers to is her memory problems. It is clear that the Claimant suffered from these and for a period of time following her haemorrhage, she was unable to remember to take medication without assistance from her daughter and was unable to find her way home from places she was familiar with and knew well. I am satisfied that when she was suffering from them, the Claimant's memory loss problems did have an adverse effect

upon her ability to carry out normal day to day activities such as finding her way to the shops and remembering to take medication when she should do so.

Headaches

46. The Claimant also suffered from headaches as a result of the haemorrhage, but these had largely gone away by June 2013. There is reference to tension headaches and headaches relating to the Claimant's stress at work in December 2015, but these appear unrelated to the haemorrhage. I have no doubt that the Claimant did suffer from headaches in the period immediately following her haemorrhage but no evidence was given by the Claimant as to the impact that these headaches had upon her and as the burden is upon her, I am not satisfied that she has shown that they had an adverse effect on her ability to carry out normal day to day activities.

Fatigue

47. The final after-effect which the Claimant relies upon is her fatigue. The Claimant reports that upon her return from hospital, she suffered frequent and sudden attacks of fatigue which could happen at any time. There is little mention of the fatigue in the early medical reports and records and by June 2013 the Claimant was well enough to return to work. The Claimant was imprecise as to when and for how long the periods of fatigue continued and to what extent prior to her return to work, but it is clear that following her return, her fatigue became worse and that if she remained at work for extended lengths of time, she would fall asleep and she could not work a full normal shift without short breaks during the day to get up and walk about or get some fresh air before returning to work. She reported falling asleep at work. Being able to enjoy a professional working life is something which is capable of being a normal day to day activity and falling asleep within work, if an individual is unable to take breaks, is something which would have an adverse effect upon those activities. Further, fatigue to the extent that an individual falls asleep during the day when she sits down, or sleeping for a number of hours upon returning from work would inevitably result in that individual being unable to participate in normal everyday activities such as joining in a family meal or being able to carry out everyday household tasks.

Was the effect substantial?

Subarachnoid Haemorrhage

48. As I have said above at such time as the Claimant was suffering the immediate after-effects of the haemorrhage, the adverse effect on her normal day to day activities was clearly substantial.

49. In view of my findings in relation to the headaches and mood swings, I deal with the remaining impairments as follows:

Memory

50. The Claimant's memory problems during the period when she was suffering from them would have had a substantial adverse affect upon her normal day to day activities. Being unable to find your way home from a place which you were familiar with, I find amounts to a substantial adverse effect, but I do not find that these effects continued. Although there is mention of memory issues in a GP letter addressed 'to whom it may concern' dated 7 November 2014, there is no corresponding reference in any medical notes and I believe the GP was reporting upon historic issues to assist the Claimant.

Fatigue

51. At such time as she was suffering fatigue, the medical evidence and the evidence provided by the Claimant supports that the effect upon her day to day activities was substantial. On her return to work in June 2013, understandably, having had such a serious condition and having been absent from work for some months, she found working again very tiring. Whilst in work, the Claimant was able to work for 30 hours a week with a small adjustment of breaks of 10 minutes in the morning and in the afternoon. She was however excessively tired in the evenings such that she would fall asleep immediately she got home for a number of hours. This is not normal and impacted upon her abilities to undertake normal activities. Fatigue to the extent that it prevents the Claimant from joining in everyday activities because she falls asleep during normal daytime hours either at home or at work, is in my view a substantial adverse effect.

52. It is not however clear from the medical and Claimant's evidence that she was suffering with fatigue during the whole period following her return to work in June 2013. It appears to have had a varying impact upon her normal day to day activities. Sometimes she could manage in work provided she had breaks and on other occasions it caused her to be excessively tired.

53. If the substantial adverse effect is likely to recur as at the date of the alleged discrimination, paragraph 2(2) of Schedule 1 of the Equality Act provides that the substantial adverse effect is treated as continuing. In the Claimant's case, although her fatigue and the difficulties that her fatigue problems cause her come and go, there is clear evidence from the Occupational Health practitioners that her overall stamina and energy reserves are reduced long term and that she has a chronic underlying condition resulting in ongoing fatigue. I find that it was therefore likely that the substantial effect would recur. In any event the Claimant in evidence to me confirmed that she has continued to suffer these effects since her dismissal and continues to do so. The medical view therefore was accurate.

Is the effect long term, in particular when did it start and has it lasted for at least 12 months or is/or was it likely to last at least 12 months.

Memory

54. Based upon the medical evidence that I have reviewed and the evidence of the Claimant, I am not satisfied that the effects of the memory loss had a substantial adverse effect upon the Claimant's normal day to day activities, lasting for at least 12 months or likely to last for at least 12 months. I find that there was a substantial adverse effect but it was short term and ended by June 2013. Further there is no medical evidence that it was likely to recur.

Fatigue

55. In view of my finding that the substantial adverse effect of the Claimant's fatigue was likely to recur, I go on to consider when such effect commenced and did it or was it likely to last 12 months? At the time of the haemorrhage the Claimant was already undergoing investigation for sleep apnoea, and the medical notes refer to the Claimant falling asleep at work. The evidence of the Occupational Health Physician states that fatigue is a possible consequence of the haemorrhage and one which can be long term, though its impact can vary from person to person. Although the Claimant had fatigue issues before she suffered her haemorrhage, and she says that she continued to suffer with these thereafter, I consider that it is likely that the fatigue and its worsening effects upon the Claimant particularly after her return to work in June 2013 are a consequence of the haemorrhage

which the Claimant suffered. From the evidence before me however, the date at which I can conclude that the adverse effect upon the Claimant's normal day to day activities became substantial was when she returned to work in June 2013.

56. I therefore conclude that the Claimant was a disabled person by reason of the subarachnoid haemorrhage and the after-effect of fatigue, from 6 June 2013 to the date of the Claimant's dismissal being 28/29 November 2016 in that, although the fatigue ceased at times during that period to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect as it was likely to recur. Further it did in fact recur throughout that period. The effect therefore lasted or was likely to last at least 12 months.

57. This matter shall now be listed for a preliminary hearing for one hour to consider case management orders.

Employment Judge Benson
22 January 2018