



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 16 June 2023

Claimant: Mrs Mandy Payne

Respondent: Indigo Service Solutions Limited

Before: Employment Judge E Fowell

Representation:

Claimant Amanda Robinson of counsel

Respondent Daniel Brown of counsel, instructed by GS Verde Law

JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was disabled at the time of her dismissal.
2. The claim will proceed to a hearing on 23 April 2024.

REASONS

Disability

1. This hearing is to decide whether Mrs Payne has a disability, or more accurately whether she had a disability at the time of her dismissal, which was on 19 November 2021.
2. In April that year she had a stroke and was taken to hospital where she remained for about two months. The stroke left her with difficulties with her speech and with her reading which continue to this day.

3. The definition of disability is at s.6 Equality Act 2010. 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.

4. According to the definitions section of the Act (s.212), “substantial” means “more than minor or trivial.”

5. The question of what is a long-term effect is dealt with at Schedule 1 to the Act, where it states that:

“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.”

6. Mrs Payne was dismissed about four months after leaving hospital, so her condition had not lasted 12 months by then. I therefore have to be satisfied that her condition was likely to last for at least 12 months. Since the stroke took place on 14 April 2021, the question is whether, as at 19 November 2021, it was likely to last until 14 April 2022, about five months later.

7. It was clear from hearing her evidence that Mrs Payne still has significant ongoing effects from her condition, which is known as aphasia. She found it difficult to find the words she wanted to use and needed questions to be repeated or explained because of the difficulty she has with reading. However, this cannot be judged in hindsight. It has to be judged at the time, and the test is whether an impairment of that duration “could well happen”: **Boyle v SCA Packaging Ltd** (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL. The Court of Appeal in **McDougall v Richmond Adult Community College** 2008 ICR 431, CA. held that tribunals must only consider evidence that was available at the time of the alleged discriminatory act:

“The Act required a prophecy to be made and did not permit recourse to evidence as to subsequent events.”

Procedure and evidence

8. I heard evidence from Mrs Payne and there was also a bundle of 183 pages. Having considered that evidence and the submissions on each side I make the following findings of fact.

Findings

9. The bundle contains a helpful report from the charity Headway, entitled *Coping with communication problems after brain injury*. It explains that this is a condition caused by damage to those areas of the brain responsible for understanding and using language, and states at page 18:

“Strokes can be associated with damage to very specific areas of the brain, including the language areas, so can cause very specific symptoms. However, most forms of acquired brain injury affect several brain regions and cause a combination of difficulties.”
10. It is therefore the result of physical or organic damage to certain areas of the brain.
11. The record of her discharge from hospital (page 46) shows that when she was admitted she had difficulty in finding words, then various seizures which worsened her speech. On her admission to the ward she was unable to read or understand the instructions given to her. Treatment was provided to her by a Speech and Language Therapy team and her reading and writing gradually improved. She was keen to go home to the support of her family and was discharged on 28 June. Her status on discharge was that she had “high-level cognitive difficulties” but was “able to express basic needs consistently”.
12. There is a table of outcome measures at page 58 which compares her progress from admission to discharge. It shows the following improvements:
 - a) auditory comprehension up from 4/18 to 17/18
 - b) verbal expression up from 2/119 to 40/119
 - c) perceptual ability up from 3/5 to 4/5
 - d) reading up from 2/14 to 13/14
 - e) writing up from 4/13 to 10/13.
13. The goals she was set included being able to write a short text message to friends or family without support, to read and respond to a short email with minimal errors, using spellcheck to assist and to make a request of a stranger over the phone without support, for example in ordering food.
14. Needless to say she did not return to work immediately but she did have a conversation with her manager, Mr Jenkins, on 12 July. According to a later account written by Mrs Payne (page 35) she told him that doing her job was not the problem, it was all the extra work that she had been required to do, and that the sooner she got back to work the better for her recovery. It is not clear, without having heard from him, what Mr Jenkins made of that but it is a surprisingly optimistic assessment given the severity of her difficulties.

15. She then saw her GP on 10 August who advised that she may be fit for work given a phased return, adding

“Patient would like to slowly return to work starting with a few hours a week to communicate with colleagues.”

16. Perhaps unconvinced by her ability to make an early return to work, Mr Jenkins made arrangements for an occupational health assessment, which took place on 8 September. It was carried out by telephone with an occupational health advisor and lasted about an hour. The adviser took a background history of her stroke, her inpatient history and discharge at the end of June with residual cognitive and speech issues. He also noted the sicknote, which he interpreted (or perhaps was presented) as a statement that she was fit to undertake a phased return to work, starting with a few hours a week and building up to a full return by 9 October. That date appears to be based on the fact that the fit note was dated 10 August and said to be valid for two months.

17. She told him that she was nearly back to her pre-stroke health; her motor skills were unimpaired and her speech had returned to 80 to 90% of its previous fluency. She would have difficulty processing speech from a non-native English speaker but could manage otherwise. Further, he noted, referring to her as “they”:

“On a daily basis, they have been able to perform all activities of daily living, and have resumed driving their automatic shift car with their GPs and stroke specialists knowledge, and have now finished their course of speech and language therapy under the NHS.”

18. He then went on to consider her other underlying conditions which included hypertension and type II diabetes. These, he considered, amounted to disabilities, but did not prevent her returning to work, and his clinical opinion was that she was safe to carry out the full range of her duties, subject to a stress risk assessment. He then outlined a more detailed phased return-to-work programme, building up over an eight week period to 100% attendance. He expressed no opinion on the lingering effects of her stroke, and the term aphasia does not appear anywhere in the report. Again, that no doubt reflects the information provided to him.

19. Mrs Payne’s very positive approach during the summer and autumn of 2021 can perhaps be contrasted with the more pessimistic assessment in her impact statements. Summarising them, in her first statement made in August 2022 she stated that:

The main problems I face every day with my reading ability, mental cognition and with my communication. It takes me much longer to read and sometimes I cannot understand what I have read. Rhys Jenkins agreed to support this I went back to work with a text-to-speech feature on my computer which would allow it to read aloud text on the screen and I would listen to it with an earpiece.”

20. She was writing then about four months after the end of the 12 month period in question and although she uses the present tense, she is also referring back to the position as she found it the previous autumn when she was discussing a return to work.
21. Other examples of normal day-to-day activities that she struggled with included travelling anywhere by car so she had to use a satellite navigation device for anywhere further than 3 miles from home. She explained in that statement that not only was it difficult to read but she became emotional and frustrated when she tried to do so - becoming emotional for no apparent reason was another feature of her condition. She was, she said, able to cope with most things in her day-to-day life such as using a computer, doing her banking, writing short emails and driving.
22. Her second impact statement was made on 4 May 2023, about a month ago. In this she was more clear that as at the date of her dismissal she had

“difficulty reading, writing, recording words, [with] expressive skills and understanding or utilising complex detailed information.”
23. It added however that she will never read a book ever again and that she quickly becomes tired with reading; even, for example, reading the subtitles or any writing on the TV screen is difficult for her. She has problems every day with her reading, mental cognition and communication. It also takes her much longer to read and sometimes she cannot understand what she has read.

Submissions

24. Mr Brown, for the respondent, submitted that these two impact statements were not a reliable indicator of how she was affected at the time and that the occupational health report was to be preferred. There had been no challenge to its stated conclusions at the time and no dispute that this was the information given by Mrs Payne. The fact that she was able to do all activities of daily living was, he submitted, inconsistent with a finding of disability, as was her statement that she was nearly back to her pre-stroke health. He also pointed to her written statement made in the course of these proceedings (page 38) that the news of her dismissal was devastating and brought her world crashing down, that she became very withdrawn, her symptoms of aphasia got worse and the improvements she had made were lost over the following days. This, he submitted, explained the delay in her recovery. However the position remained that in November 2021 she was expecting to make a full recovery within a period of weeks.
25. Miss Robinson, for the claimant, invited me to prefer the evidence in the two impact statements and emphasised the extent of the mental impairment suffered as a result of the stroke. Mrs Payne’s cognitive function had been

affected even on discharge, which had to have an impact on almost all day-to-day activities. The occupational health report still recorded some serious difficulties including that her speech was still only 80 to 90% of her previous ability, and that was her own assessment, as was her difficulty understanding non-native English speakers.

Conclusions

26. It is clear that Mrs Payne suffered a very serious affliction. On her admission to hospital she only had the most basic ability to communicate and limited understanding. The two months she spent in hospital, receiving speech and language therapy, brought about an enormous improvement, but the scores she achieved in such fundamental areas as comprehension, expression perception, reading and writing, show that she was still suffering from serious ill effects when she was discharged in June 2021.
27. Even her own view, given during the course of her Occupational Health assessment in September, that her speech was back to 80 to 90% of its previous level, and that she would need help to understand a non-native English speaker, reveals that she had substantial remaining difficulties in communicating. That information was volunteered at a time when she was anxious to return to work and to present her abilities in the most favourable light, so may well have overstated her abilities. Her statement that she could do all activities of daily living essentially meant that she was managing on a day to day basis. But a person may still suffer a substantial adverse impact if they can perform carry out day to day tasks with difficulty, such as reading a book. Accordingly, I conclude that even on the basis of the information she gave during the Occupational Health assessment, she was still suffering a substantial adverse effect in normal day to day activities at that time.
28. What then was the prognosis for her recovery? Once again, this has to be looked at from the vantage point of November 2021, without regard to the fact that these very real difficulties persist to the present day. It is also an objective assessment. I am not concerned with what Mrs Payne expected at the time, or what she told the company, simply whether she was in fact likely to overcome these continuing ill effects by the following April.
29. There is in fact no authoritative medical report on the point. We have just the fit note from her GP in August 2021 and the Occupational Health assessment in September. My reading of these two documents is that her GP was reluctant to endorse her willingness to make a speedy return to work. He or she would be aware of the extent of her difficulties and her likely recovery time, so there is a marked contrast between the guarded wording used in that note and Mrs Payne's own confident predictions at the time.

30. Mrs Payne appears then to have put the most positive spin on those words in the fit note, taking it as an endorsement of a return to full duties within two months. That has then found its way into the Occupational Health report and a detailed 8-week return-to-work plan. It does not seem to be based on anything more sound than Mrs Payne's hopes and feelings.
31. That report is not, in my view, reliable evidence of her health and abilities at the time. That is not intended as a criticism of the author, but the reality is that it would be rare for such a report to insist on a longer period of recuperation than the employee wanted, especially when that suggestion is said to be endorsed by their GP. It is surprising that more attention was not paid to statement that her reading had returned to 80-90% of its previous level, and I take it that the author fully accepted that it would have returned to 100% by the end of that eight week period. But there is in fact nothing from Mrs Payne's GP to support that conclusion. It is simply an inference drawn by Mrs Payne from the fact that her fit note was said to be valid for 2 months. Having assumed that Mrs Payne would soon be over the effects of her stroke, the report moves on, without any mention of aphasia, to consider her underlying high blood pressure and diabetes, which were accepted as disabilities. Hence these less significant conditions, which Mrs Payne is not relying on those as part of her case, were seen as disabilities and her main impairment was not addressed at all.
32. Apart from placing significant reliance on this Occupational Health report, the respondent also pointed to her statement that she had been devastated by her dismissal and suffered a setback in her recovery. The implication is that but for this bad news she would have made the expected recovery within eight weeks. But apart from the lack of any real foundation to the recovery period, it is difficult to understand how bad news, however upsetting, can have any lasting impact on her recovery from physical or organic damage to specific areas of the brain.
33. Overall therefore, it is clear that in September 2021, even on the basis of her own description at the time, Mrs Payne was still struggling with reading, understanding others and with her speech; 80 to 90% still leaves a significant gap. No prognosis had been given to her for her overall recovery but she still had a long way to go. She was having six-monthly reviews at the hospital to check on her progress – the first being in November 2021 – which is some indication that this was thought to be a long process. And it was only seven months after the Occupational Health report that the 12 month period since the stroke was up. Although it is for her to show that she was disabled at the relevant time, that limited information strongly suggests that the ill effects of her stroke were likely to be with her for some time to come. It might have been months, but it might equally have been years. To recover so well that by the following April the lingering effects were just minor or trivial would probably have seemed unduly optimistic. That is not the test however. An objective assessment in November 2021 would in my view certainly have found that she could well still have ongoing

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effects, effects that were more than minor or trivial, by the following April. On that basis, the test for disability is met.

Employment Judge Fowell

Date 18 June 2023