

Gutierrez scores a victory for discrimination

The Newcastle player's claim is a reminder to employers of the importance of ensuring a level playing field for disabled and non-disabled employees, writes **Amanda Trehwella**



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Former Newcastle United Football Club midfielder Jonas Gutierrez has succeeded in claims for disability discrimination against the club in the Employment Tribunal.

Gutierrez was signed by Newcastle in 2008 and was a prominent first-team player. After the non-renewal of his contract in 2015, he claimed that the club discriminated against him following a diagnosis of testicular cancer.

He was first diagnosed in October 2013 and, as a result, took some time off in order to have surgery in his home country of Argentina. The following summer the cancer returned, but Gutierrez thankfully made a full recovery after undergoing chemotherapy and returned to the club in November 2014.

However, in the summer of 2015 the club informed Gutierrez that he was no longer required to play and it would not be

renewing his contract.

A clause in his contract stated that if he appeared in at least 80 games for the club, his contract would be automatically extended for a further year; Gutierrez had only appeared in 78, which, he argued, was because he had been 'frozen out' of the first-team squad because of his cancer.

Under the Equality Act 2010, a worker is considered to be suffering from a disability, and therefore protected against disability discrimination, if they can show they have a physical or mental impairment that has a substantial and long-term adverse impact on their ability to carry out normal day-to-day activities.

However, there are certain illnesses and impairments which are automatically deemed to be a disability without having to prove this test. These include blindness, severe disfigurements, HIV infection, multiple sclerosis, and, as in this case, cancer.

Games quota

The Birmingham Employment Tribunal found that Gutierrez had previously maintained his place in the starting line-up for five years without any difficulty, but just over two weeks after returning to the club following his diagnosis and treatment, and at a point when he was match fit, he was told that he no longer featured in the club's future plans. The tribunal concluded that this was because of his cancer and was direct disability

discrimination.

The tribunal also concluded that the club had made it impossible for Gutierrez to meet the quota of 80 Premier League games over the duration of his four-year contract to gain an automatic extension. Due to his sickness absence he was only available to play in 121 games instead of 152, which decreased his chance of the automatic extension applying. The tribunal held that Newcastle United had discriminated against Gutierrez by failing to make reasonable adjustments to the quota provisions: 'It was in essence more difficult for the claimant to achieve the required number of games because in the periods of time that he was not absent for treatment or rehabilitation he had to be more frequently selected as a proportion of the total number of games available than his non disabled counterparts. We conclude that this was a substantial (more than minor or trivial) disadvantage.'

There were, however, two elements of Gutierrez's claim that were unsuccessful. First, his claim of unfavourable treatment in relation to his loan move to Norwich City was rejected because the move was consensual. Second, he claimed that being made to train with the under-21 squad on numerous occasions rather than with his team mates was demoralising and humiliating, and amounted to harassment. This was rejected by the tribunal, which found that

many players were required to train with the under-21 squad to gain match fitness following an injury.

The remedy in this case will be decided at a later hearing but could be up to £2m. For Newcastle United, the decision is likely to be an expensive one, both in financial terms and in relation to the club's reputation.

Reasonable adjustments

This case acts as a reminder for employers that all workers, regardless of their position within an organisation, are protected by discrimination legislation.

It may seem surprising that a professional sports person who has completed medical treatment and is otherwise fit could be regarded as disabled, but the legal definition of disability is broad. Some types of disability, such as cancer, may not be immediately apparent but are quite rightly protected by the law, in the same way as more obvious physical disabilities.

When considering any decision that has an element of discretion, such as promotions, bonuses, or reviews, employers should be mindful that employees who have had lengthy periods of absence due to a disability may be at a disadvantage when compared to their non-disabled colleagues. In these circumstances an employer is under a duty to actively support disabled employees by making reasonable adjustments to ensure a level playing field. **SJ**