



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mrs V Moore**

**v**

**Law & Property Lawyers Limited  
T/as Slade Legal**

**Heard at:** Watford

**On:**

4 April 2019

**Before:** Employment Judge Bloch QC

## **Representation**

**For the Claimant:** In person

**For the Respondent:** Ms S Chan, Counsel

## **RESERVED JUDGMENT FOLLOWING PRELIMINARY HEARING**

1. At the material time the claimant was a disabled person within the meaning of section 6, Equality Act 2010 ("EQA"), by reason of depression. The tribunal does not (at this stage) decide whether or not she was disabled also by reason of moderate traumatic brain injury or any associated condition.
2. The claimant's claims should not be struck out nor does the tribunal make deposit order.

## **REASONS**

1. The claimant began her employment with the respondent as a legal secretary on 16 January 2017. This followed her having previously acted in this capacity for the respondents on a temporary basis and being invited thereafter to become a permanent member of staff.
2. On 3 June 2017 the claimant was involved in a road traffic accident. On 4 June 2017 the claimant informed the respondent of the accident and that she had head injuries as a result.

3. In October 2017, (after the claimant had returned to work), Katherine Semlyen joined the respondent firm and became the claimant's new line manager.
4. Following concerns expressed by Ms Semlyen about the claimant's performance in November 2017, the claimant was summarily dismissed on 1 December 2017. Following a period of conciliation between 25 January 2018 and 1 February 2018, the claimant presented her complaint to the Employment Tribunal on 9 March 2018. On 6 September 2018, there was a preliminary hearing (case management) and the tribunal listed an open preliminary hearing to consider: whether the claimant was a disabled person, within the meaning of section 6 EQA; whether the claim should be struck out as having no reasonable prospects of success, whether any claims should be made subject to a deposit order; and what further case management orders were necessary for the future conduct of the proceedings.
5. The claimant's claims were recorded as being a claim for discrimination arising from disability under section 15 EQA and a claim for unauthorised deduction from wages, under section 13 Employment Rights Act 1996.

#### Disability

6. The tribunal recorded that the claimant claimed that at the material time she was a disabled person by reason of moderate traumatic brain injury and depression.
7. The claimant was ordered to provide an impact statement setting out "the impairment relied on; the precise nature and extent of the effects the impairment has had on the ability to carry out normal day to day activities; the periods over which those effects had lasted; and whether or not there has been treatment for the impairment, and what difference, if any, such treatment has had on the effects of the impairment".
8. Paragraph 13 of the order said:

"The claimant may wish to obtain a record, letter or report in relation to the matters set out in the above statement from a GP or other person providing medical treatment. Any such record, letter or report shall be sent to the respondent by no later 17 January 2019"
9. It was not until 1 April 2019 that the claimant obtained a medical report. However, this report stated:

"Please note this is a clinical assessment produced for the purposes of identifying the most appropriate treatment plan. It is not a medico-legal assessment"
10. At the beginning of the hearing, I noted my initial concerns about deciding the question of disability, in (particular in relation in moderate traumatic brain injury) without a medico-legal report. The claimant explained to me that she had wished to obtain such a report but financial resources precluded her from doing that. She was unaware of the possibility of public funding (in whole or in part) for such a report. In particular, in closing

submissions, having been cross examined as to her means (in relation to the application for a deposit order) she emphasised the substantial potential prejudice to her case by not being able to obtain a medico-legal report. I indicated that such a report would be of great assistance to the tribunal and referred to the possibility of public funding (in whole or in part) for such a report. Since the hearing, the claimant wrote to the tribunal, (by e-mail dated 5 April 2019), seeking public funding of a report.

11. I turn to the claimant claim (form ET1) and the separate sheet within the ET1 in which the claimant set out her claim in some detail. She referred to employment as a legal secretary in the family department but also assisting in the commercial property litigation and employment team. At paragraph 5 she said:

“From 16 January 2017 until 2 June 2017, I suffered from no disability for the purposes of this claim”.

That paragraph was for obvious reasons relied upon by Ms Chan. However, in cross examination, the claimant explained that in paragraph 5 she was referring to her actions within her job and not socially. Before 16 January 2017, she said that her impairments caused her difficulty socially (they always had), but they did not impact upon her job. I accept that explanation, given its consistency with the claimant’s medical history, in particular of depression, from which she had suffered for a very long time. I shall refer to this in more detail below.

12. In the ET1 the claimant went on to refer to her motor vehicle accident on 3 June 2017. From that date she alleged that she had suffered from moderate traumatic brain injury as a result of being knocked unconscious by the impact for a period of approximately 20 minutes. She described the impairment as having a substantial and long term adverse effect on her ability to carry out normal day-to-day activities. The disabilities were subsumed under the heading “Executive Dysfunction” and included the points: planning and organization; in multitasking; in concentrating and taking in information; in making decisions; inflexible thinking; in problem solving and some further degree of subtle memory problems. She maintained that the medical literature stated that moderate traumatic brain injury is known to be a disability where other people, rather than the sufferer, are most likely to see the “deficits”.
13. In her ET1 she set out the discovery of this alleged injury. She stated that as she was no longer working, she could not afford the full cost of a private neuro psychiatric report and that she would however do her best to pay 50% of such cost, if the respondent would pay the other half, for the purposes of this case. She went on to say that her current experience of how it feels to have this disability centered around frequent occurrence of forgetting something she had recently been told, read or seen, carrying out a familiar task and then discovering she had already done so. Also, that the disability largely affected her **work performance (my emphasis)** before she lost her job but that after her dismissal, following a menu, recalling information from a watched tv program, following verbal directions when driving, or

remembering when someone has told her something, are all areas from which she continues to have trouble since the accident. She maintained that the difference in her performance pre- and post-accident should have put the respondent on notice of the possibility of a connection with her accident and resultant head injury.

14. In the Grounds of Resistance, the respondent put the claimant to strict proof of the existence of the alleged disability, saying that it did not know and had nothing to put it on notice about any such disability.
15. The respondent referred to particular issues, which resulted in the claimant's dismissal: recording of incorrect time and documents on a file, correspondence sent without authority, failure to follow simple instructions, time spent on irrelevant matters, failing to listen to the whole dictation before sending out a document and various other issues.
16. Ms Chan, on behalf of the respondent, produced a very helpful document headed "Respondent's Summary of Medical Evidence".
17. This summarised inter-alia a report by a neuro-psychologist (Ruth Telfer) dated 10 August 2009, relating to a referral by a GP due to the claimant's complaint of difficulty with multi-tasking and struggling with trying to retain new information. There was a reference to severe anxiety with some depression; the claimant showed very high intellectual capabilities; however, her test results showed extreme difficulty with visuospatial working memory and difficulty with retaining complex new visual information.
18. A psychiatric old age report (by Dr Abder-Aar) of 6 August 2015 noted that the claimant was reported to have been suffering with perceived cognitive problems for the last 12 years; she was struggling with sequencing and multitasking and was losing track of what she was doing within a minute, which meant in the work context, that "she had lost every job in the last few years because of these problems"; the report also referred to the claimant suffering from severe anxiety in the workplace triggering feelings of inadequacy and incompetence affecting her cognitive abilities, as these problems seemed to be minimal outside of the work environment. The claimant scored 30/30 on the Montreal Cognitive Assessment ("MoCA"). That report evaluates orientation, short term memory, delayed recall, executive function/visuospatial ability, language abilities and various other matters. A score of 26 or higher is generally considered normal.
19. Post-accident a report by Dr Aslam (Consultant Radiologist) report stated that there was "no acute intra-cranial abnormality" following the 3 June 2017 road traffic accident.
20. Dr Abder-Aar's (psychiatrists) report of 6 March 2018, reported that the claimant felt it was not so much her memory but a problem with processes and concentration that was the problem. The claimant had no concerns regarding her activities of daily living, including driving, but her son had noticed that she was more forgetful.

21. A clinical psychologist's report (Dr Stephanie Lawrie), dated 1 June 2018, referred to the claimant reporting longstanding difficulties with memory, sequencing and multitasking since 2003 but other types of error had become apparent from October 2017, such as common sense errors of copying an address wrongly when a digit was covered by a fastening / tipping out liquid from a urine sample and difficulty remembering the time visits were due. These occurred approximately twice a month. The claimant was "currently managing daily tasks without significant impact" although the claimant's son sometimes had to repeat himself.
22. Finally, there was a report dated 1 April 2019 (referred to above) from Dr Georgie Boothroyd, Clinical Psychologist. Dr Boothroyd said she had not accessed past medical reports and (as referred to above) the report was not a medico-legal assessment; the report stated that the claimant had difficulty processing and retaining information seen and heard, problems with time management, she found it hard to use equipment, difficulty remembering and having panic attacks, which she attributed to the June 2017 accident. However, her anxiety was in the normal range.
23. Dr Boothroyd went on to say that based on the information available, the claimant was most likely to have sustained a mild traumatic brain Injury following the 2017 car accident. Patients usually recover within a few months at best, but if the symptoms persisted after the initial few months, this could be "Post-Concussion Syndrome" which happens to a small proportion of people. On testing, the claim performed well on language, visual memory and mental flexibility (75% - 99% of the population).
24. Dr Boothroyd went on to say that the claimant's test scores were suppressed across other domains "although not to the extent to represent an absolute impairment" (it was not clear to me what was meant by that expression). The greatest difficulty was with basic sequencing (bottom 16%); other aspects were mildly below expected levels (she scored in the band of 21%-50% of the population).
25. Dr Boothroyd said that it was unlikely that there was an organic basis to her persistent symptoms 21 months after the accident. It was suspected that the Post-Concussion Syndrome symptoms would have been maintained by non-brain injury related factors, such as the stress of losing her job, financial worries, anxiety about sustaining a brain injury, low mood, pain, fatigue and sleep apnoea. Her symptoms were unlikely to be permanent and would improve as she develops a better understanding of the different moderating factors at play and develops alternative coping strategies.
26. The claimant's disability impact statement dated 29 September 2018 referred to her suffering from depression and that she has been treated for it by her GP since 1990 following the traumatic death of her second husband and other major life crises. Her depression treatment continued to date. She referred to the neuro-psychiatric report which she obtained in 2009 obtained in connection with her sequencing problems when engaged in conveyancing case-handling work. Those problems did not continue after she gave up case-handling - until her head injury in 2017.

27. She referred (paragraph 15), to an overlap in the manifestations of her depression and the effects she believes stem from her brain injury.
28. She gave an example of, (in November 2017) when she loaded clothes for a charity shop, and then realised that she could not recollect what was in the bag in her car. She discovered (in the street) new and unworn items amongst the old in the bag. She also had difficulties following political debates on television, and described how bits of information suddenly drop out of short term memory ie her forgetting what she had recently been told, read or seen; carrying out familiar tasks but then discovering she had done so with mistakes, and not being able to follow recipes without missing something. She referred to her needing to make written notes of everything in order not to forget, getting the wrong end of the stick in conversations, difficulty following verbal directions when driving, difficulties remembering when someone had told her something, or being unable to prioritise without making written notes first, and being unable to remember the plot in films. She referred to a visit to her eldest son's home when she could not remember how to work their television and DVD or remember how to put up or take down the buggy. She referred to pulling out some books to take to her grandson which were wholly inappropriate for his age. She could not use a cafetiere in someone else's home. She also mentioned that every time she filled up at the petrol station, she first attempted to dispense petrol rather than diesel (she had changed from petrol to a diesel car after the accident). She had difficulty remembering directions given to her when driving and difficulty organising appointments. She recalled a specific incident at Frankfurt Airport: she and the family had travelled out to Frankfurt together but her return flight had been booked by a family member at a different time from the rest of the party. This caused her to suffer a panic attack when she was told by ground staff that her plane had already left.
29. As to depression, she had been on anti-depressant medication from her GP from 1991 to date. Her experience of living with depression (she described) as having a reduced quality of life and lowered ability to perform daily activities, including losing interest in things she has usually enjoyed; withdrawing from people; having difficulty in concentrating; having very low energy levels; feeling stressed out or anxious and have disrupted sleep patterns. She suffered from all of these while working for the respondent and they continue today. She had fought to overcome these adverse effects in the respondent's workplace, from her time in 2016 as a temp until her new line manager, Katherine Semylon joined the firm in October 2017. She said that from that time she found her work stressful, she was constantly "torn" about whom to work for, as Katherine mistakenly believed that the claimant was meant only to work for her, but in reality, she was employed to do not only her work, but that of 2 and sometimes 3 other lawyers in the department. She described Katherine's mode of work as chaotic. She was constantly having afterthoughts about her work and either telling them to the claimant verbally or by writing changes on post-it notes, or on manuscript scraps of paper, even writing up into the margins and then

would speed out of the room. She would countermand her own earlier instructions, place piles of documents on the claimant's desk for her to work on, without clear separation, paperclips or dividers and generally demonstrated chaotic and rushed working practices. In addition, there was a sudden increase in the volume of family work that month.

30. The claimant said (paragraph 68) that she believed that as a result of her accident, she was suffering from a mental impairment which features could be subsumed under the term "Executive Dysfunction" as set out in her ET1. She said the work deficits complained of in her dismissal letter from the respondent cited a fall-off in the quality of work as set out above. She believed that the respondent should have drawn a link between the sudden deterioration in her standard of work and her head injury. Finally, she said that after the early 2000's not long after she started doing conveyancing case handling, she did not seem to have a sufficiently flexible memory structure to recall details of the current case without confusing it with the previous one. Legal secretarial work was different because the sequencing is done by the person dictating the work.
31. The claimant also filed various witness statements by family members referring to signs of forgetfulness and mental confusion on the part of the claimant and supporting other aspects of claim regarding the effects of the accident.
32. The claimant was (fairly) cross-examined by Ms Chan on her impact statement and aspects of her claim. The cross-examination tended to show that many of the matters complained of by the claimant were not in fact day-to-day, (eg clearing out cupboards was not a daily or even monthly activity); and that other points added by the claimant did not demonstrate a substantial impact (eg not being able to follow political discourse on television was quite normal and likewise with regard to not remembering oral road directions). I
33. In the course of evidence, I asked the claimant to explain as best she could the effects of her anti-depression medication. She explained that without the medication the effects of her depression and day to day activities would be very substantial. She remembered one occasion in around 2008, when she had forgotten to take her pills with her on holiday. The result was that she could not talk properly, could not finish her sentences and she stood there shaking. The father of a boy of whom they were on holiday said to her that she was not making any sense. She also said something quite inappropriate so that this boy's father's face was "ashen". She was frightened of driving home and stopped the car in laybys. Her son asked her what the matter was. The symptoms stopped when she got home and took the tablets. The respondent's counsel was given the opportunity of the questions in relation to this part of the claimant's evidence but did not do so.
34. One of Ms Chan's closing submissions, was that I should not make findings with regard to the effects of the claimant's alleged impairments on the claimant's work-related activities (ie as normal day-to-day activities). She

submitted that this area was a matter to be decided at the full merits hearing (if the matter went that far). I understood Ms Chan to mean that the tribunal would be faced at the full merits hearing (if that proceeded) with deciding whether the claimant's conduct at work (which gave rise to her dismissal), was something arising in consequence of her disability, within the meaning of section 15 EQA.

The Law

35. Section 6 of the EQA states:

34.1 A person (P) has a disability if:–

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

36. Section 15 of the EQA states:

35.1 A person (A) discriminating against a disabled person (B) if:-

- a) A treats B unfavorably because of something arising in consequences of B's disability, and
- b) B cannot show that the treatment is a proportionate means of achieving a legitimate aim.

37. Schedule 1 (Disability; Supplementary Provision), paragraph 5 of Part 1, (effective medical treatment) states:-

An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:-

- a) Measures are being taken to treat or correct it, and
- b) But for that, it would be likely to have that effect.

38. The Guidance on the definition of disability, refers to the meaning of "substantial adverse effect". Paragraph B 12 states: "The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial effect if, but for the treatment, or correction, the impairment is likely to have that effect. In this context, "likely" should be interpreted as a meaning "could well happen". The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question".



39. The Guidance (paragraph D2), on the meaning of “normal day-to-day activities”, (paragraph D3) states:

“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. **Normal day-to-day activities can include general work-related activities** and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or a shift pattern”. (**my emphasis**).

40. I understand the reference to general work-related activities to be consistent with European Law on the subject, cf Chácon Nevas v Eurest Colectividades SA 2007, ICR 1 ECJ, where the European Court of Justice referred to the requirement of domestic courts and tribunals to give meaning to day-to-day activities which encompass activities that are relevant to participation in professional life. Such activities would include those enabling a worker to advance in his or her employment. Given that this authority was not cited to me, I do not rely upon it in itself, but rather as support for the reference in paragraph D3 of the Guidance, to which I referred Ms Chan during the hearing.

41. In my judgment, the claimant has, for a long time, suffered from depression and has during that time been under medical treatment in the form of anti-depressants, in order to alleviate the effects of that impairment. I am required, under paragraph 5 of schedule 1 EQA, to consider what, but for treatment or correction “could well happen” (or be likely to happen) without the anti-depressant medication. Looking (in particular) at the “deduced” effect, the position is clear. The claimant’s inability to finish sentences, to shake and “not to make sense”, constitute substantial adverse effects of her depression. Even without applying paragraph 5, the claimant’s evidence of the effect of depression on her day-to-day activities indicates a substantial long-term adverse effect on her normal day-to-day activities. While there are some possible inconsistencies regarding the evidence in this regard, the evidence of “deduced effect” is clear. Whilst I accept (as submitted by Ms Chan) that the particular event relied upon by the claimant, occurred as long ago as 2008, and therefore may not represent the position at the latter part of her employment, nonetheless, it provides a graphic illustration of what I would in any event be minded to infer. I can only assume that there was a good reason for the continued administration to the claimant of anti-depressants up to and including the time that she was in the respondent’s employment until the present day. It can fairly be inferred that without this medication her depression would have had a substantial adverse effect on normal day-to-day activities and that the incident in 2008 is a graphic illustration of that.

42. The position in relation to the claim of moderate traumatic brain injury is more difficult. It might be easy for me to have regard to what Dr Boothroyd

refers to as “Post-concussion Syndrome” and assume that that this was the cause of the fall-off in the claimant’s work performance towards the end of her employment. However, that would seem to me to be a possibly unwarranted conclusion, given the claimant’s earlier history of cognitive difficulties, including sequencing problems and the substantial increased work pressure during the latter part of the claimant’s employment. Of particular significance, might well be the pressures upon the claimant of dealing with the working methods of her new line manager (as set out above in some detail). In any event, Dr Boothroyd’s conclusions in relation to Post-Concussion Syndrome appear to be rather speculative. One comes back to the problem identified at the outset of this preliminary hearing, namely the absence of a medical report directed towards the definition of disability under the EQA.

43. Further, (for the reasons advanced by Ms. Chan (albeit that I have not accepted these) the claimant was not cross-examined on the work-related effects of the disability, as alleged by the claimant. In the overall circumstances of this case, I do not think it would be just to make inferences against the respondent in this connection, especially given the potential “overlap” effect of any such finding on the full merits hearing. Rather, it seems just for this issue to be decided at the full merits hearing upon full evidence, including proper expert evidence.
44. In all the circumstances, it seemed to me that absent a proper medical report, there was a real risk of any decision by me being an unjust decision either for the claimant or the respondent.
45. Accordingly, I concluded that I could (and should) find the claimant’s depression to be a disability within the meaning of section 6 EQA but that I should not make any finding in regard to the alleged condition of moderate traumatic brain injury, or post-concussion syndrome (which appears to be related to moderate traumatic brain injury).
46. I appreciate that in the nature of things this may mean that the full merits hearing on **15-17 July 2019**, will have to be vacated. However, this is not necessarily the case and I shall give directions to try prevent this result.
47. I will briefly give reasons in relation to the strike out and deposit applications. In my judgment it would be wholly inappropriate at this stage to strike out the claimant’s claims, there being no basis to conclude that any of the claims has no reasonable prospect of success. There have been numerous decisions of the Employment Appeal Tribunal and Court of Appeal, indicating that it is only in a highly exceptional case that the tribunal should at the preliminary stage strike out a discrimination claim. I do not believe that any of these claims come within that description.
48. I did not grant a deposit order for the following reasons:
  - 47.1 I did not conclude that any of the claims had little reasonable prospect of success. With regard to the evidence which will need be

given at the final merits hearing in relation to the respondent's state of knowledge or what they ought to have known in the circumstances alleged by the claimant, I can see the claimant may have difficulties - but I cannot at this stage conclude that the claims have little reasonable prospect of success. The lack of clarity on which (if any) of the disabilities relied on by the Claimant will be proved at trial, is a further reason for caution at this stage in taking a view on the merits of the claims.

- 47.2 In any event, even if I had concluded that any of the claims had little reasonable prospect of success, given the claimant's financial position, I do not think it right to make such an order. It is obvious that the claimant (as she explained in more detail in cross-examination), just manages to get by from month-to-month and has no savings. In these circumstances, any sum I would have awarded would have been so derisory as to be meaningless.
49. I gave further directions which are set out in separate case management orders.

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Employment Judge Bloch QC

Approved: 15/4/2019

Date: .....

Sent to the parties on: 17.04.19.....

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For the Tribunal Office