



# EMPLOYMENT TRIBUNALS

**Claimant:** A B

**Respondent:** Churchers Solicitors LLP

**Heard at:** Bristol **On:** 20<sup>th</sup> November 2024

**Before:** Employment Judge P Cadney

**Representation:**

Claimant: Ms J Sharratt (Counsel)

Respondent: Ms Hana Abas (Counsel)

## PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

- i) The claimant was at the material times a disabled person within the meaning of s6 Equality Act 2010 by reason of traumatic brain injury.
- ii) The case remains listed for final hearing of the claimant's remaining claims.
- iii) The parties are directed to notify the tribunal **within 14 days** whether in the light of the conclusion as to disability there is:
  - a) Any need to amend the List of Issues, and if so to provide a draft Amended List of Issues.
  - b) To provide proposed draft directions for the final hearing which remains listed for final hearing for four days in Southampton on 23 / 24 / 25 / 26 June 2025 as set out in EJ Roper's case management order.

### Reasons

1. By a claim form issued on 13<sup>th</sup> February 2024 the claimant brought claims of disability discrimination. The case came before EJ Roper on 29<sup>th</sup> July 2024 and he identified the claims; gave case management directions; and listed the case for final hearing.

2. Disability – The claimant originally relied on three impairments:
  - i) Degenerative spondylosis;
  - ii) Menopause;
  - iii) Traumatic Brain Injury
3. The respondent accepts that the claimant was at all material times a disabled person by reason of degenerative spondylosis; but not by reason of either of the other conditions. The claimant has since withdrawn reliance on menopause.
4. EJ Roper also listed today's hearing to determine the following issues:
  - (1) Whether the claimant was a disabled person at the times material to this claim, namely from 8 September 2023 until 27 November 2023 by reason of
    - (a) a traumatic brain injury and/or
    - (b) the menopause; and
  - (2) to the limited extent that may be necessary to finalise the List of Issues accordingly, and
  - (3) to make such further case management orders as may prove necessary (including any directions for Judicial Mediation if the parties agree at that stage).
5. Issue 1(b) has fallen away, and the first issue to be determined is that set out 1(a):
  - (1) Whether the claimant was a disabled person at the times material to this claim, namely from 8 September 2023 until 27 November 2023 by reason of
    - (a) a traumatic brain injury
6. Background - The claimant was employed by the respondent, a firm of solicitors, from 8th September 2023 until 27th November 2023 (which is the relevant period in which to consider the issue of disability) when she was dismissed with immediate effect as an assistant in the wills and probate team. She brings a number of claims of disability discrimination arising from her employment.

### Disability

7. In order to be a disabled person within the meaning of s6 Equality Act 2010 the claimant must fulfil three elements of the statutory test:-
  - i) She must have a physical or mental impairment; which

- ii) Causes a substantial adverse effect on normal day to day activities; and which
  - iii) Is long term; meaning that it has lasted or is likely to last for twelve months (meaning that it “could well happen” that it lasts for twelve months as judged at the time of the act of discrimination).
8. A general summary of the overall structure of the law is set out below and specific points relevant to this case are dealt with in relation to the individual issues:

### The Relevant Law

*Section 6 of the Equality Act provides as follows:*

*a person (P) has a disability if-  
P has a physical or mental impairment, and  
the impairment has a substantial and long-term adverse effect on P’s ability to  
carry out normal day-to-day activities.*

*Schedule 1 to the Equality Act 2010 contains further clarification on the matters  
to consider when determining disability and provides in so far as is relevant:*

### Long-term effects

*2 (1) The effect of an impairment is long-term if—  
it has lasted for at least 12 months,  
it is likely to last for at least 12 months, or  
it is likely to last for the rest of the life of the person affected.*

### Impairment

*The meaning of impairment is dealt with at A3 of the Guidance which provides:  
“the term mental or physical impairment should be given its ordinary meaning. It  
is not necessary for the cause of the impairment to be established, nor does the  
impairment have to be the result of an illness.”*

*Thus ‘Impairment’ in s.6 EQA 2010 bears ‘its ordinary and natural meaning... It is  
left to the good sense of the tribunal to make a decision in each case on whether  
the evidence available establishes that the applicant has a physical or mental  
impairment with the stated effects’ (McNicol v Balfour Beatty Rail Maintenance  
Ltd 2002 ICR 1498, CA) The term is meant to have a broad application.*

*The meaning of ‘substantial adverse effect’ is considered at section 212(2) EQA  
2010 and paragraph B1 of the Guidance which provides “a substantial effect is  
one that is more than a minor or trivial effect”.*

*The Tribunal’s focus, when considering adverse effects upon day-to-day  
activities, must necessarily be upon that which claimant maintains he cannot do  
as a result of his physical or mental impairment” (see Aderimi v London and  
South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591).*

*In that context, the appendix to Schedule 1 of the Equality Act 2010 includes examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These include “a total inability to walk, or inability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue, and persistent distractibility or difficulty concentrating.”*

*Conversely the guidance indicates that the following factors would not reasonably be regarded as having such an effect: “experiencing some tiredness or minor discomfort as a result of walking unaided from a distance of about 1.5 kilometres or 1 mile; inability to concentrate on a task requiring application of several hours.”*

*Day-to-day activities include normal day-to-day activities and professional work activities, even if there is no substantial adverse effect on activities outside work or the particular job (see Iqweike v TSB Bank Plc [2020] IRLR 267). In conducting that assessment, the tribunal should disregard the effects of treatment (see Guidance at sections B12 to B-17).*

*The Guidance addresses recurring or fluctuating effects at C5. Examples of how to address episodes of such conditions as depression, or conditions which result in fluctuating symptoms are given at paragraphs C6, C7 and C 11; they provide:*

*C6. If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long term.*

*C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the “long-term” element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.*

*C11. If medical or other treatment is likely to permanently cure condition and therefore remove impairment so the recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those are facts. However, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stops, as is the case with most medication, then the treatment is to be ignored and the effect is to be regarded as likely to recur.*

*In order to determine whether a claimant has a disability the tribunal should consider four questions (see Goodwin v Patent Office [1999] ICR 302, EAT):-*

*i) did the claimant have a mental and/or physical impairment? (the ‘impairment condition’)*

- ii) *did the impairment affect the claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')*
- iii) *was the adverse condition substantial? (the 'substantial condition'),*
- iv) *and was the adverse condition long term? (the 'long-term condition').*

*It will not always be essential for a tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities — J v DLA Piper UK LLP 2010 ICR 1052, EAT. Similarly, it is not always necessary to identify an underlying disease or trauma where a claimant's symptoms clearly indicate that he or she is suffering a physical impairment — College of Ripon and York St John v Hobbs 2002 IRLR 185, EAT*

Substantial - The meaning of 'substantial adverse effect' is considered at section 212(2) Equality Act 2010 and paragraph B1 of the Guidance which provides "a substantial effect is one that is more than a minor or trivial effect".

Effect on normal day to day activities - The Tribunal's focus, when considering adverse effects upon day-to-day activities, must necessarily be upon that which claimant maintains he cannot do as a result of his physical or mental impairment" (see Aderimi v London and South Eastern Railway Ltd UKEAT/0316/12, [2013] ICR 591).

*In that context, the appendix to Schedule 1 of the Equality Act 2010 includes examples of factors which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities. These include "a total inability to walk, or inability to walk only a short distance without difficulty; for example because of physical restrictions, pain or fatigue, and persistent distractibility or difficulty concentrating."*

*Conversely the guidance indicates that the following factors would not reasonably be regarded as having such an effect: "experiencing some tiredness or minor discomfort as a result of walking unaided from a distance of about 1.5 kilometres or 1 mile; inability to concentrate on a task requiring application of several hours."*

*Day-to-day activities include normal day-to-day activities and professional work activities, even if there is no substantial adverse effect on activities outside work or the particular job (see Igweike v TSB Bank Plc [2020] IRLR 267). In conducting that assessment, the tribunal should disregard the effects of treatment (see Guidance at sections B12 to B-17).*

9. Traumatic Brain Injury (TBI) – The issue for me today is whether the claimant does or does not fulfil the statutory definition in respect of the asserted condition of TBI.
10. In accordance with EJ Roper's directions the claimant has produced a second Disability Impact Statement for this hearing which solely relates to traumatic brain injury, having produced an earlier one in relation all three conditions. Any references in this decision are to the second DIS unless otherwise indicated. The

summary set out below are the effects of the TBI contended for by the claimant as set out in the second DIS.

11. The claimant contends that the traumatic brain injury is a consequence of multiple concussions she sustained; firstly during the period 2006 to 2010 as a result of domestic abuse; secondly from further concussions suffered whilst on deployment in the United States Marine Corps from both vehicle accidents and enemy attacks. In 2012 she had to withdraw from Marine Corps martial arts training due to presumed concussion; and in 2015 she began the process which led her to being permanently medically retired from the US Marine Corps in 2017, in part due to the traumatic brain injury.
12. She contends that the traumatic brain injury has resulted in a number of effects on her day-to-day activities.
13. Migraines - She states that migraines are a symptom of TBI and that her medical retirement from the Marine Corps included in assessment of having a 50% service connected disability as a result of the migraines. When she suffers a migraine it is completely debilitating and she is unable to do anything except lie down in a dark room. She has a daily low grade headache of four to 10 on a pain scale, and can predict the onset of a severe migraine as the pain switches from the right to the left and is preceded by visual aura. To prevent the onset of a severe migraine she has an auto injection. Despite using daily migraine medication she uses the injections once or twice a week without which she would develop a full migraine with the consequences set out above. A migraine can be triggered by certain smells such as strong perfume A full migraine can last for three to four days during which she is incapacitated with nausea confusion blurred vision fatigue and increased sensitivity to light sound or noise. She has in the past attended A&E to receive intravenous medication to stop the symptoms of a full migraine. Despite the medication she has a full migraine approximately at once a month.
14. Daytime Sleepiness/Sleep Issues – The claimant contends that she suffers from abnormal fatigue, and that when at home she cannot get through the day without a three to five hour nap; and that when working for the respondent she could work a full day but would immediately go home and sleep until the next, and that as it was a part time job at working four days a week she would stay in bed for the other three. She has much reduced energy levels and anything more than a 30 minute dog walk or a short session in the gym can bring on symptoms including extreme fatigue and muscle weakness dizziness nausea vomiting depression and irritability.
15. Memory Issues / Aphasia – Whilst the claimant's long term memory is excellent, she has problems with short term memory. She gives examples of introducing herself to any legal secretary at three times having forgotten that she had previously done so; she creates lists and keeps everything in specific places. Due to her forgetfulness her husband takes charge of her medication. Her husband has been assigned to HMS Queen Elizabeth and has been away for extended periods of time resulting in her forgetting to take her medication.

16. Limb Weakness / Vertigo – She suffers from limb weakness and vertigo which she also attributes to the TBI which results in her suffering injuries including tripping on stairs, dropping boiling water on her hand and tripping whilst walking. Her husband often has to help her to walk upstairs; and she spent an entire year using mobility aids due both to the spinal issues and the risk of the fall due to the limb weakness.
17. Tinnitus - Since 2012 she has suffered tinnitus which was rated as a 10% service connected disability and in respect of which she has to wear hearing aids to manage the symptoms. If she does not wear the hearing aids she will suffer unbearably loud sounds in her ears.
18. Sleeping - Due to the tinnitus, hot flushes, and pain she has difficulty sleeping at night which carries over at into the daytime.
19. Summary – Before dealing with the evidence and the detailed points of dispute I will set out each parties broad position –
20. Claimant – The claimant contends that:
  - i) There is sufficient evidence to establish the underlying condition of TBI;
  - ii) The claimant's evidence, if accepted, establishes that she suffers a constellation of symptoms which both consistent with the diagnosis of TBI, and the onset of the symptoms is temporally linked to it;
  - iii) That even if the tribunal does not accept either that the underlying condition is proven and/or that the symptoms from which the claimant suffers are causally linked to it, that in and of themselves they satisfy the statutory definition in any event in that the tribunal is required to concentrate on the effect of the impairments, not the underlying diagnosis or lack of it.
21. Respondent- The respondent contends that:
  - i) There is insufficient evidence to establish the diagnosis of TBI and/or to establish that even if historically diagnosed that there was an existing diagnosis at the point at which the claimant was employed by the respondent;
  - ii) There is insufficient evidence linking the symptoms to TBI and that many may be freestanding conditions and/or symptoms of other underlying conditions (e.g. the degenerative back condition and/or the menopause);
  - iii) The claimant has squarely identified TBI as the disability relied on and that if she is not able to establish an extant diagnosis during the relevant period and/or establish a link between it and the symptoms it is not open to her simply to rely on the symptoms/impairments themselves to establish disability;
  - iv) This is a paradigm case in which expert evidence is required and in its absence the assertion of disability cannot be proven.

22. Medical Evidence – The medical evidence starts with documents relating to the claimant's medical retirement from the US Marine Corps.
23. The first is the finding of a medical evaluation (5<sup>th</sup> August 2015) which recommended that she be placed on the "Temporary Disability Retired List" (TDRL) because of an Unspecified Depressive Disorder (PTSD related diagnosis) which despite treatment had not resolved sufficiently allow her to resume military duties.
24. The Disability Evaluation System Proposed Rating document sets out an number of conditions with an associated percentage, which is I understand it is an assessment of the percentage contribution the specific injury makes to the overall assessment of disability, albeit that an individual condition may in and of itself attract a 100% assessment irrespective of the percentage that may be attributed to any other condition. In the claimants case the first condition identified is "*Major Depressive Disorder with Post Traumatic Stress Disorder, and Traumatic Brain Injury (TBI) (also claimed as anxiety disorder, insomnia, and TBI with memory loss, lack of concentration and dizziness)[PTSD...]*". This is assessed at 100% in and of itself. The 100% evaluation is further defined in the letter from 2016 set out below "*An evaluation of 100% at is assigned whenever there is evidence of total occupational and social impairment, due to such symptoms as gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behaviour; persistent danger of hurting self or others; intermittent inability to perform activities of daily living including maintenance of minimal personal hygiene; disorientation to time or place; memory loss for names of close relatives own occupation or own name.*" Whilst it is not alleged that the claimant suffered or suffers from all of these symptoms it is apparent that a finding by the US DoVA of a 100% disability necessarily involves a finding of very significant impairment. The document identifies in excess of thirty separate conditions, and for my purposes it is also relevant that it includes Tinnitus, and Migraine, as separately identified conditions.
25. A further letter from the US Department of Veterans Affairs dated 29<sup>th</sup> December 2016 confirms that the assessment remains unchanged.
26. There are extracts from her GP records which include "long history of headaches and migraines POS related to multiple head injuries while in the in the marines" (5<sup>th</sup> January 2024), and chronic migraines which she is getting twice a month and can last for up to four days (29<sup>th</sup> December 2023).
27. A letter from her GP Dr Magee dated 31<sup>st</sup> May 2024 in support of her application for a blue badge which refers to her spinal problems and "multiple traumatic brain injuries in the past."
28. The claimant also relies on a letter dated 13th November 2024 from Dr Ade Buluro; who states : " I am happy to confirm that based on the clinical evidences reviewed such as the letter from the Department of Veterans affairs dated 29th July 2015 with a heading "Disability Evaluation System Proposed Rating", I'm confident that a diagnosis of traumatic brain injury was made historically."; and "I



also confirm I have viewed a letter dated 28th July 2017 with subject "Transfer from the Temporary Disability Retired List (TDRL) to the Permanent Disability Retired List (PDRL) which advised Kelly would be placed on the Permanent Disability Retired List with a disability at rating of 70% effective August 1st 2017.... This leads me to be inclined to assume that the letter dated 28th July 2017 was subsequent to the outcome of the assessment done with us (YEHS).

29. Oral Evidence – Only the claimant has given evidence, and she was the subject of relatively detailed and lengthy cross examination. Having heard her evidence it was in my judgement wholly honest and reliable. By way of example one of the effects contended for is aphasia, which the claimant asserts manifests in her case in struggling to find the correct word (which she described as the "on the tip of my tongue effect"). During her evidence it was clear that this was affecting her whilst giving evidence.
30. In relation to the migraines the claimant relies on a letter from Dr Z Hirmitz dated 28th May 2019, which confirms a diagnosis of "Daily headache in the context of functional medical/neurological disorder". It confirms that she was medically retired from the US Marine Corps in 2015 because of a continuing disability; and describes her own view that her condition has progressively deteriorated since 2015. It describes her suffering "four weeks ago" a period of headache on the morning waking with nausea retching and vomiting; and in terms of headache she has "a constant frontal headache which is around the right eye and (which) once every fortnight it moves to the left side of her head. This does not respond to analgesia and does not appear to respond to medications currently given as it is ongoing". The overall diagnosis is of functional neurological disorder.
31. She accepts that some of the impairments are multi -factorial. For example she accepts that the limb weakness is principally a consequence the degenerative spondylosis, but that the vertigo is one of the consequences of the TBI. Similarly she accepts that the hot flushes which are partly responsible for interrupted sleep are related to the menopause.
32. Requirement / Necessity for Medical Evidence - The respondent asserts that there are cases involving assertions of disability, of which this is one, which require medical evidence to allow the tribunal to draw any, or any safe conclusions (See for example: Royal Bank of Scotland v Morris ULKEAT/0436/10 para 55 / Igweike v TSB Bank plc 2020 IRLR 267 para 50). For the avoidance of doubt there is no rule of law that requires medical evidence in any given case; the question is whether in some cases the nature and effect of the condition, and whether it meets the statutory definition can only be established with medical evidence. The paradigm example is often the issue of mental ill health where the evidence before the tribunal is of episodes of symptomatic ill health separated by periods of good health. Are the episodes discrete and limited, or are they symptomatic episodes of an underlying condition. Without medical evidence it may be impossible to draw any conclusions. The respondent submits that this is such a case, and in summary that the claimant has produced insufficient evidence to satisfy the statutory definition relation to TBI in that:
  - i) There is no independent confirmation from the US Department of the Navy and/or US Department of Veterans Affairs which support a confirmed diagnosis

- of traumatic brain injury in any event (the diagnosis is actually of an unspecified depressive disorder);
- ii) The documents contain only headline diagnoses at best, and only cursory details;
  - iii) Both documents from the US DoVA are several years old and at best confirm the position at that point and do not assist in establishing the impairment at the times relevant to these claims (put simply even if the tribunal concludes that they are sufficient to establish a diagnosis of underlying traumatic brain injury in 2015 -2017 that there is no evidence supporting the fact of such a diagnosis at the times relevant to this claim);
  - iv) There is no medical evidence which would allow tribunal to conclude that the symptoms are symptoms of any underlying traumatic brain injury.
  - v) The medical records contain no reference to any diagnosis of traumatic brain injury, and are entirely silent as to the other symptoms, save for the migraine;
33. The claimant's case is that the respondent's submission fails to understand the nature of traumatic brain injury. Whenever the head suffers a concussive/percussive injury there may be some underlying brain injury which may be minor and/or temporary in and of itself, particularly if given sufficient time to recover. In evidence the claimant gave the example of many contact sports which now have concussion protocols to prevent a player from continuing to play in the match itself, or for a period thereafter to allow for recovery from the injury. The difficulty comes with repeated exposure to such concussive/ percussive injuries. The claimant gave the example of punch drunk syndrome in boxers. It is the fact of a constellation of symptoms consistent with traumatic brain injury, and the persistence which allows the diagnosis to be made. In the end the only absolute means of determining the extent of any underlying brain injury is a post mortem examination. When the respondent asserts that at its highest the conclusions of the US DoVA only support the diagnosis between 2015 and 2017, and does not support any continuing diagnosis thereafter they fail to understand, or give credit for the fact, that what has been identified is permanent underlying damage to the brain caused by significant numbers of concussive/percussive injuries which has led to the permanent symptoms from which she suffers. When they assert that there is no specific medical evidence as to the underlying physical damage they are correct, but such evidence will only be available from a post mortem examination. It is the continuation of the symptoms themselves which reflects a permanent underlying injury as was diagnosed by the US DoVA and is reflected in its conclusion that she is permanently unfit for future service in the US Marine Corps.
34. This is the central dispute in this case. Is it on the evidence permissible for me, if I accept the claimant's evidence as to her symptoms and their longevity (which I do), to accept that they are reflective of a continuing and permanent underlying traumatic brain injury first diagnosed in 2015-2017; or would such a conclusion only be open to me with further medical evidence establishing the underlying injury and/or the link between the symptoms and the injury.

35. In my judgment I am entitled to take the following into account:
- i) The claimant's evidence that she suffered none of the symptoms/ impairments prior to suffering the persistent concussive injuries set out above;
  - ii) Her evidence that they have been effectively continuous since, and indeed have progressively deteriorated;
  - iii) The fact that she was discharged from the US Marine Corp because the symptoms were long term, permanent and disabling and supported an underlying diagnosis of traumatic brain injury.
36. In those circumstances in my judgment I am, on that basis, able to resolve the issue without the necessity of any further medical evidence; and I am satisfied that in respect of each of the impairments set out separately above:
- i) That they are symptoms of underlying traumatic brain injury;
  - ii) That they are individually and certainly cumulatively, in and of themselves sufficient to satisfy the requirement to have a substantial effect on normal day to day activities;
  - iii) That they are long term, in that they are the permanent consequence of the underlying traumatic brain injury.
37. It follows that in my judgment the claimant was a disabled person at the material times by reference to the symptoms set out above, and the underlying traumatic brain injury.

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Employment Judge P Cadney

Dated: 10 December 2024

Original Judgment sent to the parties on  
14 January 2025

Amended Judgment sent to the parties on  
12 July 2025

Jade Lobb  
FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS