



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms B Gajjar  
**Respondent:** British Gas Services Limited  
**Heard at:** Leicester  
**On:** 21 August 2018  
**Before:** Employment Judge Ahmed (sitting alone)

## Representation

**Claimant:** In person  
**Respondent:** Ms Louise Stratton, Solicitor

## JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The complaint of disability discrimination is struck out as having no reasonable prospect of success.
2. The complaint of unfair dismissal is not struck out nor is there any order for a deposit.

## REASONS

1. By a claim form presented to the Tribunal on 14 February 2018 Ms Bharti Gajjar brings complaints of unfair dismissal and disability discrimination. Ms Gajjar did not tick any of the discrimination boxes in the ET1 and the fact that she was bringing a complaint of disability discrimination was not immediately detected upon vetting. In any event, the fact that she was bringing a disability discrimination complaint was identified both in the Response Form (ET3) and at the initial consideration stage by an Employment Judge.

2. There was then a Preliminary Hearing before Employment Judge Dyal on 12 July where the complaints of disability discrimination were identified as being those of direct discrimination and discrimination arising from disability. The impairments relied on are several, namely chronic back pain, low back pain, frozen shoulder, dizziness and diabetes.

3. Following the Preliminary Hearing it was decided that the matter should be listed for an open Preliminary Hearing to determine:-

3.1 Whether the Claimant was a disabled person;

3.2 Whether the complaints should be struck out as having no reasonable prospect of success;

3.3 Alternatively, whether the Claimant should be ordered to pay a deposit as a condition of continuing her complaints.

4. Prior to today's hearing the Respondent conceded the question of disability but continues to pursue the strike out/deposit applications. It appears to accept disability in relation to all of the alleged conditions. At this Preliminary Hearing, the Claimant has represented herself with assistance with from a McKenzie friend. Miss Stratton, a solicitor, appeared for the Respondent.

5. Rule 37 of the Employment Tribunal Rules of Procedure 2013, so far as is relevant states:-

“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:-

(a) that it is scandalous or vexatious or has no reasonable prospect of success.”

6. Rule 39 of the Employment Tribunal Rules of Procedure 2013 so far as is material states:-

“(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.”

7. The facts, so far as they are relevant to this hearing, are taken from the ET1 and ET3 and the oral submissions. The Claimant does not agree with all of the facts as set out in the ET3 but it is not necessary for me to make any specific factual findings today.

8. Ms Gajjar was employed by the Respondent as a Customer Service Adviser from 4 September 2000 to 21 September 2017. She was dismissed for gross misconduct for fraud and falsification of records.

9. The Respondent offers its employees a period of paid leave where they have unavoidable caring duties at home and need to provide support to members of their family in difficult circumstances. It is known as Carers Leave. Those who are not eligible for Carers Leave, or are not offered it in the Respondent's discretion, must either take unpaid leave of absence or normal annual leave.

10. The Claimant's son was unfortunately involved in an accident at his school. The Respondent agreed, in what appears to have been an untypical situation for granting Carers Leave, that she could have such leave during a short period of difficulty. The Claimant's shift pattern at the time was that she was working reduced hours. These included working on Fridays. During the period of Carers Leave she was being paid for the shifts she would have been working so that she could look after her son at home. The leave began on 25 January 2017. It is agreed, and if not agreed, I find that the leave included Friday 10 February and Friday 3 March 2017.

11. In the early hours of 8 April 2017, the Claimant's manager received a message on her mobile phone purportedly from the Leicestershire Police to say that the Claimant had been involved in a road accident and that she would not be in at work on Monday. The manager thought it rather odd that the Police should contact an employer directly about absence from work. Enquiries were made of Leicestershire Police who said that they had no record of any such call.

12. The Respondent decided to make further enquiries. They interviewed the Claimant who initially said that the accident occurred on a return journey from her Aunt's house. However, that was not true and Ms Gajjar later admitted that she was actually returning from a second job she had recently started at The University of Warwick. Further enquiries revealed that the Claimant had been in paid employment on at least some of the occasions when she in receipt of payment by way of Carers Leave.

13. There was then a fairly detailed investigation which culminated in the Claimant being called to a disciplinary hearing on 21 September 2017. Following the disciplinary hearing the Claimant was dismissed for gross misconduct in falsifying a claim for Carers Leave which necessarily implies that the Claimant is not able to work. It should be said there were in fact two misconduct allegations. The first was giving false information in relation to a road traffic accident and the second was claiming Carers Leave whilst working in another job without informing her employer. On the first allegation the Respondent found there was no case to answer.

14. The Claimant appealed unsuccessfully against the decision to dismiss. Following ACAS early conciliation she presented her claim to the Tribunal on 14 February 2018. There is no issue that the unfair dismissal claim has been brought in time or that it is not early conciliation compliant. There are issues as to time limits of the disability discrimination complaint.

15. The Claimant disagrees with the Respondent's version of the facts in the ET3 but that does not materially affect the position in relation to the disability discrimination complaints. She argues that her employers were aware of her second job but despite the question being put to her several times by myself she was unable to offer any evidence in support of that contention. The Claimant points out that some of the dates when she was paid by the University of Warwick do not coincide with payments for Carers Leave. I am satisfied there are at least two occasions when it does. The fact that the Claimant was only undertaking induction with the University of Warwick is irrelevant as she was paid during the induction process.

16. In her succinct and persuasive submissions Miss Stratton recognises the difficulties in principle in striking out discrimination complaints. There is well established authority that complaints of discrimination should not generally be struck out particularly when there are disputed facts (see for example, **North Glamorgan NHS Trust v Eszias** [2007] IRLR 603). There is also established authority that it is only in exceptional cases should unfair dismissal claims be struck out where the issue is essentially whether the decision to dismiss fell in or outside the band of reasonable responses (see **Riley v Tayside Public Transport Company Limited** [2012] UKEAT 0065/10).

17. Ms Stratton argues that in relation to the disability discrimination complaints there is no material which could possibly give rise to an inference of discrimination where none has been identified. In support she cites a passage from **Chandhok v Tirkey** (UKEAT/0190/14), paragraph 20, where the EAT (per Langstaff J) said:

“There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in **Madarassy v Nomura** [2007] ICR 867):

“...only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

## **CONCLUSIONS**

### Disability discrimination complaint

18. The Claimant’s case must be judged based upon the information that is before me. The complaints of disability discrimination were identified at an earlier Preliminary Hearing as discrimination arising from disability and direct discrimination only. Today, the Claimant is also referring to a failure to make reasonable adjustments. I appreciate she is not legally represented but it represents yet another shift in her position. The allegations however remain vague and unspecified in relation to the complaints advanced. In addition to alleging that she was dismissed for matters that were advanced at the earlier preliminary hearing the Claimant raises new allegations today.

19. Ms Gajjar suggests today that she was the subject of disability discrimination because she was, amongst other things, shouted at and that this was related to or because of her disability. That is not something which was mentioned to Employment Judge Dyal in his very comprehensive order which identified the issues. The Claimant’s earlier allegations of unfavourable treatment were about dismissal because of disability, her sickness absence not being fully or properly dealt with, not getting proper breaks, requests for shorter shifts, the need for an adapted chair and no allowance being made for working slower.

20. If the Claimant was shouted at that might be a complaint of harassment but no complaint of harassment is brought in these proceedings. She does not give any reason why we should draw a link between her disabilities and any

shouting which on the face of it might not necessarily be restricted to disabled employees only. She does not give any dates of the alleged incidents or who was responsible for them. At no point during the disciplinary process did the Claimant identify that her dismissal was anything to do with her disabilities. Miss Stratton submits that the Claimant has attempted to throw enough mud hoping something will stick.

21. I am satisfied that there is no reasonable prospect of the disability discrimination complaint getting off the ground. The Claimant's narrative as to what she is complaining about tends to shift from one moment to the next. Her written case is in stark contrast to what she says today. There are differences in her own accounts of discussions with her manager about taking breaks. She does not raise any potential facts which could give rise to an inference of direct discrimination.

22. The allegations also appear to be well out of time. There is no reason put forward as to why time should be extended. The Claimant was a member of the union and had access to advice. She did not raise any grievance or complaint at the time.

23. It is difficult to see how any complaint of direct discrimination or discrimination arising from disability is likely to get off the ground. There is no actual comparator cited. The Claimant refers to a hypothetical comparator but there is nothing to suggest that anyone who had behaved in the same way as the Claimant would not also have been dismissed. If the Claimant felt that there was any hint of disability discrimination she would undoubtedly have mentioned that in the disciplinary process. There is nothing to suggest that the Claimant was dismissed because of anything other perceived gross misconduct. The Claimant only referred to her long-term sickness during the appeal process but even then did not mention discrimination.

24. There are no prima facie facts on the basis of which the Claimant might have an arguable case. The unfavourable treatment for the purposes of the discrimination arising from disability is dismissal. It is difficult to see how the Claimant will be able to link that with the matters referred to in paragraph 19 above. The disability discrimination complaint has no reasonable prospect of success. It will therefore be struck out.

#### Unfair dismissal

25. The primary issue is whether the dismissal fell within the band of reasonable responses open to a reasonable employer. I am mindful of the three-step test in **Burchell v British Home Stores** [1978] IRLR 379.

26. There is nothing to suggest the Respondent did not have an honest and genuine belief in the Claimant's misconduct. There does not appear to be any valid criticism of the investigation. Such criticism as the Claimant makes is unlikely to render it procedurally unfair. The real issue will be whether the decision was one which a reasonable employer could take. In doing so the Tribunal must not substitute its view for that of the Respondent. That issue will however more require detailed evidence and submissions.

27. Having regard to the fact that the Tribunal will need to consider the range of reasonable responses test, I am satisfied it is not proper to either strike out the complaint of unfair dismissal or order the Claimant to pay a deposit. I should say that making a deposit is unlikely to have the desired effect of discouraging the Claimant in any event because she appears to be impecunious. She is currently out of work and has an outstanding county court judgment against her.

28. I have made it clear to the Claimant that the fact her unfair dismissal complaint is not struck out nor a deposit ordered should not be taken as some validation that these complaints have merit.

29. Finally, there are two matters which though not relevant to striking out or deposits ought to be mentioned. The first is made having in mind the 'overriding objective' (see Rule 2 of the Employment Tribunal Rules of Procedure 2013) which includes putting the parties on an equal footing. The Claimant is a litigant in person. In furtherance of the overriding objective, I have pointed out to the Claimant that she has not brought any complaint of breach of contract in these proceedings and she may wish to take advice on that. She was employed for 17 years by the Respondent and thus any potential breach of contract award might be significant. The legal test to be applied on a breach of contract claim is different to the test in unfair dismissal cases. The Claimant would however need to apply for an amendment. I am not dealing with any amendment application today.

30. Secondly, Employment Tribunals have a statutory duty to encourage alternative dispute resolution at all stages (see Rule 3 of the Employment Tribunal Rules of Procedure 2013). The value of any award is likely to be low. The costs of the case may be substantial. The Claimant should of course seek legal advice if she is not sure of her position. The Tribunal should not be informed of any such discussions unless of course they result in a settlement.

31. Case management orders in respect of the final hearing are given separately.

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Employment Judge Ahmed

Date: 14 September 2018

SENT TO THE PARTIES ON