THE EMPLOYMENT TRIBUNAL

HEARING: **BY CVP VIDEO CONFERENCE**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

Mr EJ Ajabor

Claimant

And

Asda Stores Limited

Respondent

PRELIMINARY HEARING

ON: **18 – 20 January 2021**

Appearances:

For the Claimant: Mr Lamina, Lay representative (for part of the hearing)
For the Respondent: Ms A Meredith, Counsel

JUDGMENT ON PRELIMINARY ISSUES

1. The unfair dismissal claim is struck out for want of jurisdiction as at the time it was presented, the claimant was still employed by the respondent.

2. The disability discrimination claim is struck out as, at the material time, the claimant was not disabled pursuant to section 6 of the Equality Act 2010.

3. The remaining claims are struck out pursuant to rule 37(1)(b) and (c) of the Employment Tribunal Procedural Rules 2013.

REASONS

1. This was a hearing to consider the matters at paragraph 10 of the Case Management Order of Employment Judge Mason of 8 January 2021, namely:

   (i) Whether the unfair dismissal claim should be struck out on the grounds that it was presented prematurely, having regard to the unfair dismissal case set out by the claimant;

   (i) Whether the claimant was a disabled person at all relevant times;

   (ii) Whether the claims should be struck out pursuant to rule 37(1) of Employment Tribunal Rules of Procedure 2013 (the Rules)

2. I was provided with a Preliminary hearing bundle in electronic form and the references in square brackets are to the pages within that bundle. I also had a separate witness statement from the claimant and from a Trevor Butler, for the respondent.

3. The claimant brings complaints of unfair dismissal; disability discrimination; race discrimination; unlawful deduction of wages, breach of contract (Notice Pay) and, possibly, protected interest disclosure detriment. He presented two separate claim forms, the first on the 6 June 2019 (2303696/2019) [119-168] and the other on 1 July 2019 [71-82]. The claims were duplicates of each other and the earlier claim was dismissed upon withdrawal on 29 April 2020.

4. The claimant does not have professional representation. Throughout these proceedings, he has been assisted by a friend, Mr Lamina, who describes himself as a McKenzie friend. However, he is more properly described as a lay representative as he has represented the claimant at hearings and most of the correspondence with the respondent and the Tribunal has come from him.

   Unfair dismissal

5. The respondent contended that the Tribunal did not have jurisdiction to hear the unfair dismissal complaint as the claimant was still employed when the claims were presented.

6. In the claim form, the claimant says that his employment ended on 1 May 2019. At the start of this hearing, the claimant asserted that on that date, he resigned verbally during a telephone call with Mr Trevor Butler, Warehouse Shift Manager. There was no evidence to support that assertion and the claimant does not refer to a verbal resignation in his particulars of claim; his lengthy further particulars or the witness statement that he has prepared for this hearing. The respondent denied this, stating that the first time Mr Butler spoke to the claimant was in the summer of 2019.

7. The claimant then changed his position, stating that he was mistaken and that the telephone resignation actually occurred on 23 July 2019. Again, there was no evidence to support this but in any event, the new date relied upon did not assist the claimant's case as it post-dates the presentation of the claim by 22 days.

8. I find that the claimant did not resign on either date given, or at all. I also find that the claimant was not expressly dismissed on those dates or any date prior to the presentation of the claim. There is evidence in the bundle which is consistent with the claimant having still been employed at the date of presentation of the claim e.g. There are payslips covering the period 27.4.2019 -14.9.2019 [45-47]. Also, from mid-July 2019, the respondent was communicating with the claimant in relation to a disciplinary investigation and hearing [459-463, 469-470]

9. The respondent's position is that the claimant was dismissed for gross misconduct on 9 September 2019. That is supported by a dismissal letter of the same date citing the reason for dismissal as the claimant's repeated failure to attend work and fulfil his contractual obligations [471 - 473].

10. The right not to be unfairly dismissed under section 94 Employment Rights Act 1996 (ERA) only applies if there has been a dismissal. I am satisfied from the evidence that that the claimant was still employed when he presented his claim. Therefore, the Tribunal has no jurisdiction to hear the unfair dismissal claim and it is accordingly struck out.

Disability Discrimination

11. The claimant brings a claim of disability discrimination and in order to pursue that claim, he must qualify as a disabled person for the purposes of section 6 of the Equality Act 2010 (EqA).

12. Section 6 provides that a person has a disability if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities.

13. The burden is on the claimant to prove that he meets the section 6 criteria in respect this condition.

14. The claimant relies on a physical impairment – injury to his rib and wrist – and a mental impairment – anxiety and depression. On the mental impairment, this is contrary to what the claimant says in his further and better of particulars of claim where he expressly states that anxiety and depression are not pleaded as separate disabilities [325] However, I have allowed the claimant to pursue those matters conscious of the fact that further particulars were drafted on his behalf by another lay person. It also occurs to me that the reference to "anxiety and depression not being pleaded as separate disabilities may have meant that they were being treated conjunctively as one condition.

15. In support of his case, the claimant submitted a disability impact statement and also gave oral evidence. I also considered medical evidence contained in the bundle, including OH reports, psychological reports and doctor's Fit notes.

16. The relevant date for determining whether the claimant was the disabled is the 1 July 2019, at the latest, this being the date of presentation of his claim.

Physical Impairment

17. I am satisfied from the evidence that the claimant suffered an injury to his ribs and wrist. This was said to have been caused following an accident at work on 4 December 2018. However the claimant accepts, and the medical records confirm, that his physical injuries were resolved by 14 March 2019 [52]. As the injury clearly did not last for 12 months, it cannot be relied on as a disability.

Mental Impairment

18. The first reference to the claimant suffering from anxiety is in a doctor's fit notes dated 4 March 2019. There were later references to anxiety and stress. [56-60]. In a psychologists services report on 22 March 2019, stated that an assessment of the claimant showed indicators of moderate depression [53] However, there is no diagnosis of depression in the OH reports or fit notes during the relevant period and I am therefore not satisfied that the reference to depression was a clinical diagnosis. Hence, whilst I that the claimant was suffering from anxiety and stress, I am not satisfied from the evidence that he was suffering from depression.

19. On the question of what amounts to a mental impairment, I have considered the EAT authority: J and DLA Piper [2010] ICR 1052 In that case, Mr Justice Underhill (President) as he then was, drew a distinction between symptoms of low mood and anxiety caused by a mental illness, often referred to as clinical depression, and low mood and anxiety as a reactions to adverse life events. The former is a mental impairment for the purposes of the EqA, the latter is generally not. The claimant's anxiety and stress fell within the latter category as it was a reaction to adverse life events, namely, problems at work. This is supported not just by the Occupational Heath reports but by the claimant's own evidence. In his disability impact statement, the claimant refers to suffering a psychological and emotional illness due to his unfair treatment by Asda Management [67]. I find that the claimant's condition did not amount to a mental impairment.

20. If I am wrong about that, I find, in any event that the impairment was not long term. In order for disability to be long term, at the relevant date, it must have lasted for 12 months, have been expected to last for 12 months or for the rest of the person's life. The earliest reference to a potential mental impairment was 4 March 2019 [56] so by 1 July 2019, it had clearly not lasted for 12 months. There is also no evidence that it was expected to last for 12 months. On the contrary, OH were clearly of the view that once the workplace issues were resolved, in particular, the issue of redeployment, the claimant would be fit to return to work. That strongly suggests that they did not consider his condition to be long term.

21. The claimant submitted that he remained under the care of a counsellor up until December 2019. Firstly, this is still less than 12 months from the onset of the condition and secondly, and more importantly, it is irrelevant for our purposes as it postdates the relevant date. The issue is whether on or before 1 July, the impairment was likely to last 12 month and as I've already stated, there is no evidence to suggest that it was.

22. For all of these reasons, I find that the claimant has not discharged the burden of showing that he was disabled at the relevant time. The disability claim is therefore struck out.

Strike Out Application

23. The respondent makes an application to strike out the claimant's remaining claims pursuant to rule 37(1) (b) and (c).

24. Rule 37(1) provides that "*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……...*

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;"

25. In exercising its powers under Rule 37(1), the Tribunal is also to have regard to the overriding objective, as provided by Rule 2, which provides:

"*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

(a)ensuring that the parties are on an equal footing;

(b)dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c)avoiding unnecessary formality and seeking flexibility in the proceedings;

(d)avoiding delay, so far as compatible with proper consideration of the issues; and

(e)saving expense".

26. There are two stages to the exercise. The first is to establish whether either of the grounds are established. The second is to consider whether to exercise the discretion to strike out. Strike out is a draconian step and must not be embarked on lightly. In considering whether to exercise the discretion, a number of general principles apply:

27. In considering whether a claim should be struck out under 37(1) (b) and (c), a tribunal must consider whether a fair trial is still possible and whether strike out is proportionate. De Keyser Ltd v Wilson 2001 IRLR 324, EAT;. Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA

28. The power to strike out under rule 37(1)(b) requires 2 conditions; that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.

29. Rule 37(1)(b) expressly includes the manner in which proceedings have been conducted *on behalf of* a party, making it clear that a representative's conduct can be

taken into account. What is done in a party's name is presumptively, but not irrefutably, done on his or her behalf. When the sanction is the drastic one of striking out the whole of a party's case, there must be room for the party to disassociate him or herself from what his or her representative has done. The claimant has not done so in this case.

30. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

    - the magnitude of the non-compliance
    - whether the default was the responsibility of the party or his or her representative
    - what disruption, unfairness or prejudice has been caused
    - whether a fair hearing would still be possible, and
    - whether striking out or some lesser remedy would be an appropriate response to the disobedience

31. The claimant was and has been at all time represented by a friend. Although not a professional representative, Mr Lamini nevertheless claims to have a double Masters in Law and is therefore more qualified than most lay representatives to understand case management orders; the importance of compliance; and the consequences of non compliance.

32. The particulars of claim are set out in a 33-page document annexed to the claim form [133-165]. Despite the length of the document, it does not properly identify the legal and factual issues in the case. Hence following a case management hearing on 21 January 2020, the claimant was ordered to provide further particulars of all of his claims. The order gave a very careful and detailed direction of the information required for each head of claim. The information was to be provided by 21 February 2020. [268-272].

33. On 21 February 2020, the claimant submitted a 58-page document purporting to be the further particulars of claim. Unfortunately, the document was wholly unwieldy, contained numerous assertions of breaches of legislation without particulars: quoted extracts from legislation randomly; contained irrelevant commentary and repeated the directions but without accompanying answers. To compound this, large parts of the document were incoherent. The document did not clarify the nature of the claims being brought and did not comply with the order. [207-285].

34. The claimant sent a further document on 3 March 2020, running to 56 pages, but to all intents and purposes, it was the same format as the earlier one and did not clarify the issues [304-360]

35. On 20 March 20 the respondent wrote to the Tribunal applying for strike out of the claim based on the claimant's non-compliance of the Tribunal's order [277]

36. On 29 April 2020, a case management hearing took place by phone, which the claimant's representative attended. At that hearing, the current preliminary hearing was listed to consider the strike out application. In addition, the claimant was given further

time to provide the outstanding further particulars, by 28 May 2020. Further, in order to curb the claimant's tendency to submit lengthy documents, a limit was imposed on the length and font of the particulars for each head of claim and on his witness statement for this preliminary hearing. Mr Lamini claimed that he had never received a copy of the Tribunal's order. However, I have had sight of an email from the Tribunal file dated 9 June 2020, sent to Mr Lamina enclosing the order. I satisfied that the order was received.

37. Since then, further documents have been produced by the claimant at various times which appear to be a re-hash of the earlier ones with some additional narrative. These do not amount to the further particulars that were ordered. Also, the further documents ignored the direction on the length and font.

38. The respondent contends that the content of some of Mr Lamini's communications is abusive and amounts to scandalous conduct. For example, on 24 August 2020, the respondent wrote to the Tribunal complaining about the claimant's non-compliance with orders [476-478] On 11 September 2020, and supposedly in response to the respondent's letter, Mr Lamina wrote to the Tribunal and the respondent and one paragraph reads: "*I further applause the rationale bragging "a lay man" but for certified in locus standi thereto academy outweighing a singing of a buffoon(with due respect). Sir/Madam".* It further states "*But for I/We believe unreasonable thereto Particulars made at the case management hearing on 21 January 2020 and (on 29 April 2020) (Gobbledygook)" [485-486].* The language is unconventional but the sentiment is clear. These are insults directed at the respondent's representative and/or the Tribunal. Further, in an email of 17 January 2021, again in response to correspondence by the respondent, Mr Lamini uses the phrase, "myopic brain" in relation to the respondent's solicitors.

39. Scandalous in the context of rule 37(1)(b) includes the giving of gratuitous insults to the Tribunal or another party. I consider Mr Lamini's correspondence to amount to scandalous conduct for these purposes.

40. I am satisfied from the factual background that grounds 37(1)(b) and (c) are made out.

41. In considering whether to strike out the claims, I have had regard to the following:

42. I do not consider that the claimant's scandalous behaviour, on its own, sufficient to prevent a fair trial from being had. In reaching that conclusion, I have had regard to Mr Lamini's contrition, expressed by way of an apology during his closing submissions.

43. There was significant non-compliance of the Tribunal's orders which persisted over an 11-month period. This was a serious and deliberate breach. Mr Lamina has provided no explanation for the failure. On the contrary, he spent most of his closing submissions, unjustifiably blaming the respondent for the claimant's position and accusing it of procedural breaches. The claimant has chosen to ignore the Tribunal's clear directions and has continued to conduct the litigation in his own way, which has been disruptive. We are 18 months on from the commencement of the proceedings and the respondent and Tribunal still have no idea what the claimant's case is about. This matter is listed for a 12-day final hearing commencing on 19 May 2021 and the claimant's conduct has hampered the case preparation, such that there is a danger that the hearing may not be effective. If the matter were to be postponed, it would result in a disproportionate

amount of the Tribunal's time being taken up on this case, to the detriment of other cases in, what is, a very busy Tribunal list.

44. The respondent has been prejudiced by the claimant's behaviour. It has spent a lot of time and money reviewing the claimant's lengthy documents and communicating with the claimant and the Tribunal in relation to his non-compliance. Costs that are unlikely to be recoverable.

45. For the above reasons, I consider that a fair trial can no longer be had.

46. I have considered whether a lesser sanction than strike out, such as an Unless Order, would be appropriate. However, the claimant has been given a number of opportunities to address his non-compliance, to no avail and I have no confidence that giving him another chance would lead to a different result. All that it would do is result in the respondent incurring additional costs. The only appropriate sanction is strike out.

47. My decision is that the remaining claims be struck out pursuant to grounds 37b) and c).

Judgment on preliminary issues

48. All claims are struck out.

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Employment Judge Balogun
Date: 24 January 2021