



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Wafash

**Respondent:** WM Morrison Supermarkets plc

**Heard at:** Manchester                      **On:** 24 March 2022

**Before:** Employment Judge Phil Allen (sitting alone)

## Representatives

For the claimant: In person

For the respondent: Mr M Salter, counsel

# STRIKE OUT JUDGMENT

The judgment of the Tribunal is that:

1. The following claims brought by the claimant will be struck out as they have no reasonable prospect of success, and the claims are accordingly dismissed:
  - a. The claimant's claims against the respondent for harassment related to race and/or religion or belief; and
  - b. The following claims brought by the claimant against the respondent for direct discrimination because of race and/or religion or belief:
    - i. Being dismissed in 2017;
    - ii. Not being allowed time off work in July 2018;
    - iii. Being warned for working too slowly in July 2018;
    - iv. Being given a written warning for being late and/or being investigated regarding breaks in July 2018;
    - v. The way Julian Davies spoke to the claimant and/or that he hit the claimant on his head on 29 January 2019;
    - vi. The allegation that Julian Davies called the claimant an asylum seeker and made a comment about visiting the claimant's home and seeing his wife in February 2019;

- vii. That HR did not respond to Mark O'Neill asking for a copy of the statement which had been made in February 2019; and
  - viii. That HR did not address the claimant's complaint correctly in late January or early February 2019.
2. The following claims brought by the claimant against the respondent will not be struck out as the claims have some reasonable prospect of success:
- a. The claims that the dismissal of the claimant on 6 May 2021 was direct discrimination because of race and/or religion or belief.

# REASONS

## Introduction

1. The claimant was employed by the respondent as a warehouse operative from 5 April 2004 until 6 May 2021 when he was dismissed. The claimant alleges direct discrimination because of race and/or religion and belief, and harassment related to race and/or religion and belief. The respondent denies discrimination and/or harassment and contends that the dismissal was on capability grounds, following the claimant's lengthy ill health absence.

## Issues

2. This Judgment relates only to the respondent's application to strike out the claimant's claims on the basis that they had no reasonable prospect of success. A separate case management order records other matters arising from the preliminary hearing. A deposit order records the decision made to require a deposit to be paid and the reasons for that decision.

## Procedure

3. The claimant represented himself at the hearing. An interpreter attended and interpreted for the claimant throughout the hearing. Mr Salter, counsel, represented the respondent.

4. The hearing was conducted in-person.

5. The issues were clarified in the morning. The issues identified are recorded in the case management order. The issues as identified are reflected in the Judgment above.

6. The respondent provided a bundle of documents and a note for the hearing. The claimant produced a pile of documents which he wished me to refer to. The respondent's representative had not seen the documents in the pile, but he did not object to me reviewing those documents. The vast majority of the documents had been prepared by the respondent or they were documents which the respondent would previously have seen. I identified a small number of documents which appeared important to the issues to be determined and a copy of those documents was retained by me and one was provided to the respondent's representative. The

other documents were returned to the claimant. Some of the documents provided, such as the claimant's grievance, the dismissal letter, and an Occupational Health report of 9 January 2020, did prove to be helpful.

7. The respondent's counsel was given the opportunity to make his application. The claimant was provided with the opportunity to respond. I also asked the claimant some questions to endeavour to focus what he said on the issues to be determined and the claimant was able to say what he wished to in response to the questions asked.

8. Judgment was reserved and accordingly I provide the Judgment and reasons outlined below.

### **Facts**

9. The claimant relied upon a series of allegations starting with a previous dismissal by the respondent in 2017. All complaints, except for the dismissal, ended in February 2019. In January/February 2019 the claimant alleged he had been discriminated against and/or harassed by a colleague, as well as allegedly being discriminated against and/or harassed by the respondent's HR team and an identified member of that team in their response to requests and/or complaints made. The last date upon which those allegations occurred was February 2019. For the purposes of this Judgment I have not determined the merits of those claims, about which the claimant clearly had very strong feelings. I have taken the claimant's case at its highest and therefore (for the purposes of this decision) have assumed that they will be made out on the facts as the claimant alleged.

10. The claimant's trade union advised and represented him at various times throughout the relevant period. An ACAS Early Conciliation certificate was obtained on 8 February 2018; the claimant's evidence being that was as a result of the trade union's actions. The claimant raised some of the matters upon which he now relies, with the Police, in early 2019. A grievance, including some of the matters about which discrimination and harassment are now alleged, was raised in December 2019. The claimant was still being advised by the trade union following his dismissal in May 2021, as was evidenced by a text from the regional officer of Unite to the claimant sent in May 2021.

11. In the preliminary hearing, the alleged discriminator for each and every allegation was identified. Of the five alleged discriminators identified by the claimant for the events in 2017 to February 2019, three had since left the respondent's employment and one was someone the respondent could not identify at all. Most importantly, the person who was alleged to have harassed and discriminated against the claimant in January and February 2019 (in what appeared to be the most serious allegations), had left the respondent's employment on 27 November 2020.

12. There was no real reason provided by the claimant for him having not entered a claim at the Tribunal earlier. When asked, he emphasised that he had claimed once he had been dismissed.

13. The claimant remained employed and working throughout 2019 (with some period of absence). He commenced an extended period of ill health absence on 28 December 2019 from which he did not return. The medical report of 9 January 2020

confirmed that the claimant was unwell at the time, but the report also advised that there was no reason to consider him unfit for work. I have read that report as showing that the claimant was not physically unable to enter a claim during his period of ill health absence. The claimant was absent for seventeen months before he was dismissed. It was clarified with the claimant that he did not allege that he had suffered any other acts of discrimination or harassment at any time in the period between February 2019 and 6 May 2021.

14. On 6 May 2021 the claimant was dismissed. The person who made the decision to dismiss was someone who the claimant only met once, at that meeting. The claimant confirmed that the decision-maker had no connection to any of the matters which formed part of the earlier allegations. The decision-maker's letter of 12 May 2021 explained his decision. That letter explained that the decision was on the grounds of incapability due to ill health. It is not in dispute that, at the time of his dismissal, the claimant had been absent for a continuous period from 28 December 2019 until 6 May 2021 due to his health. The decision recorded that, at the time of the dismissal, the claimant was unable to provide a foreseeable date of return to work. In the preliminary hearing, the claimant agreed that was correct. The decision-maker was someone that the claimant only met for the purposes of that decision.

15. The claimant did not raise a comparison with any other person, when alleging that the various matters were discriminatory. He asserted that each was less favourable treatment because of his race and religion.

16. The claimant provided a text message which was sent to him by the Unite the Union regional officer. It had a date on it of 17 May 2021. The views expressed shed light upon a very senior trade union official's view of the claimant's dismissal more generally. Most importantly, no connection was drawn between any of the other events and the decision to dismiss.

## The Law

17. I have the power to strike out the claim or any part of it under rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. This can occur where the claim (or a part of it) has no reasonable prospect of success.

18. In **Cox v Adecco UKEAT/0339/19** the Employment Appeal Tribunal reviewed the authorities and from them drew the following general propositions. I would particularly emphasise the first (but have considered them all).

*“(1) No-one gains by truly hopeless cases being pursued to a hearing;*

*(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;*

*(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;*

*(4) The Claimant's case must ordinarily be taken at its highest;*

*(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;*

*(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;*

*(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;*

*(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;*

*(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.”*

19. In his written note, the respondent's representative emphasised that the test on striking out is whether a claim has a realistic prospect of success, which requires prospects that are more than merely arguable or fanciful. He relied upon **North Glamorgan NHS Trust v Ezsias [2007] IRLR 630** and submitted that cases involving disputes of fact are still susceptible to being struck out depending upon the nature and scope of the factual dispute.

20. As it is at the heart of the question whether the claimant's claims should be struck out, I have also considered section 123 of the Equality Act 2010 as it addresses the time in which a claim should be entered at the Employment Tribunal and the Tribunal's jurisdiction to consider such claims. That provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

21. In determining whether allegations are part of a continuing act, the question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** makes it clear that the focus should be on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably. Tribunals should look at the substance of the complaints in question

and determine whether they can be said to be part of one continuing act by the employer. One relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor.

22. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, “*such other period as the Employment Tribunal thinks just and equitable*”. That includes consideration of the factors explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336** which I will not re-produce in this Judgment. Subsequent case law has said that those factors illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case (and they are not a checklist which must be rigidly adhered to). **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirmed that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

### Conclusions – applying the Law to the Facts

23. I will address the claims in two separate tranches in this Judgment: the allegations between 2017 and February 2019; and the dismissal allegations (6 May 2021).

24. For the earlier allegations, the claims were brought outside the time required. The last allegation occurred in February 2019. The claim was entered at the Tribunal on 4 August 2021. The claim was entered two and a half years after the events complained of. I have not distinguished between the earlier events in considering the time limits, albeit that the first allegation occurred approaching four years before the claim was entered. I have assumed for the purposes of my Judgment that the earlier events might be considered to be a continuing act, albeit it is far from clear that they were.

25. There is no reasonable prospect of the claimant being able to establish that the earlier allegations are part of a continuing act with the dismissal. The decision-makers or alleged discriminators are entirely different. The claimant himself offered no connection or continuity between them, save for the fact that the alleged discriminators are part of the same company. The decision and the basis upon which it was contended to have been made are entirely different from the alleged discrimination/harassment which was alleged to have occurred in early 2019. The decision-maker in 2021 was not contended by the claimant to have any connection with the earlier allegations.

26. I have considered very carefully whether it can be said that there is no reasonable prospect of the claimant successfully arguing that time should be

extended on a just and equitable basis for the earlier allegations. I am mindful that the decision as to whether or not to extend time is a discretionary one, and therefore whether I might not consider that the discretion should be exercised in a particular set of circumstances does not mean that there is no prospect of the claimant successfully persuading a Tribunal that it should do so. The fact that potentially meritorious claims will never be determined is a factor in the exercise of that discretion. Nonetheless, on the facts of this case and as it applies to the earlier allegations, I have determined that the claimant has no reasonable prospect of successfully arguing that time should be extended on a just and equitable basis, for the following reasons:

- a. The delay itself is substantial, over two years;
- b. There was no genuine reason for the delay in claiming;
- c. The claimant had access to trade union advice throughout the relevant period of delay and received advice in 2017 and 2018;
- d. An ACAS Early Conciliation certificate was obtained in 2018, proving that the claimant had access to advice and assistance about bringing claims at that time;
- e. The claimant raised matters with the Police and, later, as a grievance, showing he was able to raise matters when he wished to (and did);
- f. The claimant was in work for 2019 and physically able to raise matters throughout all (or at least almost all) of the period of delay; and
- g. Time limits are there for a good reason and any such extension is the exception and not the rule.

27. The position for the claims arising from the dismissal on 6 May 2021 is entirely different. Those claims were presented within the time required and the Tribunal does have jurisdiction to hear those claims. In the separate deposit order, I have recorded why I consider that the dismissal claims have little reasonable prospect of success on their merits. However, if the claims proceed to hearing, the Tribunal will need to determine why the decision-maker reached the decision to dismiss the claimant. There is a dispute of fact about why he did so. That is a dispute which requires evidence to be heard and considered. As a result, I am satisfied that the dismissal claims have some prospects of success (and cannot be said to have no reasonable prospect). On that basis I have decided not to strike out the claims which rely upon the decision to dismiss made on 6 May 2021.

Employment Judge Phil Allen

4 April 2022

JUDGMENT SENT TO THE PARTIES ON

29 April 2022

FOR THE TRIBUNAL OFFICE

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