



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. K. Owsiany

**Respondent:** Lidl Great Britain Ltd.

**Heard on:** Video (CVP)

**On:** 25 April 2022

**Before:** Employment Judge S Evans (sitting alone)

## Representation

**Claimant:** in person

**Respondent:** Ms. L. Gould, Counsel

**JUDGMENT** having been sent to the parties on 27 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## REASONS

1. These reasons are supplied at the request of the claimant.
2. A preliminary hearing was held on 25th April 2022. At that hearing, the claimant appeared in person and the respondent was represented by Ms. Gould of Counsel. The parties agreed, at the outset of the hearing, that the sole issue for determination was that outlined in paragraph 5 of the notice of hearing, namely:  
*whether the Claim should be struck out as having no reasonable prospect of success due to issue estoppel, cause of action estoppel or the rule in Henderson v Henderson.*  
The notice also specified that, if allowed to proceed, this hearing would go on to consider case management orders and directions to ensure the case is ready for a final hearing.
3. The parties agreed the order of proceedings and that both had possession of the bundle before the Tribunal, which consisted of 66 pages. In reaching my decision, I took account of such pages of the bundle as I was directly referred to, together with the submissions made by the claimant and on behalf of the respondent and the relevant law outlined below. I also had regard to an email sent by the claimant to the Tribunal office in

Cardiff, dated 16<sup>th</sup> September 2021.

4. The history of this matter begins with what I shall refer to as "Claim 1", namely claim number 1601149/2021 which was issued by the claimant against the respondent on 27<sup>th</sup> of August 2021, following a referral to the ACAS Early Conciliation process on that date. The ACAS certificate was issued the same day, bearing the number R167709/21/30.
5. In Claim 1, the claimant indicated, by the tick boxes of paragraph 8 of the ET1, that he was pursuing a claim of disability discrimination. The narrative in paragraph 8.2 of the ET1 gave details of the incidents relied on with regard to the claims of disability discrimination and also stated "I strongly believe that employer made unlawful/ unauthorised deduction on February's payment".
6. Claim 1 does not appear to have been served on the respondent when it was first issued in the Employment Tribunal.
7. On 16<sup>th</sup> September 2021, the claimant sent an email to the Wales Employment Tribunal at 9:20am which read:  
*"Good morning,  
In regards to the claim number (162018259600) I would like my application to be withdrawn.  
Thank you  
Kristof."*
8. Although the claim number provided in the email of 16<sup>th</sup> September 2021 was incorrect, the claimant confirmed that the email related to the Employment Tribunal claim, of which at that time he had only one. At the time the claimant had another claim in the Social Security tribunal which could explain the wrong claim number but the claimant was clear in his submissions that he had intended to withdraw his Employment tribunal claim on the 16<sup>th</sup> of September, referring to mental health issues of depression and to advice that his father had given him to withdraw his claim which he accepted. The fact that the wrong claim number was given was not a matter of relevance to today's proceedings.
9. A Rule 52 Judgement was issued by the Employment Tribunal dated 19<sup>th</sup> October 2021 and sent to the parties on either the 5<sup>th</sup> of November 2021 or the 8<sup>th</sup> of November 2021 (the date is unclear on the face of the judgement). On 8<sup>th</sup> of November 2021, a letter was also sent by the Employment Tribunal to the claimant, thanking him for informing the tribunal that the claim was withdrawn and confirming that the file would be retained until 8<sup>th</sup> November 2022 and then destroyed.
10. The claimant told me that he did not see this correspondence and that the emails may have been deleted as his telephone had been hacked. Nothing turns on this. The claimant does not dispute that he requested a withdrawal of Claim 1 and was steadfast in his confirmation that he intended to do so. Further, no submission was made that he would have requested a reconsideration of the withdrawal of Claim 1 if he had seen

the correspondence sent to him in November.

11. Also on 8th November 2021, Notice of Claim 1 was sent by the Employment Tribunal to the respondent. This must have been sent in error as Claim 1 had been dismissed upon withdrawal by a Rule 52 judgment dated 19 October 2021.
12. The claimant issued claim 1601819/2021 ("Claim 2") on 22nd November 2021 after reference to ACAS on 14th of October 2021 and ACAS certificate R181319/21/51 dated 18th October 2021. The claimant agreed that the same causes of action were raised in Claim 2 as in Claim 1, namely discrimination on the basis of the protected characteristic of disability and an unlawful deduction of pay. The exact wording of paragraph 8.2 of Claim 1 was replicated in Claim 2 with the following exceptions:
  - (a) Claim 1 included the statement "In December 2019 I have been signed off and I am currently getting medical treatment for depression." This sentence does not appear in Claim 2.
  - (b) an allegation of being directly blocked by the store manager was made in both Claim 1 and Claim 2. Claim 2 added the additional wording "and it seems to me that he tried to avoid any contact with me."
  - (c) Claim 2 added the following statements  
"I also believe that pay slip for the month of February 2021 have been fabricated.  
On multiply occasions I have contacted my employer (October 2021, September 2021 etc) regarding my payment but I have still not received a satisfactory respond.  
The employer have stopped reply to my emails and not providing me information I have been requesting."
13. The claimant's submission was that he should be permitted to proceed with Claim 2 as there had been no abuse of process and no disadvantage caused to the respondent as it was not aware of the original claim until November 2021.
14. Counsel for the respondent relied principally on the provision of Rule 52 as to why Claim 2 should be struck out. She also submitted, briefly, that, at common law, the judgment on Claim 1 had determined the claim and that allowing Claim 2 to proceed would be an abuse of process.
15. Under Rule 51 of the Employment Tribunal Rules of Procedure 2013, as amended:  
*Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.*
16. Under Rule 52 of the Employment Tribunal Rules of Procedure 2013, as amended:  
*Where a claim, or part of it, has been withdrawn under rule 51, the*

*Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—*

*(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or*

*(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.*

17. Neither of these exceptions were relevant in this case. The Claimant did not express a wish to reserve the right to bring a further claim. There was no reference to such in his email of 16<sup>th</sup> September 2021 and indeed, he did not submit today that such a wish had been expressed. Rule 52 (a) was therefore not engaged. Rule 52(b) was not engaged.
18. The consequence of the Judgment, as set out in paragraph 15 above, is therefore, that the claimant *may not commence a further claim against the respondent raising the same, or substantially the same, complaint* as set out in Claim 1.
19. The differences between the details provided in Claim 1 and Claim 2, as set out in paragraph 12 above do not disclose any new complaints or causes of action within the jurisdiction of the Tribunal. The claimant accepted that the complaints were the same. Even if the fabrication of payslip allegation might disclose a new cause of action, none was identified and the claimant did not seek to address this allegation in his submissions.
20. As Rule 52 prevents further claims being brought after a claim has been dismissed in withdrawal, there is no discretion available to me as the complaints in Claim 2 raise the same, or substantially the same complaints as Claim 1. It is a matter of jurisdiction that Claim 2 cannot proceed because of the provisions of Rule 52.
21. At common law, on the facts, it is cause of action estoppel, as considered in *Virgin Atlantic Airways Ltd v Zodiac Seats Limited* [2014] AC 160 which prevents the claimant from proceeding with Claim 2. The matters raised are the same causes of action in relation to disability discrimination and unauthorised deductions as were determined by the Judgment issued in Claim 1.

Employment Judge **S. Evans**

Date 7 June 2022

JUDGMENT SENT TO THE PARTIES ON 8 June 2022

FOR THE TRIBUNAL OFFICE Mr N Roche