# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Jarju

**Respondent:** John Lewis plc

**Heard at:** Reading **On:** 15 May 2023

**Before:** Employment Judge Shastri-Hurst

**Representation**
Claimant: Mr H Ogbonmwan (lay representative)
Respondent: Mr D Hobbs (counsel)

# RESERVED JUDGMENT

1. Paragraph 20(iii) of the Revised List of Issues (the alleged reasonable adjustment of "allowing the Claimant full access to pending medical treatment prior to the holding the disciplinary hearing") is struck out as having no reasonable prospect of success;
2. Paragraph 21(iii) of the Revised List of Issues (the alleged protected act of attending a Black Lives Matter event on 26 October 2020) is not struck out.

# REASONS

## Introduction

1. The claimant was employed by the respondent from 16 August 2004 to 20 April 2021 as a Warehouse Partner at the Waitrose & Partners warehouse in Bracknell. He was dismissed: the respondent says that the reason for dismissal was conduct.

2. Early conciliation started on 29 June 2021 and ended on 10 August 2021. The claim form was presented on 9 September 2021. The claimant brought claims of:

   2.1. Unfair dismissal – s98 Employment Rights Act 1996 ("ERA");
   2.2. Holiday pay – Working Time Regulations 1998 ("WTR");
   2.3. Direct race/religious belief discrimination – s13 Equality Act 2010 ("EqA");

2.4. Failure to make reasonable adjustments – ss20/21 EqA
2.5. Victimisation – s27 EqA.

3. The claimant relies upon alleged disabilities of depression and a shoulder injury. All relevant disclosure of medical evidence has been made, and an impact statement has been provided. The respondent denies that the claimant satisfied the definition of disability within s6 EqA at the relevant time, on 30 April 2021.

4. The final hearing in this matter is listed for 16 to 20 October 2023.

5. On one matter of nomenclature, where pages are referenced below, they are page references to the agreed bundle prepared for 3 April 2023 hearing, and retained by the Judge.

## Issues

6. The issues to be dealt with at this hearing were set out in the notice of hearing and are as follows:

6.1. Whether the allegations at paragraph 20(iii) and paragraph 21(ii) of the revised list of issues should be struck out, or made subject to a deposit order, due to having no or little reasonable prospect of success;
6.2. Whether the allegations at items 7 and 15 of the direct race and religious belief discrimination claim in the revised list of issues are in the original claim form and, if not, has an application to amend been made in relation to them;
6.3. Whether any other application to amend has been made and, if so, that application will be dealt with;
6.4. To finalise the list of issues;
6.5. To make case management orders leading to the final hearing.

7. All issues other than the strike out application are dealt with in a separate case management order.

## Law

### Strike out

7. At the last hearing, on 3 April 2023, I indicated that I would consider at today's hearing whether two allegations made by the claimant had no or little reasonable prospects of success. Those two allegations are:

7.1. Failure to make reasonable adjustments – paragraph 20(iii) of the Revised List of Issues;

> "Allowing the Claimant full access to pending medical treatment prior to the holding the disciplinary hearing."

7.2. Victimisation – paragraph 21(ii) of the revised list of issues;

> "Did the claimant undertake a protected act... in 2020 when he participated in a Black Lives Matter event?".

8. The relevant ground for strike out is found within r37(1) of Sch 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules"). R37 provides as follows:

> "37(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 on any of the following grounds –
>
> a. That it is scandalous or vexatious or has no reasonable prospect of success;"

9. The Tribunal has the power to make deposit orders against any specific allegations or arguments that it considers have little reasonable prospect of success under r39 of the Rules:

> "39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim…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.
>
> 39(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

10. For discrimination claims, the starting point regarding case-law is **Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL**. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing.

11. I am also assisted by the case of **Balls v Downham Market High School and College [2011] IRLR 217**, in which Lady Smith held:

> "When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether there written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

12. Mitting J in **Mecharov v Citibank NA [2016] ICR 1121 EAT** provided the following guidance at paragraph 14:

> "…the approach that should be taken in a strike out application in a discrimination case is as follows:
>
> 1. Only in the clearest case should a discrimination claim be struck out;
> 2. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> 3. The claimant's case must ordinarily be taken at its highest;
> 4. If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,

5. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

13. However, there are some caveats to the general approach of caution towards strike out applications. In **Ahir v British Airways plc [2017] EWCA Civ 1392 CA**, it was held that, when a tribunal is satisfied that there are no reasonable prospects of the facts needed to find liability being established, strike out may be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

## Findings of fact

### Procedural background

14. The claimant commenced the ACAS early conciliation process on 29 June 2021. This process concluded on 10 August 2021, and the claim form was presented on 9 September 2021. The respondent defends the claim, and presented its response on 10 January 2022.

15. On 26 April 2022, the Tribunal sent out case management orders requiring the claimant to produce a disability impact statement and any medical evidence upon which he wished to rely by 25 May 2022. No response was received from the claimant in line with this order.

16. By letter of 13 June 2022, the respondent made an application to strike out claims for non-compliance or in the alternative failure to actively pursue his claim. By email of 20 June 2022 the claimant's representative responded in writing to the respondent's application to strike out.

17. On 2 August 2022, the order requiring the claimant's disability evidence to be served by 25 May 2022 was extended to 18 July 2022.

18. The matter was listed for a preliminary hearing on 2 September 2022.

### The 2 September 2022 hearing

19. The matter was listed for a private case management hearing on 2 September 2022, at which Employment Judge Tynan was presiding. In advance of that hearing, Mr Hobbs, for the respondent, had produced a draft list of issues to assist the progression of the case. That draft included six allegations of direct race/religious belief discrimination pursuant to s13 of the Equality Act 2010 ("EqA"). Although this document was provided to Mr Ogbonmwan in advance of the hearing, he did not provide any comments on it or seek to agree its contents in advance of this hearing.

20. At the hearing, following discussion with the parties and the Judge, it was apparent that Mr Ogbonmwan sought to suggest that there were in fact 21 allegations of direct race/religious belief discrimination that the claimant wished to pursue.

21. The judge at that hearing did not have the time to establish whether all of the additional 15 allegations were apparent on the ET1 or whether an application to amend was required. It was recorded by the Judge at this hearing that no application to amend had been made as at 2 September 2022. The Judge

ordered that any application to amend was to be made by 23 September 2022 and listed the matter for a preliminary hearing to deal with any application and to clarify the list of issues, on 3 April 2023.

22. At this hearing, Mr Ogbonmwan indicated that he may wish to make an application to amend the claim to add a post-termination discrimination claim. However, the Judge specifically noted that there was, as at 2 September 2022, no application to amend the claim; particualrly he noted that the email of 1 September 2022 cannot be regarded as an application to amend.

23. At this stage in proceedings, the claimant had still not complied with the order for him to provide his disability documents/statement (order originally made on 16 April, varied on 2 August 2022). Although the claimatn had provided an impact statement the day prior to this hearing, it was 16 pages and 341 paragraphs of single-spaced typing, and the respondent had not had the chance to consider this.

24. At the hearing on 2 September 2022, the Judge also made orders for the claimant to provide further and better particulars at paragraphs 1.1.1 to 1.1.5 of his Order by 26 September 2022. The claimant failed to do this.

25. The Judge also ordered that any application to amend must be presented by 23 September 2022 (paragraph 4.1 of the Order).

**Aftermath of the 2 September 2022 hearing**

26. As a result of the claimant's failure to comply with the order requiring him to provide further and better particulars by 26 September 2022, the respondent applied to strike out the claimant's claim for disability discrimination on the ground of non-compliance, or in the alternative underground of the claim had no or little reasonable prospect of success.

27. By letter of 29 September 2022, the respondent applied for an unless order requiring the claimant to provide the respondent with the further and better particulars as ordered to be providedby 26 September 2022.

28. On 10 October 2022, the Tribunal required that the claimant "must confirm that he has now provided the information at paragraphs 1.1.1 to 1.1.5 of the 2 September order or explain why he has failed to do so".

29. On 14 October 2022, the respondent wrote to the Tribunal, confirming that it maintained its position that the claimant's disability status was denied.

30. In response to this, on 17 October 2022, the claimant sent a document that perported to be the further and better particulars as well as an application to amend. This was followed by a schedule of loss on 21 October 2022.

31. On 4 November 2022, the respondent applied to the Tribunal for a preliminary hearing in order to:

    31.1. Deal with the claimant's application to amend; and
    31.2. Attempt to finalise a list of issues between the parties, as the document provided by the claimant on 17 October 2022 did not take matters further.

32. By letter of 29 November 2022, the Tribunal stated that the document presented by the claimant on 17 October 2022 were "not in a form acceptable to the Tribunal". The Tribunal stated that, if the claimant failed to comply with the Tribunal's order within a further 14 days (13 December 2022), then consideration would be given to striking out those parts of the claim to which the order refers.

33. On 13 December 2022, the claimant sent an email attaching an 11-page document purporting to be particulars.

34. On 22 December 2022, the respondent applied to strike out various aspects of the claimant's claim, on the basis of non-compliance with the Tribunal's order. The claims/allegations subject to that application were as follows:

    34.1. The holiday pay claim;
    34.2. Allegations of direct race/religious belief discrimination (Issues 1, 2 and 14 on the Revised List of Issues):
    34.3. Part of the reasonable adjustments claim (paragraph 20(iii) on the Revised List of Issues);
    34.4. Part of the victimisation claim (paragraph 21(ii) on the Revised List of Issues).

35. Furthermore, in relation to the direct discrimination claim, the respondent did not accept that allegations 7 and 15 of the Revised List of Issues were apparent from the claim form, and were of the view that an application to amend needed to be made if the claimant sought to include these specific allegations.

36. I should explain the term "Revised List of Issues". Following the hearing on 2 September 2022, the respondent's legal team analysed the ET1 and accepted that most of the 21 allegations set out at the 2 September 2022 hearing were (even if just obliquely) in the ET1. Mr Hobbs produced a Revised Draft List of Issues to reflect all the additions that had been identified by Mr Ogbonmwan in the 2 September 2022 hearing. It was however made clear by the respondent that inclusion of all 21 did not mean that the respondent accepted that all the additional 21 claims were within the ET1.

37. The 3 April 2023 hearing was therefore listed, before me, to consider the respondent's application to strike out, any applications to amend, and a list of issues.

**The 3 April 2023 hearing**

38. On the morning of 3 April 2023, at 0930hrs, Mr Ogbonmwan sent another document to the Tribunal that he said provided the further and better particulars.

39. Having looked at the various correspondence on file, I made the parties aware that the only document/part of document that I considered could be an application to amend is the last two pages of the document sent by the claimant on 17 October 2022, that relates to post-termination victimisation and discrimination.

40. I asked Mr Ogbonmwan whether he thought he had made any applications to amend. He said that he was applying to amend to include claims that were out of time, as well as the post-termination discrimination/victimisation. I could not find any other document that could be understood to be an application to amend. Mr Ogbonmwan said that he had not sent in an application, as he had prepared a document in advance of the 2 September hearing, that the Judge had accepted as being, to all intents and purposes, an application to amend.

41. I explained to Mr Ogbonmwan that the Judge's order is very clear: he did not consider that there was, as at 2 September 2022, any application to amend in front of him. He then ordered that any application to amend be presented by 23 September 2023. Mr Ogbonmwan confirmed that he had not sent in any other application to amend, as he did not want to cause the Tribunal more work.

42. My decision at the 3 April 2023 hearing was as follows:

    42.1. The holiday pay claim was struck out for non-compliance;
    42.2. Allegations 1, 2 and 14 of the direct discrimination claim as set out in the Revised List of Issues were struck out for non-compliance;
    42.3. Issues at paragraphs 20(iii) and 21(iii) of the Revised List of Issues were not struck out for non-compliance;

43. Unfortunately, we ran out of time to deal with the other issues before the Tribunal, and so I postponed the matter as part-heard, and re-listed it for 15 May 2023 for 3 hours, to deal with the following issues:

    43.1. (On the Tribunal's own initiative) whether the allegations at paragraphs 20(iii) and paragraph 21(ii) of the Revised List of Issues should be struck out, or made the subject of a deposit order, due to having no or little reasonable prospect of success;

    43.2. Whether the allegations at items 7 and 15 of the direct race/religion claim in the Revised List of Issues are in the original claim form and, if not, has an application to amend been made in relation to them;

    43.3. Whether any other application to amend has been made, and, if so, that application was to be dealt with. At the hearing on 3 April 2023, I identified that there may be an application to amend in relation to post-termination discrimination/victimisation, as set out at the end of the document submitted by the claimant on 17 October 2022. I made it clear that I was not at that stage aware of any other application to amend;

    43.4. To finalise the list of issues;

    43.5. To make case management orders leading to the final hearing.

**The 15 May 2023 hearing**

44. The claimant's representative had made two applications to postpone the hearing today, on 14 April 2023 and 12 May 2023: both of these were rejected for reasons set out in response to those applications at the time.

45. The hearing was therefore reconvened today. The issues to be dealt with were repeated at the beginning of the hearing, and were those as set out in my Case Management Order from 3 April 2023.

46. In advance of this hearing, this morning, Mr Ogbonmwan sent to the respondent's solicitors and to the Tribunal two documents, labelled as:

    46.1. "Note for Employment Judge Conducting the preliminary Hearing 3rd April 2023" (9 pages). This in fact was the respondent's note prepared for use at the 3 April 2023 hearing; and,

    46.2. "Note for Employment Judge Conducting Open Preliminary Hearing Request for Amendment and Defence to the Respondent's Strike Out Application", referred to below as "Note" (11 pages).

47. During the course of the hearing, Mr Ogbonmwn also handed up a document that he said had been given to the Tribunal in advance of the 2 September 2022 hearing (this is the 16 page, 341 paragraph document referred to above). I have now read this document, and his "Note". It must be said that these documents are not easy to read; they are dense and unclear.

48. I heard submissions from both parties on all issues, and heard evidence from the claimant in relation to his financial situation, in case I determined that a deposit order was appropriate. Given the time constraints, I was unable to give a decision today, and so reserved my decision. I made it clear to the parties that, in terms of a finalised List of Issues, I would amend the Revised List of Issues to reflect my decisions following today's hearing, and attach that finalised List of Issues to my case management orders. Those orders, with that finalised List of Issues are contained within a separate document.

## Conclusion

### Strike out: Paragraph 20(iii) of the Revised List of Issues

49. Paragraph 20(iii) is part of the reasonable adjustments claim, and sets out one of the adjustments that the claimant alleges would have been reasonable. That paragraph reads as follows:

> "allowing the Claimant full access to pending medical treatment prior to the holding the disciplinary hearing".

50. The claimant's case, as established today, is that the claimant had a GP appointment on 21 April 2021 (before the disciplinary hearing) and a course of physiotherapy sessions due to start on 25 April 2021, in relation to his shoulder injury.

51. The claimant did not miss any prearranged appointments by attending the disciplinary hearing on 30 April 2021. The claimant's point was that he had not completed his course of physiotherapy at the time the disciplinary hearing took place. He was also subject to a fit note that signed him off as unfit to work on the basis of depression and functional issues.

52. in terms of his claim that he should have been permitted to conclude his medical treatment, he can therefore only be referring to the ongoing course of physiotherapy regarding his shoulder issue.

53. In terms of a substantial disadvantage suffered by the claimant as a result of not having finished his medical treatment, the claimant's case appears to be that his mental health was exacerbated and he suffered injury to feelings. It was not said that any symptom relating to his shoulder injury caused him problems at the 30 April hearing.

54. Reading paragraph 20(iii), and combining it with what I learned today, the suggestion by the claimant is that the disciplinary hearing should have been delayed until such time as his physiotherapy course had finished. In other words, the claimant says the disciplinary hearing should have been delayed. This is a repetition of the issue recorded at paragraph 20(i).

55. From what Mr Ogbonmwan told me today, I understand that the substantial disadvantage allegedly suffered is an exacerbation of the claimant's mental health. There appears to be no substantial disadvantage related to the shoulder injury. Therefore, the completion of a physiotherapy course related to the claimant shoulder is not causative of any substantial disadvantage.

56. Instead, the substantial disadvantage of which is complained (exacerbation of mental health) is much more directly connected to the question of whether the disciplinary hearing should have been delayed until such time as the claimant fills that he mentally would be in a position to deal with hearing.

57. Given that there is no substantial disadvantage that was highlighted to me that is said to have arisen specifically from a failure to allow full access to medical treatment (i.e. physiotherapy), I find that there is no reasonable prospect of this part of the reasonable adjustments claim succeeding. This is because the facts which I understand the claimant seeks to rely upon, taken at their highest, have no reasonable prospect of leading to a finding of liability.

58. I therefore strike out paragraph 20(iii) of the claim.

**Strike out: Paragraph 21(ii) of the Revised List of Issues**

59. This paragraph seeks to claim that the claimant did a protected act by attending a Black Lives Matter ("BLM") event. According to the claimant's Note, the event is said to have occurred on 26 October 2020. The respondent argues that this activity cannot fall within any of the four definitions of protected act, as set out at section 27(2) EqA. That section states as follows:

> "Each of the following is a protected act:
>
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

60. It is the claimant's position that attending a BLM event could fall within s27(2)(c).

61. Looking at the legal test for what falls within the scope of s27(2)(c), I have the following guidance:

    61.1. The case of **Aziz v Trinity Street Taxis Ltd [1988] IRLR 204** held that making tape recordings of conversations amounted to doing something "under or by reference" to the Race Relations Act 1976 ("RRA" the applicable legislation of the time). In that case, it was held that something could be done "under or by reference" to the RRA, even in a situation where the individual does not have his mind on any particular part of the RRA.

    61.2. In the case of **British Airways Engine Overhaul Ltd v Francis [1981] IRLR 9**, the claimant's assertion that she had done a protected act failed. She alleged that the protected act was making a statement to the press that she (as shop steward) was disappointed that the union was not seeking equal pay for women. She relied on the definition of protected act of "by reference to". This allegation failed, as the claimant had not alleged that either her employer or the union had acted in breach of the Sex Discrimination Act 1975 ("SDA", the relevant legislation at the time).

62. In the index case, there is not an assertion of the respondent's failure to comply with the Equality Act 2010. However, the definition of "doing any other thing for the purposes of or in connection with" the EqA is a broad one; I am therefore not satisfied that there are no reasonable prospects.

63. I therefore refuse the application to strike out this part of the claim.

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Employment Judge **Shastri-Hurst**

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Date 8 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

12 June 2023

GDJ
FOR EMPLOYMENT TRIBUNALS