



EMPLOYMENT TRIBUNALS

Claimant: Mr A Algedawy

Respondent: ABM Aviation UK Ltd

Heard at: Manchester

On: 14 and 15 October 2024

Before: Employment Judge Porter
Ms A Ashworth
Mr A Berkeley-Hill

Representation

Claimant: In person

Respondent: Mr J Hillerby, solicitor

CORRECTED JUDGMENT

(in accordance with Certificate of Correction dated 28 January 2025)
The unanimous decision of the tribunal is that:

1. The claim **under each of the above cited case numbers** is struck out.

Case No: 2402350/2023 and 2403

2. The application for reconsideration of this judgment is unsuccessful. The Order striking out the claim is confirmed.
3. The claimant is ordered to pay to the respondent costs in the sum of £4,548.00.

109/2023

REASONS

1. Written reasons are provided pursuant to the request of the claimant at the conclusion of the hearing.

Background

2. The claimant presented the claim under case number 2402350/2023 on 3 February 2023. At Box 8.1 of the claim form the claimant indicated that he was bringing claims of unfair dismissal, discrimination on the grounds of religion or belief, together with a claim for “other payments.”
3. A preliminary hearing was held on 17 May 2023 before EJ Martin, who made orders to progress the claim to hearing. During the course of that hearing it was recorded that:

26. During the course of the hearing a discussion took place about the claims and issues being pursued by the claimant. Employment Judge Martin went through the legal basis of the complaints in relation to discrimination on the grounds of religion/belief. She noted that there were two preliminary points with regard to the claim for unfair dismissal.

27. The claimant makes various allegations relating to discrimination on the grounds of his religion. The claimant says that he was prevented from praying, was forced to sell alcohol and tobacco (which is against his religion) and that it was because of his beliefs that he was effectively not offered any other work. The respondent denies those claims.

28. *The claimant has not provided details of his complaints in relation to his claims of discrimination on the grounds of religion and belief other than the bare minimum details as set out in his ET1. The claimant was therefore ordered to provide further information in relation to those allegations.*

29. *During the course of the hearing a discussion took place about the claims being pursued by the claimant, in particular his claim of underpayments. The claimant initially indicated that related to injury to feelings, which it was explained to him was an element of compensation for any complaint of discrimination. The claimant then suggested that he was pursuing complaints relating to unpaid shifts and overtime. The claimant did not seem clear what wages he was actually seeking. He had sought disclosure of documents from the respondent because he said that once his contract had ended, he could not access the app which contained his payslips.*

30. *The respondent's representative submitted that there was no claim for unlawful deduction from wages referenced in the claim form.*

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31. *Employment Judge Martin accepted that there was no claim of unlawful deduction from wages. She noted that the claimant had not ticked that box in the ET1, which she said in itself was not fatal for an unrepresented claimant. However, she stated that there was no reference whatsoever to any claim or sums being sought in relation to unpaid shifts or overtime. Therefore Employment Judge Martin did not accept that there was a claim for unlawful deduction from wages in the claim form.*

32. *Employment Judge Martin explained to the claimant that he could seek leave to amend his claim to bring such a claim and explained how such an application could be made. It was explained to the claimant he would need to indicate what he was actually seeking if he sought leave to amend his claim to bring such a complaint. It was also explained that there may be issues with regard to any time limits.*

4. At that hearing before EJ Martin on 17 May 2023:

4.1 the claims were identified as being claims of direct discrimination under s13 Equality Act 2010 and unfair dismissal under s94 Employment Rights Act 1996.

4.2 A preliminary hearing was listed to determine whether the claimant had sufficient length of service to pursue a claim of unfair dismissal.

4.3 Orders were made for disclosure of documents and exchange of witness statements.

5. A preliminary hearing took place on 1 September 2023 before EJ Allen. At that hearing a judgment was made that:

1. The claim for unfair dismissal is struck out because the manner in which the proceedings have been conducted was unreasonable and the claimant had not complied with the orders of the Tribunal made at/following the hearing on 17 May 2023.

....

3. A costs order is made against the claimant in the amount of £1,000.

6. Written Reasons for the judgment were provided. Extracts read as follows:

12. The case management order made following the hearing on 17 May 2023 had set out various steps which were required for the case to be prepared for this hearing:

a. The parties had each been ordered to send to the other a list, together with copies, of all documents relevant to the issue to be determined today. The claimant had never complied with this order. He had sent a video which showed

extracts from some emails. He had not listed the emails. He had not provided copies of the emails. He wished to rely upon those emails at today's hearing and he said they were relevant. He had not brought copies with him, so neither the respondent nor I had copies of the emails which the claimant said were relevant.

b. The parties had been required to each send to the other copies of witness statements prepared for today's hearing on or before 5 July 2023. At approximately 9 am this morning the claimant had provided a witness statement to the Tribunal and the respondent. The respondent had copied it and had included it in the bundle it produced. The respondent's representative had not had the opportunity to consider the statement.

c. By 21 June 2023 the claimant had been required to send the respondent further information about his complaint of discrimination on the grounds of religion. He had not done so on that date. He had provided a document on 1 August and said that there had previously been an issue with it being sent by email.

13. *The respondent applied to strike out the entire claim on the basis that the manner in which the claimant had conducted proceedings had been scandalous and/or unreasonable, and/or for non-compliance with the Tribunal's orders. The respondent contended that a fair hearing today was not possible.*

14. *The claimant had no real explanation for the lack of compliance and/or late compliance with orders, save that he highlighted how busy he had been working six days a week and he emphasised that he was not legally represented.*

15. *After hearing the submissions of the parties, I decided that: the claim for unfair dismissal should be struck out; but the claims for discrimination on grounds of religion should not be. I briefly explained the reasons for my decision in the hearing and those reasons are confirmed below.*

...

17. *The claimant had not complied with the Tribunal's orders (as I have set out). I found that his conduct in preparing for this hearing had been unreasonable. He had only provided his witness statement at 9 am this morning; far too late for the respondent to prepare for the hearing. He had sent a video showing that he had relevant documents and he confirmed that he had relevant documents upon which he wished to rely today, but those documents had not been provided to the respondent. They were not available today for me to consider. They had never been listed, as the order required. It was my decision that a fair hearing today of the issue to be determined in the unfair dismissal claim (continuity of service), was not possible, as the respondent had not had time to prepare after receipt of the claimant's witness statement and the relevant documents in the claimant's possession or control were not available to me. I also decided that it was appropriate and in accordance with the overriding objective including dealing with cases fairly and justly, for the unfair dismissal claim to be struck out.*

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7.

EJ Allen set out the reasons for making a costs order, noting that the claimant had conducted the hearing in an unreasonable manner and had failed to comply with Orders. In deciding whether to exercise his discretion to award costs EJ Allen noted:

33. Whether I should award costs is, however, a discretionary decision and is an exception and not the rule. I would not have exercised my discretion to award costs based on the prospects of success of the claimant's argument about continuity. In the Employment Tribunal we see many unrepresented claimants pursue arguments which do not turn out to have had much prospect of succeeding and I would not have awarded costs on that basis in this case based on the weakness of his argument about continuity.

34. I have taken a different view about awarding costs for the claimant's unreasonable conduct of the proceedings and his failure to comply with the orders made. I have considered the claimant's approach of providing a video showing emails which he says were relevant, but not providing copies of the emails themselves. I have also considered his decision to provide a witness statement only at 9 am this morning and not earlier. I have decided that costs should be awarded as a result. It has not been possible to hear today, the issue which today's hearing was listed to determine. I have struck out the unfair dismissal claim for that reason and I have also decided that it is appropriate to award costs as a result.

8. At that preliminary hearing orders were made to progress the claim to a final hearing. A Case Management Order was sent to the parties which included the following:

The claimant has brought two claims against the respondent which have been allocated two different case numbers (Case No: 2402350/2023 and 2403019/23). The claims have been joined and both case numbers were included in the case management order made following the previous preliminary hearing. The respondent was unaware of the second claim and its representative has not seen the second claim form. The claimant confirmed that the two claims reflected each other. The respondent is to be provided with a copy of the second claim form. I waived the requirement for the respondent to respond to the second claim. Save for me raising the existence of the second claim, neither party made any reference to anything which arose from it as being relevant to the decisions made, the issues, or the steps required to prepare for the final hearing.

9. The issues were identified in the Annex to the Order a copy of which appears in the Annex to these written reasons. The Case management order stated:

(11).....It is important that the list of issues is accurate and complete. The parties must consider this list carefully to make sure that it accurately records all issues to be determined at the final hearing. If not, the Tribunal and the other party must be notified within 14 days from the date this document is sent to the parties.

.....

(14) The claimant was very clear when asked, that the only discrimination claims which he was pursuing were for direct discrimination on grounds of religion. The

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respondent's representative also confirmed that was consistent with what the claimant had also confirmed at the previous preliminary hearing

Orders at this final hearing

10. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following.

11. At the outset of the hearing the claimant indicated that he wished to make a number of applications including:

11.1. The exclusion of Mr PJ Liyanage as an attendee and/or witness at the hearing on the grounds that Mr Liyanage had left the employment of the respondent and could no longer give credible or reliable evidence;

11.2. An application for disclosure of documents relevant to the claim;

11.3. An application to introduce new witness evidence from 2 new witnesses.

11.4. An application for leave to amend the claim to include a claim of indirect discrimination

12. EJ Porter explained that the fact that Mr Liyanage had left the employment of the respondent did not prevent him from attending as a witness in the proceedings. If the claimant believed that the credibility of the evidence

of Mr Liyanage was affected in some way by him leaving the respondent company, then this matter could be put to Mr Liyanage in cross examination.

13. EJ Porter sought clarity on the nature of the applications. The claimant explained that he wished to rely on written representations which were contained in a bundle of documents. The tribunal adjourned to allow that bundle of documents to be copied and copies provided to the respondent and the tribunal.

14. After the adjournment the respondent indicated that it opposed the applications and wished to make an application for strike out of the claim on the grounds that:

- 14.1. the claimant was, by presenting these applications on the first morning of the final hearing, conducting the proceedings in a scandalous or unreasonable manner;
- 14.2. The claimant had engaged in similar conduct at the preliminary hearing before EJ Allen when the claim of unfair dismissal had been struck out.

15. The claimant relied on his written representations in support of his applications and made a number of additional oral submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was additionally asserted that:-

- 15.1. he had only recently received the new witness statements from former work colleagues. He could not provide them earlier. The witnesses would not attend tribunal for cross-examination;
- 15.2. the respondent had provided a new witness statement of Mr Liyanage in the last week;
- 15.3. he had recently received legal advice and now understood that his claim was one of indirect discrimination and that he was entitled to documents relevant to that issue;
- 15.4. he had obtained legal advice shortly after the preliminary hearing before EJ Allen on 1 September 2023;
- 15.5. he was a litigant person who struggled to understand the necessary procedures and, as he was working, he had limited time to prepare for this case.

16. Solicitor for the respondent made a number of detailed submissions which the tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:

- 16.1. It had been confirmed at both of the prior preliminary hearings that the only claim of discrimination was a claim of direct discrimination;
- 16.2. The respondent has prepared for the hearing on that basis. A claim of indirect discrimination is a new claim which would require this hearing to be adjourned, new documents disclosed and witness statements prepared. This would incur additional costs;
- 16.3. The claimant has failed to provide a satisfactory explanation for his delay in seeking leave to amend to include the claim of indirect discrimination;
- 16.4. The request for specific disclosure of documents was vague but seemed to relate to the claim of unfair dismissal which was dismissed by EJ Allen;
- 16.5. The respondent has not served new witness statements. Witness statements were provided to the claimant on 20 May 2024 in accordance with the terms of the Order. In preparing a bundle of witness statements for this final hearing solicitor for the respondent made an error and included the witness statement of Mr Liyanage which had been exchanged in readiness for the preliminary hearing on 1 September 2023. Solicitor for the respondent recently acknowledged the mistake and informed the claimant of that error, providing the claimant with an updated witness statement bundle containing only the witness statements exchanged in advance of this final hearing in accordance with the terms of the Order;

16.6. The claimant is once again engaged in scandalous or unreasonable conduct of these proceedings by presenting on the first morning of the final hearing new evidence and his application for leave to amend the claim. It is no longer possible to have a fair hearing. The claim should be struck out.

Law relevant to the applications

17. Under rule 29 of the Employment Tribunal Rules and Procedure the tribunal has a broad discretion to allow amendments at any stage of the proceedings, either on the tribunal's own initiative or on application by a party. Such a discretion must be exercised in accordance with the overriding objective in rule 2 of dealing with cases fairly and justly.

18. In considering the application for leave to amend the claim the tribunal has noted the principles set out in **Selkent Bus Co Ltd v Moore 1996 ICR 836**. In exercising its discretion as to whether to grant leave to amend, the tribunal must take account of all the circumstances, and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The circumstances to be taken into account may vary according to each case, but particular note should be made of the nature of the application itself, i.e. whether it is minor or substantial, the relevant time limits for any new cause of action, the timing and manner of the application. Although delay in itself should not be the sole reason for refusing an application, the tribunal should nevertheless consider why it was not made earlier and why it is now being made.

19. In exercising the discretion, it is necessary to identify whether the amendment is:

- (a) merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;
- (b) seeking to add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; or
- (c) would add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

20. If the new claim arises out of facts that have already been pleaded in relation to the original claim, if it is a question of adding a new label to already pleaded facts, the proposed amendment will not be subjected to scrutiny in respect of the time limits, but will be considered under the general principles applicable to amendments, as summarised in **Selkent**. If the proposed amendment falls within category (b) or (c) then time limits will be considered.

21. If the claim falls within (b) the tribunal will decide whether it is in the interest of justice to allow the claim by balancing the injustice to the parties. The Court of Appeal in **Ali v Office of National Statistics 2005 IRLR 201 CA** acknowledged that there will be circumstances in which, "although a new claim is technically being brought, it is so closely related to the claim already the

subject of the (claim form), that justice requires the amendment to be allowed, even though it is technically out of time.”

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22. If the claim falls within (c), that is, an entirely new claim unconnected with the original claim as pleaded— then the tribunal must consider whether the new claim is in time and, if it is not, whether time should be extended to permit it to be made.

23. The tribunal must therefore determine whether the amendment amounts to a wholly new claim, as opposed to a change of label, by examining the case as set out in the original claim form to see if it provides the necessary 'causative link' with the proposed amendment **Housing Corpn v Bryant [1999] ICR 123**.

24. In balancing the injustice and hardship to the claimant in refusing the amendment against the injustice and hardship to the respondent in granting the tribunal must consider what the real, practical consequences of allowing or refusing the amendment will be.

25. The Court of Appeal in **Sarnoff v YZ and ors 2021 ICR 545 CA** has clarified that orders for disclosure against parties to proceedings are made by the tribunal exercising its case management power under rule 29 of the Employment Tribunals Rules and Procedure. In **Santander UK plc and ors v Bharaj 2021 ICR 580** the EAT offered guidance on determining applications for specific disclosure. It confirmed that there could be no order for specific disclosure unless the documents to which the application related were likely to be disclosable in the sense that they were likely to support or adversely affect the case of one or other party and were not privileged. Specific disclosure would only be ordered to the extent that it was in accordance with the overriding objective to do so. This includes considering whether it was 'necessary for the fair disposal of the issues between the parties', following **Canadian Imperial Bank of Commerce v Beck 2009 IRLR 740**. In that case the Court of Appeal held that 'relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. Rather, the document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings'. One relevant consideration is the timing of the application. In **Jones v Standard Life Employee Services Limited EATS 0023/13** the EAT held that an employment judge had been entitled to take the lateness of the application — made only 12 days before the hearing — into account when refusing the order. The overriding objective made it clear that dealing with a case justly included, as far as practicable, ensuring that it was dealt with expeditiously. It did not help the expeditious and fair hearing of a case if applications were made late.

26. The tribunal has the power to strike out the claim (or parts of the claim) under rules 37(1)(b) and 37(1)(c) of the Employment Tribunal Rules of Procedure 2013 where:

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; or

there has been non-compliance with any of the Tribunal Rules or with an order of the tribunal.

27. This is a two stage test. The tribunal must decide whether the conduct of the proceedings has been scandalous, unreasonable or vexatious, whether there has been non-compliance with an Order. If so, then it is for the tribunal to exercise its discretion in deciding whether it is appropriate to strike out. The tribunal must consider all the circumstances, including the magnitude of the default, whether it is the responsibility of the party, what disruption, unfairness or prejudice had been caused, whether a fair hearing was still possible, and/or whether strike-out or some lesser remedy would be an appropriate response.

Determination of the applications by the tribunal

28. The written representations relied upon by the claimant go further than an application for leave to amend the claim to include a claim of indirect discrimination. The claimant appears to be pursuing an application for leave to amend the claim to include a claim of unfair dismissal. However, the claimant did present a claim of unfair dismissal which was struck out by EJ Allen at the preliminary hearing on 1 September 2023. The claim of unfair dismissal cannot be reinstated by an application for leave to amend the claim. This tribunal is bound by earlier judgments. The claimant had the opportunity to apply for a reconsideration of that judgement and/or to lodge an appeal. He failed to do either. This application is refused.

29. The application for leave to amend also relates to allegations of negligence, breaches of human rights, data protection violations, breaches of the Health and Safety at Work Act. The tribunal has no jurisdiction to hear such claims. The application for leave to amend to include such claims is refused.

30. The claimant seeks leave to amend the claim to bring claims of unlawful deductions from wages, breach of contract, failure to provide written reasons for a significant change in employment status, namely ceasing to assign shifts during the Christmas period. The grounds upon which such claims are being pursued are not clear. The claims of breach of contract and failure to provide written reasons were not identified at the two preliminary hearings set to identify the issues before EJ Martin and EJ Allen, as

discussed above. The possibility of a claim of unlawful deduction from wages was discussed at the preliminary hearing before EJ Martin. However, it was noted that no such claim appeared in the Claim Form. Employment Judge Martin explained to the claimant that he could seek leave to amend his claim to bring such a claim and explained how such an application could be made. The claimant has not made such an application until the commencement of this final hearing. These are completely new claims. The addition of these new claims would necessitate full particulars to be

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provided, the respondent would have to be given full opportunity to investigate these claims. The claimant has provided no satisfactory explanation as to why these claims were not identified earlier, as to why he did not make application for leave to amend the claim as explained by EJ Martin. These claims relate to work carried on by the claimant during his engagement with the respondent between September and October 2022. The claims are out of time. The claimant has failed to provide a satisfactory explanation for the claims being out of time. The claimant was aware of his right to bring tribunal proceedings. It was reasonably practicable for the claimant to present such claims in time. The injustice and hardship to the respondent in allowing the amendment outweighs the injustice and hardship to the claimant in refusing the amendment. The introduction of the new claims would lead to an adjournment to clarify the grounds of each of these complaints, an escalation in costs in the investigation of the complaints by the respondent, and a delay in concluding these proceedings. The application for leave to amend the claim to include these new claims is refused.

31. The claimant makes application for leave to amend the claim to include a claim of indirect discrimination. This relates to the same set of facts upon which the claimant pursues his claim of direct discrimination. Although the exact grounds of this complaint have not been fully provided in the claimant's application, it is clear that, in the alternative to the claim of direct discrimination, the claimant is asserting that the relevant provision criterion or practice, or PCPs, put the claimant, and others of the Muslim faith, at a substantial disadvantage. The PCPs are:

- the requirement to serve alcohol;
- the policy of not allowing prayer time or suitable arrangements for prayer while work;
- the requirement to serve tobacco products.

32. The claimant also seeks to pursue a claim of harassment under section 26 Equality Act. Again, this relates to the same set of facts upon which the claimant pursues the claim of direct discrimination.

33. The tribunal has weighed the injustice and hardship to the respondent in allowing the amendment against the injustice and hardship to the claimant in refusing it. The tribunal has considered all the circumstances and notes in particular that:

33.1. the application is made on the first day of the final hearing. The first time that the respondent was aware of this application was at the commencement of this hearing;

33.2. At the preliminary hearing on 1 September 2023 EJ Allen identified the claim as one of direct discrimination only. The case management order sent to the parties on 30 September 2023 clearly identified the issue as being solely of direct discrimination. The order stated:

The parties must consider this list carefully to make sure it accurately records all issues to be determined at the final hearing. If not, the tribunal on the other party must be notified within 14 days from the date of this document is sent to the parties.

- 33.3. The claimant did not challenge the accuracy of the issues identified by EJ Allen;
- 33.4. The claimant has accepted that he obtained legal advice on his claim shortly after that preliminary hearing before EJ Allen;
- 33.5. EJ Martin had explained to the claimant the procedure for making an application for leave to amend at the preliminary hearing on 17 May 2023;
- 33.6. Granting this application would require an amendment to the response, disclosure of new documents and preparation of new witness evidence. This final hearing would have to be adjourned and would lead to an escalation in costs and delay.

34. In all the circumstances it is not in the interests of justice to allow the amendment. To do so would be contrary to the overriding objective in rule 2 of dealing with cases fairly and justly. In reaching this decision the tribunal bears in mind that the facts pleaded in this case more readily support a claim of indirect discrimination, rather than a claim of direct discrimination. The refusal of the application for leave to amend does adversely affect the claimant's chances of success. However, the claimant has attended 2 preliminary hearings when the claimant identified his claim as one of direct discrimination only. He obtained legal advice shortly after the preliminary hearing on the 1 September 2023. He was aware of the procedure for making application for leave to amend following the preliminary hearing before EJ Martin on 17 May 2023. The respondent has spent time and costs in preparing its defence to this claim on the basis of the issues identified at those two preliminary hearings. Granting this amendment would lead to an escalation in costs. The prejudice to the respondent in allowing the amendment outweighs the prejudice to the claimant in refusing the amendment. The application for leave to amend the claim to include a claim of indirect discrimination and harassment is refused. The claim shall proceed to hearing as listed: a claim of direct discrimination.

35. The application for specific disclosure by the claimant is refused. This application again is made on the morning of the first day of the final hearing, without any prior notification to the respondent of this request. The documents requested, to a large extent, relate to the claims of unfair dismissal and indirect discrimination. Their relevance to the claim of direct discrimination, the only claim remaining before the tribunal, is not clear. The tribunal finds that disclosure of these documents is not necessary for the fair disposal of the issues between the parties.

36. The application to rely on two additional witness statements is refused. The witnesses are not in attendance today. The claimant has given no indication that they will attend. The respondent has not had the opportunity to investigate and/or challenge the truth of their evidence. It is not in the

interests of justice for the claimant to introduce additional witness evidence at such a late stage.

37. In all circumstances the tribunal orders that the hearing shall proceed with the determination of the claim of direct discrimination on the basis of the bundle of documents as originally prepared and the witness statements previously exchanged in accordance with the case management orders.

38. The application to strike out the claim is refused. Time has been spent with the claimant's applications including the application for leave to amend the claim. However, any remedy to the respondent lies in an application for costs, which would be considered following the determination of the substantive merits of the claim. The tribunal considers that there can still be a fair hearing of this claim.

Commencement of the final hearing

39. EJ Porter provided an explanation of the conduct of the proceedings, including the giving of evidence, the conduct of the cross-examination and re-examination. EJ Porter indicated that the claimant would give evidence first, followed by the respondent's witnesses. EJ Porter asked the claimant if he had any questions about the procedure. The claimant indicated that he did not.

Evidence

40. The claimant gave evidence. During the course of giving his answers in cross-examination the claimant began to raise matters which were not relevant to the question. EJ Porter explained that the claimant would be able to raise any relevant matters arising from the cross-examination, and/or provide clarification on any matters arising, during re-examination. The claimant was provided with pen and paper to enable him to make a note of any such matters during the course of his cross-examination.

41. An agreed bundle of documents was presented.

42. The claimant started to give his evidence at 2:50 pm on the first day of the hearing. The hearing finished at 4:30pm. The claimant was in the middle of cross-examination. The usual warning was given to the claimant that he should not discuss his evidence over the break. It was ordered that the hearing continue at 10am the following day.

Second day of the hearing

43. At the commencement of the second day of the hearing the claimant made application that the hearing of the claim be adjourned to a different panel on the grounds that this panel was prejudiced. In support of his application the claimant provided an email which raised the following concerns:

43.1. *Presence of Mr. PJ Liyanage .*

It has come to my attention that Mr. PJ Liyanage, who is no longer employed by the Respondent as of September 15, 2021, is present in the courtroom. Mr Liyanage left the Respondent's employment and moved to a different company at the same airport in a similar position after 7.5 years of service. Despite this, he was present at this hearing, and I have concerns that his presence may create a conflict of interest or a

perception of bias. I respectfully question whether his continued presence in this hearing is my right to a fair and impartial trial under Article 6 of the

European Convention on Human Rights. I raised this concern in court on 14/10/2024, and the judge responded that Mr. Liyanage was permitted to be present. However, I remain concerned that this decision may compromise the fairness of these proceedings.

43.2. *Unknown Individual Shadowing the Respondent's Solicitor*

Additionally, there is a woman present in the courtroom who has been observed shadowing the Respondent's solicitor. She has not introduced herself, and her role has not been clarified. This lack of transparency raises significant concerns about the integrity of these proceedings. I respectfully request that the court clarify the identity and role of this individual to uphold transparency and fairness.

43.3. *Another Woman Accompanying Mr. PJ Liyanage.*

Furthermore, there was another woman observed sitting with Mr. PJ Liyanage in the courtroom. Her identity and connection to this case have not been explained. Again, I believe this lack of clarity may impact the impartiality of the trial. I respectfully request that the court clarify her role and the reason for her presence in the courtroom.

44. EJ Porter explained that:

- 44.1. the presence of Mr Liyanage had been explained the previous day. He was a witness of the respondent. A witness statement had been provided to the claimant. The claimant has raised no valid objection to the attendance of Mr Liyanage;
 - 44.2. the tribunal was provided with an attendance sheet that indicated that the person sitting next to the respondent solicitor was Mrs S Kauser, a witness of the respondent. A witness statement had been provided to the claimant. The claimant had not, at the commencement of the hearing, questioned with the tribunal who Mrs Kauser was. Again, she was a witness who was entitled to be present;
 - 44.3. the attendance sheet provided to the tribunal indicated that there was an observer, who remained seated at the rear of the tribunal during the course of the hearing. The tribunal is an open hearing. Any member of the public can attend the hearing. The tribunal does not question the attendance of any observer to the hearing.
45. The claimant confirmed that he pursued his application for an adjournment and for the case to be heard before a different panel on the grounds that this panel was prejudiced. When asked for further details of the alleged prejudice the claimant asserted that he had nothing more to say.
46. Solicitor for the respondent objected to the application asserting that:
- 46.1. the claimant has provided no explanation as to why he believes that the panel is prejudiced against him. There is no basis upon which to make this application, which is a waste of time and costs;
 - 46.2. the presence of Mr Liyanage was explained yesterday;
 - 46.3. this is an open hearing. Any member of the public can attend. In fact, the observer in the room is the daughter of Mrs Kauser who has an interest in observing legal proceedings. She has taken no part in the proceedings;
 - 46.4. It is difficult to see how a new panel would provide a fair hearing for the claimant. This is just a case of the claimant objecting because his case is not going well.
47. EJ Porter asked the claimant whether, in light of the explanation provided, he was prepared to continue with the hearing before this panel. EJ Porter suggested that an adjustment could be made whereby Mr. Liyanage be excluded from the hearing while the claimant continued giving his evidence. The claimant rejected that suggestion, asserting that he did not know that this was an open hearing, that this had not been a fair trial.

The relevant law

48. In considering the claimant's application the tribunal took note of the House of Lords' judgment in **Porter v Magill 2002 2AC 357 HL**, where it was noted that the concept of impartiality required not only that the court or tribunal be truly independent and free from actual bias, but also that it must not appear in the objective sense to lack these essential qualities: it must also be free from *apparent* bias. In order to establish whether there was apparent bias in any case, the court or tribunal must consider whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased. The hypothetical observer need not apprehend that bias actually existed, nor even that it was 'likely' or 'probable', only that there was a risk that was more than minimal.

Determination of the claimant's application for the tribunal to recuse itself and the claim be adjourned to be heard before a different panel

49. The tribunal rejects the application on the grounds that the claimant makes a bare assertion that the tribunal is prejudiced against him without any explanation of how the tribunal is said to have displayed such prejudice. The claimant objects to the attendance of the respondent's witnesses and the observer. He has rejected the suggestion that, for the continuation of his evidence, Mr Lyonage be excluded from the hearing. The claimant did not, on the first day of the hearing, say that his ability to give evidence was adversely affected by the presence of the witnesses and/or the observer. Prior to the claimant commencing his evidence EJ Porter explained the procedure to be adopted, explained that he would be given the opportunity to cross-examine each of the respondent's witnesses. When asked the claimant said that he had no questions about the procedure. The claimant did not at any time seek clarification of the identity of the other people in the room. It was reasonable for the claimant to expect that the respondent's witnesses would be in attendance at the hearing. This is an open hearing. While the claimant was giving evidence the observer sat quietly at the back of the tribunal room. She did not interrupt the evidence of the claimant. The tribunal is independent and free from bias. It is satisfied that there is no apparent bias, that a fair-minded and informed observer would not conclude that there was a real possibility that the tribunal was biased.

Further application for an adjournment

50. When the tribunal announced its decision, the claimant indicated that he would not accept the decision, that he was not comfortable to continue with the hearing. He asserted that he was medically unfit to continue with the hearing. The tribunal adjourned while the claimant provided medical evidence in support of his assertion. The claimant provided a fit note from his GP dated 4 October 2024 stating that the claimant was suffering from

depression and a physical ailment. The Fit note indicated that he may be fit for work with amended duties, that is, to consider altered hours.

51. When the hearing resumed the claimant was given the opportunity to make further representations. He stated that:

51.1. he had tried to obtain treatment for his condition on the previous Saturday when he went to the hospital, but he could not be seen;

51.2. he has been suffering from a mental health issue for a while; 51.3. he had no further medical evidence in support of his application;

51.4. his mental health is more important than anything else.

52. Solicitor for the respondent objected to the application for an adjournment on the grounds that:

- 52.1. the fit note does not support the claimant's assertion that he is unfit to attend the hearing;
- 52.2. the claimant attended the hearing the previous day and did not mention this - at no point was medical evidence referred to ;
- 52.3. the claimant, in his earlier application for the tribunal to recuse itself, made no reference to the claimant being unfit to continue. Only when the application was denied did the claimant make the assertion;
- 52.4. the respondent has no objection to any increase in breaks, as and when necessary, to allow the claimant to continue.

53. The tribunal considered all the circumstances and in particular the following:-

- 53.1. the claimant made no reference to a medical condition affecting his ability to attend and participate in the hearing until after his application for the tribunal to recuse itself was unsuccessful;
- 53.2. the medical evidence provided does not support the claimant's assertion that he is unable to participate in tribunal proceedings;
- 53.3. the tribunal acknowledges that the claimant is suffering from depression and finds the tribunal proceedings difficult and stressful. However, steps can be taken to assist the claimant. For example, we can take extra breaks, we can ask the respondent's witnesses to sit in the waiting room while the claimant continues with his evidence, we can ask the observer to observe a different hearing. When the time comes for cross examination of the respondent's witnesses steps can be taken to assist the claimant. This can be discussed with the claimant when he has finished giving his evidence.

54. In all the circumstances the application is refused. It is not in the interest of justice to delay this hearing.

55. When the tribunal announced its decision EJ Porter confirmed to the claimant that the hearing would continue, with reasonable adjustments being made. The claimant indicated that he would not continue.

56. EJ Porter advised the claimant that if he refused to participate in the proceedings, if he refused to continue with the cross examination, the respondent had indicated that it would make an application to strike out the claim. EJ Porter advised the claimant that he would be given time to reflect on the decision of the tribunal, which would retire for 10 minutes before coming back in to restart the hearing.

57. When the tribunal returned ten minutes later the claimant was in attendance. He did not ask for any further time for reflection. He indicated that he would not proceed with cross examination, that he would not participate in the hearing because he was unable to.

Application to strike out the claim

58. The claimant remained in attendance while the respondent made an application to strike out the entire claim on the grounds that the claimant's refusal to participate in the proceedings was unreasonable and/ or scandalous behaviour and it was in the interests of justice to strike the claim out.

59. The claimant objected to the application asserting that it would be unfair to strike out the claim because the claimant was suffering from a mental health condition.

Determination of the application to strike out the claim

60. The tribunal has considered its powers to strike out under rule 37 as indicated above. Again, the tribunal considered the two stage process. It was satisfied and found that the claimant's conduct, refusing to participate in the hearing, was an abuse of process, was unreasonable conduct in the proceedings. The tribunal went on to consider all the circumstances, including the magnitude of the default, whether it is the responsibility of the claimant, what disruption, unfairness or prejudice had been caused, whether a fair hearing was still possible, and/or whether strike-out or some lesser remedy would be an appropriate response, whether it was in the interest of justice that the claim be struck out.

61. The tribunal has considered all the circumstances including, in particular, the following:

61.1. From the outset of the hearing the claimant has made repeated applications, the outcome of which, if successful, would have been to postpone the hearing;

61.2. The claimant made his applications for leave to amend the claim, for specific disclosure of documents, for the reliance on additional witness statements on the morning of the first day of the hearing, without giving

- the respondent advance notice of his applications. The claimant was fully aware from the preliminary hearing before EJ Allen on 1 September 2023 that presenting evidence on the day of the hearing is unreasonable;
- 61.3. The application for the tribunal to recuse itself was unsupported by any examples of how the tribunal had exhibited prejudice against the claimant;
- 61.4. The claimant refused to accept the explanation given for the attendance of Mr Liyanage in the tribunal;
- 61.5. The claimant did not on the first day seek clarity as to the identity of the people in the room, did not express any concern about the attendance of an observer, did not seek any adjustments to allow him to participate in the hearing;
- 61.6. the claimant refused to continue to participate in the hearing by refusing to continue with his cross examination. The respondent did not have the opportunity to put its full case to the claimant, to challenge the entirety of his evidence;
- 61.7. the claimant did not, on the first day of the hearing indicate that he was suffering from ill-health, that he had been to the hospital, that he was unfit to take part in the proceedings. That assertion was made only after the tribunal had rejected the claimant's application to recuse itself and adjourn the hearing to a different panel;
- 61.8. there was no medical evidence to support the claimant's assertion that he was unfit to continue with the hearing. Indeed, he has been able to continue with the hearing by making applications and responding to the respondent's applications. He has done so in the presence of Mr Liyanage, Ms Kauser and the observer;
- 61.9. the claimant wrongly asserted that the respondent had served a new witness statement upon him outside the time limit ordered. This is incorrect. The tribunal has been provided with the two witness statement bundles prepared by the respondent. The documentary evidence supports the respondent's assertion that the witness statements were provided to the claimant in time, in accordance with the terms of the order, and that the provision, in advance of this final hearing, of the first witness bundle containing the statement of Mr Liyanage relevant to the preliminary hearing, was an error which was rectified by the respondent's solicitor.
62. The claimant has throughout this hearing acted in an unreasonable manner and has, without justification, refused to participate in the continued hearing of the evidence. The claimant is fully responsible for this conduct which has disrupted the hearing.
63. The tribunal is satisfied and finds that the conduct of the claimant has deprived the respondent of its right to a fair hearing. In all the circumstances it is in the interest of justice and consistent with the overriding objective to strike out this claim in its entirety. A lesser penalty would not be appropriate.

The only lesser penalty would be to adjourn the hearing to a later date. This would increase the costs of the respondent and it is not clear whether the claimant would participate in any such hearing, bearing in mind his conduct at this hearing and that any adjournment of the hearing would be to a later date before this same panel.

64. The claim is struck out.

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Respondent's application for costs

65. When the tribunal returned to the tribunal hearing room and announced its decision the claimant was in attendance. The respondent indicated that it intended to make an application for costs. The tribunal adjourned the hearing over the lunch break and ordered that:

- 65.1. the respondent provide the tribunal and the claimant with a schedule of the costs claimed;
- 65.2. The application for costs be heard after the lunch break;
- 65.3. the claimant was entitled make representations to oppose the costs application and could choose whether to make written representations rather than attend the hearing in person.

66. The respondent provided the Schedule of Costs, to the tribunal and to the claimant, as ordered. The claimant attended the hearing in person following the lunch break to oppose the application for costs.

67. The tribunal considered the submissions of the respondent and the Schedule of Costs, which was a break down of the hours spent by the respondent's solicitors in preparing for the hearing. In summary it was asserted that:

- 67.1. the application for costs is made under rules 76(1)(a) of the Employment Tribunal Rules of Procedure;
- 67.2. The respondent accepts that the award of costs in the tribunal is the exception rather than the rule;
- 67.3. However, the claimant has been guilty of unreasonable conduct and his claim has been struck out on that basis. The bar to the award of costs has been reached;
- 67.4. The respondent has incurred £12,251 in legal costs in defending this claim. There was an order by EJ Allen that the claimant pay costs in the sum of £1,000, leaving outstanding costs in the sum of £11,251;

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- 67.5. the respondent seeks recovery of its legal costs in preparation of the case from the date of the last hearing on the 1 September 2023 until today's date. As indicated in the schedule of costs this totals £5740;
- 67.6. Legal work by the respondent's solicitor is charged at an hourly rate lower than the national guidelines.

68. The claimant was given the opportunity to respond to the application. The claimant alleged that his right to a fair hearing has been denied, the tribunal has ignored his human rights and his request for an adjournment. The tribunal has a legal obligation to provide reasonable adjustments and has failed to do so.

69. EJ Porter indicated that all these matters were relevant to an appeal against the decision of the tribunal. The tribunal awaited the claimant's reply to the application for costs.

Claimant's application for reconsideration of its decisions

70. The claimant asserted that he was applying for a reconsideration of the decision to strike out the claim and the refusal of the claimant's request for an adjournment on the grounds that:

70.1. the respondent accused the claimant of scandalous behaviour. This was deeply offensive to the claimant and created a hostile environment in the tribunal;

70.2. This offensive conduct of the respondent solicitor was unchallenged by the tribunal and undermined the claimant's confidence in the fairness of the hearing and affected his ability to present his case in an environment free from bias;

70.3. the respondent's solicitor has breached the Solicitors Regulatory Authority (SRA) code of conduct. He should be reported to the SRA.

This conduct was not corrected by the tribunal;

70.4. the tribunal ignored the medical evidence and failed in its duty to make reasonable adjustments by adjourning the proceedings.

71. In relation to the application for costs the claimant asserted:

71.1. he could not afford to pay costs. He is now working on reduced hours because of his mental health. This has resulted in a reduction in income;

71.2. he does not have any savings;

71.3. it was hard to him for him to pay the £1000 costs previously awarded but he did pay that by monthly instalments of £80.

72. Solicitor for the respondent strongly refuted the allegation of offensive conduct asserting that he had used the word scandalous to describe the claimant's conduct as this was the statutory wording under Rule 37 (1)(B). It is not offensive behaviour to quote from the rules of the tribunals.

The Law relating to an application for reconsideration

73. Rule 70 of Employment Tribunals Rules and Procedure states that a Tribunal may, on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

74. A tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' . Rule 2.

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75. In **Outasight VB Ltd v Brown 2015 ICR D11** Her Honour Judge Eady QC accepted that the wording 'necessary in the interests of justice' in [rule 70](#) allows employment tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, 'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation'.

Determination of the application for reconsideration

76. The tribunal has considered the claimant's application for reconsideration of its decision to strike out the claim and to refuse the request for a postponement.

77. The tribunal has considered all the circumstances including the following:

77.1. the claimant did not assert on the first day of the hearing or earlier on the second day of the hearing that the respondent's solicitor's conduct was offensive to him, and/or was affecting his ability to conduct the hearing. This allegation was made for the first time on the afternoon of the second day of the hearing, following the decision to strike out the claim. The allegation is without merit. The respondent's solicitor was quoting the tribunal rules when describing the claimant's conduct as "scandalous";

77.2. the tribunal has not witnessed any inappropriate conduct by the respondent's solicitor. He has presented the respondent's case in a professional manner;

- 77.3. The tribunal did not fail in its duty to make reasonable adjustments. The need for reasonable adjustments was raised by the claimant for the first time on the second morning of the hearing. The tribunal found that it was not in the interests of justice to grant an adjournment. An adjournment was not a reasonable adjustment based upon the medical evidence relied upon by the claimant. The tribunal did consider that medical evidence and took note that the claimant is suffering from depression. It offered a series of adjustments to enable the claimant to continue in the conduct of the proceedings. The suggested adjustments were rejected. The claimant did not adduce any additional medical evidence in support of his application for reconsideration;
- 77.4. The claimant refused to continue his cross examination. He stated clearly that he did not intend to take any further part in the proceedings, that he was unfit to do so;
- 77.5. The claimant did continue to take part in the conduct of proceedings after his request for an adjournment was refused. He made oral representations in reply to the application for strike out. The tribunal adjourned for an early lunch while the respondent prepared for its

application for costs. The tribunal ordered that the respondent provide the claimant and the tribunal with a written schedule of costs. EJ Porter advised the claimant that he could either attend tribunal to oppose that application or he could make written representations for the tribunal to consider. The claimant chose to make oral representations and again attended the tribunal.

78. In all circumstances the application for reconsideration is refused. There are no grounds on which to support this application. New allegations have been made about the conduct of the respondent's solicitor and the tribunal but these are completely without merit. It is not in the interest of justice to revoke or vary the decision to strike out or the decision to refuse the request for an adjournment. These decisions are hereby confirmed.

The law relating to an application for costs

79. Under rule 76 (1) Employment Tribunals Rules of Procedure 2013 a tribunal may award a costs order or preparation time order where a party has in either bringing the proceedings or in the conduct of the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably; or the claim or response had no reasonable prospect of success.

80. Under rule 76(2) a tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

81. Rule 76 imposes a two stage test.

82. The tribunal must ask itself whether a party's conduct falls within rule 76 if so, it must then ask itself whether it is appropriate to exercise its discretion to make the award. The tribunal, in deciding whether to exercise its discretionary power under rule 76 should consider all relevant factors including the following;-

- costs in the employment tribunal are still the exception rather than the rule;
- the extent to which a party acts under legal advice;
- the nature of the claim and the evidence;
- the conduct of the parties

83. In **D'Silva v NATFHE EAT 0126/09** the EAT confirmed that it was not necessary to establish a direct causal link between particular examples of unreasonable conduct and the costs incurred by the respondent. Once a finding of unreasonable conduct is made, the question of costs is then very much within the discretion of the tribunal.

Determination of the application for costs.

84. The tribunal has considered the application for costs. It applies the two stage test. The claimant has been guilty of unreasonable conduct in the conduct of these proceedings as identified above. He has on various

grounds, sought an adjournment of these proceedings and, when his applications for an adjournment were refused, refused to continue with the conduct of the hearing, refused to continue to give evidence under cross-examination.

85. The tribunal has considered whether to exercise its discretion and make an award of costs. We bear in mind that an order for costs is the exception rather than the rule. We have considered all the circumstances including the following:

85.1. The claimant has been guilty of unreasonable conduct previously in this proceedings. He is aware of the possible cost consequences of such behaviour. EJ Allen ordered him to pay costs on 1 September 2023;

85.2. Nevertheless, the claimant engaged in further unreasonable conduct in presenting, on the first day of the final hearing, an application for leave to amend the claim and a request for specific disclosure of documents and the introduction of two new witnesses. The respondent had not been given prior warning of either of those applications;

85.3. The claimant has refused to continue with the presentation of his evidence. He has refused to take further part in the final hearing, although he has continued to take part by making his application for reconsideration and making representations in relation to the application for strike out and costs order;

85.4. the respondent has incurred legal costs in preparing for the final hearing which could not continue because of the conduct of the claimant.

86. We bear in mind the claimant's assertion that he does not have sufficient funds to pay costs. We accept what the claimant says. He is in financial difficulty. However, that is not a bar to making an order for costs. As stated above, he knew the possible cost consequences of presenting evidence for the first time on the morning of a hearing. He was advised of the procedure for making an application for leave to amend the claim by EJ Martin in May 2023. He took legal advice after the preliminary hearing on 1 May 2023. Nevertheless, he waited until the morning of the final hearing to make his applications. We have considered the respondent's schedule of cost. In all the circumstances it is in the interests of justice that the claimant pay the respondent's costs for the preparation of this hearing.

87. As to the amount of costs, we note that the respondent restricts its costs to those incurred in preparing for the final hearing since the preliminary hearing on 1 September 2023. The hourly rate of the solicitor's fees is reasonable. It is lower than the national guidelines.

88. In all the circumstances it is in the interests of justice for the claimant to pay costs in the sum of £4548.00, which is the amount of legal costs incurred for the preparation of this hearing since 4 September 2023. We have calculated this figure by looking at the schedule of costs, counting the number of hours in preparation for the hearing. We have excluded the

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time spent in telephone calls and engaging in correspondence as these items have not been fully explained to the tribunal.

Employment Judge Porter

Date: 28 October 2024

Corrected on: 28 January 2025

JUDGMENT with REASONS SENT TO THE PARTIES ON
31 October 2024

For the tribunal office

Annex

List of Issues for determination at the final hearing (as ordered by EJ Allen on 1 September 2023]

1. Direct discrimination on the grounds of religion
(Equality Act Section 13).

1.1 Did the respondent treat the claimant less favourably?
The alleged less favourable treatment relied upon is the following. The Tribunal will need to determine the facts in relation to the following allegations:

1.1.1 The claimant alleges he was prevented from being able to pray. The occasions when the claimant says he was not able to pray were on the 4 am to 10 am shifts which he worked on 10, 11, 16 and 18 October 2022. No one said the claimant could pray or could not pray on those occasions, but the claimant had told Mr Liyanage (a manager) about praying in the workplace on 25 and 26 September 2022;

1.1.2 The claimant alleges that he had difficulty in praying as a result of the location available. The prayer room was in a different terminal and the claimant was not able to move without an escort. On 4 October 2022 the claimant was bullied for removing his shoes, his prayer mat was moved to another room, and the room available for him to pray in was the canteen;

1.1.3 The claimant alleges that he was forced to sell alcohol and/or tobacco (which is against his beliefs) on: 17 September; 19 September; 25 September; 2 October; 3 October; 4 October; 6 October; 20 October and 27 October 2022; and/or

1.1.4 The claimant was dismissed and/or prevented from carrying on working with the respondent and/or

not provided with any more shifts, after the last shift which the claimant worked on approximately 31 October 2022.

1.2 Did the respondent treat the claimant less favourably than it treated or would have treated a comparator? The claimant is not relying upon an actual comparator, he is relying upon a hypothetical comparator, that is he says that if he was not a Muslim, he would not have been treated in the ways alleged

1.3 Can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's religion?

1.4 If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

1. Remedy

2.1 Should the Tribunal make any declaration and/or recommendation(s)?

2.2 Has the claimant suffered any injury to feelings and, if so, should the Tribunal award the claimant any compensation as a result?

2.3 Has the claimant suffered any losses and, if so, should the Tribunal award any compensation as a result?

