



EMPLOYMENT TRIBUNALS

Claimant: Mr S Pirvu

Respondent: Amazon UK Services Limited

RECORD OF A PRIVATE PRELIMINARY HEARING

Heard at: Midlands West (by telephone)

On: 19 July 2024

Before: Employment Judge Faulkner

Appearances

For the Claimant: In person

For the Respondent: Ms K Anderson (Counsel)

Interpreter: Ms A Moise (Romanian)

CASE MANAGEMENT ORDERS

Background

1. This case came before me last on 8 July 2024. I do not repeat the background to the case and that Hearing which was set out in the resulting Case Management Orders.
2. This further, three-hour, Hearing was scheduled by me on an urgent basis to deal with the outstanding case management issues which I set out at paragraph 12 of those Orders.
3. The bundle of documents for today's Hearing was the same as that for the Hearing on 8 July. Page number references below are references to that bundle. In addition, the Claimant had provided some additional documents/information to the Respondent in compliance with my Orders, and the parties also submitted a Case Management Agenda. References below to the "Kelly List of Issues" are

to the list produced by Employment Judge Kelly following a Case Management Hearing on 28 March 2023.

4. **The Final Hearing remains listed for 5 days from 5 to 9 August 2024.** It will take place in **Birmingham (Employment Tribunals, 13th Floor, Centre City Tower, 5 – 7 Hill Street, Birmingham B5 4UU)** with a time estimate of **5 days**. The case will be heard by an Employment Judge and two non-legal members. The Hearing will start at 10.00 am. You must arrive by 9.30 am.

Amendment

5. I do not repeat my decisions in relation to the amendment issues dealt with on 8 July, except where they relate to matters left outstanding at the end of that Hearing, though it was agreed that there should be some changes to the dates I set out in the List of Issues following the 8 July hearing, which are reflected below. Accordingly, the following paragraphs record my further discussion with the parties today about the Claimant's correspondence of 9 April 2023 (pages 66 to 78) commenting on the Kelly List of Issues, his application to amend his Claim dated 17 June 2023 (page 95) and my decisions in relation to any contested matters. My starting point remained what it had been on 8 July 2024, namely that the Claimant did not seek to raise with EJ Kelly any new complaints set out in his correspondence of 9 April 2023. It is conceivable an experienced judge like her could miss one or two points of detail in a lengthy discussion, but not the number of issues identified by the Claimant.
6. As on 8 July, where what the Claimant had raised required permission from the Tribunal to amend his Claim, I kept in mind the relevant case law, including **Selkent Bus Co Ltd v Moore [1996] ICR 836** and **Vaughan v Modality Partnership [2021] ICR 535**, as well as the relevant Presidential Guidance. The first point in each such instance was to identify the nature of the amendment, in summary whether it was simply a relabelling or clarification/elaboration of a complaint that was already within the Claim Form or the Kelly List of Issues, or alternatively what might be called a substantive amendment. The second question was whether to grant permission to amend. There is no list of factors that tribunals must consider in that regard, though the relative injustice and hardship between the parties, or what might be said to be the balance of prejudice, is crucial.
7. Again, where the question of a complaint having been brought after the expiry of the relevant time limit arose as part of my deliberations, I made clear that if the Claimant's application to amend was granted, that would not prevent the Respondent raising time limit issues at the Final Hearing, given that the questions to be considered when deciding whether there was conduct extending over a period and/or whether to extend time would ordinarily require hearing evidence, which could not properly be done in a private hearing such as this. See the decisions of the Employment Appeal Tribunal ("EAT") in **Galilee v Commissioner of Police of the Metropolis [2018] ICR 634** and **Reuters Ltd v Cole UKEAT/0258/17**). In other words, if the amendment was granted, it would be subject to any time limit issues which would need to be determined at the Final Hearing.

Double Stacker

8. This complaint was addressed at the Hearing on 8 July. As I recorded in the resulting Orders, I omitted to discuss with the parties who the Claimant relies on as his comparator. The Claimant confirmed today that he relies on Theo [surname unknown]. After discussion, he said that he would not also seek to rely on a previously unnamed comparator, Cosmin Codrean. As Ms Anderson pointed out, I had previously taken (and remained of) the view that, unless not disputed by the Respondent, the Claimant should not be permitted to rely on a comparator not named either in his Claim Form or in his correspondence of 9 April 2023 – see my previous Orders.

Warning

9. This matter is recorded from the penultimate paragraph on page 70 to and including the first two lines on page 72, but excluding the last paragraph on page 70 (which is the further matter referred to immediately below). The Claimant's position is that in December 2022, Mr Shorrocks warned him in writing for "idle time" and for being slow at his work. This was allegedly retracted twice by Human Resources, but issued by Mr Shorrocks again on both occasions, so that he issued it in total three times, on three consecutive days. The Claimant disclosed to the Respondent following the 8 July Hearing three documents which he says amounted to those warnings. They appear to be dated 13, 14 and 15 December 2022.
10. The Respondent submitted that the Claimant required permission to amend his Claim to pursue this complaint, whilst the Claimant asserted that it was within the statement in his particulars of claim at page 8, where he stated that Mr Shorrocks subjected him to "various intimidating and abusive acts". That seemed to me to be effectively equivalent to a claimant alleging "discrimination" and then seeking to argue that whatever details they subsequently set out falls under that heading, and therefore was not in my judgment sufficient to indicate this or any specific complaint having been pleaded at the outset.
11. There is within the Kelly List of Issues a complaint that on 6 November 2022 Mr Shorrocks said to the Claimant that he was taking too much "idle time", which is reflected at paragraph 2.2.2 in the List of Issues below. Given that there is no reference to this in the original particulars of claim either, I can only assume that by consent or otherwise, EJ Kelly permitted this (and indeed various other) matters to be added to the Claim, and that this was not subject to later resolution of any time limit issues; the Respondent has not sought to argue otherwise. Nevertheless, I was not prepared to permit the Claimant to amend his Claim to add a complaint about what he describes as the written warnings. As Ms Anderson pointed out, the documents he disclosed after the Hearing on 8 July do not refer to Mr Shorrocks and in fact appear to refer to other individuals as having created them. Accordingly, the Respondent would be put to the prejudice of having to make new lines of enquiry to defend the complaint.
12. Balanced against that, whilst it is not his fault that his correspondence of 9 April 2023 was not dealt with substantively by the Tribunal until I discussed it with the parties on 8 July 2024, there is little prejudice to the Claimant in not allowing the

amendment. This is because, albeit there is a difference between a complaint that there was an informal warning and a complaint that the same person gave a written warning, the substance of what is complained about – age discrimination by Thomas Shorrocks related to “idle time” – is already within the bounds of the Claim. The Claimant loses little by not being able to pursue a complaint about this related to 13 to 15 December 2022, when he is able to pursue a complaint about the same issue, albeit in a slightly different form, related to 6 November 2022.

Warning about supporting colleagues

13. The next matter raised by the Claimant is recorded in the last paragraph on page 70, namely that Mr Shorrocks informally warned the Claimant that he should not support his colleagues, “even in court”. The Claimant said to me on 8 July that this was an additional complaint of victimisation. He has since confirmed that the date of the informal warning was 6 November 2022 and that Mr Shorrocks reiterated it in December 2022.

14. I accepted, as did Ms Anderson, that this was simply clarification of the dates on which Mr Shorrocks is said to have made the comment which is set out in the last paragraph of the particulars of claim on page 8. I have therefore added it to the List of Issues below at paragraph 4.3.4.

17 November 2022

15. This matter is set out at paragraph (iv) on page 72. Ms Anderson agreed that this is simply a slight further particularisation of the complaint set out at paragraph 2.2.3 in the List of Issues below. It is not a new complaint given the reference in the first paragraph of the original particulars of claim to Mr Shorrocks telling the Claimant that his health problems were because he was old. I have amended paragraph 2.2.3 accordingly.

Occupational health

16. The next paragraph on page 72, in which the Claimant says he sought help from occupational health, plainly describes something he did himself, albeit as a consequence of what he says were prior acts of discrimination. It does not therefore set out any alleged act of discrimination by the Respondent.

17. The Claimant agreed that the final paragraph on page 72, and the first on page 73 (the latter denoted as paragraph (v)) were already included in the Kelly List of Issues, and so nothing further was required in relation to them.

Health assessment meeting on 7 December 2022

18. The next matter raised by the Claimant was set out at paragraph (vi) on page 73. It took some time for the Claimant to explain to me why what he was alleging amounted to age discrimination. Eventually, he said that his complaint is that at the meeting on 7 December 2022, Daniel Kirby refused to withdraw the statement made by Mr Shorrocks that the Claimant’s health problems were because he is old. The Claimant said that this was set out in the fourth

paragraph of his original particulars of claim on page 8, but it plainly was not. Ms Anderson submitted that it was thus a new complaint. She confirmed that Mr Kirby is already a witness, I assume to help the Respondent deal with other complaints, though he does not address this particular point in his witness statement.

19. I agreed that this was plainly a new complaint, not being referred to in the Claim Form; indeed, as Ms Anderson pointed out, it was not something which the Claimant set out in his correspondence of 9 April 2023 either. I was however prepared to permit the Claimant to amend his Claim to incorporate it. Unlike the complaint related to the written warnings allegedly given by Mr Shorrocks (see above), this is not a complaint that was in substance already within the bounds of the Claim to be determined at the Final Hearing, in that it challenges Mr Kirby's conduct, not that of Mr Shorrocks. There was thus some prejudice to the Respondent in having to deal with it as an additional matter, but given that Mr Kirby was already to be a witness, and that it is a very small point factually, that prejudice is minimal and is outweighed by the prejudice to the Claimant of not being able to pursue the matter. On balance therefore, the amendment was permitted. It thus appears in the List of Issues at paragraph 2.2.10 below.
20. I made clear however that this was subject to any time limit points that may arise, on the basis set out at paragraph 7 above. Given that it was mentioned for the first time before me, the complaint will be deemed to have been presented on 19 July 2024.
21. We then discussed the comparator on which the Claimant relies. He said initially that he relied on Mandy (referred to at the top of page 74), but as Ms Anderson pointed out, it was plain that the Claimant was not saying that Mandy was someone in respect of whom a manager agreed to withdraw comments and was thus not someone in materially similar circumstances to him. The Claimant eventually confirmed that he relies on a hypothetical comparator, namely that Mr Kirby would have withdrawn such comments for someone of a different age to the Claimant.
22. I add for completeness that the Claimant did not seek to add any new complaints based on what he had actually written at paragraphs (vi)(a) and (vi)(b) on page 73. In any event, it seems to me that they are, at least to a large extent, already reflected in the List of Issues below at paragraphs 2.2.5, 2.2.6 and 4.3.3.

Silvia Rotaru

23. From the bottom of page 76 to halfway down page 77 the Claimant referred to a manager called Silvia Rotaru denying him from March 2022 the opportunity to do certain roles such as working on the Double Stacker and as Problem Solver, because of the protected act set out at paragraph 4.1.1 in the List of Issues below.
24. Ms Anderson did not accept that this was a particularisation of the existing complaints of victimisation reflected in the List of Issues below at paragraphs 4.3.1 to 4.3.3 (taken from the Kelly List of Issues). I accepted her submission,

given that the Claim Form made no mention of Ms Rotaru at all, and in fact explicitly stated that it was Mr Shorroch who victimised the Claimant because of his support for his colleague's tribunal claim. The Respondent has not made any arrangements to call Ms Rotaru to give evidence. Ms Anderson also submitted that on the face of it, any complaint about Ms Rotaru's alleged conduct from March 2022 is substantially out of time.

25. The Claimant told me that it was Ms Rotaru who first made comments about not supporting his colleague, and that he recalls mentioning this to EJ Kelly. He said that whilst it was Mr Shorroch who prevented him from working on the Double Stacker and as a Problem Solver completely, Ms Rotaru had reduced those opportunities before the Claimant's sick leave.

26. I did not permit the Claimant to amend his Claim in this respect:

- a. I was conscious that he had first raised the matter in April 2023, and again, that it was not his responsibility that it was only substantively considered by the Tribunal in July 2024. As a result, any concerns that allowing the amendment might mean that the Final Hearing in just over two weeks' time could not proceed, because the Respondent would need to deal with a new issue, could not be a determinative consideration.
- b. That said, it was plainly a new complaint, and it seems unlikely that an experienced judge such as EJ Kelly would have omitted from the Kelly List of Issues the name of a manager mentioned to her at the March 2023 Hearing, and what that manager is alleged to have said.
- c. Like in respect of the complaint against Daniel Kirby, there is some prejudice to the Claimant in not being able to proceed with a complaint against someone who is said to have engaged in the same alleged act of discrimination as Mr Shorroch (though that prejudice is mitigated somewhat by the fact that the substance of the complaints is identical to those against Mr Shorroch).
- d. There are two main differences in relation to this matter however. First, on the face of it, Ms Rotaru is not someone who the Respondent could have anticipated calling as a witness and, unlike Mr Kirby, it has not done so. It thus faced the prejudice referred to by Ms Anderson if the amendment were allowed. Secondly, what Ms Rotaru is said to have done was somewhat more remote in time from Mr Shorroch's alleged actions than the action attributed to Mr Kirby.
- e. The Claimant may also have faced substantial time limit issues if this complaint were permitted to proceed, albeit this was not something capable of proper consideration on my part in the context of a case management hearing.

Assessing all of those factors overall, the application to add this complaint was refused. If already referred to in his witness statement, or otherwise given

permission by the Tribunal at the Final Hearing, this does not prevent the Claimant referring to Ms Rotaru's alleged actions in his evidence.

February 2023

27. At the bottom of page 77, going on to page 78, the Claimant set out comments made by Ms Rotaru in February 2023. After some discussion, I could not see that the Claimant was there setting out a further complaint, and he eventually confirmed that this was simply evidence in support of his existing complaints of victimisation.

Harassment

28. What I have only noticed in writing up these Orders, and what neither party raised with me, is the fact that on page 75, the Claimant clearly stated that his harassment complaints are all of the matters he raises as direct discrimination. Where I have permitted an amendment therefore, of whatever nature, I have made clear in the List of Issues below that it is pursued as direct discrimination and, alternatively, harassment. Ultimately, as the Equality Act makes clear, a single act cannot be both, but it is commonplace for them to be pursued as alternative causes of action. Given that they rely on identical facts, there is no prejudice to the Respondent in having to prepare to meet both at the Final Hearing.

Health and Safety at Work Act 1974 ("HASAWA") and Employment Rights Act 1996 ("ERA")

29. The Claimant made a formal application to amend his Claim on 17 June 2023 (pages 94 to 95), having taken legal advice. Again, it is regrettable it was not dealt with until this Hearing, but I can deal with it briefly.

30. The Claimant says the Respondent breached the HASAWA by neglecting his health issues after his sick leave, demonstrating a flagrant lack of care for his wellbeing and failing to make adjustments to reinstate him to the workplace.

31. As I explained to him, the Tribunal has no power (jurisdiction) to hear complaints under the HASAWA. He referred to adjustments, but has not sought to assert that he was at the relevant times a disabled person under the Equality Act.

32. As for the ERA, the Claimant referred to section 98. That deals with unfair dismissal. The Claimant remains employed.

33. It was not for me to speculate on other possible causes of action the Claimant might have pursued, whether under the ERA or otherwise, though I note that seeking to amend his Claim to add complaints under the ERA in June 2023 would have presented likely insurmountable time limit issues for him.

34. The application of 17 June 2023 was refused for these reasons.

Applications

35. The Claimant maintained his application for a witness order in respect of Amit Kalsi.

36. I refused the application for the following reasons:

- a. A witness order is a serious step for a tribunal to take. A fundamental requirement for taking it is that the tribunal is satisfied that the person in question has relevant evidence to give.
- b. The Claimant said that Mr Kalsi was the person in the Respondent's HR team who dealt with his complaint about Mr Shorrock's comments relating to his age, and not Claire Wiltshire as the Respondent asserts. Ms Anderson informed me that Ms Wiltshire has prepared a statement for the Respondent saying that she spoke with the Claimant on 21 November 2022, though as she is no longer employed by the Respondent, there is some doubt about whether she will attend the Final Hearing.
- c. The Claimant would want Mr Kalsi to confirm that they engaged in email correspondence to the effect that the Claimant was not permitted to transfer to another department. That is an insufficient basis on which to make a witness order given that both parties agreed the correspondence in question is in the bundle for the Final Hearing.
- d. The Claimant would also want Mr Kalsi to say that they spoke about these matters in person, and that Claire Wiltshire has lied in her statement about speaking to the Claimant for more than a couple of minutes (he seems to accept they had a brief conversation) and that an email in the bundle apparently prepared by her was never sent to him.
- e. Given that the correspondence with Mr Kalsi is in the bundle, that would not seem to me to go to any of the issues the Tribunal has to decide. It might of course go to Ms Wiltshire's credibility, and perhaps the broader credibility of the Respondent's case, but I do not see how Mr Kalsi being able to tell the Tribunal that he spoke with the Claimant would demonstrate that Claire Wiltshire did not also speak with him for more than a couple of minutes, or that she did not send the email.
- f. The Claimant did not explain how the content of his oral conversations with Mr Kalsi would assist the Tribunal beyond its examination of the emails between them.

37. The Claimant repeated at the end of the Hearing his assertion that the Respondent has certain fabricated documents, including the email from Claire Wiltshire referred to above. I referred him to the decision set out at paragraph 30 of my 8 July Case Management Orders.

Claims and Issues

38. The complaints and issues, as discussed at the Hearing on 8 July and at this Preliminary Hearing, are listed in the Case Summary below so that the parties, and the Tribunal hearing the case in August, have a complete list in one place. If you think the list is wrong or incomplete, you must raise this with the Tribunal and with the other party by no later than **26 July 2024**. If you do not, the list will be treated as final unless the Tribunal decides otherwise.

Documents

39. As I recorded after the Hearing on 8 July, documents have been exchanged. Ms Anderson said that in light of the clarification of the Claimant's complaints at the last two Hearings, the Respondent may need to disclose further documents. Both parties have an ongoing duty of disclosure in relation to relevant documents. A document is "relevant" for these purposes if it relates to the issues in the List of Issues below, whether related to liability or remedy and a party intends to rely on it at the Final Hearing, or it supports that party's case, or it supports the other party's case. Both parties must make reasonable searches for relevant documents. A document is in a party's control if it could reasonably be expected to obtain a copy by asking somebody else for it.

40. If as a result of complying with its obligations summarised above the Respondent identifies further documents that must be disclosed to the Claimant, after providing him with the file/bundle of documents as set out below, it must disclose those additional documents to him immediately. It must also ensure that any such additional documents are added to the bundles to be sent to the Tribunal.

File of documents

41. The Respondent must prepare a file of those documents which either party will refer to at the Final Hearing, with an index and page numbers. It must send a copy to the Claimant by **26 July 2024**.

42. The file should contain:

- a. The Claim and Response forms, any changes or additions to them, and any relevant Tribunal Orders, including these Orders. Put these at the front of the file, although as the bundle is already prepared, any new such documents (such as these Orders) can be added at the back.
- b. Other documents or parts of documents that are going to be used at the hearing, including the Schedule of Loss. Put these in date order, though again any newly disclosed documents can be added at the back.
- c. The two documents which Ms Anderson said the Claimant had recently provided to the Respondent, whether or not the Respondent disputes their relevance.

43. In preparing the file, the rules set out below must be observed:

- a. Unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in e-mail strings) is to be included in the file.
- b. The documents in the file must follow a logical sequence which should normally be simple date order, subject to what is set out at paragraph 42 above.
- c. Handwritten documents which are not easily legible (such as notes of meetings) should be transcribed into typed format by the party producing the document, and an agreed typed version included in the bundle. Only if the parties are unable to agree the accuracy of the typed version should the handwritten version be included as well.
- d. In relation to handbooks, policies, contracts or other long documents, ordinarily only the pages that either party will refer to at the Final Hearing should be included in the file.
- e. Where an electronic file is provided it must be in PDF format and the pages must be numbered so that they match the automatic PDF numbering system. If extra documents are added they must be added at the end of the PDF file. Documents must appear the right way up and with the correct orientation

44. The Claimant and the Respondent must both bring a copy of the file to the Final Hearing for their own use.

45. The Respondent must provide to the Tribunal copies of the file of documents and the schedule of loss in accordance with the document entitled, "Providing Documents to Midlands West Employment Tribunal, Regional Practice Direction", a copy of which will be sent to the parties with this document.

Witness statements

46. The Claimant and the Respondent must prepare witness statements for use at the Final Hearing. Everybody who is going to be a witness at the Hearing, including the Claimant, needs a witness statement.

47. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.

48. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. They must also include any evidence about financial losses and any other remedy the Claimant is asking for. If the witness statement refers to a document in the file it should give the page number.

49. At the Final Hearing, the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal. The Claimant should therefore attend the Final Hearing ready to ask questions of the Respondent's witnesses, for example challenging what is set out in the statements of those witnesses.
50. I understand that the parties have exchanged witness statements, though given the process of clarifying the complaints on 8 July and today, they may need to provide supplementary statements. The Claimant and the Respondent must therefore send each other copies of any and all further witness statements by **1 August 2024**.
51. The Claimant and the Respondent must both bring copies of all the witness statements to the Final Hearing for their own use.
52. The Respondent must provide to the Tribunal copies of all witness statements (including the Claimant's and the statements of any other witnesses for the Claimant) in accordance with the document entitled, "Providing Documents to Midlands West Employment Tribunal, Regional Practice Direction"

About these Orders

53. These Orders were made and explained to the parties at this Preliminary Hearing. I explained to the parties that they must be complied with even if this written record of the Hearing arrived after the date given in an Order for doing something.
54. If any of these Orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the Claim or the Response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules. The Tribunal may also make a further Order (an "unless order") providing that unless it is complied with the Claim or, as the case may be, the Response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
55. Anyone affected by any of these Orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':
<https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf>

Writing to the Tribunal

56. The parties are reminded of rule 92 of the Tribunal's Rules of Procedure:
"Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so". If, when writing to

the Tribunal, the parties do not comply with this rule, the Tribunal may decide not to consider what they have written.

Useful information

57. It should be noted that the Tribunal's staff are very busy and therefore the parties should not call the Tribunal's office unless it is urgent. If sending an email, the parties are asked to make sure the case number is in the subject line. An automated message means the Tribunal has received it. There may be a delay until the Tribunal can deal with emails substantively.

58. All judgments (apart from judgments under Rule 52) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the parties.

59. There is more information about the Employment Tribunals on the judiciary website. In particular, you may wish to read the information behind the tiles "Before the hearing", "At the hearing", "Rules, Orders, Practice Directions and Guidance", "Sources of advice and support" and "Further information". The website is here:

[Employment Tribunals \(England and Wales\) - Courts and Tribunals Judiciary](#)

60. The Employment Tribunals Rules of Procedure are here:
<https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>

61. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here:
<https://www.gov.uk/appeal-employment-appeal-tribunal>

62. Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings. You can access the Direction and the accompanying Guidance here:

[Practice Directions and Guidance for Employment Tribunals \(England and Wales\) - Courts and Tribunals Judiciary](#)

CASE SUMMARY

Background and complaints

The relevant background can be briefly stated:

1. The Claimant has been employed by the Respondent since 10 January 2016 as a Retail Inbound Associate. ACAS Early Conciliation started on 29 November 2022 and ended on 10 January 2023. The Claim Form was presented on 10 January 2023.
2. The Claim is about how the Claimant says he was treated after he returned to work from sickness absence in November 2022. He complains of age discrimination, age-related harassment and victimisation, the details of which are set out below.
3. The Respondent resists the complaints.

The Issues

The issues the Tribunal will decide at the Final Hearing are set out below, adopting the list prepared by Employment Judge Kelly after a Case Management Hearing on 28 March 2023 and adding in the matters discussed before me on 8 July 2024 and today.

1. Time limits

- 1.1 Given the date the Claim Form was presented and the dates of ACAS Early Conciliation, any complaint about something that happened before 30 August 2022 may not have been brought in time. The Respondent may also seek to raise time limit issues in relation to complaints set out in the Claimant's correspondence of 9 April 2023 which the Tribunal determines are new and for which permission to amend the Claim is or has been granted. To the extent that is the case, any such complaint will be deemed to have been presented on 9 April 2023.
- 1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
 - 1.2.1 Was each complaint made to the Tribunal within three months (plus ACAS Early Conciliation extension) of the act to which the complaint relates?
 - 1.2.2 To the extent not, was there conduct extending over a period?
 - 1.2.3 If so, was the complaint about the last act in that period made to the Tribunal within three months (plus ACAS Early Conciliation extension) of the end of that period?

1.2.4 To the extent not, was the complaint made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why was the complaint not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Direct age discrimination (Equality Act 2010 section 13)**

2.1 The Claimant identifies himself as being in the age group of being middle aged, between 40 and 59.

2.2 Did the Respondent do the following things:

2.2.1 After the Claimant returned from sick leave on 6 November 2022, by the Claimant's manager, Thomas Shorrocks, not allow the Claimant to drive machinery because he said the Claimant was too slow.

2.2.2 On 6 November 2022, by Mr Shorrocks, say that the Claimant was too slow and needed too much time to go to the toilet and to drink water and that he was having too much 'idle' time, i.e., non-working time.

2.2.3 On 14 November 2022, by Mr Shorrocks, say that the cause of the Claimant's medical problems was that he was old and/or refuse to retract or modify that comment following the Claimant's email to him of 17 November 2022.

2.2.4 By Mr Shorrocks, write to the Claimant after an informal meeting on 14 November 2022 on his return from sick leave and say that the Claimant's problems were due to his age.

2.2.5 After his return from sick leave, not give the Claimant a chance to be a Problem Solver, a role he had undertaken prior to his absence.

2.2.6 After his return from sick leave on 6 November 2022, not permit the Claimant to change department.

2.2.7 By Mr Shorrocks, fail to conduct a Welcome Back meeting after the Claimant's return from sick leave on 6 November 2022.

2.2.8 By Mr Shorrocks, fail to conduct a risk assessment after the Claimant's return from sick leave on 6 November 2022.

2.2.9 After his return from sick leave, refuse the Claimant the opportunity to work on/operate a Double Stacker (machinery for carrying very heavy objects).

2.2.10 On 7 December 2022, by Daniel Kirby, refuse to withdraw the statement made by Mr Shorrocks that the cause of the Claimant's medical problems was that he was old.

2.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than the following:

2.3.1 In relation to the complaints at paragraphs 2.2.5, 2.2.7 and 2.2.8 above, Vilia [surname not specified] who is 6 years younger than the Claimant, and (in relation to the complaints at paragraph 2.2.5 and 2.2.9) Theo [surname not specified] who is about the same age as the Claimant.

2.3.2 In relation to the complaint at paragraph 2.2.6 above, Mandy [surname not specified] who was aged between 48 and 51 and was allowed to change department.

2.3.3 Otherwise, a hypothetical comparator.

2.4 If so, was it because of age?

2.5 The Respondent does not seek to argue that the treatment was a proportionate means of achieving a legitimate aim.

3. Harassment related to age (Equality Act 2010 section 26)

3.1 Did the Respondent do the things at paragraphs 2.2.1 to 2.2.10 above?

3.2 If so, was that unwanted conduct?

3.3 Did it relate to age?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Victimization (Equality Act 2010 section 27)

- 4.1 Did the Claimant do a protected act as follows:
 - 4.1.1 Being a witness for a colleague, Georgiana Ramona Vasiliu, in an employment tribunal claim (130026/2022), which he says the Respondent found out about when that colleague informed the Tribunal who her witnesses were in Summer 2022?
- 4.2 Alternatively, did the Respondent believe that the Claimant had done or might do a protected act by being a witness in that claim?
- 4.3 Did the Respondent do the following things:
 - 4.3.1 Not allow the Claimant to drive machinery.
 - 4.3.2 Not give the Claimant the chance to be a Problem Solver.
 - 4.3.3 Not allow the Claimant to transfer to a different department.
 - 4.3.4 By Mr Shorrocks, on 6 November 2022 and again in December 2022, informally warn the Claimant that he should not support his colleagues, "even in court".
- 4.4 By doing so, did it subject the Claimant to a detriment?
- 4.5 If so, was it because the Claimant did a protected act?
- 4.6 Alternatively, was it because the Respondent believed the Claimant had done, or might do, a protected act?

5. Remedy for discrimination or victimisation

- 5.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
- 5.2 What financial losses has the discrimination caused the Claimant?
- 5.3 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- 5.4 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?
- 5.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 5.6 Did the Respondent or the Claimant unreasonably fail to comply with it?

- 5.7 If so, is it just and equitable to increase or decrease any award payable to the Claimant?
- 5.8 By what proportion, up to 25%?
- 5.9 Should interest be awarded? How much?

Employment Judge Faulkner
Date: 20 July 2024

Sent to the parties on:

23 July 2024

For the Tribunal Office:

Karl Frankson