



# EMPLOYMENT TRIBUNALS

This has been a remote hearing which has been consented to by the parties. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to comprised of an agreed bundle of documents (342 pages) and a skeleton argument from the Respondent's counsel. The orders made are described at the end of these reasons.

**Claimant**

**Respondent**

**Mr M Ahmed**

**v**

**Tesco Stores Limited**

**Heard at:** Watford (via CVP)

**On:** 9 January 2023

**Before:** Employment Judge Smeaton

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr C Kelly (counsel)

## RESERVED JUDGMENT

1. The Claimant was not disabled at the material time by reason of an ear condition or an arm condition. Accordingly, the claims of unfavourable treatment because of something arising in consequence of disability and two claims of failure to make reasonable adjustments must fail and are struck out.
2. The Respondent accepts that the Claimant was disabled by reason of anxiety and depression from April 2021 onwards. Those claims which rely on that disability will continue to a final hearing, subject to the payment of a deposit order.
3. The Claimant is ordered to pay a deposit of £50 not later than 21 days from the date of this Order, as a condition of being permitted to pursue the arguments that he was directly discriminated against because of his disability, as detailed below.
4. In respect of the order to pay a deposit, the Judge has had regard to any information available as to the Claimant's ability to comply with the order in

determining the amount of the deposit.

5. The claim remains listed for a final hearing on 7-11 August 2023. If the parties think that, in light of this judgment, less time is needed for the hearing, they must write to the Tribunal as soon as possible.

## REASONS

### The claim

1. The Claimant has been employed by the Respondent as a Warehouse Operative since November 2017.
2. On 11 September 2021, following a period of ACAS Early Conciliation between 18 August 2021 and 24 August 2021, the Claimant brought a claim at the Employment Tribunal alleging disability discrimination. The box for unfair dismissal was ticked but the Claimant has subsequently confirmed that he had not been dismissed at that point. There is no claim for unfair dismissal before the Tribunal.
3. The Claimant was ordered to provide further information about his claim. He responded on 28 February 2020. That response included a statement in which he set out the impact on him of the three conditions he relies upon in this claim, namely:
  - (a) anxiety and depressive disorder;
  - (b) left ear ET Dysfunction with mild otitis externa, dizziness, vertigo ('the ear condition'); and
  - (c) right forearm muscle strain, muscle weakness of upper limb ('the arm condition').
4. At a Preliminary Hearing before Judge George on 18 August 2022, the claims brought by the Claimant were clarified and categorised as claims of direct discrimination (s.13 Equality Act 2010 ('EqA 2010')), discrimination arising from disability (s.15 EqA 2010), failure to make reasonable adjustments (s.20/21 EqA 2010) and harassment related to disability (s.26 EqA 2010).
5. The parties agree that the List of Issues set out in the subsequent Case Management Order accurately reflect the claims brought by the Respondent. That List of Issues formed the basis of the hearing before me.
6. The Respondent accepts that the Claimant was disabled within the meaning of s.6(1) EqA 2010 by reason of anxiety and depression from 19 April 2021. It does not accept that he was disabled by reason of the ear or arm conditions or that the Claimant was disabled by reason of anxiety and depression prior to 19 April 2021.

### The hearing

7. The hearing was listed to consider whether the Claimant was disabled within the meaning of s.6 EqA 2010 at the material time by reason of the ear condition and/or the arm condition and to consider the Respondent's application dated 30 September

2022 for deposit orders in respect of all claims of direct discrimination and discrimination arising from disability, and two claims of failure to make reasonable adjustments (set out at paragraphs 5.3.1 and 5.3.2 of the List of Issues).

8. The hearing took place via CVP. The Claimant represented himself. The Respondent was represented by Mr Kelly (counsel).
9. I was provided with an agreed bundle of 342 pages and a skeleton argument from Mr Kelly. The parties confirmed that they were not expecting me to have any other documents.
10. In accordance with the guidance in *Cox v Adecco and others* UAEAT/0339/19/AT(V), I spent some time considering the claims and issues. Upon further discussion, the following was added to the agreed List of Issues:
  - (a) The act of direct discrimination at paragraph 3.1.1 is alleged to have taken place on 30 June 2020
  - (b) The acts of direct discrimination at paragraph 3.1.5 and 3.1.6 are alleged to have taken place on 22 and 23 May 2021, respectively
  - (c) The act of discrimination arising from disability at paragraph 4.1.1 is alleged to have taken place on 23 June 2021
  - (d) The acts of discrimination arising from disability at paragraph 4.1.4 and 4.1.5 are alleged to have taken place on 22 and 23 May 2021, respectively
  - (e) The 'something arising in consequence of disability' for the purposes of the claims of discrimination arising from disability under s.15 is limited to 'sickness absence'. Paragraph 4.2.2 of the List of Issues is, accordingly, deleted
  - (f) Part of the claim for failure to make reasonable adjustments which relies on the disability of anxiety and depression appears to pre-date April 2019 (the date from which the Respondent concedes that the Claimant was disabled). Mr Kelly invited me not to make any findings on whether the Claimant was disabled by reason of anxiety and depression prior to that date. Although acknowledging that the GP records contain no reference to anxiety or depression prior to April 2019, he was not confident that the full medical picture had been provided by the Claimant and considered, as a matter of fairness, that it ought to be left to the final hearing. I agreed.
11. In light of the above, when the parties disclose their documents to each other, they must disclose any documents relevant to the issue of whether the Claimant was disabled by reason of anxiety and depression prior to 19 April 2021.
12. The Claimant gave evidence and was cross-examined by Mr Kelly. I asked some questions about his means and to clarify certain aspects of his claim.
13. Both parties made closing submissions. The Claimant indicated that it would be helpful for him to have my decision in writing given his mental health condition. Accordingly, and given that I would not have been in a position to give a decision until late in the day, I reserved my decision, which I now give.

## The law

14. The principles which I must apply in reaching my decision are as follows:

### (1) Disability

15. The burden of proof is on Mr Ahmed to demonstrate, on the balance of probabilities, that he was disabled within the meaning of the EqA 2010 at the material time.

16. Under s.6 EqA 2010:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.

17. In considering s.6(1) EqA 2010, the Tribunal should ask itself four questions (*Goodwin v Patent Office* [1999] ICR 302):

- (i) Did the Claimant have an impairment (mental or physical) at the material time;
- (ii) Did the impairment affect his ability to carry out normal day-to-day tasks;
- (iii) Was the adverse effect substantial; and
- (iv) Was it long-term (i.e. had it lasted, or was it likely to last, at least 12 months).

18. Schedule 1 to Part 1 EqA 2010 contains further provisions relevant to the assessment of whether a person is disabled. Further guidance is provided in the 'EqA 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability' ("the Guidance") and in Appendix 1 to the Code of Practice on Employment published by the Equality and Human Rights Commission ('EHRC') ('the Code of Practice').

19. Although the EqA 2010 does not contain a list of normal day-to-day activities, the Guidance (at paragraph D3) provides that such activities are '*things people do on a regular or daily basis for example shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities*'.

20. In *Paterson v Comr of Police of the Metropolis* [2007] IRLR 763, [2007] ICR 1522, EAT, the Claimant was a police officer who suffered from dyslexia. He was found to be a disabled person by the Employment Appeal Tribunal ('EAT'). An expert had recommended he be allowed additional time to undertake the examinations necessary to achieve promotion. The EAT found that the activities of carrying out assessments or doing examinations were 'normal day-to-day activities', as were reading and comprehension. The EAT had regard to the ECJ judgment in *Chacón Navas v Euresst Colectividades SA* C-13/05, [2006] IRLR 706, [2007] All ER (EC) 59 and considered how the Claimant's professional life was affected when assessing the question of whether normal day-to-day activities were impaired.

21. 'Substantial' for this purpose means more than minor or trivial (s.212 EqA 2010). The focus must be on what a person cannot do, or can only do with difficulty, not what they are able to do.
22. An impairment may not directly prevent someone from carrying out normal day-to-day activities but may still have a substantial adverse effect on how the person carries out those activities. This is relevant to the issue of pain: *'where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so'* (the Guidance at paragraph D22).
23. For the purpose of determining whether an impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities, the effect of ongoing medical treatment on the impairment is ignored (paragraph 5(1) schedule 1 EqA 2010).
24. *'Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would **not** be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person.'* (Guidance at paragraph B9).
25. Some modification of behaviour may, however, be reasonably expected. When considering modification of behaviour, whilst it would be reasonable to expect an individual to avoid extreme activities (e.g. skiing for someone with chronic back pain) it would not be reasonable to expect the person to give up, or modify, more normal activities that might exacerbate the symptoms (Guidance at paragraph B7).
26. Further, when considering modification or coping strategies, the guidance (at paragraph B10) provides that, *'In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.'*
27. By paragraph 2(1) of Schedule 1 to the EqA 2010, the effect of an impairment will be long term if:
  - (a) it has lasted for at least 12 months; or
  - (b) is likely to last for at least 12 months, or is likely to last for the rest of a person's life.
28. In considering whether the effects are likely to last for at least 12 months, the Tribunal must consider matters as at the date of the alleged discriminatory act, and must not take into account anything only known or occurring after that time (*All Answers Ltd v W* [2021] EWCA Civ 606, [2021] IRLR 612) (paragraph C4 of the Guidance).

29. The Tribunal must consider what the effects of the impairments were at the material time and whether there is information before it which shows, viewed at that time, that it could well happen that the effects would last for more than 12 months (*Nissa v Waverly Education Foundation Ltd* [UKEAT/0135/18 (19 November 2018, unreported).
30. 'Likely' means "could well happen" and is not to be equated with 'more probable than not' (Guidance at paragraph C3 and *Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)* [2009] ICR 1056, HL).
31. By paragraph 2(3) of Schedule 1 to the EqA 2010, the impairment is treated as continuing if its substantial adverse effect on normal day-to-day activities is likely to recur.

## **(2) Deposit order**

32. The power to grant a deposit order is contained in rule 39 of Sch 1 of the Rules which provides, so far as is relevant:

*39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim...has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

*39(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

33. Although a less draconian step than striking out the claim, I must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response before making a deposit order. (*Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors* EAT 0096/07).
34. If I am satisfied that a particular allegation or argument has little reasonable prospects of success, I must only make a deposit order if I am also satisfied that it would be in accordance with the overriding objective to deal with cases fairly and justly to do so.
35. I bear in mind that the purpose of such an order is not to restrict access to justice disproportionately. Any order made must be for an amount that is affordable by a party, and can be realistically complied with (*Hemdan v Ishmail and anor* [2017] IRLR 228).
36. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order (*Adams v Kingdon Services Group Ltd* EAT/0235/18).

## Findings - disability

### (1) The ear condition

37. According to his medical records, the Claimant first attended his GP in January 2019, when he had painful ears and throat, which was diagnosed as viral. He attended again on 2 March 2019 and was diagnosed with '*ET dysfunction with mild otitis externa*'; an external ear infection. He was prescribed a nasal and ear spray to use for 10 and seven days, respectively. That medication resolved his symptoms.
38. The evidence before me does not suggest that the infection had a significant adverse effect on the Claimant's ability to carry out normal day-to-day activities. Further, there is nothing to suggest, at that point, that his symptoms were likely to last for longer than two weeks and there was no reason to suggest that the symptoms were likely to recur.
39. The Claimant next attended his GP as a result of ear ache (and a sore throat), eight months later, on 7 November 2019. He was diagnosed with a lower respiratory tract infection and prescribed amoxicillin and a steroid for six and five days, respectively. The Claimant was seen by his GP again on 11 and 18 November 2019, with ongoing symptoms. He was reassured that his symptoms were likely to still be connected to the lower respiratory tract infection. The Claimant was signed off work between 7 and 17 November 2019.
40. Although, given the fact that he was unfit for work, it can reasonably be assumed that during that period the infection had a significant adverse effect on his ability to carry out normal day-to-day activities, there is nothing to suggest that the symptoms were likely to last longer than three-four weeks, nor that they were likely to recur. Eight months had passed since his last ear infection.
41. The Claimant attended his GP again three months later, on 14 February 2020, when he was diagnosed with acute left otitis media; a middle ear infection which was said to be likely viral. He was again prescribed amoxicillin (for five days). The Claimant was unfit for work between 14 and 18 February 2020. As above, whilst there may well have been a significant adverse effect on his ability to carry out normal day-to-day activities during his period, there is no evidence to suggest that his symptoms would be long-term nor that they were likely to recur. The infection was said to be likely viral, not something indicative of an underlying condition.
42. Consistent with that, the Claimant experienced no further difficulties until a year later. He next attended his GP on 12 February 2021. His GP records describe him as suffering from an inner ear infection. He was prescribed an anti-sickness medication for an initial period of 10 days and then a further 28 days. As above, whilst there may well have been a significant adverse effect on his ability to carry out normal day-to-day activities during This period, there is no evidence to suggest that his symptoms would be long-term nor that they were likely to recur.
43. There is nothing before me from any medical professionals to suggest that the Claimant suffers from an underlying, recurring condition, as opposed to a series of distinct viral infections. The Occupational Health ('OH') assessment records the

Claimant saying that specialists had advised him that his working environment (noise and cleanliness) was the cause of his ear issues. The OH advisor noted that he was unable to understand that because the Claimant did not work in a noise hazardous area and he did not understand what aspect of work cleanliness was being implied. There was no evidence before him from any such specialist explaining this position. There is no such evidence before me.

44. It cannot safely be inferred from the frequency with which the Claimant has suffered from those infections, that he has an underlying condition, the effects of which are likely to recur so that he satisfies the 'long-term' element of the test. The burden of proof is on the Claimant to establish that he is disabled in respect of his ear infection and I do not accept that he has done so.
45. Accordingly, I do not accept that the Claimant's claimed ear condition meets the definition of a disability in s.6(1) EqA 2010.

**(2) The arm condition**

46. In May 2021 the Claimant had an accident at work. He was seen by a doctor who described him as suffering from a likely musculoskeletal injury. The Respondent accepts that, at the time he suffered from that injury, it had a substantial adverse effect on his ability to carry out normal day-to-day activities.
47. The issue for me to determine is whether or not the effects were long-term. They had not, at the date of the alleged discriminatory acts, lasted for 12 months or more. Accordingly, I must consider whether the effects were likely (in the sense that it 'could well happen') to last at least 12 months, taking into consideration only the facts known at the date of the alleged discriminatory act.
48. The advice given to the Claimant at the time was that, with rest, the strain should settle. He was not prescribed any medication but was advised to take over-the-counter medication. He was also advised to undertake light duties at work.
49. On his return to work the Claimant was told that there were no light duties for him to undertake. Accordingly, he was signed off from work for a period of three weeks.
50. The Claimant was seen by his GP on 23 August 2021 with ongoing pain. He was diagnosed with likely tendonitis and referred for physiotherapy. In August 2021, he was assessed by Occupational Health who indicated that his injury would be likely to continue if he carried on in his current role and that he should temporarily undertake lighter duties. Although the Occupational Health adviser was unable to give a definitive timescale for recovery, he indicated that with appropriate treatment his injuries should resolve within six-eight weeks.
51. The evidence before me, relevant to the material time, does not suggest that the effects of the impairment were likely to last at least 12 months. The evidence suggests that, with appropriate treatment, the Claimant would recover within a matter of months. Accordingly, I am not satisfied that the Claimant's arm condition met the necessary definition in s.6 EqA 2010.



52. The effect of my findings on disability is that some of the claims in the List of Issues cannot proceed and will be struck out.
53. The claims of unfavourable treatment because of something arising in consequence of a disability (s.15 EqA 2010) are all based on the Claimant's arm condition (see paragraph 4.2 of the List of Issues). As I have found that the arm condition does not amount to a disability, those claims cannot proceed and will be struck out.
54. The claims of failure to make reasonable adjustments at paragraphs 5.3.1 (5.5.1) and 5.3.2 (5.5.2) of the List of Issues rely on the Claimant's ear and arm conditions, respectively. As I have found that neither meet the definition of a disability, those claims cannot proceed and will be struck out. The remaining claim of failure to make reasonable adjustments at paragraph 5.3.3 (5.5.3) of the List of Issues relies on the Claimant's anxiety and depression, which is accepted as a disability. That claim therefore proceeds.
55. The claims of direct discrimination and harassment related to disability also proceed, but only in respect of the accepted disability of anxiety and depression.

## **Findings – deposit order**

### **(1) Direct discrimination**

56. The Claimant has not identified in either his claim form or further information the basis upon which he says the alleged treatment was less favourable treatment because of disability. He has not named a comparator and when asked during the hearing why he believed he was treated as alleged because of his disability, he said that he believed the alleged perpetrators were motivated by his sickness absence.
57. On the face of it, that is a claim that falls more appropriately under s.15 EqA 2010, not s.13 EqA 2010.
58. Without a named comparator, and without anything to indicate a likely difference in treatment between himself and a hypothetical comparator, the Claimant will have real difficulty in discharging the initial burden of proof on him to establish a claim of direct discrimination. Accordingly, it appears that the Claimant has little prospects of succeeding in such a claim even taking into account that the evidence is not yet before the Tribunal.
59. I am satisfied in all the circumstances that it is in accordance with the overriding objective to make a deposit order in respect of this claim.
60. I deal with the amount of the deposit order below.

### **(2) Discrimination arising from disability**

61. This element of the claim will be struck out for the reasons set out above. Accordingly, there is no need to consider the Respondent's application for a deposit order.

### (3) Failure to make reasonable adjustments

62. A deposit order was sought in respect of paragraph 5.3.1 of the List of Issues only. Given that that element of the claim for failure to make reasonable adjustments relied on the Claimant's ear condition, and can no longer proceed, there is no need to consider a deposit order.

### Quantum

63. The Claimant gave evidence as to his means. He is not currently fit for work. His wife works as a teacher and provides the sole income for the family. He has two young sons. Although the evidence as to the amount of the Claimant's debts was not clear, I am satisfied that he has significant debts, at least exceeding £10,000. I am satisfied that the Claimant and his family are in a poor financial situation. He is not, however, in receipt of any benefits and owns a house, with a mortgage.

64. Having made reasonable enquiries into the Claimant's means, in accordance with rule 39(2), I am satisfied that the appropriate amount for a deposit order is £50. In my view, such an amount marks the seriousness of the relevant claim being brought against the Respondent and my assessment of the weak merits of that claim, whilst not being so high so as to effectively amount to a strike out of that claim.

65. In imposing the deposit order above in the amount of £50, I am not seeking to make it difficult for the Claimant to access justice but am seeking to ensure that serious consideration is given before pursuing the claims further. I am satisfied that the total amount is proportionate and reasonable.

66. I will exclude myself from hearing the final hearing in this matter, having given the above opinion on prospects.

### **Public access to employment tribunal decisions**

67. All judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

68. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: [www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/](http://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/)

69. The parties are reminded of rule 92: "*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)...*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.**

70. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.

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**Employment Judge Smeaton**

Date: 2 February 2023

Sent to the parties on: 9 February 2023

NG - For the Tribunal: