



EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant: Mr Y Ceesay

Respondent: City Facilities Management Limited

Heard at: Leeds **On:** 20 November 2019

Before: Employment Judge Licorish (sitting alone)

Appearances:
For the claimant: in person
For the respondent: Mr B Brown (trainee solicitor)

JUDGMENT

1. The grounds of the claimant's claim are amended to include a complaint of direct race discrimination based on his dismissal. The amendment allowed is as set out at paragraphs 7.9 to 7.13 of the separate case management summary dated 25 November 2019.
2. No separate deposit order has been made relating to the claimant's complaints.
3. The claimant's complaints of automatically unfair dismissal, ordinary unfair dismissal and direct race discrimination will continue. The parties should proceed to comply with separate case management orders dated 25 November 2019.

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REASONS

1. The claimant was employed by the respondent as a cleaner at one of its client's sites. He was dismissed for gross misconduct in April 2019. By a claim form accepted by the Tribunal on 28 August 2019 (following a period of early conciliation) the claimant brought complaints of unfair dismissal and race discrimination. In terms of the discrimination complaint, he ticked "race" at box 8.1 of the claim form, but did not further specify the type of discrimination

he complains of or on what basis he intended to pursue such a complaint. In the attached grounds of his claim he summarised the circumstances of his dismissal. He also stated: *"There is so many things that has happened but I am able to discuss this at a Tribunal."*

2. In its response, the respondent maintains that the claimant's race discrimination complaint should not have been accepted by the Tribunal under rule 12 of the Employment Tribunal Rules of Procedure 2013 (the Rules), on the basis that it cannot be sensibly responded to. In the alternative, the respondent argues that it should be struck out or a deposit order made because the complaint has no or little reasonable prospects of success. This preliminary hearing was accordingly listed to clarify the complaints and issues, and determine any applications as necessary.
3. Today the claimant clarified that he intends to pursue a complaint of direct race discrimination. He describes himself as black and of African origin. The treatment complained of is dismissal. There is a dispute about the circumstances under which he booked annual leave to go to the Gambia. He took that leave because a close family member was about to undergo major surgery. The claimant was eventually dismissed for gross misconduct because the respondent considered that part of his leave was unauthorised.
4. The claimant is able to name two actual comparators in respect of the holiday issue. At the final hearing, he also wants the Tribunal to take into account a number of matters in deciding whether the respondent's actions were tainted by race discrimination, including the following allegations:
 - 4.1 The respondent has an inconsistent approach to conduct issues generally (for example, white colleagues have not been disciplined for fighting).
 - 4.2 Another black African colleague was told that he would have to resign and reapply for his job when he asked for unpaid time off to attend the funeral of a close family member in the Gambia.
 - 4.3 The respondent was consistently difficult whenever he asked for time off to go to the Gambia.
 - 4.4 Following the transfer of his employment to the respondent, the claimant was (among other things) moved from a day to night shift, where he was mostly made to work on his own. He says that his working environment was "very white" as a significant number of BAME cleaners left the respondent's employment. The claimant believes that he was also overlooked for promotion to supervisor.
5. The claimant now understands that he cannot simply submit a claim and provide details as it progresses. He therefore asked the Tribunal for permission to amend his claim as now clarified.
6. The respondent also helpfully accepted that the only mechanism by which a respondent can challenge the Tribunal's decision to accept a claim is by an application to strike out the claim, rather than an application under rule 12 itself. Otherwise, if the claimant is allowed to amend his claim, the respondent will argue that both of his complaints should be subject to the payment of a deposit.
7. The Tribunal therefore proceeded to determine the following preliminary issues in order:

- 7.1 whether the claimant is required to amend his claim for the Tribunal to determine any complaints raised and, if so, to determine his application to amend;
 - 7.2 if relevant, whether to strike out any complaint because it has no reasonable prospects of success;
 - 7.3 whether to order the claimant to pay a deposit as a condition of continuing to advance any specific allegation or argument if the Tribunal considers that any such allegation or argument has little reasonable prospects of success.
8. The respondent produced a file of documents (marked as R1) and copies of legal authorities. In the event, the Tribunal was referred only to two documents in the bundle. The respondent will readily recognise how the Tribunal has taken its submissions into account in the following analysis.

Amendment

9. The Tribunal accepts that permission is required on the basis that the factual allegations pleaded by the claimant relate only to the disciplinary charge he faced and the circumstances which led to his dismissal. Although he reserved his position in the grounds of his claim, in **Chandhok v Tirkey 2015 IRLR 195** the EAT confirmed: *“The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond.”*
10. Additionally, **Chandhok** states that if a claim is to be understood as being wider than that set out in the claim form, it would be open to a claimant after a relevant time limit has passed to point to other documents or statements to advance a different case: *“Such an approach defeats the purpose of permitting or denying amendments; it allows the issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus.”*
11. The question as to whether a claim form contains a specific complaint has to be judged by reference to the whole ET1, and considering the name given to the complaint as well as any accompanying factual details (**Office of National Statistics v Ali 2005 IRLR 201, CA**). However, in **Baker v Commissioner of Police of the Metropolis UKEAT/0201/09/CEA** the EAT also confirmed that it was correct for a Tribunal to decide that a claim form did not include a claim for disability discrimination when the claimant had ticked the box marked *“disability”* at section 6, but did not make a complaint which was recognisably an allegation of disability discrimination in the notes attached to his ET1.
12. The relevant factors in deciding whether to allow a claim to be amended are summarised in the Presidential Guidance on general case management. The Guidance (among other things) sets out the principles in the case of **Selkent Bus Co Ltd v Moore 1996 ICR 836**. Put simply, the Tribunal must carry out a careful balancing exercise of all the relevant factors, taking into account the interests of justice and the relative hardship that will be caused to the parties by allowing or refusing any amendment. Relevant factors include (but are not limited to) the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

13. First, the Tribunal is satisfied that there is a link between the amendment and the facts described in the claim form. The further information provided by the claimant therefore amounts to the addition of facts or the addition or substitution of facts already described, or a labelling or relabelling of facts already described.
14. In this case, the claimant has indicated in his claim form that he intends to pursue complaints of unfair dismissal and race discrimination, and has set out the circumstances of his dismissal. In the Tribunal's view, the proposed amendment therefore ascribes the legal label of direct race discrimination and sets out further factual allegations against the respondent in support of that complaint, which is based on his dismissal. He does not seek to pursue an unrelated and free-standing complaint, for example based on the respondent's alleged failure to promote him.
15. Secondly, in terms of the timing and manner of his application, the claimant explained that English is not his first language and he found it difficult to explain what he wanted to say in writing. That is why he effectively reserved his position in the grounds of his claim. The respondent highlights that the claimant made allegations of discrimination and victimisation during his appeal, but did not refer to his race (R1, pages 56 and 60). The claimant explained that his working environment was challenging – his colleagues were mostly white and English, and he found it difficult to raise the issue of his race in that context. The respondent maintains that that does not explain the lack of detail in the claim form.
16. Generally, the Tribunal also takes into account that if permission to amend his claim form is refused, the claimant will be deprived of the opportunity to have a complaint of direct discrimination based on his dismissal determined on the merits. The respondent argues that allowing the amendment will put it to extra time and effort, and involve calling additional witnesses.
17. In the circumstances, the Tribunal finds that the balance tilts towards the claimant. Today he put forward a clear statement of the proposed amendment when given the opportunity to do so. The alleged discrimination is limited to his dismissal. As part of his unfair dismissal complaint, he alleges that the respondent treats its employees inconsistently. Much of what the claimant alleges as part of his race discrimination complaint is therefore likely to be as relevant to his unfair dismissal complaint in any event.
18. The claimant has also provided sound reasons for acting as he did. In the Tribunal's view, his race discrimination complaint is apparently arguable. In the circumstances, permission is therefore granted to amend the claim to include a direct race discrimination complaint as now set out at paragraphs 7.9 to 7.13 of a separate case management summary dated 25 November 2019.
19. Further and separately, if the Tribunal had been persuaded that there was no link between any facts described in the claim form and the proposed amendment, and the claimant was therefore seeking to add an entirely new cause of action, the Tribunal would have been bound to consider whether the new complaint is in time, taking into account the applicable test for extending time limits. Extensions of time to present a discrimination complaint are made on a just and equitable basis.

20. For the purposes of time limits, amendments to Tribunal claims which introduce substantively new complaints or causes of action take effect at the time permission is given to amend. However, the fact that a relevant time limit for presenting a new claim has expired is an important factor but not determinative. The balance of hardship must always be considered.
21. The Tribunal would still have found that the balance tilts towards the claimant in respect of his race discrimination complaint. The claimant has provided a number of reasons why he acted as he did. He does not appear to have acted improperly. It would therefore have been just and equitable to extend time. Notwithstanding the respondent's views of the merits of the race discrimination complaint, it also involves disputes of fact which will need to be determined at a final hearing to establish whether discrimination should be inferred.
22. The contended discrimination is further limited to the claimant's dismissal. In the circumstances, the balance of hardship tilts towards the claimant. Permission would therefore have also been granted to amend the claim to include a complaint of direct race discrimination as an entirely new cause of action.

Deposit order

23. The respondent's position is that if the Tribunal allows the claimant to amend his claim, it acknowledges that it would be inappropriate to strike out the race discrimination complaint as having no reasonable prospects of success, but nevertheless contends that deposit orders would be appropriate in respect of the claimant's claim in its entirety.
24. Rule 39(1) of the Rules provides that where at a preliminary hearing a Tribunal considers that any specific allegation or argument in a claim or response 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*". However, before making an order, the Tribunal must make reasonable enquiries into the ability of the party to pay the deposit, and have regard to any such information when deciding the amount of the deposit (rule 39(2)).
25. When determining whether to make a deposit order, a Tribunal is not restricted to a consideration of purely legal issues but is also entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (**Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07, [2007] All ER (D) 187 (Nov)**). In any event, the Tribunal "*must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response*".
26. In this respect, the respondent says that the claimant's claim is otherwise threadbare and lacks detail. A deposit order would therefore require the claimant to give careful consideration as to whether he wishes to pursue it. Such an order is effectively a "*yellow card*" rather than an impediment to access to justice.
27. Today the claimant was able to clarify the basis on which he brings both of his complaints. What the Tribunal has heard and read today, assessed objectively, shows no proper basis for doubting the likelihood of the claimant

being able to establish the facts essential to his complaints of unfair dismissal and direct race discrimination.

28. The Tribunal appreciates that much of the evidence will be disputed. The claimant's position is that much more was happening behind the contemporaneous documentation, and he found it difficult to raise certain issues in direct terms. The Tribunal's provisional view that much will depend upon the credibility of all witnesses at the final hearing. It does not automatically follow that, because central facts are disputed, the claimant's complaints accordingly have little reasonable prospects of success.

In the circumstances, the Tribunal declines to make a separate deposit order in respect of the claimant's complaints as now pleaded.

Employment Judge Licorish
Date: 27 November 2019