

Appeal No UKEAT/0161/18/JOJ

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 8 August 2018

**Before**

**HER HONOUR JUDGE STACEY**

**(SITTING ALONE)**

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THE COLOR COMPANY DISTRIBUTION LIMITED

APPELLANT

MR I BLAKE

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

MR BENJAMIN GRAY  
(of Counsel)  
Instructed by:  
British Printing Industries Federation  
Unit 2 Villiers Court  
Meriden Business Park  
Copse Drive  
Coventry  
CV5 9RN

For the Respondent

MR IRVIN BLAKE  
(The Respondent in Person)

## **SUMMARY**

### **PRACTICE AND PROCEDURE - Amendment**

The Employment Tribunal erred in failing properly to consider whether the Claimant below (the Respondent to the appeal) had included an allegation that he was subjected to unjustified direct age discrimination in relation to pay in his ET1 claim form, and, if not, whether to exercise its judicial discretion to allow an amendment.

On the Claimant accepting that the claim form and narrative attached had not referred to an age discrimination pay complaint; the issue is remitted back to the Tribunal to consider whether to grant the Claimant's application for an amendment to enable the pay complaint to be considered.

Whilst there is no loss of confidence in the professionalism of the original Tribunal, given that the Full Merits Hearing is listed for hearing in December this year, the case is remitted to a differently constituted Tribunal for simplicity of listing, to minimise delay and avoid the risk of postponement of the substantive hearing.

**A**      **HER HONOUR JUDGE STACEY**

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1.      This appeal raises the issue of when a clarification of the issues by a Tribunal at a Preliminary Hearing amounts to an amendment of the claim. The Judgment in question was heard and promulgated on 4 June 2018, before Employment Judge Henderson in the London (Central) Regional Office of Employment Tribunals at a Preliminary Hearing. The Decision was promulgated on 4 June 2018. The Appellant, The Color Company Distribution Limited, was the Respondent in the Tribunal below, and the Respondent to the appeal, Mr Irvin Blake, was the Claimant. I shall continue to refer to the parties by reference to their status below.

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2.      The brief history is this. Following his dismissal on 23 June 2017, the Claimant instituted proceedings for unfair dismissal, age and race discrimination on 22 November 2017. It was resisted by the Respondent, who correctly understood that the Claimant relied on David Payne as a younger, white comparator, whom the Claimant considered had been treated more favourably than him in comparable or materially similar circumstances in relation to both disciplinary proceedings and an incident that occurred at the belated office Christmas party which took place in January 2016 which led to the involvement of the police.

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3.      In further particulars volunteered in response to the ET3 on 25 February 2018, the Claimant referred to a number of incidents dating back to 2010, such as how his holiday requests had been treated and allegations of bullying by his colleagues. The case was first heard at a closed Preliminary Hearing for a Case Management Discussion, before Employment Judge Stewart on 13 April 2018 when the Claimant was ordered to serve further particulars concerning his age and race discrimination complaint, which he duly did on 27 April 2018. The further particulars referred to incidents, some of which had been set out in the Claimant's voluntary

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A response to the ET3 in greater detail. It included other matters, such as some of his colleagues were “*self-confessed EDL members*” and contained a number of serious allegations of race discrimination and described the Claimant working in an environment which was extremely intimidating, substantially because of his race and the far-right political or group affiliation of some of his colleagues, when he worked at the Respondent’s premises in Canada Street.

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C 4. The further particulars also stated at paragraph 1(b):

“Ageism was another factor, employing younger men without experience, starting on wages up to £2,000 to £3,000 per annum more than I was being paid. Also, having to show them or advise them about the job. With 11 years working in the company and seeing new inexperienced employees benefitting from my experience and hard work. The company knew that, at my age, I would not be seeking employment elsewhere.”

D 5. At the first closed Preliminary Hearing before Employment Judge Stewart, it was wrongly thought by the Respondent that the claims for unfair and discriminatory dismissal had been lodged out of time and the case was listed for an open Preliminary Hearing to decide the time limits point. It is that open Preliminary Hearing before Employment Judge Henderson on 4 June 2018 that is the subject of this appeal. At that hearing, everyone agreed that the dismissal claim had been brought in time and time limits in that regard were no longer in issue. The parties and the Employment Judge then clarified the issues and made the orders necessary for the parties to prepare for the substantive hearing listed for seven days to commencing on 6 December 2018.

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G 6. The ET set out what it understood to be the complaints in paragraph 2 of the Case Management Summary:

“By a claim form presented on 22 November 2017, the claimant brought complaints of unfair dismissal; race and age discrimination under the Equality Act 2010 (EA). The respondent defended the claims. In essence the complaints arise out of the claimant’s dismissal on 23 June 2017 for misconduct and also the Claimant’s view that he was paid less than younger, more inexperienced men.”

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**A** 7. At paragraph 4 of the Judgment, the Tribunal found as follows:

**B** “The Case Management Order of April 2018, also raised the issue of whether the Claimant’s discrimination claims were to be allowed as they were out of time. The Claimant has now clarified his discrimination claims (as set out in the issues listed below), and these have been brought within the relevant time limits. Mr Gray objected to the Claimant’s age discrimination claim stating that it had not been raised in the ET1 as presently couched by the Claimant. However, I noted that the Claimant had listed an age discrimination claim in the ET1 and had referred to the general tenor of his claim, in its current terms, in the Further and Better Particulars (F&BP’s) provided in April 2018. However, I accept that the Claimant’s age discrimination claim is couched in vague terms and he needs to particularise this claim (as ordered below). The Claimant confirmed (having been allowed time to consider this) that he had no other age or race discrimination claims - but that some of the information contained in the F&BP’s of April 2018 would be used by him as background evidence to his discrimination claims.”

**C** 8. The reference to the Claimant’s pay inequality because of his age referred to in paragraph 2 was further explained in paragraph 8 of the Case Management Summary under the heading “Section 13 EA: Direct discrimination on grounds of age.

**D** “8.1. The Claimant is aged, 58/9. He says that because of his age he was not paid a fair wage when compared to younger less experienced men (whom he had to train himself). This continued up to the date of his dismissal.”

**E** 9. The Order then goes on to point out that, if the Claimant succeeds in establishing that the reason for his pay rate was his age, it will be open to the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

**F** 10. It is the inclusion of the complaint of pay discrimination because of the protected characteristic of age that the Respondent objects to.

**G** 11. The appeal was lodged and was sifted to a Full Hearing<sup>1</sup> by the President (Simler J), with the Respondent’s concern having been reformulated and categorised as procedural irregularity.

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<sup>1</sup> Other than in respect of a bias ground of appeal, which disclosed no arguable case and was dismissed and about which no more needs to be said.

A 12. It is apparent that the claim form itself does not raise or allude to the issue of pay  
discrimination because of age. To the Claimant's credit, he accepts today that he did not mention  
B it on his ET1. From the Case Management Summary from the Preliminary Hearing, the question  
of whether age discrimination in pay had been sufficiently pleaded and, if not, how, if at all, the  
judicial discretion to exercise its power to allow an amendment should be exercised, in  
accordance with the wide-ranging case management powers available to an Employment  
C Tribunal has not been addressed; see the Presidential Guidance and the well-known case law,  
such as Selkent Bus Company Ltd v Moore [1996] IRLR 661.

D 13. It is urged, on me today by Mr Gray, that I should rule that the age discrimination in pay  
cannot proceed. That cannot be right and would subvert the role of the Employment Tribunal.  
That exercise is for the Employment Tribunal to undertake and not within the appellate powers  
of this Tribunal and I remit the case back for the Tribunal to consider the Claimant's application  
E to amend the complaint to include the allegation set out at paragraph 8.1 of the ET Judgment  
quoted at paragraph 8 above.

F 14. It is not part of my role to decide whether there has been compliance with Orders that  
have not been raised in this Tribunal. But if the Claimant has not yet done so, it would clearly  
be sensible for him to set out in full the precise details of the age discrimination in pay allegations  
and serve them on the Respondent and Tribunal as soon as possible. The ET can then address  
G any issues arising when it considers the amendment application.

H 15. Since the consequence of a remission back to the same Tribunal is more likely to result  
in delay, than if I remit this case back to a differently constituted Tribunal (since arranging an  
extra case for one Judge's diary will take longer than arranging for the case to be heard by any

**A** one of the Judges in the London (Central) Region. I remit this case back to be heard by a  
differently constituted Tribunal. I emphasise that is not because of any lack of confidence in the  
Tribunal nor any concerns about professionalism, but solely for the purpose of ensuring an earlier  
**B** hearing. Furthermore, I direct the matter to be expedited by the ET.

**C** 16. Accordingly, the appeal is allowed. The case is remitted back to a differently constituted  
Tribunal to consider whether or not to grant the amendment sought by the Claimant that he was  
paid less than younger, less experienced men because of age, and for the matter to be listed as  
soon as possible, so as not to jeopardise the substantive hearing of this case commencing 6  
December 2018.

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