Case Numbers: 1300217/2018
2600086/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr K Oppong	**v**	DHL Services Limited (1) Staffline Group PLC (2)

PRELIMINARY HEARING

Heard at: **Birmingham** **On: 11 October 2018**

Before: **Employment Judge Woffenden**

Appearances
For the Claimant: In Person
For the First Respondent: Mr. A Watson of Counsel
For the Second Respondent: Mr. C MacNaughton, solicitor

RESERVED JUDGMENT

1. The claimant's application to amend the claim against the first respondent is refused.

2. Employment Judge Woffenden is considering striking out the claim against the first respondent because it has no reasonable prospect of success. If the claimant wishes to object to this proposal, he must give his reasons in writing or request a hearing at which he can make them **by 27 December 2018**.

3. The claimant's application to amend the claim against the second respondent is granted.

REASONS

1. I had conducted a preliminary hearing for case management purposes on 4 July 2018 in relation to the above claims which had been ordered to heard together. At that hearing the claimant told me his claims against the first respondent in case number **1300217/2018** ('the DHL claim') were of direct race discrimination and victimisation and his claims against the second respondent in case number **2600086/2018** ('the Staffline claim') were of direct race discrimination harassment related to race and victimisation).He also identified the acts of direct race discrimination and the protected act and detriments he relied on for the purpose of the claims against the first respondent and the acts of direct discrimination harassment related to race the protected act and detriments he relied on for the

purpose of his claim against the second respondent. He had already provided on 16 February 2018 further information about both claims having been ordered by Employment Judge Dimbylow to do so in relation to the DHL claim (in the form of a statement). Both respondents told me then that they considered an application to amend was required which would be opposed.

2. I gave the respondents until 29 August 2018 to confirm this, giving reasons, and explaining why any such application would be opposed. I told the parties I would then consider whether the preliminary hearing should be converted to an open preliminary hearing to determine any contested application to amend the claims

3. The first respondent complied with my order on 24 August 2018 .The second respondent did not do so until 11 September 2018.The claimant objected to the conversion to an open preliminary hearing in relation to the second respondent and ,after discussion, I decided under rule 5 of the Employment Tribunal Rules of Procedure 2013 ('the Rules')that time for the second respondent to comply with my order should be extended to 11 September 2018 for the reasons I gave at the time.

4. I had ordered the claimant by 4 October 2018 to prepare a statement of any evidence he intended to give at today's hearing about the amendment application (in particular addressing the factors in the case of **Selkent Bus Co Ltd v Moore [1996] ICR 836** and attaching any relevant documents .He had asked for an extension of time until 5 October 2018 to comply with that order. He was cross examined on the statements he had prepared in relation to each respondent. No documents were attached but I was able to use the bundle of documents which the parties had agreed for the preliminary hearing on 4 July 2018.

5. I did not find the claimant a credible witness under cross examination. He was both vague and hesitant .Although there was evidence that he had a stress related problem (about which he saw his GP five times in three months) which he contended made him lazy and affected his concentration there is no corroborating evidence that these were indeed the effects of his condition and although he said he recalled telling his GP about them these symptoms are not be found in the GP notes and he conceded that by November 2017 he was able to participate in church activities. I am unable on the evidence before me to conclude that the stress related condition had any material impact as alleged on his ability to concentrate or attend to things on time or with care. He said under cross examination he thought he had put in enough detail in the DHL claim but then Employment Judge Dimbylow had ordered him to put in more and specific details. I did not find that evidence credible since even the most cursory reading of the DHL claim would have revealed to the claimant it did not include any allegations about the actions or omissions of the first respondent or any of its staff.

6. As far as the Staffline claim was concerned the claimant alleged in his statement that until receipt of the second respondent's ET3 he was not aware of the matters of which he now wishes to complain so they could not be included in his claim form. He was cross examined about when he was aware of the relevant facts in relation to each allegation. Again, his evidence was vague hesitant and wholly lacking in credibility and I conclude he had no genuine belief whatsoever in the explanation he had proffered.

7. I have treated the further information about both claims provided on 16 February 2018 and as recorded at the preliminary hearing on 4 July 2018 as recorded in paragraphs (10) and (12) of the order sent to the parties on 9 July 2018 as the claimant's application to amend. Under its general power to regulate its own proceedings and specific case management powers, an Employment Tribunal can consider an application to amend a claim at any stage of the proceedings. The principles in relation to the grant or refusal of an amendment are set out in the case of **Selkent** in which the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? Whilst it was impossible and undesirable to attempt to list them exhaustively, the EAT considered that the following are relevant:

(a) The nature of the amendment – this can cover a variety of matters such as:

i. the correction of clerical and typing errors;
ii. the additions of factual details to existing allegations;
iii. the addition or substitution of other labels for facts already pleaded;
iv. the making of entirely new factual allegations which change the basis of the existing claim.

(b) The applicability of time limits - if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the ET to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application - it is relevant to consider why the application was not made earlier and why it is now being made: e.g. the discovery of new facts or new information appearing from documents disclosed on discovery.

9 I remind myself that the question of whether a new cause of action contained in an application to amend would, if it were an independent claim be time barred, is determined by reference to the date on which the application to amend is made, not the date of presentation of the original claim.

10 I read the respondents' written submissions and heard the parties' oral submissions which I have carefully considered.

11 The claimant does not accept he needs to apply to amend the DHL or Staffline claim because he just provided the information that he had been ordered to provide by Employment Judge Dimbylow to help the tribunal and the respondents understand them. The first respondent had not appealed Employment Judge Dimbylow's order .As far as time limits were concerned he explained in his statement he had presented his claim on 13 January 2018 although it was date stamped 14 January 2018 and he would have presented it before had he not been suffering from stress caused by the first respondent (as was the case when he got his ACAS EC certificate on 13 December 2017) and it was a good case of race discrimination. The first respondent had not put forward any prejudice which it would suffer if the claim against them was to be amended.

12 As far as the Staffline claim was concerned the claimant submitted he could not reasonably have included the allegations in question when he presented it on 16 January 2018 because they were new to him and were in time because time ran when he became aware of those allegations (rather than the date of the act or omission in question and he could have presented a new claim containing them which could then have been heard with the Staffline claim. There was no prejudice to the second respondent which would still be able to defend the claims.

13 In the DHL claim Mr. Watson relied in his submissions on **Chandhok v Tirkey [2015] ICR Olayemi v Athena Medical Centre and others UKEAT/0613/10/ZT** and **New Star Asset Management Holdings Limited v Evershed Case No:A2/2009/1841** .He pointed to the prospects of success ;not even a prima facie case of race discrimination (direct or victimisation) had been forward by the claimant. In particular there was no particularisation of a protected act. The original claim and the new complaints were out of time. The claimant had not explained how his concentration was affected or how that want of concentration stopped him being able to set out his complaints until February 2018.Although the fact claims were out of time were not fatal this was a factor which counted against the claimant. The application to amend had been late and for no good reason. He acknowledged the claimant was a litigant in person but described him as an experienced one because he had previously litigated against the first respondent. The claimant had put forward no evidence why it would be just and equitable for time to be extended in his favour. If the amendment was granted the first respondent would have to prepare for and attend the strike out application which was already listed.

14 In the Staffline claim Mr. McNaughton opposed the claimant's application to amend in relation to paragraph12 d. e. f. and j. (in part only) and (iii) c. of my order. In his written submissions he referred to the causes of action identified in the claim form and the factual basis for and in support of them in the subsequent 20 numbered paragraphs. That document covered the basis of the claimant's claim and the claimant could not add more at his whim (**Chandhok**). The claimant sought to add new facts and claims and were a major substantive alteration not expansion of previously pleaded facts and matters which the second respondent had accepted in relation to some of the other allegations contained in the further information provided by the claimant. They were out of time and the claimant had not put forward any representations why the time limit should be extended. It was not 'just and equitable' for the second respondent to be prejudiced by the claimant's deficient pleadings. In his oral submissions he adopted Mr. Watson's submissions and pointed out that not only were the matters raised 'brand new' the claimant's claims remained vague and unparticularised. The burden of proof could not pass. The claimant's reasons for not having included new matters in the Staffline claim were disingenuous. The second respondent would suffer additional prejudice; the allegations made had grown were serious and would be hanging over the witnesses for many months.

15 I do not accept the claimant's submission that he did not need to apply to amend his claims Employment Judge Dimbylow's order had, in effect, ordered him to do so. As Langstaff J (the then President of the Employment Appeal tribunal said in paragraph 25 of **Chandhok** '*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 on 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 the respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made- meaning ,under the Employment Rules of procedure 2013 (SI 2013/1237),the claim as set out in the ET1.' By making his order Employment Judge Dimbylow was not granting permission to the claimant to amend the DHL claim. He had decided the claim was not clear and more information was needed.

16 In the DHL claim presented on 14 January 2018 in section 8.2 of the claim form (in which claimants are asked to give details of their claim) the claimant complained of less favourable treatment on grounds of race and victimisation by "institutional racist management staff" (among other complaints now withdrawn). In the following 6 short numbered paragraphs (in which the first respondent was described as 'the hirer' and the second respondent as the 'agency ') the claimant recounted how he had been scheduled to work the night shift week commencing 11 September 2017 and was unable to attend on 11 and 12 September 2017 due to child care issues. He spoke to an unnamed woman twice on 11 and 12 September 2017 before returning to work on 13 September 2017 when he received what he described as a threatening text from Richard Brookes. He telephoned Mr. Brookes and asked him why he was bullying harassing and threatening him and told him about the conversations he had with the unnamed woman and when Mr. Brookes phoned him again, he did not answer his call.

17 In the further information which the claimant provided in response to the order of Employment Judge Dimbylow the claimant made it clear that both the unnamed woman and Mr. Brookes worked not for the first respondent but the second respondent and complained for the first time about the actions of Kate Davis (who works for the first respondent) on various dates in August and September 2017 ,the last alleged act being 18 September 2017 contending that she had both directly discriminated against him because of race under section 13 Equality Act 2010 and victimised him under section 27 Equality Act 2010 . None of that further information was contained in section 8.2 of the DHL claim. There is no evident link between it and the facts pleaded in the DHL claim. It follows therefore that the further information contains entirely new facts and claims of race discrimination and victimisation against the first respondent. It is a substantial alteration.

18 As far as time limits are concerned whether these matters are considered individually or as conduct extending over a period and therefore treated as done at the end of the period on 18 September 2017 they are out of time (sections 123 (1) (a) and (3) (a) Equality Act 2010). Is it just and equitable for time to be extended under section 123 (1) (b) Equality Act 2010)?

19 In my judgment there are no grounds on which it would be just and equitable to extend time. The exercise of discretion to allow such an extension is the exception rather than the rule and it is for the claimant to convince me it is just and equitable to extend the time limit. I was not persuaded the claimant's stress related condition had any material effect on his ability to include these complaints in the DHL claim presented on 14 January 2018 or that he thought he had put enough detail in until Employment Judge Dimbylow ordered him to provide more. The claimant knew of the facts in question at the time he presented the DHL claim and, in my judgment,

has used the order to justify and remedy omissions from that claim. As far as prejudice is concerned if time is extended the respondent will be put to the further costs and expense of the strike out application and (no doubt) of having to deal with wholly new allegations against Ms Davis at a time when over a year has passed from the events in question. If accepted those allegations could be damaging to her reputation. The claimant will be deprived of the pursuit of what may be entirely speculative complaints; I am not in a position to assess their merits one way or another.

20 As far as the timing and manner of the application is concerned, I cannot agree that having previously litigated against the first respondent the claimant is an experienced litigant in person. I accept that he did not apply to amend his claim at the Preliminary hearing on 4 July 2018; that was when it became apparent that the respondents considered both claims required amendment the acts of discrimination alleged having been identified during that hearing. However, he knew or ought to have known what was in the (brief) section 8.2 of his claim form and it is through his own unexplained failure to include facts he was aware of at the time he presented that claim that he needs the tribunal's permission to amend it.

21 I am mindful that if the amendment application is not granted the claimant is left with a race discrimination claim against the first respondent that as pleaded has no reasonable prospect of success. However, taking into account all of the relevant circumstances above and having regard to the relative hardship which would be caused to the parties I decline to grant him leave to amend the DHL claim.

22 In the Staffline claim presented on 16 January 2018 paragraphs 1 to 7 inclusive of section 8.2 of the claim form are in identical terms to the DHL claim. Thereafter in paragraphs 8 to 19 the claimant complains of events alleged to have occurred on 13 14 18 19 20 and 22 September 2017 concerning Mateus Gebory Richard Brookes and Dylan Hughes (all Staffline employees). In the further information which the claimant provided in response to the order of Employment Judge Dimbylow the claimant sets out the alleged acts /omissions recorded in paragraph12 d. e. f. and j. (in part only) and (iii) c. of my order. These are new factual allegations which postdate those pleaded in the Staffline claim and raise new claims of race discrimination and victimisation. They are substantial, and I discern no link (other than the identity of some of the individuals concerned) between the facts in section 8.2 of the Staffline claim and the amendments proposed.

23 As far as time limits are concerned whether these matters are considered individually or as conduct extending over a period, I have insufficient evidence before me on which I could decide the date of the acts or omissions in question and therefore whether they are out of time. However, if they were out of time, I observe the claimant would have failed to persuade me that there were any grounds whatsoever on which it would be just and equitable to extend time. Such time limit questions will however have to deferred to any final hearing.

24 As far as the timing and manner of the application is concerned, I have already accepted that the claimant did not apply to amend his claim at the Preliminary hearing on 4 July 2018.However, he has not explained satisfactorily why it was not until 16 February 2018 that he provided further information about his claim against

Staffline or when he became aware of the facts which are included in that further information.

25 As I have already said above if the claimant does not secure leave to amend his claim he can still proceed (subject of course to the outcome of the strike out application) with his existing claim but I was not convinced that the respondent will suffer any substantial prejudice as contended by Mr. McNaughten should his application to amend be granted. The claims will indeed have grown but the new allegations are narrow in ambit and Richard Brookes and Dylan Hughes(referred to in the new allegations) are already the subject of race discrimination claims 'hanging over them' and Mr. McNaughton did not seek to argue that memories were dimming because of the passage of time or that a fair trial was no longer possible for that or any other reason. Therefore, taking into account all of the relevant circumstances above in my judgment and in considering the relative hardship to the parties in this instance the balance is of hardship is in favour of the claimant and I grant leave.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. It was not possible to list the final hearing because I reserved judgment. Case management orders can be made and the hearing listed (if necessary) at the Preliminary Hearing on **28 January 2019.** Mr. MacNaughten tells me it is the second respondent's intention to apply in writing (giving the grounds on which the applications are made) for the strike out of some or all of the claimant's claims under rule 37 and /or the payment of a deposit by the claimant as a condition of continuing to advance some or all of those claims under rule 39 to be heard at that Preliminary Hearing. I have decided that having refused the claimant's application to amend the DHL claim it appears it has no reasonable prospect of success. I have therefore made a strike out warning.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. 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.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Woffenden
14 December 2018