



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Pasquale Mazzone

**Respondent:** Primark Stores Ltd

## RECORD OF AN OPEN PRELIMINARY HEARING

**Heard at:** Watford

**On:** 22 November 2021

**Before:** Employment Judge Alliott (sitting alone)

### Appearances

For the claimant: In person (with an interpreter)

For the respondent: Ms Kight, Counsel

## JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's application to amend the claim to include the factual allegations set out in his further and better particulars supplied on 1 May 2021 is dismissed.
2. The claimant's application to amend the claim to add a recent incident dated 7 May 2021 is dismissed.
3. The claimant's application to amend the claim to add a claim of unfair dismissal is dismissed.
4. Consequent upon an Unless Order made on 15 April 2021, the claimant's claims under the Equality Act 2010 were struck out on 7 May 2021 and are dismissed.

## REASONS

1. The claimant was employed by the respondent on 22 April 2019 as a warehouse team member. By a claim form presented on 17 April 2020, the claimant brings complaints of race discrimination and/or harassment. At the time of the claim form the claimant was still employed by the respondent.
2. I have been informed that the claimant was dismissed by the respondent on 15 October 2021. Consequently, as of today's date, the claimant is in a position to bring a claim for unfair dismissal.
3. This preliminary hearing was ordered by Employment Judge Postle on 15 April 2021 to determine:-
  - “(a) Whether the claim should be struck out having no reasonable prospect of success; and
  - (b) Whether the claims have little reasonable prospect of success and thus whether a Deposit Order should be made.”
4. Also at the Preliminary Hearing on 15 April 2021, the claimant was ordered to provide further and better particulars of his claim. Pursuant to that Order, on 1 May 2021 the claimant provided a two page document which he described as “bullet points of the incidences which occurred at Primark against me.”
5. On 7 May 2021 the claimant sent an email as follows:-

“I would also like to add a recent incident have happened and report to Primark and the social media platform which if I do not dealt will be need to be add hoping to have fulfil the requested as this is the best, I could do without help and while still working on my health.”
6. I have treated this as an application to amend this claim to include a further recent incident.
7. In an email dated 11 October 2021 the respondent asserted that the further and better particulars constituted entirely new factual allegations and that consequently the claimant needed to apply to amend if he wanted to include them.
8. On 27 October 2021 the claimant emailed the Tribunal stating that he would like to request that unfair dismissal is also added to the claim as he had been dismissed on 15 October 2021.
9. Consequently, before dealing with the applications for a Strike Out Order and/or a Deposit Order, I need to deal with whether or not the claimant has complied with the Unless Order made on 15 April 2021 and whether or not the claimant should be given permission to amend his claim in the three ways applied for.

### The law

### Compliance with an Unless Order:

10. The cases of Ijomah v Nottinghamshire Healthcare NHS Foundation Trust UK EAT/0289/19 and UWHUBETINE v NHS Commission Board England UK EAT/0264/18 gave the EAT the opportunity to restate a number of propositions applicable when the Tribunal is determining whether or not there has been compliance with an Unless Order.
11. First, the Tribunal is not concerned with revisiting whether the Order should have been made or made in those terms. It is not concerned with whether, if there has been non-compliance, it is in the interests of justice to set the Order aside.
12. Second, the task at this stage is to look at the terms of the Order itself, look at what has happened and decide whether that complied with the Order or not.

“If there is ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.”

13. In Johnson v Oldham MBC, UK EAT/0095/13 Langstaff P held that the question of whether there had been substantial compliance with the Order should be judged qualitatively not quantitatively. Where an Order required some further particulars to be given,

“The Benchmark is whether the particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient particulars have been given to meet that test.”

### Applications to amend

14. As per the IDS Employment Law Handbook (Employment Tribunal Practice and Procedure) at 8.16:

“In Chapman and others v Goonvean & Rostowrack China Clay Co Ltd [1973] ICR 50, NIRC, Sir John Donaldson stressed that, in making use of their discretionary power to amend, Tribunals should seek to do justice between the parties having regard to the circumstances of the case.”

15. Then, in Cocking v Sandhurst (Stationers) Ltd & another [1974] ICR 650, NIRC, he laid down a general procedure for Tribunals to follow when dealing whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it.

16. Further, at 8.18 “Balance of Hardship and Injustice”:

“In determining whether to grant an application to amend, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the

interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment – Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT. In Selkent, the then President of the EAT, Mr Justice Mummery, explained that relevant factors would include:

- The nature of the amendment
- The applicability of time limits
- The timing and manner of the application”

17. Dealing with new causes of action at 8.27:

“... Tribunals should, when considering applications to amend that arguably raise new causes of action, focus “not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.”

18. At 8.50 dealing with the timing and manner of the application for amendment:-

“In Ladbroke's Racing Ltd v Traynor EAT S0067/06 the EAT gave some guidance as to how a Tribunal may take into account the timing and manner of the application in the balancing exercise. It will need to consider:

- Why the application is made at the stage at which it is made and why it was not made earlier
- Whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and
- Whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.”

**The facts**

19. The claimant presented his claim on 17 April 2020. At s.8.1 he has ticked the race discrimination claim and included harassment. In s.8.2 the claimant has set out a range of events between October 2019 and 7 January 2020. Of particular relevance, the claimant refers in that document to his diary log of incidents that have occurred. The claimant confirmed to me today that he has such a diary log and I have taken this to be a contemporaneous or semi-contemporaneous record of the matters about which he complains. Consequently, in formulating his claim the claimant was not working exclusively from a later memory.

20. In its response the respondent complains that the claim against it has not been particularised and makes a request for further and better particulars. The respondent clearly made enquiries concerning some of the allegations that can be discerned from the claim form, for example relating to driving an LLOP (low level order picker), an incorrect wage payment and an occasion when the claimant was taken to hospital.

21. On 21 May 2020 the respondent made an application for an Open Preliminary Hearing and an application for further and better particulars.
22. The claimant was clearly aware of the application for further and better particulars because on or around June 2020 the claimant provided a document to clarify some of the issues that he says he had to face. This document did not provide any real clarity as to the nature of the claimant's case save in one respect when he stated as follows:-

“One incident this was apparent Mr Marcinkowski informed me that I should not be complaining about favouritism that he shows to his friends in the workplace. He then continued to say Italians are corrupt anyway so live with it. When I had mentioned to him about my mental health and how this is affecting me both at work and home, his reply was one of, “your mental health is your issue not mine, not the companies””

23. In due course the matter was listed for a Preliminary Hearing in front of Employment Judge Postle on 15 April 2021. The following is recited from the Case Management Summary (with the correct year inserted in the first paragraph):

“(4) By one claim form filed on 22 April 2020 following a period of early conciliation with ACAS commencing on 28 February 2020 and concluding on 28 March 2020 the claimant who is of Italian national origin made claims under the Equality Act for the protected characteristic of race, particularly harassment.

(5) The claimant remains employed by the respondent though presently off sick. The claimant is employed as a Warehouse Team Member.

(6) Unfortunately his claim form though referring to harassment because of race was completely unparticularised failing to provide the details of the harassment alleged to have taken place.

(7) As a result of a request from the respondent for further and better particulars the claimant responded by letter of 15 June 2020. Unfortunately apart from one incident recorded in particular that Mr Marcinkowski referred to Italians as being corrupt, there seems to be no further particularised allegation of harassment just general vague allegations that do not show a prima facie case of harassment.

(8) Attempts during the course of this morning's hearing were made to try and pin down specific allegations of harassment and unfortunately that proved unsuccessful. It may be in part due to the claimant's language barrier, English not being his first language.

(9) In order to move matters forward an Unless Order is made requiring the claimant to set out precisely the allegations made in order to move matters forward and it was explained to the claimant that if he fails to provide the information by the due date that his claim will [be] dismissed without further order or notice.”

24. The Unless Order was made in the following terms:-

“1. Unless Order

- 1.1 Unless the claimant provides the following further particulars of his claim of racial harassment on or before 7 May 2021 the claimant's claims under the Equality Act will be dismissed without further order or notice on 7 May 2021.
- 1.2 The reasons this order has been made is the claimant's continued failure to set out precise allegations of racial harassment due to his Italian national origin.
- 1.3 The further particulars required are:-
  - (i) What was said or done to the claimant which the claimant says was either unwanted conduct which violated his dignity or created an intimidating, hostile, degrading or offensive environment in the workplace?
  - (ii) Who was responsible?
  - (iii) The dates of each act complained of.
  - (iv) Where did it take place and if witnessed by a third party the name?
  - (v) A short explanation as to why the allegations referred to above relate to the claimant's race."

25. On 1 May 2021 the claimant provided his document which he has described as "bullet points of the incidences which occurred at Primark against me". This document sets out six incidents. The claimant accepted that the first, second, third and sixth incidents were entirely new factual allegations that were not contained within his original claim form. I have closely examined incidents (4) and (5) to see if they can be said to relate to incidents that are set out in the claim form.

26. Regarding incident (4), the claim form sets out the following:-

"22 November – I had a breakdown at work and couldn't breathe. Rachel realised I wasn't well and text me saying "Hey you okay seemed a little down today". I explained what happened today which she then replied with "That's a shame because I really enjoy working with you. Have a good weekend."

Following days I explained to both managers Bart [Marcinkowski] and Dean [Hilliam] explaining how their friends were affecting me, Bart's reply was your mental health is your fault and problem."

27. In the further particulars incident 4 is described as follows:-

"- this incident occurred when Marcinkowski insulted me by calling me a racist name.

- I broke down and said it is not funny, it is affecting my mental health
- To which he sniggered and stated that your mental health was not his or Primark's problem. I better stop complaining since all Italians are corrupt and take back handers."

28. There are two matters common to this alleged incident, namely that the claimant says he broke down and the comment about mental health being the claimant's problem. Nevertheless, the incident as pleaded in the claim form appears to relate to conduct of Bart and Dean's friends and does not constitute the

allegation in the further particulars about Bart Marcinkowski calling the claimant a racist name. In my judgment these represent two different events and consequently the fourth incident in the further particulars is not elaborating on a factual allegation already pleaded.

29. The fifth incident in the further particulars is not really a single incident but is an allegation against Mr Marcinkowski along with four other named colleagues that allegedly racist and offensive remarks were made on a regular basis to or at him. In my judgment the fifth incident does not arise out of any specific issue pleaded in the original claim and constitutes entirely new factual allegations.
30. I have considered the wording of the Unless Order. I cannot re-write it and its wording is clear in my judgment. The claimant has been ordered to provide the further particulars of his existing claim and that in default his claims would be dismissed. In my judgment the claimant failed to comply with that order in that the further particulars provided do not relate to any existing claim and consequently I find that the claims were struck out on 7 May 2021. However, pursuant to Rule 38(1) of ET's (Constitution & Rules of Procedure) Regulations 2013, in circumstances where the claim has been dismissed on the basis of failure to comply with an Unless Order, the Tribunal must give written notice to the parties confirming what has occurred. This has not yet happened.
31. This judgment is written notice to the claimant that his claim has been struck out for failure to comply with the Unless Order. I have explained to the claimant that pursuant to Rule 38(2) a party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the Order set aside on the basis that it is in the interests of justice to do so. Further, that unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.
32. Notwithstanding that the claim has been struck out, I have considered it expedient to go on to consider the application to amend.
33. I have taken into account the following circumstances:
  - 33.1 The claimant is an Italian national who does not have English as his first language. Further, he is a litigant in person. Whilst he appeared before me with an interpreter, it is clear to me that he has some English and I have seen many pages of his handwritten English grievances which indicate to me that he is quite proficient in the English language. Further, the claimant has managed not only to initiate his claim but provide details of incidents he complains about.
  - 33.2 The Case Management Summary of Employment Judge Postle makes quite clear what he was requiring the claimant to do and the consequences to the claim of not doing so. I do not accept that the claimant was confused or did not understand precisely what he was required to do. It had been explained to him at the Preliminary Hearing.

- 33.3 The claimant has stated that he kept a diary log of incidents. As such, the claimant had readily to hand details of what he was complaining about.
- 33.4 The nature of the amendment is to include six entirely new factual allegations. It is fair to say that both Bart Marcinkowski and Dean Hilliam are referred to in the original claim form. However, the other named colleagues are not. Consequently in my judgment the amendment does involved substantially different areas of enquiry on the facts.
- 33.5 The application to amend was made in effect on 1 May 2021 when the particulars were provided. The events referred to occurred between approximately July 2019 and February 2020. Therefore, as of May 2021, they were between 22 months and 15 months old. They are therefore significantly out of time. Whilst this is not determinative, it is an important factor. Given that the claimant had his diary log and was aware of those alleged facts, then, in my judgment, it would not be just and equitable to extend time.
34. I now turn to consider the timing and the manner of the application. The respondent flagged up that further and better particulars were required and the claimant made a failed attempt to clarify his claim in June 2020. The claimant only raised these new issues following the Preliminary Hearing on 15 April 2021 in the face of an Unless Order.
35. I have to carry out a balancing exercise. Clearly by refusing the amendment the claimant will lose the opportunity to litigate these six factual allegations of racial harassment. Against that, the respondent will be put to extra cost due to investigating and dealing with these new allegations. In particular I have been informed that four of the people the claimant wishes to make allegations against no longer work for the respondent and two of the main protagonists, namely Bart Marcinkowski and Dean Hilliam now live and work in Australia and Poland respectively. In my judgment, the respondent faces genuine prejudice in that it will probably have considerable difficulty in obtaining the co-operation and participation of those witnesses.
36. Consequently, in balancing hardship and injustice I find that the greater hardship and injustice would inure to the respondent if I allowed these amendments and consequently the application is refused.
37. As regards the “recent incident” the claimant accepted that this was not a matter of complaint as far as his race was concerned. Consequently I do not allow that amendment.
38. The claimant is still within time to bring a separate claim for unfair dismissal. Given the potential complexity of that claim and the fact that he has been off sick since February 2020 and that the unfair dismissal claim does not, on the face of it, appear to be related to the claimant’s race, then there is no good reason to join it with this claim even if it still existed.



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**Employment Judge Alliott**

Date: 26 January 2022

Sent to the parties on:

2 February 2022

For the Tribunal: