EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	AND	**Respondent**
Mr F Da Silva		Costa Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham (via CVP)

ON 24 March 2025

EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: In person
For the respondent: Mr T McArdle, Solicitor

JUDGMENT having been sent to the parties on 26 March 2025 and written reasons having been requested by the respondent in accordance with Rule 60(3) of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided:

REASONS

1. The claim. This is a claim by Mr Fernando Da Silva (the claimant) against his former employer Costa Ltd (the respondent). The claimant commenced work for the respondent on 4 September 2015. He went to ACAS on 15 April 2024, and the 2nd date on the certificate is 16 May 2024. The claim form was presented on 10 June 2024. The respondent resists the claims. There was a private preliminary hearing before Employment Judge Taylor on 31 January 2025. At that hearing directions were given for today's hearing to dispose of 3 things: (1) dealing with any amendment application by the claimant which had to be made by 14 February, (2) dealing with a strikeout application, and/or (3) a deposit order application both made by the respondent (which were to be particularised by 28 February 2025). Unfortunately, the claimant was not able to explain his case in

detail at the hearing on 31 January and the issues were never defined. Thus, I needed to define the issues with the claimant at the start of the hearing today as I could not proceed to deal with the tasks before me without doing so.

2. The issues. We discussed the claim for racial harassment. The claimant confirmed that his nationality is “Portuguese” although he was born in Brazil and has what he calls “Latin American heritage”. Helpfully, the parties had prepared a list of 34 potential claims. However, when I worked my way through them with the claimant only 2 of them were issues for the tribunal to have to determine and they were at item: (n) by being called “Francesco” by another employee called Diya, and at (o) being called “Pablo” by another employee called Julia, as particularised on page 59 of the bundle. The claimant explained that colleagues deliberately misnamed him to wind him up. The rest of the matters set out in his list were background, rather than issues to be determined by the tribunal.

3. Then I turned my attention to the whistleblowing claim and asked the claimant to explain in more detail what he had said or written when he made the disclosures. There were 3 things that he relied upon:

(1) by text message to his Line Manager Grace Audley on 9 September 2023 (p.145 in the bundle).

(2) verbally in-store to Bonnie Webb, Acting Store Manager, on 9 September 2023. Both disclosures (1) and (2) related to the store being dirty, no risk assessment undertaken, poor hygiene and cleaning practices, and a hairbrush being kept alongside cutting tables.

(3) by text message (although not in the bundle) to Grace Audley on 14 October 2023. This time the claimant drew attention to the store being infested with rats.

The claimant told me he believed that his disclosures tended to show that:

(1) the respondent had failed, was failing or was likely to fail to comply with any legal obligation, and

(2) the health and safety of any individual had been, was being or was likely to be endangered.

If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to his employer.

The claimant went on to explain the following things which he said amounted to detriments:

(1) the same 2 instances of racial harassment over the misuse of his name at (n) and (o).

(2) Bonita Webb intimidated or threatened the claimant in her reply on p.146 (of the bundle). This was on the basis that he saw it was a threat because

the claimant did not report the matter to her but rather her boss namely Grace Audley.

(3) Katie Blabey, a Learner Partner who occupied an office upstairs at the Leamington Spa Parade branch did not threaten the claimant but shamed him by distributing the message at p.147 to other managers in the group.

3. The evidence. I received no oral evidence. The parties relied on the following documents: an agreed bundle which the respondent prepared and which I marked as exhibit R1 (149 pages). They also relied upon their written representations in the bundle, and also made some oral submissions.

4.1 The law. The law in relation to the amendment application. Rule 30 of the tribunal Rules 2024 gives a broad discretion to the Employment Tribunal to allow amendments at any stage of the proceedings either on its own initiative or an application by a party. This discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in Rule 3, which states:

"Overriding objective

3. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

4.2 I know from Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT, that when making a determination of an application to amend I am required to carry out a careful balancing exercise of all relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include: the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

4.3 A significant feature in this case was that the respondent asserted the application to amend was, on the face of it, made out of time. In considering the exercise of my discretion I would need, in part, to take into account the 3-month time limit applying to the Equality Act 2010 and the provisions for extending time. However, in view of my findings which I expressed about whether an amendment application was actually necessary, there is no need for me to elaborate on this part of the law any further.

4.4 The law on striking out a claim and/or ordering a deposit. Rule 38 (1) of the Employment Tribunal Rules 2024 provides that all or any part of a claim or response may be struck out if it has no reasonable prospect of success or there are other specified grounds established. Tribunals always give special consideration to striking out a claim of discrimination. In the case of Anyanwu and another v South Bank Students' Union and another [2001] ICR 391, the House of Lords highlighted how important it was not to strike out discrimination claims except in the most obvious cases, because they are generally fact sensitive and require a full examination to enable a proper determination of the issues. Such a cautious approach to striking out claims of discrimination has been emphasized in subsequent cases, such as Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330. This has given rise to the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered. It is a draconian measure and one which I would not entertain lightly. My starting point is that I will not strike out a claim. If I were to consider that any specific allegation or argument in a claim had little reasonable prospect of success, I may make an order requiring the claimant to pay a deposit as a condition of continuing to advance that allegation or argument. This power stems from Rule 40 (1). It is important that I arrive at a decision which is just, fair and proportionate, having regard to the overriding objective, as more particularly described in Rule 3 above.

5. Submissions. Having heard from the parties in trying to establish the issues, I then invited further submissions. I heard from Mr McArdle 1st. He relied upon his written submissions in the bundle (105-115) and took me through it in part. He emphasised that there was no reference in the claim form to public interest disclosure or whistleblowing, merely a sentence saying that an issue was raised. The PID box is not ticked on the claim form and in effect there was no reference to the subject until the application to amend dated 14 February 2025. The claimant had not put it on the amended list of issues. He referred me to 2 cases which were not in his submissions: Mechkarov v Citibank UKEAT/0119/17/DM and Parekh v London Borough of Brent UKEAT/0097/2011MAA. I did not have time to read them before I gave my oral judgment and reasons; but I have done so whilst preparing theses written reasons, although they did not lead me to change my mind as to my outcome expressed orally. Further, he submitted, if no amendment was required, the claim was out of time anyway. If it required an

amendment then the prospects of success were limited. In any event, the claimant would not establish a detriment arising out of p.146. This is a group chat showing photos of the state outside the premises and could not be construed as threatening or intimidatory. The claimant would have to demonstrate how Ms Blaby knew of the disclosure.

6. In relation to the racial harassment claim, now that the claimant had clarified his case, there was no mention of the 2 items in the claim form. Judge Taylor had recognised that the claims were not pleaded, and the claim form needed to be amended to include them. Because the claimant had made an application to amend, he knew that they were not in the claim form.

7. As to the balance of hardship, this was against the respondent because a number of employees had now left its employ. Particularly so in relation to Diya who left in August 2024 and Julia in March 2024. The interpretation of issues (n) and (o) is that these were misleading in that it was Peter who called the claimant Pablo and Dean (in o) is only confirming what someone else had said.

8. I then heard briefly for from the claimant. He relied upon what he had set out in his application to amend (pages 57 – 66 in the bundle). It was Julia's husband that had called him Pablo and Julia replicated the joke again. He emphasised that the whistleblowing claim was not new as it was already in the ET1 form. Reference to "Natasha's law" is on p.15 in the bundle as is the reference to "rats". "Everything started from there", according to the claimant.

9. We agreed that I would adjourn at this point to determine the amendment application and subject thereto return to the respondent's applications in respect of striking out and/or deposit orders.

10. My conclusions and reasons on the amendment application. The respondent vociferously asserted that the claimant was attempting to bring in entirely new complaints in relation to racial harassment and whistleblowing. I saw it somewhat differently. I concluded the claimant was adding factual details to existing allegations which were only broadly described in the claim form. This was further information or further and better particulars of the claims. Furthermore, the claimant appeared to me to be adding a label to a very loosely pleaded whistleblowing claim. Time-limit issues do not usually arise in respect of re-labelling. There appeared to be a causative link on the facts described by the claimant as to his disclosures and the detriments, although at this stage I say nothing about the strengths and weaknesses of the claims. However, a time point seems to have arisen in the way in which the claimant has described the detriments orally, as opposed to those that he set out in his notice to amend.

11. I tried to give the claim form a fair reading. It plainly refers at paragraph 8.2 of the ET1 to "bullying and harassment…including racial slurs". It also refers to the

complaint or broadly, a disclosure in the “Additional information” section at paragraph 15 of the ET 1:

“It all started when I asked for transfer… I was allocated first, Leamington Spa Parade…. when I went to the store handover … I found the store not compliant with serious health and safety issues including “Natasha’s law” and rats. Due this situation, I refused to do the handover ....Bonita Webb then start rumours about me leading staff to want to move with her to other store, the whatsapp group to mock me ….instigating staff to undermining me…”

12. This document is not what would be described as a formal pleading in any sense and of course it is not necessary for a party to set out every fact and piece of evidence they want to use in support of their case. At this stage of the proceedings, I was looking at the substance of the complaints and not their form. I concluded I did not need to approach the issues in the technical, narrow legalistic manner, which in effect the respondent was asking me to do. The faults in the claimant’s claim form arise out of the fact that he describes his case in a narrative form, not in legal terms or by applying the correct legal labels. The claimant was self-represented and expressed himself poorly in his claim form. However, I found this was not fatal and the claimant and he has put his house in order by giving a better narrative by way of explanation. I concluded that no amendment was required for either the race discrimination or whistleblowing claims which we clarified today.

13. A fact which emerged in the analysis of the whistleblowing allegation is that the claim may be out of time for the detriments advanced by the claimant today although not necessarily in terms of what he advanced in his notice of 14 February 2025. There might be an argument for a further preliminary hearing on the out of time point, although at this stage it seemed to me that that subject would best be canvassed as part of any final hearing.

14. During the hearing today, the claimant confirmed that he had resigned from his employment with the respondent on notice given on 13 December 2024, and he had last worked on 16 January 2025. He said that he was in touch with ACAS and was contemplating amending these proceedings to include his resignation (a constructive unfair dismissal claim) or issuing further proceedings. I urged him to take legal advice as soon as possible and get on with it one way or the other if that was his intention.

15. I then turned to discuss the striking out/deposit applications. Having considered the matter further Mr McArdle decided that the strike out application would not be pursued. This was a professional, realistic and helpful approach to the issue. However, he asked for a deposit in relation to 2 of the detriments in relation to whistleblowing and both allegations of racial harassment. Stated shortly, Mr McArdle considered these were out of time, and the claimant would

not be able to demonstrate knowledge on the part of the alleged perpetrators. He submitted there was little reasonable prospect of success and each allegation should attract a deposit of £100.00, making a total payable of £400.00. The claimant gave me details as to his income, outgoings, assets and liabilities. However, he confirmed that he could pay £400.00 if required. I adjourned to consider the matter.

16. When I reviewed the paperwork during the adjournment, I noticed the respondent gave notice for a deposit order but only in relation to race discrimination and not public interest disclosure. Rule 53 would make it a material procedural irregularity for me to make an order when the respondent and the tribunal had not given notice of it to the claimant. In the circumstances, I considered that it was just, fair and proportionate to adjourn the application for deposit orders. This could be dealt with in a private preliminary hearing, but because of the prospect of the claimant applying to amend the claim I listed it as a public preliminary hearing, although of course the status of the hearing can be changed later. I gave a direction as to when the claimant would be required to give notice of any amendment application to include further claims. It is open to him to issue a new claim if he wishes or is so advised.

Approved by Employment Judge Dimbylow

On 16 April 2025