EMPLOYMENT TRIBUNALS

BETWEEN

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

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham (via CVP)

ON 16 June 2025

EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: In person
For the respondent: Mr R Dempsey, Solicitor

JUDGMENT having been sent to the parties on 26 June 2025 and written reasons having been requested by the claimant 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 a public preliminary hearing (PPH) on 24 March 2025 to dispose of 3 things: (1) dealing with any amendment application by the claimant which had to be made by 14 February 2025, (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. I was the judge at the on 24 March 2025 and gave a judgement and full written reasons, which I do not need to repeat here, but which should be read in conjunction with this set of reasons.

2. The issues. I had to deal with the following: (1) The claimant wanted to bring a claim for constructive unfair dismissal and gave notice of an application to amend his claim to the tribunal and the respondent dated 17 April 2025. It was agreed that I would deal with the amendment application before dealing with (2) the respondent's application for deposit orders and (3) any general case management that was required, including fixing the date for any further hearings. We agreed a rough timetable for today's hearing. However, we ran out of time to deal with item 3 and by agreement we adjourned to 10am on 1 July 2025 to take the next steps in the case.

3. The evidence. I received oral evidence on oath from the claimant. The parties relied on the following documents, which I marked as exhibits:

C1 claimant's written submissions

R1 an agreed bundle (171 pages)

R2 respondent's written submissions

The parties also made some oral submissions.

4.1 The law. The law in relation to the amendment application. Rules 30 and 31 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. - (1) The overriding objective of these Rules is to enable the Tribunals to deal with cases fairly and justly.

(2) 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.

(3) The Tribunal must seek to give effect to the overriding objective when it –

(a) Exercises any power given under these Rules, or
(b) Interprets any rule or practice direction.

(4) The parties and their representatives must –

(a) assist the Tribunal to further the overriding objective, and
(b) 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 I had regard to the Employment Tribunals (England & Wales) Presidential Guidance – General Case Management (2018), and in particular Guidance Note 1 which deals with amendments.

4.4 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 Employment Rights Act 1996 s111 and the provisions for extending time.

4.5 The law on ordering a deposit. 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). I can order a deposit up to £1,000 for each allegation or argument. I took into account the claimant's ability to pay, and I had information about the claimant's financial circumstances. The claimant indicated the amount was not an issue in the event I made an order.

5. The submissions. I heard from the claimant first. He relied upon what he had set out in his application to amend (pages 133 to 142 in the bundle) and emphasised certain points. The claimant submitted that he had sick notes until 12

April 2025 although he did not produce any after 2024. Those in the bundle referred to the claimant not being able to work rather than not being able to deal with tribunal proceedings. He submitted that there was no prejudice to the respondent by submitting the application to amend on 17 April 2025 as the respondent knew the factual matrix that he was relying upon. They knew he was going to bring a claim from 13 December 2024 when he gave his notice of resignation (139). The claimant told me that he resigned because of the unfair process. The claimant said that he wanted the merits of the claim discussed. He complained that the respondent only gave him 48 hours' notice of documents to be used at an internal hearing and he should have been given 3 to 5 days. However, when I asked him to confirm the date of the meeting we were talking about, he was unable to help with that and said he could not find it. The claimant then took me through the grounds for his resignation as set out in his letter of resignation and in the grounds of making his application to amend at 133. He submitted that it was open to the tribunal to extend the time and I should adopt "the jurisprudence" arising out of the case of Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148. We then discussed the ACAS certificate issued on 19 February 2025. At one stage during today's hearing the claimant had conceded that the argument advanced by the respondent on any extension of time by virtue of the certificate was correct; but then he moved away from that concession during his submissions. The claimant said that he intended by going to ACAS to resolve the dispute amicably. In the interests of justice, the claimant urged me to grant the application to amend and that he had complied with "Rule 29" of the Rules of Procedure. He rounded off by submitting that there was no prejudice to the respondent because they knew of his claim from 13 December 2024.

6.I then heard from Mr Dempsey. He too spoke to his written submissions and emphasised his point made at paragraph 13. The nature of the amendment was that it was a new claim. I should consider the timing and manner of the application. The last date to present it in time was 12 April 2025. The key question was why the claimant had not brought the application in time. There was a lack of explanation from the claimant. I should conclude that it was reasonably practicable. The claimant had introduced an "idiosyncratic" interpretation of the delay between 24 March 2025 and 12 April 2025 arising out of my order. The claimant had failed to explain why he could not have brought his claim between 13 December 2024 and 24 March 2025. The claimant had been plainly urged to get on with it by me on 24 March 2025 and the order I made could not be interpreted in the way in which the claimant wanted me to do so today. In the absence of any evidence or explanation from the claimant as to why he could not have brought the claim in time, it followed therefore that it was reasonably practicable to have brought it in time. The sick notes produced related 2024 and not 2025. The claimant's interpretation of the facts was at fault and in particular in relation to the respondent's letter at page 139 telling the claimant he would have

been dismissed in any event. The claimant then used that letter as if it was information gathered before his letter of resignation. There is prejudice to the respondent because of the turnover of staff and difficulty in getting in touch with witnesses some of whom would be ex-employees at this stage. As to the merits of the claim, it was poorly framed. The issue of dismissal was not predetermined as at the point of the claimant's resignation on 13 December 2024; the respondent was simply setting out a view afterwards. There could be no bias on the part of Ms Williams about using the word "rude" when describing the claimant as she was not a disciplinary officer. The claimant's case was not strong.

7. My conclusions and reasons on the amendment application. The claimant asked me to consider the Aga case and I have read it during the break and taken it into account when making my decision. The claimant told me that the CAB referred the case to him, although the citation was wrong as it was attributed to 2023. The claimant did not say how this case was specifically relevant to his time issue.

8. I carried out the balancing exercise. The application was not made late in the proceedings because no final hearing date or case management orders in relation to such a hearing had been made. The claimant found it hard to explain the cause of delay in making the application to amend. As he said, he was threatening to make it in his resignation letter of 13 December 2024 but did not do so until 17 April 2025. He said that he was ill; but he could produce no supporting evidence that he could not issue the amendment application until the date that he did because of any illness. The sick notes only show that he was not fit for work and covered an earlier period of time to that under consideration now. I found the claimant to be articulate and intelligent. If there was a serious medical or any other reason preventing him from issuing further proceedings or making the application to amend sooner then he would have told me about them. He was clearly aware of the right to bring proceedings having done so before. He knew of the 3-month time limit.

9. The claimant went to ACAS again in the hope that he might settle proceedings amicably. As to the delay between 12 April and 17 April 2025 the claimant advanced the argument that my order of 24 March 2025 gave him an extension of time to bring the claim. I have read that order as carefully and fairly as possible to see whether I can give it that interpretation; but I do not. I urged him to get on with the case on 24 March.

10. There is a serious lack of explanation from the claimant as to why he did not issue a new claim or apply to amend sooner in 2025. I agree with the respondent that the information given to the claimant in page 139 could not have been a driver for the decision to resign on 13 December 2024. There may be some prejudice to the respondent in having to chase up witnesses but no specifics were given to me, although that may not be a surprise as we do not have all the

detail of the claim for constructive unfair dismissal. When asked about the delay between the end of ACAS conciliation on 19 February 2025 and the preliminary hearing on 24 March 2025 the claimant could not give any explanation. An argument the claimant repeated was that my order extended the time limit but I cannot conclude a reasonable interpretation to my order was that I extended the time. The claimant knew his rights, he knew the time limits, there was no adviser that appeared to be at fault. The claimant failed to demonstrate he was ill. He did not establish that he was disabled in a way that may have adversely affected his understanding of the process. There were no proceedings pending which might have held up the process other than the 1st claim, and that in itself did not hold up any further action by the claimant. There was no postal delay or technical issue with the amendment. I do not blame the claimant for going to ACAS in trying to promote a settlement but the clock was still ticking.

11. The claimant's application is not minor; it is a new claim. If I granted it there is prejudice to the respondent because it has to defend a claim that would have been dismissed as out of time if it had been brought separately. The claimant asked me to consider the merits of the constructive unfair dismissal claim. Little information has been put before me, and the respondent has yet to plead to it. However, I would make the observation that it is a risky strategy to resign in the face of disciplinary proceedings where the outcome has not been decided and then claim constructive unfair dismissal. Plainly the prejudice to the claimant if I do not allow the amendment is that he will not be able to pursue a claim for constructive unfair dismissal. Of course, the claimant can still proceed with his existing claims.

12. When I balance the prejudice against each side, I come to the conclusion that when interpreting section 111 ERA 1996 the claimant has not brought a complaint before the end of the period of 3 months beginning with the effective date of termination of his contract on 13 January 2025. He made an application to amend on 17 April 2025 which was 5 days after the limitation period expired. The claimant has to satisfy me that it was not reasonably practicable for the complaint or the amendment to be presented before the end of the period of 3 months and he has failed to do so. Therefore, I do not have to go on to consider whether it was reasonable to extend the time for another 5 days. The application to amend therefore is refused. I concluded that this outcome was just, fair and proportionate, having regard to the overriding objective.

13. I tried to give the claim form a fair reading, and looked to see if there were sufficient facts in it to construe a claim for constructive unfair dismissal. However, I concluded it was not there.

14. In relation to the 2nd ACAS certificate issued in 2025 I concluded that this did not extend the time to present the claim. There is a considerable amount of case law on the subject. The Commissioners for HM Revenue & Customs v Garau

UKEAT/0348/16/LA is a leading authority. I agree with the analysis of the respondent. In effect, the claimant was trying to get the benefit of the early conciliation certificate extension twice. A 2nd certificate would not generate a 2nd extension of time. The HMRC case was approved in the case of Smith v The Restaurant Group UK Ltd [2024] EAT.

15. I then turned to the deposit order applications. Having considered the matter further Mr Dempsey decided that the application for deposits over the harassment claims would not be pursued. However, he asked for a deposit in relation to 3 detriments in relation to whistleblowing. Stated shortly, Mr Dempsey considered these were out of time, the matters complained of would not amount to detriments, 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 £300.00. The claimant gave me details as to his income, outgoings, assets and liabilities in the previous hearing, and he confirmed his circumstances were the same today. The claimant resisted the applications. He was not entirely sure of some of the dates of acts complained about; and did say there were some continuous acts. He confirmed that he could pay £300.00 if required. I adjourned to consider the matter.

16. In relation to the 3 detriments that I identified in the reasons for my judgement given on 24 March 2025 I did not conclude that detriment 1 had little reasonable prospect of success, and therefore I made no order for a deposit. However, I concluded on the information before me that at the final hearing detriments 2 and 3 both had little reasonable prospect of success as they were likely to be held to be out of time, and time is not likely to be extended. I also concluded that in relation to the same 2 detriments the claimant had little reasonable prospect of demonstrating that the actions complained of by the respondent actually amounted to detriments. I made an order that the claimant paid a £100 deposit to be able to proceed with each of the detriments 2 and 3. This was just, fair and proportionate. I made a separate deposit order which has already been sent to the parties.

Approved by Employment Judge Dimbylow

On 27 June 2025

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