



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs G Mabrouk

**Respondents:** 1. Future Cleaning Services Ltd  
2. Exclusive Contract Services Limited

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Manchester (remotely)

**On:** 7 July 2021

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

### Representatives

For the claimant: Ms M Kponou, Counsel ...

For the respondents: Ms Amy Smith, Counsel, Mr Niall Loughran, Solicitor

## JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's application for amendments to her claim succeeds in respect of the matters set out in paragraphs 36,37,39,40 and 41

## REASONS

### Background

1. This was a preliminary hearing case management which was listed by Employment Judge Dunlop on 29 April and which in the interim was designated to decide on further amendment applications in addition to more general case management.

2. The Case Management Summary of 29 April 2021 sets out the background to this case. In addition to that summary the following events are relevant to the amendment history.

3. The claimant brings claims of unfair dismissal and race discrimination. The claimant cannot communicate well in English and her daughter has made herself available on Tuesdays to facilitate communication between the claimant and her lawyer

4. The respondent provided disclosure in December 2020 following which the claimant's daughter contracted COVID and was ill for several weeks. Following this Ms Kponou contracted a serious case of chickenpox which included attendance at hospital. During Ms Kponou's illness an Unless Order was made on 5 February 2021 with a compliance date of 19 February 2021. The matters the subject of the Unless Order were not complied and the effect of that is that the claim is struck out without further order or correspondence on the date for compliance. Obviously, the Tribunal needs to know at some point it has not been complied with, and the respondents informed the Tribunal of this on 21 February 2021 and asked that the dismissal be confirmed.

5. Ms Kponou objected to this stating inter alia that her illness had prevented her from complying on behalf of her client. There was correspondence regarding disclosure issues with which the respondents did not engage as they considered that the case had been struck out. However, a hearing was then listed to consider whether there had been a material failure to comply with the Unless Order and whether, if there had, the dismissal of the claim should nonetheless be set aside. It appears to me that technically the Unless Order bit on 19 February 2021 and the claim was struck out. At paragraph 13 it states:

"I heard detailed submissions from both parties as to whether the dismissal should be set aside and applied the interests of justice as set out in rule 38(2)."

6. Accordingly, it appears that there was an understanding that the Unless Order had resulted in the dismissal of the claimant's case and it was reinstated by Judge Dunlop on 29 April 2021.

7. Subsequently there were further Case Management Orders which included a disclosure that the respondents were to review their position in respect of disclosure by 13 May 2021, enclosing any further documents it considers are properly disclosable, and setting out its response to the specific disclosure request made in the claimant's email of 25 February 2021. However, I am not clear whether the respondents have set out their response to the specific disclosure, although they assure me that they have many times advised the claimant that they have no further documents to disclose.

8. On 17 June 2021 the claimant applied to further amend her claim. However, she stated in an email that she was not in a position to delineate in detail the actual proposed amendment. In particular, there was a difficulty over CCTV footage which the claimant's representative had still been unable to view, although she had received it. The respondents indicated their objection. In her response Ms Kponou stated that the amendments arose partly out of disclosure and were delayed because of the claimant's daughter's illness, which the claimant's daughter being relied on for translating for the claimant; the representative's illness and the fact that the claim was then struck out. She observed that Judge Dunlop at the last hearing

had said the respondents were not to be criticised for not engaging actively regarding disclosure when the case had been automatically dismissed. The claimant said likewise it was not appropriate for them to be engaging in seeking to amend the claim until after 29 April 2021, and also until after the respondents' further disclosure date of 13 May 2021.

9. Further submissions of the claimant will be recounted below.

10. The further and better particulars, which were accepted as part of the pleadings, now contain the claimant's amendments starting at paragraph 28. The amendments paragraphs were 28, an additional 29, an additional 32, an addition to 34, a new paragraph 35, a new paragraph 36, the removal of paragraph 31, an addition to paragraphs 38 and 39, a new paragraph 40, a new paragraph 41, a new paragraph 45, an addition to paragraph 46, a new paragraph 47, and the removal of 42, 43, 44, 45, 46 from the previous further and better particulars. The removals mainly related to the claims not allowed at the Dunlop Tribunal.

11. The amendments actually requested are appended to this Judgment and within this Judgment I shall just refer to the new and old (where appropriate) paragraph numbers, and give my decision.

### **Law on Amendments**

12. Guidance as to whether or not to allow an application to amend is given in the case of **Selkent Bus Company v Moore 1996 EAT**, the overarching principle was stated by Mummery J to be "whenever the discretion to grant an amendment is invoked 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."

13. Mummery J went on to set out a non-exhaustive list of factors relevant to the exercise of discretion.

- A. The nature of the amendment;
- B. The applicability of time limits;
- C. The timing and manner of the application.

14. It was stressed however that the paramount consideration remains that of comparative disadvantage, the Tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it. In respect of the nature of the amendment it was said in **Selkent** "applications to amend are many different kinds ranging on the one hand from the correction of clerical and typing errors to addition of factual details to existing claims and the additional substitution of other labels for facts already pleaded to on the other hand the make of an entirely new factual allegation which change the basis of the existing claim. The Tribunal has to decide whether the amendments sought is one of the minor matters or is a substantial alteration pleading a new course of action. Where an amendment merely involves relabelling facts that were fully set out in the claim form the amendment will in most

circumstances be very readily permitted **TGWU v Safeway Stores Limited EAT 2007**. If, on the other hand, it introduces a whole new claim it is important to consider time limits as part of the overall balancing exercise.

15. In respect of time limits Mummery J observed that of a new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so, whether the time limits should be extended under the applicable statutory provisions. It is not an absolute bar however that a claim is out of time. The Tribunal has to consider whether the claim would have been out of time even if included in the original claim form. In terms of comparative hardship, the claimant suffers no disadvantage by the refusal of the amendments as the newly introduced claim would inevitably fail on the time limit grounds.

16. In respect of the timing and manner of the application the guidance in **Selkent** was “an application should not be refused solely because there has been a delay in making it there are no time limits laid down in the regulations for the making of amendments, the amendments may be made at any time – before, at, even after the hearing of the case, a delay in making the application is, however, discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made – for example the discovery of new facts or new information appearing from documents disclosed on discovery. Under the Section 109(1) of the Equality Act 2010 an employer is liable for acts of discrimination and harassment or victimisation (note the definition of employer/employee in the Act as opposed to in the 1996 Act) carried out by its employees in the course of employment. This says that anything done by a person (A) in the course of A’s employment must be treated as also done by the employer. Three things must be established:-

- (i) That there was at the relevant time an employment relationship between the employee and the alleged discriminator.
- (ii) That the conduct occurred in the course of employment;
- (iii) That the employer did not take all reasonable steps to prevent the conduct in question.

17. Part of the **Selkent** balancing exercise may involve examining the proposed amendment claim on its merits, the weaker the allegations the less disadvantage there will be to the claimant in refusing to allow the claimant to introduce it. However, it has to be a clear-cut case.

### **Claimant's Submissions**

18. The claimant submitted that:

- (1) In general, the claimant's representative had great difficulty obtaining instructions from the claimant, who spoke very little English, and she relied on the claimant's daughter to provide a translation/interpretation service, in effect, to her. The claimant's daughter was a nurse working shifts some considerable way from home in Blackburn, and could only

make herself available on Thursdays to assist in translating/interpreting. The claimant's other daughter worked nights and therefore it was not practicable for her to assist.

- (2) In December 2020 the claimant's daughter had COVID and therefore was unavailable in December to assist.
- (3) In January and February, the claimant's representative had a severe case of chickenpox and was unable to comply with Case Management Orders.
- (4) The claim was then struck out and in line with Judge Dunlop's observations it was not practicable or appropriate to make an amendment request during that period.
- (5) The claimant was expecting further disclosure by 13 May following the hearing on 29 April but there was no further disclosure.
- (6) Whilst the claimant was in possession of WhatsApp and did receive the minutes of the disciplinary hearing in December, due to illness etc recited and the claim being struck out it was not practicable to start considering an amendment until they knew on 29 April that the claim was reinstated.
- (7) Following this they were still limited by the availability of the claimant's daughter and their expectation that there would be further disclosure on 13 May.
- (8) When there was not further disclosure the claimant then began to draft the amendment request and flagged up that there would be the amendment request up in June. The claimant's representative believed it was not in the interests of the overriding objective to piecemeal apply for amendments and so although some may have been apparent from the disclosure in December, she was awaiting further disclosure to complete the amendment request.
- (9) In addition, it was believed that once the CCTV was working this would assist with deciding whether to proceed with the amendments and/or withdraw any claims. Prior to December 2020 the claimant was relying on her memory.
- (10) In relation to potential disclosure, the claimant was expecting the four previous warnings referred to in the disciplinary hearing to be provided by 13 May, which would enable the claimant's representative to assess the strengths and weaknesses of the claimant's unfair dismissal claim and discrimination claims. However, this was not forthcoming by 13 May and accordingly at that point it was realised that the amendment application would need to be made.

19. In relation to some of the specific amendments, for example in relation to the protected acts, the claimant was changing the sequence when these were made as she was now aware following disclosure when these occurred, and that her

memory was unreliable prior to this.

20. In respect of many of the amendments the matters being added would assist the Tribunal in determining the matter as it filled in gaps in the evidence and also gave context to documents that would be in the bundle which the respondent's witnesses would be questioned about.

21. In respect of a matter such as the respondent's policy and procedures, it would be a matter of routine for the Tribunal to consider whether the respondent had acted in accordance with their policy and procedures in relation to unfair dismissal and discrimination claims.

### **Respondent's Submissions**

22. The respondents submitted:

- (1) The Tribunal should note the claimant's representative's failure to comply with any of the Case Management Orders in a timely fashion. While she had been ill, she should have contingency plans for this.
- (2) Regarding the claimant's reasons for not requesting these amendments before, the respondent submits as follows:
  - (i) The information has been with the claimant since December 2019 when the minutes of the disciplinary hearing were disclosed, or in relation to her own WhatsApp messages she would have these herself from the time they actually arose;
  - (ii) Regarding disclosure, the claimant had had all the disclosure and had been told on various occasions that there was no further disclosure to make, and it was confirmed again on 13 May 2021. That was still a month before the application for amendment was made.

23. The respondents then commented on the various paragraphs as follows:

- (1) Paragraph 28 – although this appeared to just add the words “move to have her dismissed”, this was part of a concerted attempt, as would be seen with other amendments, to create a case that Mrs Hartley had influenced Ms Mawby, the decision maker, into dismissing the claimant in order to set up a “**Jhuti**” style case. There was absolutely nothing in disclosure which could have led to that comment needing to be added.
- (2) Paragraph 29 – referring to messages and the claimant and Ms Mawby on 18 December when the claimant alleges that she said Ms Hartley had accused the claimant of being racist and Ms Mawby promised to investigate. It would have been apparent to the claimant from her own WhatsApp messages from when those WhatsApp messages took place in December 2019.

- (3) The removal at paragraph 31 of “on the same day” – this was a tidying up rather than an amendment.
- (4) New paragraph 32 – concerns a visit to the claimant’s home on 23 December to ask what had happened on 20 December. The claimant would have been aware that Ms Mawby had visited her since 23 December 2019, and there is no rational reason why she would not have raised this with her representative. In addition, the claimant states that she was the victim of racial abuse by Mrs Hartley, thus making this a protected act. Further, there was potentially a victimisation comment made by Ms Mawby, according to the claimant, that she advised her “not to go down that route”. This would be a new protected act and a new possible detriment, so this was a new claim of victimisation not a simple factual point.
- (5) Amendments to new paragraph 34 – these were comments on the minutes from the disciplinary meeting and would have been known to the claimant initially, but even if not they were apparent from the minutes served on the claimant in December 2020.
- (6) Paragraph 31 is then removed as the respondent believed this is because the claimant had changed her case on unfair dismissal.

24. At this point I did raise with the respondents that it is often the case that a claimant will be concerned about one aspect of their dismissal but once they have legal advice from someone who understands employment law there may be many other points where a respondent has behaved incorrectly in terms of procedure, and possibly in terms of the reasonable responses test, although I was not saying that was the case here but that would not be unusual, particularly in the case of someone completely ignorant of employment law.

- (7) Paragraph 38 amendment – this was raising that Ms Mawby had not addressed the complaints the claimant had made about Mrs Hartley under the respondent’s equal opportunities procedure and anti-harassment and bullying policy.
- (8) Paragraph 39 – this raises matters known about since December 2020, again in relation to the disciplinary hearing.
- (9) Paragraph 40 – this was a new paragraph concerned with the respondent’s failure to follow its disciplinary procedure in that it failed to undertake an investigation sufficient to establish a fair and balanced view of the facts before deciding to proceed with a disciplinary hearing and a failure to follow its equal opportunities and anti-harassment policies. Witness statements that were compiled for the disciplinary hearing were never given to the claimant, nor were alternative sanctions short of dismissal considered. Neither was an appeal convened.
- (10) Paragraph 45 – this is a new allegation as well in that the claimant says the treatment at the hearing by Ms Mawby, the comments she made

about the claimant's English and the homeland, by not directing her questions to the claimant, by not ensuring the questions were properly translated, and by not allowing the claimant to answer, were harassment related to race.

(11) Paragraph 46 – the claimant now says that the first and second protected acts took place when the claimant messages Ms Mawby between 18 and 20 December, and the third was what was conveyed to Ms Mawby when she visited the claimant at home. The claimant then goes on to add further detriments, not addressing the allegations, acting contrary to its own policies and raising false evidence regarding the four warnings, and not addressing the claimant's allegation of race discrimination for the purpose of the disciplinary hearing. These were all new allegations and new detriments.

(12) Paragraph 47 – this relates to an email disclosed from Mrs Hartley setting out her account of the 17, 18 and 20 December. The claimant says that this email described the claimant's actions in a completely false way in order to justify the matter being referred to a disciplinary hearing. The claimant is again trying to set up a “**Jhuti**” type situation, with an elaborate allegation that Mrs Hartley knew that the claimant had made an allegation of discrimination, as she mentions this in the email yet the claimant had not told Mrs Hartley about these matters directly herself. Again, this is a completely new gloss on the facts in order to justify a “**Jhuti**” type claim.

25. The claimant then removed other paragraphs which related to amendments that she had not been allowed to proceed with.

### **Other General Points**

26. The respondents did not accept that it would not be appropriate to apply for amendments piecemeal, and whilst there were reasons why there may have been delays the respondents did not accept that those justified a seven-month delay.

27. In respect of disclosure, the respondents had many times stated that there was no further disclosure to be made.

28. The allowing of these amendments would put the hearing in jeopardy as it would certainly generate much further cross examination and would involve calling Mrs Hartley.

29. I did query with the respondents whether it was correct that Mrs Hartley was not going to be called to date. Their representative said she did not have instructions on date. I said that if she was not then it could only be because the respondents were relying entirely on a time limit point, and it was very surprising to me that the respondents would not call Mrs Hartley when there were a number of direct discrimination allegations against her.



## Claimant's Reply

30. I allowed the claimant to reply. She reiterated some of the points she had made before: that there was nothing new in the allegations against Mrs Hartley and if they extended the case against her she was so central to the claim it was surprising the respondents were not intending to call her to give evidence.

31. The claimant was in effect attempting to be helpful by providing extremely detailed further and better particulars and amending these in good time for the hearing so that the witness statements, which were not due until August, could fully address all these points. Some of the points would in any event have to be canvassed in the Tribunal, and it was more helpful if the context in which the points arose were explained the further and better particulars and then the claimant's witness statement rather than just by taking the respondents' witnesses to documents.

32. In respect of the protected acts, protected acts have been pleaded but the claimant had not remembered when they had occurred correctly and so that information was now being provided.

33. Other issues had been raised in the original pleadings, such as the original paragraph 39 had stated that Mrs Hartley had raised false and unreasonable accusations against the claimant which the respondent adopted and which led to disciplinary action against the claimant, and that Mrs Hartley did this on the grounds of one or both of the claimant's protected characteristics but hid those reasons behind the accusations. The accusations were adopted and acted upon by the respondents against the claimant.

34. Therefore, the **Jhuti** had already been raised in the original further and better particulars.

## Conclusions

### General

35. I accept some of the general points made by the claimant and take into account the delays wrought by illness and by communication difficulties. It is important in insuring equality of access to the Tribunal that such matters are taken into account. However, I do not accept the piecemeal amendments argument and also the - it was struck out - argument as the claimant's representative was communicating with the respondent during this period and could have raised issues regarding amendments. Ultimately, I have balanced the prejudice between the parties particularly in the context of the impending hearing in September.

### Unfair dismissal

36. I am granting the claimant's request to amend her claim in respect of her unfair dismissal points. Although these points are obvious from the transcript of the disciplinary hearing I consider the prejudicial effect on the respondent is limited although they will have to make some change of emphasis in their witness statement regarding Mrs Mawby. I accept that a **Jhuti** point was raised in the original pleadings

(further and better particulars) and if the respondent chose not to call Ms Hartley knowing that, that has been their decision.

37. This affects paragraph numbers as follows only in the context of their impact on the unfair dismissal claim: 34, 35, 36, 38, 39, 40, 41, 47.

### **Protected Acts**

38. Firstly, I do not allow the amendments at the end of para 46 which expand the detriments relied on as these vastly expand the case and will jeopardise the hearing dates which is not in the interests of justice. The policy point in relation to the respondent's disciplinary policy can be considered in the unfair dismissal context. The points were always obvious and could have been made much earlier in proceedings.

39. The most difficult point to decide is whether to allow the reconfiguration of the protected acts (paras 46 and 47) as this also involves introducing new and potentially crucial facts relating to the claimant's communications with Ms Mawby. These are matters which have always been known to the claimant and which rely on the claimant's own what's app messages. Obviously raising these matters now is extremely late both legally – out of time - and practically – in that they may jeopardise the hearing.

40. However, this information is required to make sense of the claimant's case and it will be a distortion of the evidence if paras 46 and 47 are not allowed. In my view if the respondent does not wish to call Mrs Hartley they would still be able to do that as the issue is dealings between Ms Mawby and the claimant and whether she advised Mrs Hartley about the claimant's allegations, or indeed if the claimant made those allegations in the first place.

41. If the respondent believes that the hearing cannot go ahead because of these paras being allowed and a judge agrees with that then they may of course make an application for costs.

### **Race discrimination**

42. I do not allow any amendments which extend the ambit of the race discrimination claim. These additional claims will necessarily involve the respondent in significant extra work proofing witnesses and may require additional witnesses which they have taken a view were not necessary in the unfair dismissal context but now would be in a discrimination context. They would jeopardise the hearing. As will be known to representatives it is unlikely the hearing could then be listed before June 2023 which is not in the interests of justice or the parties.

43. Further careful examination of the claimant earlier in the claim would have revealed the majority of these amendments which are not dependent on any of the disclosure arriving in December. The claimant has been concerned throughout by her treatment by Ms Mawby so it would have been obvious that her narrative should be explored in depth to bring out any alleged instances of discrimination. This is different from the unfair dismissal where the minutes could not be remembered in

detail - which is understandable - and where the minutes may give rise to the potential infringement of fair process in an unfair dismissal context.

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Employment Judge Feeney

Date: 16 July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
Date: 19 July 2021

FOR THE TRIBUNAL OFFICE

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