



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Jackowiak

**Respondent:** Vue Entertainment Limited

**Before:** Employment Judge S Jenkins

## JUDGMENT

1. The Claimant's application to amend his claim to add a complaint that his dismissal was an act of direct race discrimination is granted.
2. The Claimant's application to amend his claim to add a complaint that his dismissal was an act of direct sex discrimination is refused.

## REASONS

### Background

1. The Claimant was dismissed on 29 September 2023, and submitted his Claim Form on 12 December 2023. In that he ticked boxes to say that he was pursuing complaints of unfair dismissal and race discrimination, and provided some details regarding those claims. The core of those details focused on assertions that the dismissal was unfair. The only reference to discrimination was as follows:

*"Discrimination raised during meeting<sup>1</sup> – told irrelevant to me – later found discrimination comments abt me – sent pictures – staff calling me discriminatory names & me being Polish & lewd searches on work iPods – "big Polish man naked" "how to turn on my manager" etc"*

2. The Respondent submitted its Response on 21 February 2024, noting that, whilst the Claimant's allegations of discrimination were unclear, the Respondent denied discriminating against the Claimant on the basis of race as alleged or at all.

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<sup>1</sup> This is understood to be the disciplinary meeting at which the Claimant was dismissed.

3. Following the usual review of the Claim Form and Response, the Claimant was directed to provide full details of his discrimination claim, saying what he says happened (or did not happen), when, and who was involved. He was to specify how those matters amounted to less favourable treatment or unwanted conduct related to race. The Claimant attempted to provide the requested particulars by way of an attachment to an email on 7 March 2024, but no attachment was successfully received.
4. On 12 March 2024, a case management preliminary hearing took place before Employment Judge MacDonald. Prior to that, the Claimant submitted the required agenda, in which he recorded that the complaints he was pursuing were ones of unfair dismissal and race discrimination.
5. In his Record of Preliminary Hearing, Judge MacDonald recorded that, in relation to discrimination complaints, the Claimant was pursuing complaints of direct race discrimination and/or harassment related to race, dealing with four specific acts or groups of acts, involving messages, photographs and drawing on labels. He did not include any assertion that the dismissal was itself an act of discrimination. The Judge did however record, in relation to the unfair dismissal complaint, that one of the assertions regarding the alleged inadequacy of the Respondent's investigation was that it did not investigate the Claimant's complaints of discrimination, despite those complaints being relevant to the motivation behind the grievances<sup>2</sup>.
6. The Judge also observed that, if the Claimant wished to include a complaint of discriminatory dismissal, he was to write to the Tribunal by 19 March 2024, setting out who he says the alleged discriminator was, and who the comparator was. The Judge also required the Claimant to provide the name of the alleged discriminator in relation to an allegation that photoshopped images of the Claimant were produced.
7. The Claimant provided an "*ET1 Amendment form, with comparators included*" as an attachment to an email dated 18 March 2024. That was a three-and-a-half-page document in which the Claimant confirmed that he wished to request leave to amend his claim, "*by including discrimination as one of the motivators for the Claimant's dismissal, namely harassment*". He went on to say that the facts relied on in respect of that amendment were included in the original ET1 and the effect of the amendment sought was merely to add a new label to facts already pleaded.
8. The Claimant then went on to refer to additional matters, appearing to suggest that his treatment in the form of being dismissed could be contrasted with that of a female, albeit seemingly Polish, colleague against whom allegations had been made who was not dismissed. He also referred to another, male and seemingly British national, colleague. He did not provide the name of the colleague who is alleged to have photoshopped images of him.
9. The Respondent's representative complained, in an email of 19 March 2024, that the only form of discrimination asserted by the Claimant in the

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<sup>2</sup> It appears that grievances raised by other employees about the Claimant formed the basis of the disciplinary allegations against the Claimant.

Claim Form had been race discrimination, and he should not be allowed to advance a claim of sex discrimination.

10. The Claimant sent an email in response, later on the same day, which led to him being directed by the Tribunal, in an email dated 26 March 2024, to confirm that his application to amend his claim to add in dismissal as an act of discrimination was made on the basis of sex and not race.
11. The Claimant replied on 2 April 2024, noting that he would like to keep in both forms of discrimination, race and sex. He attached a further version of his "*ET1 Amendment*" document, in which he confirmed that. He also extended the document by some further two pages.
12. The Respondent's representative wrote further, later on the same day, noting that it objected to the application to amend to include a claim of sex discrimination, such claim not having been referred to at all in the Claim Form, and also not having been referred to in the preliminary hearing on 12 March 2024. It was noted that the only apparent gap in the Claimant's claim had been that he had not pleaded a case of race discrimination in respect of the dismissal itself. The Respondent's earlier objection to the amendment application was reiterated.
13. As the Respondent had previously indicated that it was content for the amendment application to be considered "on the papers", i.e. without a hearing, the Claimant was asked by the Tribunal, in an email of 9 April 2024 if he was also content for the application to be considered in that manner. He confirmed, in an email dated 10 April 2024, that he was. That led me to consider the application and to my decision below.

## **Law**

14. With regard to the applicable law, the test to be applied in relation to applications to amend involves the assessment of the balance of injustice and hardship of allowing or refusing the amendment. The Employment Appeal Tribunal ("EAT") in Selkent Bus Company Ltd v Moore [1996] ICR 836, reiterated that point, which had previously been made in Cocking v Sandhurst (Stationers) Limited [1974] ICR 650, and noted a non-exhaustive list of relevant circumstances which would need to be taken into account in the balancing exercise, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. Those points have subsequently been encapsulated within the Employment Tribunals (England & Wales) Presidential Guidance on General Case Management (2018), Guidance Note 1.
15. The EAT, more recently, in Vaughan v Modality Partnership [2021] ICR 535, gave detailed guidance on applications to amend tribunal pleadings. That confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application, but noted that the focus should be on the real practical consequences of allowing or refusing the amendment, considering whether the Claimant has a need for the amendment to be granted as opposed to a desire that it be granted.

16. The circumstances set out in Selkent were specifically referred to as being non-exhaustive, and other factors can be taken account in the balancing exercise. That may include the merits of the claim being sought to be added. However, a Tribunal should proceed with caution in considering the prospects of success in the context of an application to amend. The EAT, in Woodhouse v Hampshire Hospitals NHS Trust (UKEAT/0132/12), noted that whilst an examination of the merits may be a relevant consideration, as there is no point in allowing an amendment to add an utterly hopeless case, it should otherwise be assumed that a case is arguable.

## **Conclusions**

17. Neither party had made reference to any specific practical hardship in relation to the granting or the refusal of the amendment. I was conscious of the obvious hardship to each party; of the Claimant not being able to pursue a claim he wished to pursue, if I refused the amendment, and of the Respondent having to defend a claim that it did not consider it should have to defend, if I granted the amendment.
18. Beyond that, and attempting to discern any practical disadvantage, I noted that the most significant concerns raised by the Claimant in his Claim Form, and as were clarified by Judge MacDonald following the discussion at the preliminary hearing, related to the dismissal decision and alleged deficiencies in the investigation and decision-making processes.
19. Judge MacDonald set out a comprehensive summary of the inadequacies asserted by the Claimant. Insofar as those related to discrimination, the inadequacies only record a concern that the Respondent did not investigate the Claimant's complaints of discrimination despite those complaints being relevant to the motivation behind the grievances brought by other employees about the Claimant. I presumed that the references to "complaints of discrimination" were to those which have been recorded as giving rise to claims of direct race discrimination and/or harassment related to race, and the references to "grievances" were to those which appear to have led to the disciplinary action being taken against the Claimant and to him subsequently being dismissed.
20. It seemed to me therefore that the Claimant's core concerns about his treatment will be addressed by the Tribunal, regardless of any amendment. Those concerns will include the specific elements of direct race discrimination and/or harassment related to race referred to in broad terms of paragraph 5 above.
21. In terms of the application to amend the claim to add complaints that the act of dismissal was discriminatory, the Claimant has referenced two comparators, albeit one appears to have a Polish sounding surname. In relation to the complaint that the dismissal was discriminatory by reference to sex, the Claimant, in his second amendment application, referenced four comparators, although some of them would appear to be individuals who raised complaints rather than individuals who had complaints raised against them.
22. Of relevance to me was the fact that the Claimant's initial amendment

application, in which he referred to comparators without specifying the protected characteristic he considered applicable, included one who was male and one who was female. It seemed to me therefore, that the Claimant's prospects of success in establishing a claim that the dismissal was because of his sex would be limited, although that should not be taken as any form of indication that a complaint that the dismissal decision was discriminatory on the grounds of race would necessarily have any particular prospects.

23. Of practical concern to me was the fact that the Claimant's comparators in relation to a sex discrimination amendment would involve a broader investigation by the Respondent, the need for evidence covering a greater range of matters, and the need for a longer hearing.
24. I considered that the burden on the Respondent of being required to respond to a claim that the dismissal was an act of direct race discrimination would be relatively limited, particularly in the context of it being clear from the Claim Form that the Claimant was pursuing a claim of race discrimination. By contrast, the broader burden on the Respondent of having to deal with a complaint that the dismissal was discriminatory on the grounds of sex was more significant. It also arose in circumstances where it had not been canvassed at any stage prior to the Claimant's document of 18 March 2024, some six months after his Claim Form was submitted, thus being substantially out of time.
25. I therefore granted the Claimant's application to amend his claim to include a complaint that the act of dismissing him was an act of direct race discrimination, but refused the Claimant's application to amend his claim to include a complaint that the act of dismissing him was an act of sex discrimination.
26. In the circumstances, it is appropriate for the Respondent to be given an opportunity to submit an amended Grounds of Resistance, and it has 28 days from the date that this Order is sent to the parties in which to do so.

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Employment Judge S Jenkins  
Date: 3 May 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON 7 May 2024

FOR THE TRIBUNAL OFFICE Mr N Roche