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EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mr H Acosta Piamonte		1. City and Kent Cleaning Limited 2. DOC Cleaning Limited

Heard at: London Central **On**: 12 July 2017

Before: Employment Judge: Dr S J Auerbach

Representation

For the Claimant: Mr H Tufnell, trade union representative

For the First Respondent: Mr S Morley, consultant

For Second Respondent: Mr P Mills, consultant

REASONS

1. An oral reasoned decision was given at this hearing, and the written judgment subsequently promulgated. The Claimant's representative subsequently wrote in requesting written reasons, and these are now provided.

2. The claim form, when first presented, identified two Respondents: City and Kent Cleaning Limited and DOC Cleaning Limited. The claim form identified the Claimant's representative as being Mr Durango of the CAIWU and the Claimant himself as being the General Secretary of that union.

3. It is common ground that the Claimant began employment with Mitie Cleaning on 24 May 2010. He transferred into the employment of the First Respondent by operation of regulation 4 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (TUPE) in April 2012 and then, again under TUPE regulation 4, into the employment of the Second Respondent, on 2 February 2017. At the time of this hearing he remained employed by the Second Respondent.

4. While still employed by the First Respondent, the Claimant commenced ACAS Early Conciliation on 12 November 2016, which completed on 12 December 2016, and then the claim form was presented on 21 January 2017.

5. The complaint is of detrimental treatment for prohibited purposes connected to the Claimant's participation in the activities of the CAIWU, contrary to section 146 **Trade Union and Labour Relations (Consolidation) Act 1992**. In the claim form, under section 8.1, concerning the type of claim being made, the box labelled: "I am making another type of claim which the Employment Tribunal can deal with" was ticked and the nature of the claim was described as being "Discrimination due union activities."

6. Box 8.2, concerning the background and details of the claim, was completed as follows:

> Discrimination for union activities
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> My name is Hernando Acosta, General Secretary and authorised trade union representative of Cleaners and Allied Independent Worker Union (CAIWU) and also an employee at the Museum of London, London Wall.
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> I refer to my email dated 11/04/2016 where I asked for a full-time porter job vacancy available, I was promised such vacancy.
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> A job vacancy was available on July 2016, this job was given to a work colleague. Miss Dos Santos (manager) who is aware of my union activities and I strongly believe this changes her decision making contrary to the labour consolidation act 1992.

7. In their responses, the Respondents (among other things) raised time points. At an initial preliminary hearing on 15 May 2017 before EJ Glennie it was also intimated that the Claimant wished to amend the claim. The present preliminary hearing was listed to consider the time issues, potentially the application to amend, if disputed, and, potentially, other applications that might arise; and directions were given.

8. On 30 June 2017 Mr O'Keeffe of CAIWU emailed proposed amended particulars of claim in 18 paragraphs. Further correspondence ensued, in the course of which the Respondents took issue with no *application* to amend having been tabled along with the proposed amended particulars, with the proposed amendments having been tabled a month after the deadline set by Judge Glennie, and alleging other failures by the Claimant to comply with EJ Glennie's orders.

9. On 11 July 2017, the day before the present hearing, Mr Tufnell of CAIWU emailed a revised draft text for the proposed amendments to the particulars of claim and also circulated a skeleton argument. There was also an application by the Respondents, to postpone this hearing, because of lack of compliance, or late compliance, by the Claimant with the Tribunal's orders. That application came before me at the very end of that afternoon. I decided that the hearing should not be postponed but that consideration would be given, at the hearing itself, to what matters could or could not be fairly dealt with at it.

10. At the start of the hearing a number of matters were clarified and agreed.

11. It was established that the chronology of the Claimant's employment as I have already described it: by Mitie, then transferring to the First Respondent and then to the Second Respondent, was common ground. It was also common ground that, as he had transferred under TUPE to the employment of the Second Respondent on 2 February 2017, any potential claims for alleged treatment said to have occurred after that date would lie against the Second Respondent only; but also that the same applied in relation to any potential claims for treatment alleged to have occurred *before* that date. That is because any liability in respect of these transferred from the First Respondent to the Second Respondent, by virtue of the operation of TUPE regulation 4, when the transfer happened.

12. Accordingly, it was common ground that only the Second Respondent could be potentially liable in respect of the Claimant's live claims or indeed the claims that he sought to add by amendment. In those circumstances, and by consent, the First Respondent was dismissed from these proceedings upon withdrawal of the claims against it by Mr Tufnell. Its representative, Mr Morley, then departed the hearing.

13. At the outset of the litigation, potential issues in relation to compliance with mandatory ACAS Early Conciliation (EC) had been raised. However, Mr Mills stated that the Second Respondent did *not* maintain that there was a problem of jurisdiction by reference to the ACAS EC requirements. This was because the Second Respondent accepted that the EC process which had been completed by the Claimant against the First Respondent, when still employed by it, prior to presentation of his claim, and prior to the TUPE transfer, was then, as it were, inherited by the Second Respondent, by virtue of operation of TUPE regulation 4. So, he conceded (correctly, in my view), no further compliance with the ACAS EC requirements by reference to the Second Respondent was necessary.

14. However, it was the Second Respondent's case that, when originally presented on 21 January 2017, the claim was out of time.

15. The starting point is that a complaint invoking section 146 must be presented before the end of the period of three months beginning with the act or failure to which the complaint relates (or the last of a series) (see section 147(1)(a) of the 1992 Act). In some cases, that period may be extended to take account of the ACAS EC process, by virtue of section 292A. Further, if the Tribunal considers that it was not reasonably practicable to present the claim within the otherwise requisite period, it will still be treated as in time if it was presented within a further reasonable period (section 147(1)(b)).

16. In this case, the Second Respondent submitted that the only allegation of detrimental treatment contained in the claim form was said to have occurred in July 2016. On the Claimant's best case that could have been no later than 31 July 2016. In order to procure an extension of time, ACAS EC should therefore have been begun on 30 October 2016 at the latest, but it was not. Further, even after ACAS EC was completed, on 12 December 2016, the claim was still not

presented until 21 January 2017, and, even where the timing of ACAS EC procures an extension of the time limit, that will at most be to a date one month after ACAS EC ends; but this claim was not even presented by that date.

17. In addition, submitted Mr Mills, the dates of the various alleged further treatment, which formed the proposed subject matter of the draft amended particulars of claim, were all such that, had those complaints been the subject of a fresh claim form presented on the date of this present hearing, all of those claims would also be out of time, as the date of the most recent alleged detriment was 23 March 2017. That would be equally true, he said, if the position was judged as at 30 June 2017, which was when the first version of the draft proposed amendments was tabled.

18. In reply, Mr Tufnell accepted that *if* the correct construction of the original claim form was that it only covered a complaint about failure to give the Claimant a particular job in July 2016, then that claim had been presented out of time. He confirmed that this was not a case where the Claimant would seek to argue that it was not reasonably practicable to have presented that claim in time, let alone that, if so, it was presented within a further reasonable period.

19. However, Mr Tufnell argued that the further alleged matters referred to in the draft amended particulars of claim, were capable of being regarded as coming under the umbrella of the original claim form. If so, they were properly regarded as a matter for further particulars, and not requiring permission to amend as such. Those further matters included alleged treatment going up to December 2016 which, had they been included in the original claim form, would have meant that it was, after all, presented in time. Alternatively, submitted Mr Tufnell, if amendment was required, then the Claimant should be permitted to add these matters by way of amendment, and the time point would then, again, as it were, wash out.

20. After some discussion, and although the Second Respondent had, in correspondence prior to this hearing, complained that it had not had sufficient time to prepare, it was agreed that the Tribunal did not need to hear any evidence to determine these points, and that the Tribunal could and should proceed to hear argument and adjudicate these matters at this present hearing. I proceeded accordingly to hear argument, and then to give my decision.

21. The proposed amendments set out in the 11 July 2017 document can be considered each in turn.

22. Paragraph 1 confirmed that the allegations were of treatment contrary to section 146(1)(a) and (b) of the 1992 Act. Mr Mills had no difficulty with that assertion forming part of the claim, which was clear from the original claim form.

23. Paragraphs 2, 3 and 4 offered further particulars of the Claimant's alleged participation in trade union activities in March, June and August 2016. Mr Mills had no difficulty in principle with those matters being introduced by way of particulars, save that he observed that, if the scope of the complaints was properly confined to a complaint of treatment in July 2016, then alleged participation in union activities in August 2016 could not be relevant. Mr Tufnell accepted that, as such.

24. Mr Mills also had no difficulty with paragraphs 5 and 8, because these simply gave further particulars of the job for which the Claimant said he was turned down, by way of an act of detrimental treatment in July 2016. However, all of the remaining paragraphs of the document referred to allegations of detrimental treatment which, Mr Mills said, were not covered by the original particulars of claim, and could not fairly be introduced by way of amendment now.

25. In summary, these were as follows. Paragraphs 6 and 7 related to alleged threatening remarks made by Ms Dos Santos in June 2016, following the Claimant having been involved in a workplace demonstration. Paragraph 9 related to an HR Manager, Mr Heron, allegedly becoming aggressive and hostile towards the Claimant in the month of August 2016, in connection with an on-going grievance. Paragraph 10 related to Ms Dos Santos, in September 2016, allegedly refusing to entertain an application for overtime by the Claimant. Paragraph 11 related to the allegation that applications for holiday leave in October and December 2016 were turned down. Finally, paragraph 12 related to the Claimant allegedly being prevented from taking unpaid leave in March 2017, and this being further exacerbated by threatening comments from Ms Dos Santos on 23 March 2017.

26. I turn first to the question of whether any of these matters were potentially sufficiently covered by the umbrella of the original particulars of claim, such that they could be treated as provision of further particulars, rather than requiring the granting of an application to amend. Mr Tufnell sought to argue that they could, on the basis that (a) the nub of the original complaint was of discrimination because of union activities; (b) the original claim form referred to Ms Dos Santos being aware of the union activities of the Claimant; and (c) these particulars were merely further examples of matters of discrimination by reference to such union activities.

27. I considered this argument, with respect to Mr Tufnell, to be simply misconceived. On any natural reading this claim form made only one specific factual allegation of detrimental treatment, and that was the refusal of the job in July 2016. It cannot be read as even alluding to there having been detrimental treatment on any other occasion or in any other way. The fact that the original claim form asserts that Ms Dos Santos was aware of the Claimant's union activities is simply something said in support of the claim that those activities were something that influenced her against him *in refusing him the job*. There is nothing in that sentence to convey that it is the Claimant's case that there have also been *other* episodes of *detrimental treatment* on grounds of his union activities, whether before or after July 2016. There is simply no way that this claim form can be read, even on its most generous construction, as covering other complaints of alleged detrimental treatment on other occasions.

28. Mr Tufnell suggested that, if there *had* been complaints of other detrimental treatment on other occasions, these might then be said to form part of a course of treatment. I observe that they might or might not be found to do so, whether for time purposes (section 147 refers, more precisely, to a series of similar acts, or an act extending over a period) or for other purposes; but that would not mean that the original claim form conveys that it is alleged that there has been such a course

of treatment (or series of acts or act extending over a period) involving conduct going beyond the alleged conduct specifically raised in it. It simply did not do so.

29. The disputed matters contained in the draft amended particulars of claim were therefore *not* within scope of the original claim form, and they could not be treated as the mere provision of further particulars, therefore not requiring permission to amend. I therefore turned to consider whether permission to amend should be granted in respect of some, none or all of them.

30. Mr Tufnell reminded me of some of the authorities which guide the Tribunal when considering an application to amend a pleading, including of course **Selkent Bus Co Ltd v Moore** [1996] ICR 836. The authorities remind the Tribunal that which factors are relevant to the particular application, and what weight to attach to them, is for the appreciation of the Tribunal in all the circumstances of the given case. No particular factor will necessarily be conclusive either way; and the Tribunal should not treat the exercise as one of box-ticking, but as one of careful weighing of the significance of each of the particular features of the given case. In this case, the particular factors that were highlighted by the representatives on both sides, and to which I gave particular consideration, were as follows.

31. Firstly, on the Claimant's side of the scales, it was correct to say that the alleged matters of which he sought to add complaints in his 11 July document were all said to be matters involving the same legal type of unlawful treatment as that alleged in the original claim form, namely detrimental treatment on proscribed grounds related to participation in union activities. There were also some common factual elements, in as much as most of the proposed new allegations were, as with the original allegation, of conduct on the part of Ms Dos Santos (although not all were: paragraph 9 referred to alleged conduct on the part of Mr Heron).

32. However, though there were those common threads, these were all, in substance, entirely new *factual* allegations. Whether or not it might be claimed that they formed part of a course of conduct (or continuing act, or series of similar acts), each related to alleged treatment of a distinct kind on a distinct occasion, from that alleged in the original claim form. Indeed these alleged episodes were said to have occurred at different points in an overall time frame of a number of months.

33. The addition of these complaints, if permitted, would therefore significantly widen the factual territory of the claim, from being solely about a particular job that was not offered in July 2016, to being about a number of other discrete alleged episodes in June, August, September, October, and December 2016 and then in March 2017. To allow them to be added would therefore significantly increase the time, resource and cost for the Second Respondent in defending these claims, in terms of assembling evidence, calling witnesses and associated legal work on the case. Even if the remedy sought were entirely confined to injury to feelings, to allow the addition of all these matters would also potentially appreciably increase the Second Respondent's exposure, in terms of the potential liability it would face were one or more of these complaints found to be well-founded.

34. Mr Tufnell referred to a passage in **Ketteman v Hansel Properties Limited** [1987] AC 189, cited in turn in **Smith v Gwent District Health Authority** [1996]

ICR 1044, in which it was said that "such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided." The wider picture in the present case, he submitted is (on the Claimant's case) one of a pattern of discriminatory treatment because of trade union activities. To allow the amendments would, he said, simply allow the Tribunal to grapple with that wider picture, or real controversy between the parties. But this dictum does not mean that proposed amendments should be allowed, simply because the alleged treatment raised by them is said to be of the same character as the treatment currently alleged.

35. I turn to the temporal aspect. The mere fact that a proposed amendment relates to alleged treatment said to have occurred after the date of the original claim form is not, as such, an automatic barrier to the introduction of that complaint by way of amendment of that claim form (see, e.g.: **Prakash v Wolverhampton City Council**, UKEAT/0140/06) and Mr Mills did not dispute that, as such. The fact that the alleged treatment in March 2017 post-dated the date of presentation of the claim form did not, therefore, by itself mean that that could not be the subject of an amendment.

36. However, as I have already indicated, Mr Mills' time point was a different one. It was that, in respect of *all* of the allegations set out in the 11 July document, had a freestanding claim been presented, instead of an application to amend, all of the claims would have been out of time. For these purposes, Mr Mills was content that I should treat the application to amend as having been made when the first proposed new particulars were tabled, on 30 June 2017, as he accepted that that earlier document covered substantially the same ground as the 11 July 2017 document. But, he said, given the various dates of the alleged treatment, even a freestanding claim form presented on 30 June would have been out of time, the most recent allegation being of conduct on 23 March 2017.

37. If a complaint which is the subject of an amendment would, had it been the subject of a fresh claim form, presented on the day that the application to amend was made, have been out of time, that does not, as such, prevent the Tribunal from allowing it to be added to an existing claim. Potentially, the Tribunal has the power to permit an amendment to a claim at any time. But that may be treated as a relevant consideration, when weighing up whether to allow the amendment.

38. Mr Tufnell, in response, referred, once again, to it being the Claimant's case that the conduct alleged in the original claim form, and alleged in the proposed amendments, all formed part of a continuing act or course of conduct. He submitted that the question of whether treatment on a number of occasions is correctly viewed that way should normally be left by the Tribunal to be determined at the final hearing, when all the potentially relevant findings of fact can be made.

39. However, Mr Mills submitted that that was nothing to the point in this case. This was, firstly, because (as I indeed decided) the original claim form, when presented, related solely to one alleged matter, namely the refusal of a job in July 2016, and that claim form, as it stood, was presented out of time. Secondly, he reiterated that, even if all the matters raised in the draft amended particulars were

treated as having occurred on the date of the most recent of them, they would still all, even as of 30 June, also have been raised out of time.

40. Pausing there, I agreed with Mr Mills on both points. The original claim form raised one allegation only. As it stood, it had been presented out of time. That was, itself, a consideration weighing in the balance against allowing it to be amended, because, as it stood at present, it ought to be dismissed. The proposed amendments, on the most generous view to the Claimant, had also all been first raised at a time when, as freestanding claims, they would all be out of time. Whilst, as noted, that latter consideration was not an automatic bar to their being added, it was a relevant consideration on the Respondent's side of the scales.

41. All of the alleged matters covered by the application to amend, apart from the alleged treatment in March 2017, had in fact occurred by the time the original claim form was presented. Mr Tufnell (on instructions from Mr Durango, who attended this hearing) gave me an account of why they had not been raised in the original claim form, and why they, and the allegation of treatment in March 2017, had not been raised in any form sooner than 30 June 2017. In summary, he said that there were two reasons for this.

42. The first is that the CAIWU is a fledgling trade union. It was only formed in early 2016. It had been gathering members rapidly. With this came a rapidly growing demand for support for members with employment grievances and claims, which the union had only very limited resources to meet. It was heavily dependent on the goodwill of supporters, including other unions and organisations. The original claim form, I was told, had been prepared with the help of a law student. Secondly, there had been language problems. The Claimant's first language is Spanish and he could not articulate his concerns in English without help from someone with a good command of both languages. He would have used an interpreter, had he been called upon to give evidence at this hearing.

43. I was prepared to give these aspects some weight in the scales on the Claimant's side, but only a limited amount. Firstly, while the particulars given in the original claim form bore the hallmarks of having been somewhat imperfectly translated from an account given in Spanish, it is perfectly clear that the Claimant had in mind a particular allegation of treatment in relation to a particular matter. The particulars identified that he was complaining that he had been given the expectation of a job in discussions in April 2016, that the job had then gone to someone else in July 2016, and that he was complaining that he had not got the job because of his union activities in CAIWU; and they identified the manager responsible. The Claimant clearly knew, and was able to convey, when the claim form was prepared, what, factually, he wanted to complain about, and the gist of the particular type of legal complaint that he wanted to bring in respect of it.

44. Secondly, apart from the alleged treatment in March 2017, the Claimant must, at the time when his claim form was prepared, have known, as a matter of fact, about all of the matters of alleged treatment which he only subsequently raised in his application to amend. There was no suggestion that any of them involved treatment of which he was not at the time aware, or that he only came to appreciate because of developments later on that they might have something to do

with his union activities. Whatever the limitations on his access to legal advice he was, himself, the General Secretary of the union, Mr Durango, himself a union representative, was his representative, and he plainly understood that a complaint can be made to a Tribunal of alleged treatment of this kind.

45. Even taking on board these contextual matters raised by Mr Tufnell, it therefore remained unclear to me why the Claimant would not have been able to include in his claim form, when first presented, some reference to the other matters of alleged detrimental treatment (apart from that said to have occurred in March 2017) which he later sought to raise in his application to amend, nor why they were not first identified and raised until some five months after the most recent of them was said to have occurred. Similarly, he must have known about the March episode in March, but it remained unclear why that matter was also not raised until the 30 June document was tabled, some three months or more later.

46. Mr Tufnell, referred to another dictum from the same passage in the **Ketteman** decision mentioned earlier, where it was said that "amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights." So, he submitted, the Tribunal should not punish the Claimant for the errors of his representative, by refusing his amendment.

47. However, the issue here was not whether the Claimant should be punished for the errors of his representative, but as to what weight could fairly be attached to the argument that these matters were not raised sooner than they were, because of his trade union's limited resources and/or language difficulties. The Tribunal is well used to making fair allowances for litigants' lack of resources, whether by way of representation or advice, or in other ways, and the language or other communication difficulties that they may encounter. Litigants in person who have no advice or assistance at all appear before it every day. But in all the foregoing circumstances of this case, I was not persuaded that lack of resource or language difficulties could carry more than limited weight on the Claimant's side of the scales in considering this application to amend.

48. Although, as I have said, the fact that amendments would, if raised as a fresh claim, have been out of time, is not an automatic barrier to their being allowed, I did regard this as a significant factor on the Second Respondent's side of the scales. That is because the underlying time limit rules, mean that the Second Respondent had a legitimate expectation that, after the relevant time limit had elapsed, it should not be exposed to the risk of a claim in ordinary circumstances, and that therefore be a sufficiently compelling reason to defeat that expectation by allowing one to be advanced by the amendment route.

49. Further, in this case, to allow these amendments would be to convert an original claim that is plainly, as it stands, out of time, into one that was, by the addition retroactively of complaints about events closer to the date on which it was presented, potentially, after all, in time. The application to amend effectively invites the Tribunal to combine an existing claim that is out of time, with amendments that

would be out of time if raised independently, and to thereby wash out the time issues in relation to them all.

50. Mr Tufnell made the point that a date had not yet been set for the full merits hearing, so this was not a case where allowing the amendment would jeopardise an existing trial date. Nor, I recognised, was there any suggestion in this case, that the delay in raising the allegations covered by the proposed amendments caused the Second Respondent a particular difficulty, in terms of its ability to defend them on their merits. This was not a case where, for example, it was said that a witness, or documents, which would have been available if these matters had been raised sooner, were, for some reason, no longer available. Nor did Mr Mills seek to argue that so much time had passed since these alleged events that the effect of fading memory would significantly hamper the defence at this point.

51. I accepted, therefore, that the Second Respondent would not face a significant forensic prejudice, if required to defend these allegations on their merits. Nevertheless, as I have noted, there would be a significant prejudice to it in having to defend, and face exposure, to these new allegations, and, indeed, were the amendment to be granted, in having to continue to defend the original complaint which was itself, as it stood, out of time. On the other side of the scale, of course, there would be prejudice to the Claimant if he lost the opportunity to have his complaints heard and determined on their merits. But all claims have underlying time limits attached to them, and, while, I repeat, there is greater latitude when considering an application to amend, it is an inherent consequence of the principle of time limits that a claimant who is too tardy, will lose the right to have his claims determined on their merits.

52. Standing back, and looking at the overall picture, the Second Respondent had, as a starting point, a legitimate expectation that both the complaint raised in the original claim form and the further complaints covered by the application to amend should have been raised in time. The Claimant's reasons for not having raised them in time, and not having raised them sooner than in fact they were raised, were not particularly compelling. The addition of the matters referred to in the amendment would significantly expand the factual scope of the case, and the Respondent's potential exposure to costs and liability.

53. Further, and particularly significantly, the Claimant was effectively asking the Tribunal, by exercise of the power to amend, not only to allow in further matters that as freestanding claims would have been out of time, but thereby effectively to cure the time problem which the existing claim presently faced. Assuming (and the contrary was not specifically argued before me) that the power to amend *could* potentially be properly exercised in that way, notwithstanding that the existing claim was, on its own, out of time, that would, in my view, involve a very significant downgrading, in the balancing exercise, of the weight to be attached to the background time limits; or, to put the matter another way, it would require a very strongly compelling case indeed to be advanced on the other side.

54. Weighing all of these factors, and the balance of injustice in either granting or refusing this application to amend, I concluded that the balance clearly came

down on the side of the Second Respondent, and the application to amend was, in its entirety, refused.

55. After I had given my oral decision to the foregoing effect, at the hearing, Mr Tufnell accepted that the consequence of my findings was that the original claim form, as it stood, had been presented out of time; and, accordingly, I dismissed it.

Employment Judge Auerbach
9 August 2017