EMPLOYMENT TRIBUNALS

Claimant: Miss R Grzondziela

Respondent: St Barnabus and St Paul's Church of England School

HELD AT: Manchester **ON:** 6 March 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr K McNerney

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that:

1. The decision to accept the claimant's claim on 29 June 2016 is revoked.

2. The decision is varied to the effect that the claimant's claim is rejected.

REASONS

Preamble

1. The claimant presented her claim on 14 June 2016 claiming unfair dismissal, race discrimination, disability discrimination and harassment following her dismissal by the respondent on 3 March 2016 and citing some instances which she stated were evidence of race discrimination. The claimant's claim of unfair dismissal was struck out as she did not have two years' service.

2. In the claim form the claimant named as respondent at box 2.1 Carla Martini, the Head Teacher of the school, and put the school "St Barnabus & St Paul's C of E" and its address as the address of Mrs Martini. It should be said box 2.1 says, "give the name of your employer or person or organisation you are claiming against".

3. The claimant obtained an ACAS certification form in the name of the school only which showed that the claimant entered into conciliation on 9 May 2016 and the certificate was discharged on 31 May 2016. The claim was referred to me as Duty Judge on 29 June 2016 on the basis that the named respondent in the ACAS certificate was different from the named respondent in the claim form. I accepted it under rule 12 which enables minor errors to be corrected (legislation is set out in full below), as I assumed, wrongly as it transpired, that the claimant intended to proceed against the school rather than the individual, that she was misled by the box description (as experience has shown this can be the case) and as she had included the name of the school in the address that was sufficient to describe it as a minor error. However, this may also have been an incorrect application of rule 12 as rule 12 arguably applies in respect of the certificate being incorrect rather than the claim form.

4. A preliminary hearing (management discussion) was first held by Employment Judge T Ryan on 6 September 2016. For various reasons, including the fact that an interpreter had not been arranged, no progress was made at that hearing. A second preliminary hearing (case management) was held on 27 October 2016 by Employment Judge Horne and at that hearing the claimant made clear that she intended to sue Carla Martini and she did not want to sue the school.

5. The respondent at that case management discussion raised an objection to the acceptance of the form in the first place. They had raised this at the previous case management discussion before Employment Judge Ryan and reiterated this at the hearing, stating that this was not a minor error particularly in the light of the fact that the claimant had emphatically stated that she wished to sue Mrs Martini and therefore the ACAS certification form should be in Mrs Martini's name.

6. The parties and the Employment Judge, at that preliminary hearing, agreed that as I had made the decision to accept the form it was my role to consider whether or not I should reconsider by earlier decision and if necessary hold a hearing to determine this matter. I decided I did need to reconsider the point and listed a reconsideration of my own motion with the parties attending.

7. The claimant has confirmed today, as she did at the previous preliminary hearing, that she only wishes to proceed against Mrs Martini. The claimant argues, but did not give evidence as it was not necessary at this juncture, that ACAS had made a mistake in issuing the certificate in the school's name and that she had sought to have one issued in the individual name. The claimant has since obtained a further conciliation certificate in the name of Carla Martini but she did not have it with her and the Tribunal was unable to obtain a copy (although it was subsequently located). The respondent did not have a copy either. It seems likely as a result that the claim will be out of time and a further preliminary hearing will be necessary to deal with the out of time point.

8. The Employment Judge canvassed with the parties, and as far as she could with the claimant (who was having to deal with some extremely technical matters), whether this hearing could also be a rule 13 hearing (again, described below) but, as the respondent indicated, they would want to challenge the claimant's reliance on ACAS having made a mistake and that rule 13 required an application in writing that this would not be a sensible course to take, although suggested by the Employment

Judge in an effort to reduce costs. Rule 13 only arises if the claim is rejected, which of course was not yet the case, but I was attempting to consider all relevant points at one hearing.

9. I should note that the hearing was quite difficult as the claimant understandably wanted to put her points quite quickly which made it difficult for the interpreter, as also did the respondent's representative. Both parties had to be slowed down on numerous occasions.

10. I also requested the interpreter to read to the claimant, in public but quietly, the provisions of Harvey's relevant to one of the points I had to consider, although I fully accepted it might be difficult for the claimant to absorb all this information.

11. The parties then made their submissions and requested that the decision be in writing in order that they could consider it at length for reasons which become apparent below.

The Law

12. Rule 12 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1 states that:

> "(1) The staff of the Tribunal office shall refer a claim form to an Employment Judge if they consider that the claim or part of it may be –
>
> (a) One which the Tribunal has no jurisdiction to consider;
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> (b) In a form which cannot sensibly be responded to or is otherwise an abuse of process;
>
> (c) One which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
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> (d) One which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies and an early conciliation exemption does not apply;
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> (e) One which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or
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> (f) One which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(2) The claim or part of it shall be rejected if the Judge considers that the claim of part of it is of a kind described in subparagraphs (a), (b), (c) or (d) of paragraph (1):

(a) The claim or part of it shall be rejected if the Judge considers that the claim or part of it is of a kind described in subparagraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and that it would not be in the interests of justice to reject the claim.

(3) If the claim is rejected the form shall be returned to the claimant together with the notice of rejection giving the Judge's reasons for rejecting it or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

13. Rule 13 deals with reconsideration of the rejection and says that:

"(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or rule 12 may apply for a reconsideration on the basis that –

(a) The decision to reject was wrong; or

(b) The notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defects and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing or an Employment Judge decides on considering the application that the claim shall be accepted in full, the Judge shall determine the application without hearing otherwise the application shall be considered at a hearing attended only by the claimant.

(4) If the Judge decides the original rejection was correct but that the defect has been rectified the claim shall be treated as presented on the day that the defect was rectified."

14. For reasons that will become apparent, rule 27 may also be relevant. Rule 27 refers to the dismissal of a claim or part and states that:

"(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim or part of it, or that the claim or part of it has no reasonable prospect of success the Tribunal shall send a notice to the parties –

(a) Setting out the Judge's views and the reasons for it; and

(b) Ordering that the claim or part in question shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim or part should not be dismissed.

(2) If no such representations are received the claim shall be dismissed from the date specified without further order (although the Tribunal should write to the parties to confirm what has occurred).

(3) If representations are received within the specified time they shall be considered by an Employment Judge who shall either permit the claim or part to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may but need not attend and participate in the hearing.

(4) If any part of the claim is permitted to proceed the Judge shall make a Case Management Order."

15. In respect of reconsideration of hearings in general rule 70 applies which states that:

"A Tribunal may, either on its own initiative or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision (the original decision) may be confirmed, varied or revoked. If it is revoked it may be taken again."

16. Rule 72 under "process" says:

"(1) An Employment Tribunal shall consider any application made under rule 71 if it considers there is no reasonable prospect of the original decision being varied or revoked. The application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1) the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it, and any reconsideration under paragraph (2) shall be made by the Judge, or as the case may be the full Tribunal which made the original decision."

17. Rule 73 states:

> "Where the Tribunal proposes to reconsider a decision on its own initiative it shall inform the parties of the reason why the decision has been reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)."

18. In respect of a situation regarding rejection of claims under rules 10, 11 and 12 they have proceeded on the understanding that the rules were lawfully made within the powers granted by the Secretary of State under the Employment Tribunals Act 1996 section 7. However, in the **Trustees of Williams Jones's Schools Foundation v Parry [2006] EAT**, Laing J held:

> "With specific reference to the procedure in rule 12(2) for rejecting a claim under rule 12(1)(b) (the claim is in a form which cannot sensibly be responded to or is otherwise an abuse of process). The power to reject such a claim without a hearing is not authorised by the Employment Tribunals Act 1996 section 7(3A), and (3AA), and is accordingly ultra vires and unlawful. "

19. It was germane to that decision that the rejection of a claim under rule 12 was a "determination of proceedings" and that that could not take place just on the papers as the relevant provisions of the Employment Tribunals Act 1996 could not authorise such a procedure (i.e. a papers only procedure)

20. The **Parry** case focussed on rule 12(1)(b) but Laing J held that:

> "The only provision in rule 12 which is authorised by section 7 is rule 12(1)(a) [no jurisdiction]."

21. Therefore it would seem logical that the same reasoning applies to the other grounds in rule 12 cited above at (c)-(f) and (possibly also to 10 and 11 although I did not have to consider that today). I note that Judge Horne in his case management discussion also referred to his understanding that the decision would apply to the other parts of rule 12.

22. On the basis of having found that a rejection without a hearing under rule 12(2) is unlawful the solution according to Laing J lies in Tribunals dealing with such cases under rule 27.

23. My understanding of rule 27 was that it was a new provision introduced so that a Judge could challenge at an early point (for example, when considering a file on duty probably at the point a response form had been received) in a proactive way the basis of a claim which appeared to be, for example, unsustainable in law or in fact rather than having any connection with rule 12. This was with a view to weeding out early weak claims which at the time it was felt were unnecessarily taking up respondents' and tribunals' time.

24. In **Parry** the claimant's solicitors drafted a claim form and sent it to the Tribunal saying in box 8.2 "please see attached" but attached the details referring to a different case. When the matter was referred to a Judge on the basis that "it was in

a form that could not sensibly be responded to", an Employment Judge decided to accept it rather than reject it. The respondent applied for a reconsideration of that decision under rule 70 but this was refused on the grounds that the decision to accept the claimant was not a judgment within the meaning of rule 1(3)(b) as it did not finally determine the claim.

25. The EAT, although accepting that under the terms of rule 12(1)(b) and (2) the claim should have been rejected nevertheless dismissed the respondent's appeal on the basis that it was right the claim should proceed as there was no power to reject it.

26. The decision was based on, and I quote from Harvey's here:

> "The assumption that the rejection of a claim under SI 2013/1237 schedule 1 rule 12(2) comes within the purview of 'determination of proceedings' in the Employment Tribunals Act 1996 section 7(3A) and (3AA)."

27. Harvey's goes on to say that:

> It is, however, difficult with respect to see how the rejection of a claim in limine for compliance with the formal requirements for making it can be said to equate to the determination of the proceedings within the meaning of those subsections. If the claim is rejected there is no claim at all and there are no proceedings to be determined, whether with or without a hearing. If this is correct it follows that neither the permissive provisions of section 7(3A) nor the restricting provisions of section 7(3AA) apply to a rule 12(2) rejection at all, in which case there is no question of procedure contained in that paragraph being ultra vires to those subsections."

28. Further Harvey's states that:

> "It was acknowledged in **Parry** that there was power in the ETA 1996 section 7(3ZA)(a) to make regulations prescribing the form and contents of a claim for instituting proceedings and thus that there was a power to impose the requirements set out in rule 12(1). However, Laing J did not accept an argument that the power to make requirements implied a power to provide sanctions for non compliance stating that in any event rule 27 provided a mechanism for enforcing rule 12(1) requirements. It is submitted with respect that it would be strange if Parliament had not impliedly authorised the making of regulations to provide for the consequences of non compliance. If an essential requirement for making a claim has been lawfully imposed but has not been complied with the natural consequence is that the claim will not be accepted. It is doubtful whether it is necessary for the enabling power to spell this out expressly. If this is correct then the mechanism for dealing with rejections in rule 12(2), (2A) and (3) the procedure for enabling the claimant to apply for a reconsideration in rule 13 are properly intra vires section 7(3ZA)(a) of the ETA 1996. There would thus be no need to have recourse to rule 27 at all. Indeed rule 27 would not seem to be an appropriate vehicle for dealing with any of the grounds for rejection in rule 12(1) other than rule 12(1)(a). Rule 27 specifically sets out the procedure for dismissing a claim on the grounds on that Tribunal has no jurisdiction or the claim has no reasonable

> prospect of success. It is not designed to deal with the procedure for rejecting claims at the outset for non compliance with the formal requirements. The procedure for dealing with this is contained in rule 13 which affords the claimant the opportunity, albeit after rejection, to argue why the rejection was wrong, to rectify the defect and to request a hearing."

29. Harvey's goes on to say:

> "Notwithstanding this, however, it would seem that as long as the judgment in Parry stands Tribunals will have to adapt their procedures to ensure that claims are not rejected for non compliance with the formal requirements unless and until the claimant has had an opportunity to make representations and to attend a hearing."

Respondent's Submissions

30. The respondent submitted firstly that the decision to reject a claim was not a decision to end proceedings within the meaning of the ETA echoing some of the argument in Harvey's above. The proceedings had not started. Secondly, that the objection in **Parry** was that the decision was made on the papers. However, we were now having a hearing where the claimant could make any representations regarding rejection and the respondent regarding acceptance, and therefore the objection in **Parry** was disposed of. Finally, that my decision to reject for a minor error was, in the light of all the information now available, incorrect as it was clear that the Acas certificate did name the incorrect respondent and that could not be a minor error.

Claimant's Submissions

31. The claimant stated that she had not made an error but that ACAS had put down the name of the school rather than the name of the head teacher and that was not her fault and that she should not be held responsible for that. She reiterated that she wished to proceed against Mrs Martini and not against the school.

Conclusions

32. I have reconsidered my decision of 29 June to accept the claimant's claim on the basis that there was a minor error in her ACAS certificate. I revoke that decision and on revoking my decision I have decided to reject the claimant's claim. I make this decision on the following grounds:

(1) That in light of the claimant's clear and emphatic submissions that she only wishes to pursue a claim against Carla Martini and not against the school, St Barnabus and St Paul's Church of England School, the ACAS certificate which I considered on 29 June is in the name of the incorrect respondent. That is not a minor error as it may have been if there was a spelling error or if the claimant had simply put Carla Martini on the ET1 form in error alongside the name of the school, believing that there needed to be a named person or figurehead on the ET1 as I had originally assumed.

(2) That as a hearing has now taken place, albeit under regulation 70, where the claimant has had an opportunity to explain her full intentions,

the decision to reject has not been made "on the papers" and therefore is not caught by the **Parry** decision.

33. In addition, having quote Harvey in full above, the points made in that critique in respect of the **Parry** decision appear attractive. However, I am bound by the judgment of the EAT which has the effect of vitiating the whole of rule 12 save 12(1)(a). I cannot see how the part of rule 12 I am concerned with here – 12(1)(f) - can be distinguished from the part at issue in the **Parry** case. However as I have indicated above I am satisfied that by holding a hearing this judgment is **Parry** compliant.

Future Case Management

34. As I have now rejected the claimant's claim form may now challenge that decision under rule 13 which I have set out above. If so, I suggest any hearing required under rule 13 is held in conjunction with a hearing to decide whether as the claimant has now obtained a second ACAS certificate on 4 November her claim should be allowed to proceed in the light of the relevant time limits. A copy of the certificate has now been sent to the respondent and an indication that the claimant's defect has been corrected as of 4 November.

35. I have instructed the out of time issue to be listed. If the claimant makes any application under rule 13 that can be joined with the out of time issue and further Case Management Orders, including the clarification of the claimant's claims which is urgently needed, can take place at the same time, subject to the claimant's claim surviving the preliminary issues.

Employment Judge Feeney

14th March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

20 March 2017

FOR THE TRIBUNAL OFFICE