EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE FRANCES SPENCER

BETWEEN: **Mrs. A Pirie** **CLAIMANT**

AND

Unilever PLC

ON: **13th June 2017**

PRELIMINARY HEARING

Appearances

For the Claimant: Mr Lieper QC, counsel
For the Respondent: Ms Y Genn, counsel

JUDGMENT

The Judgment of the Tribunal is that Unilever de Centroamerica SA de CV and Unilever UK Central Resources Limited shall be joined as additional Respondents to these proceedings.

REASONS

These reasons are given at the request of the Respondent following oral reasons delivered in the Tribunal.

Background and Issue

1. By a claim presented on 27th January 2017 the Claimant named 3 Respondents namely Unilever de Centroamerica SA de CV (1) Unilever plc (2) and Unilever UK Central Resources Limited (3). Her claim was for unfair dismissal (sections 98 and 103A of the Employment Rights Act 1996) and detriment on the ground that she had made protected disclosures.

2. On 3rd February 2017 the claim against the 1st and 3rd Respondents was rejected on the basis that no ACAS early conciliation certificate had been provided in relation to them.

3. By a letter dated 9th February 2017, the Claimant's solicitors made 2 applications;

   a. that the decision to reject the claims against the 1st and 3rd Respondents be reconsidered; or alternatively
   b. that the claim against the 2nd Respondent be amended to join the 1st and 3rd Respondent as parties.

4. The Respondent resists that application. This was a preliminary hearing to determine it. Although Unilever de Centroamerica SA de CV and Unilever UK Central Resources Limited were not yet parties to the claim it is convenient to refer to them as the 1st and 3rd Respondents respectively and to Unilever plc as the 2nd Respondent.

5. It is common ground that the Claimant was employed by the 1st Respondent. In her particulars claim the Claimant says that she was employed by the 1st Respondent, was on assignment to the 2nd Respondent and that day to day control of her work was through the 3rd Respondent. Although the claim for unfair dismissal is made against the 2nd Respondent only, she wishes to claim against all 3 in respect of her detriment claim.

6. Notwithstanding the rejection of the claim against the 1st and 3rd Respondents, solicitors acting for the Respondents submitted Responses on behalf of all 3 Respondents although the Grounds of Resistance were identical.

Relevant statutory provisions

7. As from 6th April 2014 anyone wishing to issue proceedings in the Employment Tribunal is required to have contacted ACAS and to have obtained an ACAS early conciliation certificate. Section 18A of the Employment Tribunals Act 1996 and the schedule to the Employment Tribunals (Early Conciliation – Exemptions and Rules of Procedure) Regulations 2014 require a prospective Claimant to provide prescribed information to ACAS. This information includes the name and address of the prospective Respondent and can be provided either by telephoning ACAS and providing the information or including it in an early conciliation form.

8. Rule 4 of the EC Rules provide that if there is more than one prospective Respondent, the prospective Claimant must either present a separate early conciliation form in respect of each Respondent or, if contact has been made by telephone, must name each prospective Respondent. By Rule 5, and provided the prospective Claimant consents, ACAS will make

reasonable attempts to contact the prospective Respondents and (by Rule 6) endeavor to promote a settlement.

9. At the end of the period, or if ACAS concludes that no settlement is possible, ACAS will issue an EC certificate in respect of each prospective Respondent.

10. Rule 10 of the ET Rules of Procedure 2013 provides that the Tribunal must reject a claim of it does not contain an early conciliation number. Rule 12 provides a claim may be rejected if the name on the claim is not the same as the name on the early conciliation certificate, although a Judge may permit its acceptance if he or she considers that the Claimant made a minor error and it is not in the interests of justice to reject the claim

Submissions

11. Mr Lieper submits on behalf of the Claimant that when the Claimant referred her complaint to ACAS she used Unilever plc as the general name of her employer. It is the parent company and the name which appeared on her P 60s each year as her paying employer. She also gave details of a number of individuals who ACAS might wish to contact with regard to the matter. He submits that in her view they represented all three Respondents without distinction. No one responded on behalf of Unilever plc or any other company and there was no engagement with the EC process.

12. Mr Lieper submits that the tribunal should allow either a reconsideration of the original rejection or an amendment to join the two additional Respondents in accordance with the principles in *Selkent Bus Co. Ltd v Moore 1996 ICR 836.* The Tribunal had a broad discretion to grant leave to amend to add Respondents to be exercised in a manner "which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions." In particular the paramount consideration is the relative injustice and hardship involved in refusing or granting the amendment.

13. Mr Lieper refers to a number of cases to support his application for joinder or reconsideration.
    a. *Science Warehouse Ltd v Mills 2016 ICR 543* (in which the EAT held that an EC certificate is not necessary to amend an existing claim to include a new, but related, cause of action.)
    b. *Mist v Derby Community Health Services NHS Trust 2016 ICR 543,* in which the EAT held that there was no requirement for a Claimant who sought to add an additional Respondent to an existing claim to go through the EC procedure again in respect of that application. The decision as to whether to permit such an amendment fell within the tribunal's general case management powers under rule 29 of the Tribunal Rules. HHJ Eady QC was satisfied that this approach was consistent with rule 34, 'which specifically addresses the addition or substitution of parties in ET proceedings without

reference to any further EC requirements', and with the overriding objective.

c. *Drake International Systems Ltd and ors v Blue Arrow Ltd 2016 ICR 445, EAT*, Mr Justice Langstaff, held that no further EC procedure is required where a Claimant seeks to amend a claim to substitute one Respondent for another.

14. Ms Genn on behalf of the Respondent resists this application. She points out that the statutory framework provided by the Early Conciliation Regulations identifies mandatory information that is required to be provided by the Claimant to ACAS in order for the process to be compliant. She refers me to section 18A of the Employment Tribunals Act 1996 and to the EC Regulations above. The Regulations provide for the provision of mandatory information. The Claimant did not provide that Information. She says that the Claimant's application was in effect to seek a waiver from the statutory regime. To allow this application would be to render the statutory process completely nugatory. This was an attempt to sidestep the rules and there should be no reconsideration or joinder.

15. Ms Genn submits that this case is different to the authorities relied on by Mr Lieper. All of those cases involved after the event knowledge. In Drake the Claimant company did not know the identity of the relevant Respondents at the time it issued the claim. In Mist the Claimant incorrectly named the Respondent and had made a minor error. Science Warehouse involved the later discovery of a cause of action. These cases were wholly different to the case before me. In this case the Claimant was represented throughout. She knew who her employer was and who the relevant parties were. She knew the ambit of her complaint. She had failed to identify the names and addresses of the other 2 Respondents as required by the Regulations.

16. The purpose of the early conciliation requirement was to encourage conciliation. To allow an application for reconsideration in a situation like this would simply be circumventing the rules. She submitted that the Claimant had chosen not to provide information about the 1st and 3rd Respondents to ACAS. She had given no adequate reasons to explain why the 1st and 3rd Respondents were not identified at the ACAS stage. She had not explained why she should have chosen to identify the 2nd Respondent as encompassing all 3 Respondents when she knew that they all had separate roles and were distinct legal entities.

17. Ms Genn further submits that if the Respondent's primary arguments against a reconsideration are not accepted Employment Tribunal should not exercise its discretion to join the 1st and 3rd Respondents. The Claimant had provided no sufficiently compelling reason to explain why they were not included as part of the early notification to ACAS as set out above. Joinder did not satisfy the requirements of relevance, reason, justice and fairness. It would not be fair to allow the Claimant to benefit from her non-compliance. The additional Respondents would be significantly prejudiced.

Conclusions

18. The Employment Tribunal has power under 13(1) of the ET Rules of Procedure to reconsider a rejection of a claim on the basis that (a) the decision to reject it was wrong or (b) the notified defect can be rectified. The former does not apply as the rejection was correct at the time. It is not wholly clear in what circumstances (b) is intended to operate. Although in my view it could cover the circumstances in this case, on balance, I consider that this application is better considered as an application for joinder.

19. I have power under Rule 34 of the ET Rules of Procedure to add new parties "if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the tribunal which it is in the interests of justice to have determined in the proceedings". As both parties submit, the exercise of my discretion whether to allow such a joinder must satisfy the requirements of relevance, fairness, and justice, in accordance with the overriding objective. In Drake the EAT found that a party could be joined or substituted even if there had been no early conciliation process in respect of it. As referred to in Drake, however, if there was any sustained suggestion of abuse of the procedure the tribunal could be expected to decline the amendment.

20. I do not accept that by allowing joinder I am permitting an abuse of process. The main thrust of Ms Genn's argument is that to allow joinder is to allow a well-informed litigant, represented by reputable and able solicitors, to ignore the requirements of the Regulations. As set out above she distinguishes the cases referred to on the basis that they involved "after the event knowledge". She says that the Claimant had a choice and to let her in would be to permit wholesale disregard of the Regulations.

21. I do not accept that. Ms Genn was unable to identify any advantage that would accrue to the Claimant by failing to take the simple step of giving the additional Respondents names and addresses to ACAS. I cannot think what advantage there might be, especially as none of the parties are in any event bound to engage in the process. (I suspect that this was an error, though no such explanation has been given.) I certainly do not think it is a course of action that would be regarded as some kind of loophole by prospective Claimants.

22. There are clearly justiciable issues between the Claimant and the 1st and 3rd Respondents which would permit joinder. In Science Mills and Drake the principle has been established that early conciliation is not a prerequisite of an amendment application. In considering the balance of hardship and justice, the balance falls squarely on the side of the Claimant. Not to allow joinder is to deprive her of a significant part of her claim, including her claim for unfair dismissal against the 1st Respondent and her claim for detriment against the third Respondent who she alleges

had day to day control of her work. To deny the Claimant joinder as she request is to deny her access to justice in respect of those claims.

23. On the other hand, the Respondents were not able to identify any particular prejudice to them if the application were allowed. Although there is some prejudice in being a party to a claim, that does not weigh heavily in the balance if the claim is properly against them. That is all the more so in a case where the additional Respondents are part of the same group of companies as the existing Respondent. It cannot realistically be said that the 1st and 3rd Respondents were taken by surprise by the Claim form in circumstances where the parent company, the 2nd Respondent, had been contacted and notified.

24. The purpose of the early conciliation proceedings is to encourage settlement. Unilever plc chose not to engage in the process. There has been no suggestion that had the 1st and 3rd Respondents been named in the ACAS early conciliation they would have engaged in the process. The interests of all 3 Respondents are closely, if not wholly, aligned. It is apparent that they will be cooperating in their joint approach to these proceedings as is demonstrated by the identical Grounds of Resistance.

25. In her written submissions Ms Genn said that there would be prejudice to the additional Respondents and in particular to the 1st Respondent, the Claimant's former employer who employs staff around the globe. "It would impose a disproportionate burden on the 1st Respondent now to be required to participate in these proceedings when to do so would require marshalling, proofing and calling witnesses from Buenos Aires, Mexico City, San Juan, Puerto Rica and Mumbai". However before me today she had no instructions as to why these additional witnesses would need to be called, who they were or why they would need to be called additionally. It is unclear why those additional witnesses would not need to be called as part of the hearing of the existing claim against the 2nd Respondent. Mr Lieper says that the 2nd Respondent had already said that it would be calling witnesses from those jurisdictions in the defence of the claim against it and that was not disputed.

26. Other than the fact of being a party to the claim Ms Genn has been unable to identify any clear prejudice to the proposed Respondents.

27. In exercising its discretion the Tribunal should avoid unnecessary formality and avoid technical legal arguments. This is precisely what Ms Genn invites to do. In balancing the relative hardship and injustice involved in refusing or allowing this application, the balance clearly comes down in favour of the Claimant.

28. A separate case management order has been made in respect of the management of the claim to a hearing.

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Employment Judge Frances Spencer
23rd June 2017