Appeal No. UKEAT/0305/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 6 June 2017
Judgment handed down on 13 September 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR V C DE MOTA — APPELLANT

(1) ADR NETWORK
(2) THE CO-OPERATIVE GROUP LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MATTHEW WINN-SMITH (of Counsel) Instructed by: Chipatiso Associates LLP Suite 102 Queens Way House 275-285 High Street London E15 2TF
For the First Respondent	MR PAUL JEFFCOATE (Representative) Chartergate Legal Services Ltd Challenge House Sherwood Drive Bletchley MK6 6DP
For the Second Respondent	MR ANDREW MacPHAIL (of Counsel) Instructed by: Analysis Legal LLP Davenport House 191c Moss Lane Bramhall, Stockport Cheshire SK7 1BA

SUMMARY

JURISDICTIONAL POINTS

Early conciliation provisions

The Employment Judge erred in law in:

(1) Examining the process prior to the grant of an early conciliation certificate in order to assess whether the Claimant was barred from instituting proceedings by section 18A(8) of the **Employment Tribunals Act 1996**.

(2) Holding that it was a mandatory requirement of an early conciliation certificate that it must name only one Respondent, such that the Claimant was barred from instituting proceedings by section 18A(8) of the **Employment Tribunals Act 1996**.

Science Warehouse Ltd v Mills [2016] ICR 252; **Drake International Systems Ltd v Blue Arrow Ltd** [2016] ICR 445; **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543 and **Compass Group UK & Ireland Ltd v Morgan** [2017] ICR 73 considered and applied.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Adilson Vilhete Claro de Mota ("the Claimant") against a Judgment of the Employment Tribunal sitting at the East London Hearing Centre (Employment Judge O'Brien sitting alone) dated 23 June 2016. It concerns the early conciliation provisions found within the **Employment Tribunals Act 1996** and subordinate legislation. By his Judgment the Employment Judge struck out the Claimant's claims because "the claimant has not satisfied the provisions of section 18A and did not, therefore, have standing to bring the instant claim".

2. There were two Respondents to the Claimant's ET1 claim form. The first was entitled "ADR Network". This is a trading name for a company whose legal name is PPF Group Limited. It is a supplier of professional LGV drivers. The second was entitled "The Co-operative Group". This again is a trading name. The correct legal name is "Co-operative Group Limited". They are the Respondents to this appeal. I will for convenience call them "ADR" and "the Co-op".

The Background Facts

3. The Claimant is Portugese. English is not his first language. He is an LGV driver. He worked from 2012 until 2015 from a depot of the Co-op in West Thurrock.

4. As pleaded in his ET1 claim form, the Claimant's case is that he was employed by, or contracted to work for, ADR; and ADR assigned him to work for the Co-op. He says that on 4 November 2015 he was "suspended" by the Co-op following a complaint from someone at a store where he had delivered goods earlier that day. He says he wrote to ADR which replied by

email that the Co-op had the right to instruct ADR not to supply the Claimant to them for work. He started work elsewhere on 22 November 2015. Later in the claim form he appears to say that he was employed by both ADR and the Co-op. He has claimed unfair dismissal, breach of contract, unlawful deduction from wages, holiday pay and notice pay.

5. I should note that ADR and the Co-op say the position is rather different. They say that the Claimant set up his own company in the UK. It provided his services to ADR; ADR paid the Claimant's company for his services. ADR in turn provided the Claimant's services to the Co-op. If this is so the Claimant's claims may face substantial difficulty; but the matter has never been investigated because the Employment Judge found that he had not complied with section 18A.

6. A prospective claimant may initiate early conciliation by presenting a completed early conciliation form to ACAS or by telephone. The Claimant chose the former option. He presented it by submitting the online form on the ACAS web site. He sat beside a friend while his friend completed it for him. There is a box entitled "The relevant employer, person or organisation". His friend typed "ADR Network and The Co-operative Group". He then typed the West Thurrock address which is both the depot of the Co-op and a business address of ADR. The form was presented on 5 December 2015.

7. The ACAS web site contains guidance about the completion of early conciliation forms on a page known as the Individual Claimant's page. The form itself requires a prospective claimant to tick a box signifying that he has read the "important information" on that page. The information includes the following.

> **"If you want to make a claim against more than one respondent (employer, individual or organisation) you must complete a separate form for each one even if it is all part of the same**

> **matter. Forms that contain more than one respondent will be rejected, causing a delay in your notification."**

This passage appears within a page entitled "Information for Individuals" which covers a number of subjects and runs to some 1300 words. It appears under a heading "Important note about details on the notification form".

8. On receipt of the form ACAS sent an acknowledgment saying that in order to progress the notification it needed some details. It asked the Claimant to contact it on a given telephone number. The Claimant did so.

9. ACAS did not reject the form. On 21 December 2015 ACAS issued an early conciliation certificate. It identified the "Prospective Respondent" as "ADR Network and The Co-operative Group", giving the West Thurrock address. It said:

> **"This Certificate is to confirm that the prospective claimant has complied with the requirement under ETA 1996 s18A to contact ACAS before instituting proceedings in the Employment Tribunal.**
>
> **Please keep this Certificate securely as you will need to quote the reference number (exactly as it appears above) in any Employment Tribunal application concerning this matter."**

10. By 4 February 2016 the Claimant was represented by a solicitor - Mr Emezie, of Chipatiso Associates LLP. The ET1 claim form was completed naming two separate Respondents in the way I have already described. It gave the same early conciliation certificate number for both Respondents. The claims appear to be made jointly and severally against both Respondents.

11. The claim was accepted by the ET. In their ET3 response forms ADR and the Co-op both took the point that there was a single early conciliation certificate for two separate entities and questioned whether the ET had jurisdiction to entertain the claim. They also denied that the

Claimant was employed by them or worked personally for them; they said he was employed by a private limited company which supplied his services.

The Relevant Statutory Provisions

12. Section 18A of the **Employment Tribunals Act 1996** introduced, with effect from 6 April 2014, a requirement in most cases that a prospective claimant should contact ACAS before instituting Employment Tribunal proceedings. The proceedings which the Claimant brought are relevant proceedings for the purposes of this requirement: see section 18(1). There are exceptions to the requirement which are not material to this appeal.

13. The essential outline of the scheme is found in section 18A(1)-(4):

> **"(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. …**
>
> **(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.**
>
> **(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.**
>
> **(4) If -**
>
> > **(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or**
> >
> > **(b) the prescribed period expires without a settlement having been reached,**
>
> **the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant."**

14. Section 18(A)(8) then provides as follows:

> **"(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)."**

15. The information which must be provided to ACAS and the manner in which it must be provided are laid down by the **Employment Tribunals (Early Conciliation: Exemption and**

Rules of Procedure) Regulations 2014. The Rules of Procedure are found in the Schedule to the Regulations.

16. Rule 1 sets out what a prospective claimant must do to satisfy the requirement for early conciliation. It provides as follows:

> ***"1. Satisfying the requirement for early conciliation***
>
> **To satisfy the requirement for early conciliation, a prospective claimant must -**
>
> **(a) present a completed early conciliation form to ACAS in accordance with rule 2; or**
>
> **(b) telephone ACAS in accordance with rule 3.**
>
> ***2.* (1) An early conciliation form which is presented to ACAS must be -**
>
> **(a) submitted using the online form on the ACAS website; or**
>
> **(b) sent by post to the ACAS address set out on the early conciliation form.**
>
> **(2) An early conciliation form must contain -**
>
> **(a) the prospective claimant's name and address; and**
>
> **(b) the prospective respondent's name and address.**
>
> **(3) ACAS may reject a form that does not contain the information specified in paragraph (2) or may contact the prospective claimant to obtain any missing information.**
>
> **(4) If ACAS rejects a form under paragraph (3), it must return the form to the prospective claimant.**
>
> ***3.* (1) A prospective claimant telephoning ACAS for early conciliation must call the telephone number set out on the early conciliation form and tell ACAS -**
>
> **(a) the prospective claimant's name and address; and**
>
> **(b) the prospective respondent's name and address.**
>
> **(2) ACAS must insert the information provided under paragraph (1) on to an early conciliation form.**
>
> ***4.* If there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form under rule 2 in respect of each respondent or, in the case of a telephone call made under rule 3, must name each prospective respondent."**

17. Rule 7 makes provision for an early conciliation certificate to be provided by ACAS; and Rule 8 for the contents of the certificate. Rule 8 reads:

> ***"8.* An early conciliation certificate must contain -**
>
> **(a) the name and address of the prospective claimant;**
>
> **(b) the name and address of the prospective respondent;**

> **(c) the date of receipt by ACAS of the early conciliation form presented in accordance with rule 2 or the date that the prospective claimant telephoned ACAS in accordance with rule 3;**
>
> **(d) the unique reference number given by ACAS to the early conciliation certificate; and**
>
> **(e) the date of issue of the certificate, which will be the date that the certificate is sent by ACAS, and a statement indicating the method by which the certificate is to be sent."**

18. The standard form of the ET1 requires the claimant to give, in respect of each respondent, an early conciliation certificate number (or an explanation for not having one). If no early conciliation certificate number (or explanation) is given, the claim will be rejected under Rule 10 of the **Employment Tribunal Rules 2013**.

19. If an early conciliation number is given, but the name of the claimant or respondent in the ET1 is not the same as the name of the prospective claimant or respondent on the early conciliation certificate, the Employment Judge may reject it unless he considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim: see Rule 12(1)(e)-(f) and Rule 12(2A) of the **Employment Tribunal Rules 2013**.

The Employment Judge's Reasons

20. The question of jurisdiction was considered at a Preliminary Hearing before Employment Judge O'Brien on 27 May 2016. After making findings of fact on which I have already drawn he spelt out the relevant legal provisions and referred to **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543 at paragraph 54. His conclusions indicate both what was argued before him and how he reached his decision. I will set them out in full:

> **"21. The early conciliation form named neither the first respondent nor the second respondent but rather a non-existent entity whose name was the conjunction of the names of the first and second respondent. It was not argued by the claimant that the form could reasonably be**

interpreted as notification of early conciliation against either one of the two [respondents] individually, nor could it sensibly be so argued; deciding which one of the respondents had been identified would involve an arbitrary choice between the two.

22. Had the claimant identified either one of the [respondents] individually using sufficient clarity to facilitate early conciliation, albeit not using its precise legal name, I would have concluded in accordance with *Mist* that early conciliation had been properly commenced against that respondent and that the subsequent early conciliation certificate was sufficient in order to bring a claim. However, the claim against the other respondent would necessarily have been struck out.

23. As it is, this case can be distinguished from *Mist*. The claimant argued that the early conciliation form and therefore the early conciliation certificate, was effective against both respondents. However, pursuant to rule 4, it is necessary to submit separate forms in respect of separate respondents. Therefore, the claimant failed contrary to s18A(1) of the 1996 Act to provide the prescribed information in the prescribed manner.

24. In any event, rule 8 provides that an early conciliation certificate contains the name of the prospective respondent (singular), with 'respondent' defined 'the person (singular) against whom proceedings are brought in the Employment Tribunal'. Therefore, it follows that separate early conciliation certificates are necessary for separate respondents. Consequently, the early conciliation certificate upon which the claimant relies was not issued in the prescribed manner, as required by s18A(4), and the claimant is prohibited pursuant to s18A(8) from issuing [proceedings].

25. For these reasons, the claimant has not satisfied the provisions of s18A and did not, therefore, have standing to bring the instant claim against either respondent. On that basis, I strike the claim out against both respondents."

Submissions

21. On behalf of the Claimant Mr Matthew Winn-Smith submitted that this case was an example of satellite litigation of a kind which was deprecated by Langstaff P in **Drake International Systems Ltd v Blue Arrow Ltd** [2016] ICR 445 at paragraph 35. He says that a highly technical point is being taken against a meagrely resourced non-native English speaker who was unrepresented when he contacted ACAS.

22. Firstly, he submitted that the certificate issued by ACAS was conclusive in terms of the Claimant's compliance with his section 18A obligations. He relied on **Mist** at paragraphs 55 to 56 and 62. He pointed out that ACAS was not bound to accept the early conciliation form; it could have rejected it; or corrected it; or regarded the error as non-material and processed the form. It took the latter course; a certificate was issued under section 18A; and that was what the Claimant required in order to bring proceedings. It was no part of the task of the Employment Tribunal to go behind the issuing of the certificate. He relied on the reasoning of

A Employment Judge Harding in **Nunan v TNT Express Ltd** ET case number 1305120/2014 to this effect. Any discrepancy between the name on the certificate and the name on the form was a matter for an Employment Judge to consider under Rule 12. The ET1 had not been rejected under Rule 12. Any error about the name was minor and immaterial. The certificate was a B certificate issued "in the prescribed manner". If necessary he relied on section 6 of the **Interpretation Act** for the proposition that words in the singular include the plural unless the contrary is shown. It was plain that the certificate named two Respondents.

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23. Secondly, by way of fallback position, he submitted that even if two forms ought to have been completed, or two certificates provided, it would not follow that the certificate was D of no effect. The certificate would have effect as regards the lead name; and an application for permission to amend could then be made as regards the second name, in accordance with **Drake**.

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24. On behalf of ADR and the Co-op, Mr Jeffcoate and Mr MacPhail supported the reasoning of the Employment Judge. Their submissions overlapped; and I think I can summarise them as follows.

F

25. Firstly, the Employment Judge found, and was correct to find, that the Claimant did not provide the "prescribed information". He found that the information given named a "non-G existent entity". That was a conclusion he was entitled to reach.

26. Secondly, in any event, the Employment Judge was plainly correct to find that the Claimant did not provide information in the prescribed manner, contrary to section 18A(1). H Rule 4 required a separate form in respect of each prospective respondent. The word "must"

A could not be ignored. The Employment Judge was entitled to distinguish **Mist**. The present point was not an issue in **Mist**.

B 27. Thirdly, the certificate relied on by the Claimant was not "a certificate under subsection (4)" as required by section 18A(8), because Rule 8, taken with Rule 4, must require a separate certificate for each separate respondent; for the purposes of the **Interpretation Act**, it is shown that the singular is not to include the plural. It necessarily followed that the Claimant had no C valid certificate and was barred by section 18A(8).

28. Fourthly, the Claimant did not argue that the certificate was valid in respect of one or D other of the Respondents; and no application for amendment was made.

29. Fifthly, while the Claimant was a litigant in person at the time of the notification to E ACAS, he was legally represented at the time when the ET1 claim form was lodged. In any event his English was not so poor that an interpreter was required.

Discussion and Conclusions

F 30. In addition to **Mist** and **Drake** I was also taken to **Science Warehouse Ltd v Mills** [2016] ICR 252 and **Compass Group UK & Ireland Ltd v Morgan** [2017] ICR 73. These are all recent cases in which the EAT has had to consider aspects of the early conciliation G provisions. They illustrate two important points about those provisions.

31. Firstly, the purpose of the early conciliation provisions is limited. It is not to require or H enforce conciliation; it is simply to build in a structured opportunity for conciliation to be considered, in the first place by a prospective claimant and then if the prospective claimant

consents by the prospective respondent. In **Morgan** Simler P, building on what Her Honour Judge Eady QC and Langstaff J had said in earlier cases, summarised the position as follows:

> **"18. We, like the appeal tribunal in *Science Warehouse* … and *Drake* … consider it significant that Parliament used the word "matter" in section 18A(1) rather than "cause of action" or "claim" and that the prescribed information required to be provided by a prospective claimant to ACAS to fulfil the obligations under the scheme is so very limited. The word "matter" is broad and, as Langstaff J observed, may encompass not just the precise facts of a claim that bring it within a cause of action but also other events at different times and/or dates and/or involving different people. There is no obligation, as we have already indicated, when notifying ACAS to identify the matter itself nor the nature of any actual or prospective dispute, still less to provide the factual details or any background to that dispute. The only information required to be provided by a prospective claimant consists of names and addresses of the prospective parties.**
>
> **19. It is also significant, in our judgment, that the process of conciliation is an entirely voluntary and confidential one. Once the prospective claimant has provided ACAS with the prescribed information, there is no requirement whatever for him or her to identify to ACAS, or indeed the prospective respondent, the subject matter or issues in dispute and no obligation whatever to enter into any discussions, still less meaningful ones, with the prospective respondent. Although it is hoped that this will follow, there is no obligation to do so. The prescribed information need not even be complete and correct. What the process does (as Judge Eady QC explained) is to build in a structured opportunity for parties to take advantage of ACAS conciliation if they choose to do so before a matter reaches litigation."**

32. Secondly, it is no part of the purpose of the early conciliation provisions to encourage satellite litigation. Echoing Her Honour Judge Eady QC in **Mist** (paragraph 53), Langstaff P in **Drake** said:

> **"35. It is a happy consequence of my reasoning that the appeal is to be dismissed: if it were not so, there could be a real risk that satellite litigation in respect of the provisions of early consideration might proliferate, with the same stultifying effect that litigation under the Employment Act 2002 had in respect of the provisions of the dispute resolution procedures for which it provided. Since it appears to have been part of Parliament's intention in enacting the Employment Tribunals Act 1996, sections 18A, 18B and 18C, in the terms in which they were enacted, and the Rules under them, to avoid such a position (see, for instance, the broad reference to "matter", and the absence of requiring any particular detail of any particular "matter" to be specified) and to avoid formalities fettering a fast and fair process of justice, I am confident that the view I have reached better serves its purpose than would the adoption of the approach for which Ms Slarks contends."**

33. Section 18A(8) focuses upon the existence of a certificate; the prohibition on presenting relevant proceedings applies only if the prospective claimant does not have a certificate under subsection (4). It is to my mind clear that Parliament does not intend that the process leading up to the certificate should be subject to criticism and examination by the parties or the Employment Tribunal.

34. It is, I think, sufficient to illustrate why this is the case with two reasons.

35. Firstly, as Her Honour Judge Eady QC pointed out in **Mist**, if the prospective claimant does not provide the prescribed information in the prescribed manner, the Rules make it plain that ACAS is not bound to reject the claim. It may contact the claimant to obtain the missing information and take the process forward. It may therefore eventually issue a certificate without the claimant ever having completed the online form correctly. She said (paragraphs 55 to 56):

> **"55. … Indeed, the absence of the relevant information does not even result in an immediate rejection of the prospective claimant's notification: ACAS *may* reject such a notification (Early Conciliation Rules, rule 2(3)), or it *may* contact the prospective claimant to obtain any missing information. That would suggest that, if ACAS considers it has sufficient to permit it to make contact with the prospective respondent (should the claimant be amenable to that), it may equally choose not to reject the notification simply because there is a non-material error in providing the prospective respondent's name and address.**
>
> **56. … On the face of the early conciliation certificate, the information provided to ACAS was sufficient for it to make contact with the first respondent. In those circumstances, I consider that the employment tribunal was entitled to treat the early conciliation certificate as conclusive in terms of the claimant's compliance with her section 18A obligations. …"**

36. Secondly, if it was open to the parties or the Employment Tribunal to go behind the certificate, it is difficult to see why it should only be in respect of Rule 1. There are also Rules which require ACAS during the early conciliation process to make "reasonable attempts" to contact the prospective claimant and (if the claimant consents) the prospective respondent. It is really inconceivable that Parliament intended the parties to be able to mount any challenge in the subsequent proceedings based on these Rules. For example, in **Nunan** the respondent sought to challenge an early conciliation certificate on the basis that ACAS had granted an extension of time unlawfully; the challenge was to my mind correctly rejected by Employment Judge Harding.

37. In this case the Employment Judge looked behind the certificate and found that the Claimant failed to provide the prescribed information in the prescribed manner on the notification form: see paragraphs 21 to 23. That was an error of law. Section 18A requires the focus to be on the early conciliation certificate.

38. The Employment Judge also found, however, that the early conciliation certificate was invalid because "separate early conciliation certificates are necessary for separate respondents" (paragraph 24).

39. At this point in his reasoning the Employment Judge to my mind correctly recognised that the early conciliation certificate named two parties. There may be cases where that matter is capable of serious dispute; but this is not one of them. One of the two parties is a household name. The earlier statement of the Employment Judge that the early conciliation form named a "non-existent entity" cannot be reconciled with his reasoning in paragraph 24 which to my mind accords with the reality of the case.

40. I would add, however, that if the Employment Judge had considered that the certificate named only one entity, he could not then have doubted the validity of the certificate as he did. There would still have been a difference between the name on the certificate and the names on the ET1 claim form, which might have led to rejection under Rule 12, but it would not necessarily have led to rejection - see Rule 12(2A), explained recently by Kerr J in **Chard v Trowbridge Office Cleaning Services Ltd** UKEAT/0254/16/DM at paragraphs 62 to 63 and 67 to 68, which are a valuable guide to the correct approach to Rule 12(2A). So if it had been correct that only one name was on the certificate, the Employment Judge would have been wrong to hold the certificate invalid.

41. However as I have said, the Employment Judge at this point correctly recognised that there were really two names on the certificate. Was he then correct to say that ACAS had issued an unlawful certificate (which is what his reasoning amounts to)? In my judgment he was not correct.

42. Rule 4 of the **Early Conciliation Rules of Procedure** applies to the early conciliation form. It is in mandatory terms. No doubt Rule 4 like Rules 2 and 3 (also in mandatory terms) are concerned with good order and administration during the early conciliation process. ACAS will have a duty, if the claimant agrees, to contact each respondent; and it is easy to see why it may be important to record and deal with each respondent individually. But it is important not to read too much into this mandatory requirement: Rule 2 is also mandatory, but as we have seen it does not mean that the ACAS officer is bound to reject the form.

43. Rule 4 does not apply to the early conciliation certificate. There is no similar mandatory requirement for that certificate. No doubt a certificate will as a general rule only contain one name and address; indeed if the addresses or relevant dates were different it might be administratively difficult to issue one certificate. In this case however the address (agreed to be a valid address for both Respondents) and the dates were the same. I would not be surprised if the issuing of a single certificate was an error on the part of ACAS; but that is not the same as saying that it was an unlawful certificate. I do not think it was.

44. I see no reason to imply into the **Early Conciliation Rules of Procedure** a mandatory requirement relating to the early conciliation certificate which is not found in the Rules, especially where the effect would be to bar access to the legal system for a litigant based on a technicality. It is one thing to impose a requirement for good order; another thing altogether to

elevate it to such a height that it bars access to the courts. I have explained the purpose of the early conciliation provisions. Nothing in that purpose suggests that it was the intention of Parliament to impose a jurisdictional requirement that the early conciliation certificate should relate only to one respondent. To my mind the ACAS certificate in this case was a valid certificate for the purposes of section 18A(8) even though it named two parties. Accordingly the appeal will be allowed.

45. I should add that although Mr Jeffcoate and Mr MacPhail argued that the grounds of appeal were not wide enough to take this point, I have no doubt that they were: see ground one.

46. In view of my conclusions on Mr Winn-Smith's primary point, I do not need to address his secondary argument to the effect that the Employment Tribunal ought to have found that the certificate was valid as regards the lead Respondent.

47. The appeal will be allowed and the matter remitted to the Employment Tribunal to continue the proceedings.