EMPLOYMENT TRIBUNALS

Claimant: Mr P Kirwan

Respondent: QED Scaffolding

HELD AT: Manchester **ON:** 8 August 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr Ball, lay representative
Respondent: Mr Lassey, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that the issues of :

1. The claimant's application for reconsideration of the rejection of his claims, and

2. Amendment his claim form so that there is at section 2.3 deletion of the tick box "no", and insertion of an ACAS early conciliation certificate number R107852/17/17 ; and

3. Whether, if his claims can proceed, they are out of time, and, if so, whether the time for their presentation should be extended

will be considered in a further preliminary hearing for one day listed at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** on **5 October 2017** commencing at **10.00am** before any Employment Judge.

REASONS

1. The Tribunal this morning has been listed to consider a preliminary hearing in relation to a claim presented by the claimant, Mr Kirwan, received by the Tribunal on 18 April 2017. In that claim he seeks to claim for unfair dismissal and disability

discrimination primarily; there are some other claims as well, but those are his two main claims, arising out of the termination of his employment on 9 December 2016.

2. The claim form was received by the Tribunal. By that I mean "effectively" received by the Tribunal, on 18 April 2017, and at box 2.3 of the claim form as received by the Tribunal, this section has been completed by the claimant or on his behalf, in this way. This is a section which deals with the compulsory ACAS early conciliation procedure and has a number of tick boxes, the first of which at 2.3 asks the question "*Do you have an ACAS early conciliation certificate number?"*, where the box "no" has been ticked, and the box beneath it for any certificate number is consequently blank. In relation to the question that is then asked *"If No, why don't you have this number?"* the third of the four boxes there has been ticked, and the exemption that was sought is in the terms that *"My employer has already been in touch with ACAS"*.

3. Having received that claim form the claimant, the tribunal initially accepted it and decided to await the response. The response was duly filed on 25 May 2017 in which this point was not expressly addressed, albeit at paragraph 23 there was a pleading that the respondent "did not receive any further correspondence from the claimant other than receiving the ET1 claim form", and made reference to an appeal that had not at that time taken place. In relation to the position as to early conciliation nothing more was said about that. The point was, however, made in the response that the claimant's claims appeared to be out of time, and it is for all those reasons that the Tribunal listed this hearing.

4. The first issue to be considered in this hearing was whether the Tribunal can consider the claims at all, on the basis that the claimant had not put any ACAS early conciliation certificate number on the claim form; secondly, if the claimant had presented the claim effectively, whether it , or any part of it, was out of time, and if so whether the Tribunal could consider it on that basis, and then to make any further Case Management Orders.

5. The claimant this morning has been represented by what is , in effect his father-in-law, certainly the father of his partner, Ms Ball, and indeed she too has spoken on his behalf. In answer to the Tribunal's initial enquiries about the completion of box 2.3 and the position in relation to early conciliation, documents were produced and somewhat surprisingly perhaps, and very much a surprise perhaps to counsel for the respondent, an early conciliation certificate has been produced. That is dated 1 March 2017, the claimant having approached ACAS on 29 January 2017 . It has the appropriate number and is a valid early conciliation certificate.

6. Consequently, the completion of the claim form as received by the Tribunal with the boxes completed at 2.3 of that form that I have just referred to was clearly inaccurate, and had the claimant put in that claim form the answer "yes" and then gone on to give the early conciliation certificate number, then the first part of the matters to be considered today would not arise. The claim would have been accepted without question and we would have moved on to consider the time limit points. But the position at the moment is that the Tribunal has a claim form in which there is no early conciliation number, and indeed an assertion, which is now

accepted to be incorrect by the claimant, that an exemption applied that the respondent had been to ACAS before he got there: it seems the opposite is the case. He made the approach, and indeed obtained the early conciliation certificate, but the form of claim received by the Tribunal, of course, is defective in that way because it does not contain an early conciliation certificate and the pleaded exemption did not apply.

7. The question then is: what happens to the claim in these circumstances? The respondent's submission is a quite straightforward and simple one, which is that the Tribunal must reject it. The basis upon which that submission is made is that that is the effect of rule 12 of the 2013 Rules of Procedure which deals with the early conciliation requirements in a claim form. These are mandatory and the provisions of rule 12 provide when a Tribunal shall reject a claim form for what are termed "substantive defects". There are a number of potential substantive defects, not all of which relate to early conciliation, but at 12(1)(d) one of the substantive defects is identified as being where a claim is one which institutes relevant proceedings, and 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. That is the situation here because Mr Kirwan's form stated that the "my employer has contacted ACAS already" exemption applied, and it is clearly the case that it did not.

8. Equally in relation to the number at 12(1)(e) there is another substantive defect if the claim is one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the prospective claimant on the early conciliation certificate to which the early conciliation number relates. That, of course, presupposes that there will be an early conciliation number and so potentially there is an issue in relation to that as well, because of course there is not one there. So in relation to that and indeed (1)(c) where again the number is required, these are significant substantive defects, submits the respondent, and they are not of the nature that are caught, in relation to (c) and (d) in particular, by the provisions of rule 12(2) which do provide that the Tribunal can accept a claim if the error is a minor one in relation to the name and address, and it would not be in the interests of justice to reject the claim. That exclusion which often is used where there is a slight difference between the name of the respondent, say, on the early conciliation form and on the claim form. That is often one that is used and is a minor error, but that discretionary exclusion of the effects of the rule does not apply in relation to (c) and (d) and consequently, submits Mr Lassey, if the Tribunal finds, as he says it must, that the claim form has that substantive defect, because it claimed an exemption which did not apply, and also did not have the relevant early conciliation number when in fact there had been an early conciliation certificate, in those circumstances the Tribunal has no alternative but to reject the claim.

9. In support of that Mr Lassey has provided the Tribunal with a judgment of the Employment Appeal Tribunal in the case of ***Cromwell v Cullen UKEATPAS/0046/14/SM***, a judgment of the then President of the EAT, Mr Justice Langstaff, on 20 March 2015, where a claim form had been rejected because the claimant indicated that her claim was exempt from early conciliation but in fact none of the exemptions applied to her claim. This was a case where basically the claimant had allegedly suffered sexual harassment and could not bring herself to contemplate any form of conciliation with her former employer, and so when she filled in the claim

form she indicated that she was exempt, but in fact the proceedings that she sought to bring were not exempt. Consequently she should have obtained an early conciliation certificate, so in terms of the similarities of the two cases, of course, they are very much the same because in this case too there was an assertion of an exemption which did not in fact apply.

10. As a result of that defect her claim too was struck out, and she appealed to the Employment Appeal Tribunal where she was represented by counsel who sought to persuade the Employment Appeal Tribunal that it could in effect "get round" this defect and allow her claim to proceed. The judgment recites the relevant law, and in particular rule 12, and considers the argument that was advanced by counsel in that case that it might be possible to apply rule 6 of the Employment Tribunal Rules. This is a provision which effectively provides that a failure to comply with provisions of the Rules did not of itself render any proceedings void, and that argument was deployed to try to get round what would otherwise be the effects of rule 12.

11. Mr Justice Langstaff, however, rejected that argument and said that rule 6 could not be used in this way. The requirements of rule 12 were mandatory, and in these circumstances the Employment Judge had no choice but to follow the rule and consequently with that type of defect there was no discretion, and the claim was rightly rejected, albeit he expressed sympathy for the claimant in those circumstances.

12. A similar result occurred in a case called ***Sterling v United Learning Trust UKEAT/0439/14/DM,*** again a decision of the Employment Appeal Tribunal under Mr Justice Langstaff, where again the issue arose as to the rejection of a claim when the claimant had not included a complete early conciliation certificate number on the claim form. The relevant part of the judgment relates really to the consequences of that for the claim and what the position of the Employment Judge would be when presented with a claim in that manner, and he basically concluded in the course of his judgment that again once that was the position the Employment Judge had no choice but to reject the claim. This is particularly harsh, it was considered, because in that case the claimant had originally put a number on the claim form but had got it wrong by omitting two digits from it, and consequently she went further than in this case because there was a number but it was the wrong number. But even that defect was such that the provisions of rule 10 and rule 12 were such that the claim had to be rejected. What he said at paragraph 22 of his judgment is this:

> *"Once it is accepted that the Tribunal is entitled to think that the form did have a couple of digits missing the question is whether the Tribunal was then obliged to reject the form. The ruling of rule 10 was not significantly in issue before me. Where the rule requires an early conciliation number to be set out it is implicit that that number is an accurate number. The Tribunal had found it was not. Once that appeared to be the case the Tribunal was obliged to reject it and that rejection would stand subject only to reconsideration which was not here asked for."*

13. So in that case even where there was a number, albeit it was short of some two digits, that was not sufficient, and again the EAT held that the Employment Judge had no choice but to reject the claim.

14. The claimant not being legally represented, of course, effectively would say to the Tribunal that the claim should be allowed to continue, and indeed the claimant has indicated that he would apply to amend his claim form so as now to insert the relevant certificate now that it is clear that he had one. That may well be so, and it may be a course open to him, but first of all the Tribunal has to decide whether there is a claim for him to amend and whether or not he can proceed and whether the claim should be accepted or not.

15. In terms of the choices before the Tribunal it either accepts the claim or rejects it, and the conclusion I have reluctantly come to is that I, as the Employment Judges in the other cases have equally found, have no alternative but to reject the claim form. It does not meet the mandatory requirements under rule 10 and rule 12, and rule 12 does not give me the power, for this defect, to treat it as a minor error and to accept the claim. Once it is clear on either basis , either that there was an early conciliation certificate but there is no number, or that there has been an exemption claimed which did not apply, in either of those two circumstances I accept Mr Lassey's submission, as indeed reinforced by the EAT judgments I referred to, that I have no choice but to reject the claim form.

16. That therefore means that these claims will be rejected, but the claimant is entitled to seek reconsideration of that rejection. In order to do so he would also need to seek to amend his claim form. That seems to me something that should be considered in due course because it will also involve, if successful, consideration of his claims then being out of time. They are potentially out of time anyway, even in the light of the existing claim if that were to be accepted because of the date of the early conciliation certificate being 1 March (he would still be out of time by a week or so in any event), but that may alter, because if the claim is reconsidered and accepted, it will not be accepted until the date when the defect was remedied, and the defect would be remedied , at the earliest, it could be argued, on the date of the application to amend to include the early conciliation certificate number, and the earliest that that would be would be today, which is when the application is effectively made; But all this will give rise to time limit issues, whatever happens, and consequently it seems to me, particularly given that we have spent over two hours on this aspect alone in any event, that all this is best considered in a further hearing.

17. Consequently, it is a matter for the claimant to pursue, but on the basis that, I assume, he does wish the Tribunal to reconsider its rejection and also seeks at the same time to amend his claim form to provide at section 2.3 the answer "yes" to the early conciliation number and to insert the relevant number into that box, that he will seek to amend to do that and also to have the rejection reconsidered. The Tribunal will, subject to anything Mr Lassey has to say, consider that application in another hearing, but in that other hearing it will also then, if it allows that application, go on to consider the time limit issues, and it would be helpful in any event for Mr Kirwan to know the sort of issues that are going to have to be dealt with then, and to prepare the necessary evidence. Indeed that would probably have been the case today if we have got to the time limit issues anyway because they do require some evidence.

18. By way of guidance in relation to what that will involve, if the claims are allowed to go forward on reconsideration, the Tribunal will then have to consider whether the claims can proceed on the basis that, in relation to the unfair dismissal,

that it was not “reasonably practicable” for it to have been presented within the original time limit; and in relation to the discrimination claims whether it would be “just and equitable” to extend the time for presentation.

19. In support of those applications the claimant should make a witness statement, in which he should set out the history of his attempts to bring these claims and that will probably involve the documents that the Tribunal has been trying to obtain today, as the claimant has, but the full picture will doubtless emerge when all facilities are available, and then he can make a witness statement, as indeed can anyone else who of course has been involved in helping him. Any of the persons assisting him may want also to make witness statements and they can set out the history of the attempts to make the claims.

20. Also, whilst it should not include details of any actual negotiations, the Tribunal does consider it pertinent that there was clearly some attempt between 29 January and 1 March 2017 at communication under the early conciliation provisions. The Tribunal should not know of the content of any actual negotiations but the Tribunal considers it would be pertinent to know of the fact of any meetings or non meetings, whatever the procedure was, in terms of that period of time, which may be relevant to whether the discretion is exercised.

21. In short, the Tribunal will reject the claims. The claimant does confirm the application to amend and to seek reconsideration. That application will be listed, I would anticipate for a day, and I will give some further Case Management Orders as to what is required in relation to that, subject of course to anything Mr Lassey has to say in relation to that proposal.

Employment Judge Holmes

Dated: 9 August 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 August 2017

FOR THE TRIBUNAL OFFICE