

Appeal No. UKEAT/0488/12/RN

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 20 November 2012

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

MR M CAMPOS & OTHERS

APPELLANTS

THE FARMRIGHT GROUP LTD & OTHERS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants

MR R WHITTOCK
(of Counsel)
Instructed by:
JMW Solicitors
1 Byrom Place
Spingfields
Manchester
Lancashire
M3 3HG

For the Respondents

Debarred

SUMMARY

PRATICE AND PROCEDURE- Application/claim

The Employment Judge erred in law in refusing to add a number of additional Claimants to an existing ET1 when at the same time he gave permission to the existing Claimant's to add a new Respondent. To require fresh claim forms would make the additional Claimants out of time.

Hamling v Coxlease School Ltd [2007] ICR 108 and **Unison and others v National Probation Service South Yorkshire and others** [2009] UKEAT/0339/09/SM applied.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the decision of Employment Judge Hollow sitting at the Employment Tribunal in Exeter and notified to the parties by letter dated 11 June 2012. The letter says this:

“Your claim has been accepted and served on the third respondent. The application to add Mr M Campos, Mr N Campos, Mr A Jamal, Mr C Kneill Mr D West, Mr R Horton, Andy Hart, Mike Bateman and Rymvydas Piorato onto the schedule for this claim has been refused. Employment Judge Hollow directs that they must be presented by way of a fresh ET1.”

2. By order of the Registrar dated 14 November 2012, the Respondents have been debarred from defending this appeal on the basis that they have not taken any part in complying with the EAT Practice Direction.

The factual background

3. This case concerns a number of Claimants who were employed by one or both of the Respondents. The Respondents went into liquidation. The Claimants are claiming both against the Respondents here and also against the Secretary of State in respect of a basic award.

4. The chronology is as follows. On 11 April 2012 eight Claimants lodged an ET1. On 17 April 2012 the Employment Tribunal confirmed that that ET1 had been accepted by the Tribunal. On 8 May 2012 an amended ET1 was submitted with an additional Respondent, The Farmright Group Limited, and a revised schedule of Claimants with two additions to it, Mr Darren West and Mr Robert Horton. On 10 May 2012, two days later, a further revised schedule this time adding seven additional Claimants, Mr M Campos, Mr N Campos, Mr A Jamal, Mr Charles Kneill, Mr A Hart, Mr R Piorato and Mr M Bateman were submitted to the Tribunal. On 11 June 2012 the Tribunal sent the letter to which I have referred agreeing to the third Respondent being added as third Respondent but refusing to accept the seven additional
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Claimants. A fresh application at that time by those seven Claimants would have been out of time and would therefore have raised the issue of limitation.

5. The Claimant's solicitor requested a review of the decision and written reasons, both of those were refused.

The relevant law

6. The relevant law is contained in the **Employment Tribunals (Constitutions and Rules of Procedure) Regulations 2004** as amended. Schedule 1 deals with the rules of procedure.

Paragraph 1: "Starting a claim" says this:

"(3) [...] a claim which is presented on or after [1st October 2005] must be presented on a claim form which has been prescribed by the Secretary of State in accordance with regulation 14.

(4) [...] the required information in relation to the claim is-

(a) each claimant's name;

(b) each claimant's address;

(c) the name of each person against whom the claim is made, ("the respondent");

(d) each respondent's address;

(e) details of the claim; [...]

(7) Two or more claimants may present their claims in the same document if their claims arise out of the same set of facts."

7. Paragraph 3: "When the claim will not be accepted by the Secretary" says this:

"(1) When a claim is required by rule 1(3) to be presented using a prescribed form, but the prescribed form has not been used, the Secretary shall not accept the claim and shall return it to the claimant with an explanation of why the claim has been rejected and provide a prescribed claim form.

(2) The Secretary shall not accept the claim (or a relevant part of one) if it is clear to him that one or more of the relevant circumstances applies -

(a) the claim does not include all the relevant required information; [or] [...]

(3) If the Secretary decides not to accept a claim or part of one for any of the reasons in paragraph (2), he shall refer the claim together with a statement of his reasons for not accepting it to [an Employment Judge]. The [Employment Judge] shall decide in accordance with the criteria in paragraph (2) whether the claim or part of it shall be accepted and allowed to proceed. [...]

(5) If the [Employment Judge] decides that the claim or part of it should not be accepted he shall record his decision together with the reasons for it in writing in a document signed by him. The Secretary shall as soon as is reasonably practicable inform the claimant of that decision and the reasons for it in writing together with information on how that decision, and the reasons for it in writing, together with information on how that decision may be reviewed or appealed. [...]

(8) Any decision by [an Employment Judge] not to accept a claim or part of one may be reviewed in accordance with rules 34 to 36.”

8. The other relevant provision is paragraph 10: “The General Power to manage Proceedings” which says this:

“(1) Subject to the following rules, the [Employment Judge] may at any time either on the application of a party or on his own initiative make an order in relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit. Subject to the following rules, orders may be issued as a result of [an Employment Judge] considering the papers before him in the absence of the parties or at a hearing.

(2) Examples of orders which may be made under paragraph 1 are orders – [...]

(q) giving leave to amend a claim or response.”

9. The appeal is on the basis that the Employment Judge erred in refusing to add the additional seven Claimants to the claim form when at the same time he had agreed on an application from the existing Claimants’ solicitor to add a third Respondent. The Respondents, as I say, have been debarred from defending this claim. Mr Whittock, who had appeared on behalf of the Appellants, has prepared a very helpful skeleton argument and he puts his case I think in several ways but three of them seem to me to be persuasive. His first submission is that except for the failure to include the date of birth of the Claimants within the schedule of claims and including the Claimants’ details in a schedule rather than the ET1A form, the claims were brought on the prescribed ET1 form and contained all the relevant information pursuant to rule 1(3) and (4). There was therefore no reason why the Employment Judge should not have accepted the claims of the additional Claimants considering that neither of the two admissions were relevant nor material having regard to the contents of the claim form and he refers me to the decision of Mr Recorder Luba QC in **Hamling v Coxlease School Ltd** [2007] ICR 108.

10. The second submission made by Mr Whittock is that in alternative the Employment Judge should have on his own initiative given leave to amend the claim to include the nine Claimants, seven plus two, contained within the amended schedules pursuant to rule (10)(2)(Q) upon adopting the injustice and hardship test set out in the well known cases of **Selkent Bus Company Ltd v Moore** [1996] ICR 836, **TGWU v Safeway Stores** [2007] UKEAT/0092/07 and **Evershed v New Star Asset Management** [2009] UKEAT/0249/09.

11. The third way Mr Whittock puts his case is based upon the decision of this Tribunal in **Unison & Others v National Probation Service South Yorkshire & Others** [2009] UKEAT/0339/09/SN. In that case the Appellants had failed to submit an ET1A but had included the name of the additional Claimant within the ET1. HHJ David Richardson said this in his Judgment at paragraph 41:

“I turn then to the question whether the Employment Judge ought to have decided that the claim should be accepted. I have already expressed my view that all the required details are within the ET1 except for the address of Unison. The Employment Judge ought to have adopted the approach set out in **Hamling v Coxlease School Ltd**. He did not do so. Once that approach is adopted, there is to my mind only one just answer. All the required details of Unison’s claim, except for the address, were in the ET1 and the attached form. The solicitors address was given. In the circumstances, having regard to the overriding objective, the claim by Unison should be accepted. The omission of the ET1a was not a material omission having regard to the contents of the ET1.”

12. I accept all three of those submissions. The only failure by the Claimants’ solicitor in putting in the details of the additional Claimants in his application letters of 8 May 2012 and 10 May 2012 were a failure to include the date of birth for each Claimant within the schedule of Claimants and including the Claimants’ details in the schedule rather than the ET1A form. It seems to me that on the authority of **Hamling v Coxlease School Ltd** referred to above and **Unison v National Probation Service South Yorkshire & Others** case both of which I agree with and follow that the Employment Judge was in error in failing to accept these applications by these additional Claimants.

13. That is particularly emphasised in this particular case because the requirement for the Claimants to bring a fresh claim would have made their claim out of time whereas by accepting it as an amendment or an addition to the ET1 form the claims would have been in time.

14. For these reasons I am persuaded that the Employment Judge's decision was an error of law by failing to apply the proper authorities and for that reason the appeal is allowed and I will substitute my decision for that of the Employment Judge and add the names of the two additional Claimants notified to the Tribunal on 8 May 2012 and the additional seven Claimants notified to the Tribunal on 10 May 2012 to the ET1 and the matter can then proceed in the usual way.