



## **EMPLOYMENT TRIBUNALS**

**Between**

**Claimant: Mr O Modupe**

**Respondent: London Fire and Emergency Planning Authority**

**Heard at London South Employment Tribunal on 6 October 2017**

**Before Employment Judge Baron**

**Representation:**

**Claimant: Tunde Oyedele - Solicitor**

**Respondent: Nick Clarke - Counsel**

### **JUDGMENT AT A PRELIMINARY HEARING**

It is the judgment of the Tribunal that the claim is dismissed.

### **REASONS**

- 1 This is another case of satellite litigation arising from the requirement for prospective claimants to contact ACAS before instituting proceedings. The facts are not in dispute.
- 2 The Claimant is employed by the Respondent. He wishes to bring claims before the Tribunal alleging that he had been discriminated against based upon the protected characteristics of race and disability. He presented a claim form ET1 to the Tribunal on 19 June 2017 for that purpose. In section 2.3 he ticked the box to state that he did not have an ACAS early conciliation certificate number. The standard reason as on the form was:

My employer has already been in touch with ACAS.

It is now accepted on behalf of the Claimant that that statement was incorrect. The Claimant did contact ACAS on 18 July 2017 and a certificate number R159550/17/44 was issued on 18 August 2017. The issue at this hearing is whether in those circumstances there is a valid claim before the Tribunal.
- 3 The statutory background is as follows. Section 18A was inserted into the Employment Tribunals Act 1996 when the ACAS early conciliation

scheme was introduced in 2014. The relevant rules and regulations have been in force at all material times. Section 18A is as follows:

**18A Requirement to contact ACAS before instituting proceedings**

(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. This is subject to subsection (7).

(2) – (6) . . . .

(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases. The cases that may be prescribed include (in particular)--

- cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;
- cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;
- cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.

(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).

(9) . . . .

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.

(11) The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).

(12) Employment tribunal procedure regulations may (in particular) make provision--

- (a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4);
- (b) requiring ACAS to give a person any necessary assistance to comply with the requirement in subsection (1);
- (c) for the extension of the period prescribed for the purposes of subsection (3);
- (d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a).

- 4 The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 were made under section 18A(7). Regulation 3(1) is as follows insofar as material:

**3 Exemptions from early conciliation**

(1) A person ("A") may institute relevant proceedings without complying with the requirement for early conciliation where--

(a) – (b) . . . ;

(c) A is able to show that the respondent has contacted ACAS in relation to a dispute, ACAS has not received information from A under section 18A(1) of the Employment Tribunals Act in relation to that dispute, and the proceedings on the claim form relate to that dispute;

(d) – (e) . . . .

- 5 The other potentially material provisions are in the Employment Tribunals Rules of Procedure 2013:

**Rejection: substantive defects**

**12.**—(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;
  - (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the 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;
  - (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;
  - (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
  - (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, or part of it, is of a kind described in sub-paragraphs (a) (b), (c) or (d) of paragraph (1).
- (2A) 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 sub-paragraph (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 it would not be in the interests of justice to reject the claim. (b)
- (3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

#### **Reconsideration of rejection**

- 13.—**(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either— (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 defect 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 a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.
- (4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.
- 6 I make a few miscellaneous points. There appears to be a drafting error in section 18A(12) of the 1996 Act in that there is no subsection (7)(a). It appears that '(a)' is superfluous. Rule 2 of the 2013 Rules contains the overriding objective to deal with matters fairly and justly, and various specific aspects are set out. Rule 5 gives the Tribunal a general power to extend or shorten time limits in those Rules.
- 7 The claim form was presented, as mentioned, with a statement that one of the early conciliation exemptions applied. It was not therefore referred to a judge in accordance with rule 12(1)(d) and it was served in the usual way. The 2013 Rules do not contain any specific provision for the Tribunal to ascertain whether or not the respondent had in fact contacted

ACAS, and it is not the practice of the Tribunal to seek such information from a claimant. Further, the 2013 Rules do not make any specific provision for circumstances where an error as has occurred in this case.

- 8 There was a discussion as to whether what I should now do was to reject the claim form retrospectively on the basis that it had now been referred under rule 12(1)(d), and then whether there had been a defect for the purposes of rule 13 which had been rectified. I was at one stage attracted by that line of thinking, but concluded that it was not correct.
- 9 Firstly, rule 12 is clearly drafted on the basis that the procedure applied at the outset of a claim. Rules 8 to 14 inclusive all come under the heading 'Starting a Claim'. Secondly, the wording of section 18A(1) is absolutely clear. Subject to subsection (7) it is a mandatory requirement that a prospective claimant must commence the early conciliation procedure. Subsection (7) then authorises the making of regulations. Regulation 3(1)(c) of the 2014 Regulations provides that the prospective claimant can show that the respondent has contacted ACAS in relation to the dispute. The Claimant was and is not able to show that was the case simply because the Respondent had not contacted ACAS. The exemption does not apply, and therefore section 18A(1) does apply.
- 10 The third and connected reason is that I do not consider that what has occurred is a defect which can be rectified for the purposes of rule 13. One cannot turn the clock back and pretend that contact was made with ACAS and a certificate obtained before the claim was presented as required by section 18A(1). Whatever flexibility is included in the 2013 Rules cannot affect the clear wording of a statute.

**Employment Judge Baron**

**06 October 2017**