Case Number: 2302740/2016

EMPLOYMENT TRIBUNALS

Claimant(s): **GMB Wales and South Western and 14 individual Claimants**

Respondent(s) **(1) OCS Group (UK) Limited**
(2) Kier Facilities Services Limited
(3) Vinci UK Developments Limited

Heard at: **Cardiff** **On: 12 April 2017**

Before: **Employment Judge P Cadney**
Members:
Representation:
Claimant: Mr George Pollitt (Counsel)
Respondent: (1) Mr B Frew (Counsel)
(2) Mr Jamie Campbell (Solicitor)
(3) Mr Nick Cooksey (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the Tribunal is:

i) The name of the second respondent is amended to Kier Facilities Services Ltd.

ii) The claim forms of the individual claimants were submitted in time.

iii) The claim forms of the individual claimants were correctly accepted by the Employment Tribunal.

iv) Permission is granted to the claimants to rely by way of amendment on the Particulars of Claim.

REASONS

1. The case comes before the Tribunal today for a Preliminary Hearing to determine a number of jurisdictional issues. The Claimants and the 2nd and 3rd Respondents have submitted written submissions. The 1st Respondent adopts the position taken in the 2nd and 3rd Respondents written submissions.

2. It has been agreed that having read those written submissions I would express my provisional views as to the issues in the case which will then allow the parties the opportunity either to seek to dissuade me from that provisional view if they wish to do so, and/or to make further submissions as to any remaining issues.

3. By a claim form submitted on 28 November 2016 the Claimant union and the individual Claimants bring claims of a failure to inform and consult pursuant to the TUPE Regulations. The factual background is that two of the individual Claimants Mr Seaton and Mr Locke were employed by the 1st Respondent OCS as security guards and on 1 August 2016 their employment transferred to the 3rd Respondent under what is accepted to be a TUPE transfer. The 2nd Respondent (whose correct name it is accepted is Kier Facilities Services Limited) employed the balance of the individual Claimants and again it is not in dispute that their employment transferred from the 2nd to the 3rd Respondent on 1 July 2016, and again that this was a TUPE transfer. The factual disputes are firstly whether the GMB was a recognised trade union within the meaning of the TUPE Regulations giving rise to a duty to inform and consult on the part of the 2nd and 3rd Respondent, it being accepted by the Claimants that it was not a recognised trade union by the 1st Respondent. In the event that it was not recognised by either the 2nd or 3rd Respondent there is a factual dispute as to whether there was appropriate information and consultation within the meaning of the TUPE Regulations. Both the 1st and 2nd Respondent assert that there was. That appears to be put in dispute by the Claimant and as yet the 3rd Respondent has had the benefit of a stay on the requirement to submit its ET3.

4. Accordingly there is no dispute that there was a TUPE transfer in respect of the various individual Claimants as between the 1st and the 3rd Respondents on 1 August 2016, and as against the 2nd and 3rd Respondents on 1 July 2016 and it follows that the primary time limits for bringing the claims for failure to inform and consult in respect of the transfer between the 2nd and 3rd Respondents was 30 September 2016 and between the 1st and the 3rd Respondents was 31 October 2016.

5. The ET1 was submitted online on 28 November 2016 is the subject of two issues raised by the Respondents. The first is whether it was validly presented on that date, and the second that it should have been rejected in any event. It is accepted that in respect of the individual Claimants if those two question are answered in their favour the claims are in time having been presented on 28 November.

6. That is not accepted in respect of the claims of the Claimant union, the GMB. The basis for that is that the ACAS early conciliation certificates in respect of the claims between the GMB and the 2nd and 3rd Respondents both indicate the ACAS early conciliation process commencing on 8 November and concluding on 11 November. Mr Cooksey on behalf of the 3rd Respondent submits that in any event a claim between the union and the Respondents does not fall within the provisions of the ACAS early conciliation process and therefore the union claimant does not get the benefit of it, but that even if it did it is not accepted that the extension of time provisions would not apply as the process commenced after the termination of the primary limitation period. It follows, submit the 2nd and 3rd Respondents, and is not in fact contested by the Claimant, that on the face of it the claims of the Claimant union against the 2nd and 3rd Respondents are out of time. (Subject to one point as to which Mr Pollitt has reserved his position which is whether if in my analysis the claims of the individual Claimants are in fact in time whether the Respondent union would get the benefit of that and therefore would actually have submitted the claims in time itself under the provisions of the early conciliation process).

7. That then leaves two primary questions of firstly the status of the ET1 and whether it was properly presented online on 28 November; and the separate question as to the consequence of the failure to attach to it the particulars of claim.

8. The ET1 which was submitted online set out in box 8.1 the bare details of the claim which was of a failure to inform and consult on TUPE. Box 8.2 was left blank. The Claimants in fact believed that they had submitted the Particulars of Claim with it, but for reasons which are not known, they were not in fact received and accordingly all that was received by the Tribunal was the bare assertions contained in box 8.1. In addition the Claimants had completed the address for themselves and the addresses for the Respondents but had not completed the section detailing where they worked, as a result of which the claim form was automatically sent to the address corresponding to that of the registered office of the 1st Respondent with the result that the claim form was received in the London South region. On receipt of the claim form London South sought information from the Claimants solicitors as to where their place of work was and once it was established that was in Cardiff on 9 December

transferred the claim to the Cardiff Employment Tribunal. That claim was served by the Cardiff Employment Tribunal on the Respondents on 5 January 2017. On 18 January 2017 the 1st Respondent raised the issue of the absence of any details of the claim and on the same day the Claimant sent those details which, as I say, it had thought it had supplied with the ET1 to the Respondents. On 23 January the 1st Respondent objected to the Claimants being entitled to rely on the Particulars of Claim and on 24 January the Claimants sought permission to amend to rely on those particulars.

9. The Respondents assert that the ET1 was not in fact presented until 5 January 2017 (or perhaps, although not expressly set out in any of the skeleton arguments on the basis of the Respondents logic the 9 December when the claim was transferred to the Cardiff region), the significance of which is on either basis that the claims would in fact be out of time. The basis for that submission is the case of ***McFadyen and others –v- PB Recovery Limited and others*** [2009] UK EATS/ 0072/2008. In that case Claimants who worked in Scotland simply identified the registered office as their employer which was in fact in Bristol and accordingly the claim was allocated to Bristol region. The Bristol office rejected that claim on the basis that they had no jurisdiction over employment in Scotland and by the time the ET1 was received in Scotland it was out of time. The EAT upheld the decision of the Bristol Employment Tribunal to reject the claim.

10. In my provisional judgment however this case is different to that of ***McFadyen*** for one very simple reason. In fact the claim falls within the jurisdiction of England and Wales. What is the effect of not completing the section of the ET1 form identifying the place of work? Firstly, it is not a mandatory field, and secondly, there are two primary Employment Tribunal regions which may have jurisdiction over a claim. In the absence of completing that part of the form it is automatically sent to that corresponding with the registered office of the Respondent. The primary consequence for a Claimant of not completing that part of the form is they may end up having to conduct a Tribunal in a location which is extremely inconvenient for them. However, in my Judgment the failure to do so does not mean that the Tribunal which receives the claim does not have jurisdiction to hear it and the fact that it was subsequently transferred to Cardiff does not in my Judgment alter the fact that it was validly presented on 28 November.

11. The second argument is that in the absence of the Particulars of Claim, that the claim form should have been rejected. This is not put on the basis of a breach of Rule 10 which clearly has been complied with, but on the basis of Rule 12(1)(b). On the face of it that is a submission with significant force. However, in the case of ***The Trustees of William Jones***

Schools Foundation –v- Parry the question of the status of Rule 12(1)(b) was considered by the EAT. As it happens in that case I made a decision to accept a claim form which the EAT decided was the right decision for the wrong reasons. The essence of that case, as in this case, was that a claim form was submitted with separate particulars of claim. In fact the particulars of claim related to another case and had been sent by the Claimants solicitor in error and as a result there were no particulars of claim relating to that claim itself. The EAT upheld the Appellants position that on the face of Rule 12(1)(b) that the claim should have been rejected, however it went on to hold that in fact there was no such power to reject as the powers contained within Rule 12(1)(b) did not derive from the underlying primary legislation and therefore any purported exercise of the powers under Rule 12(1)(b) would be ultra vires. As a result of that case which is binding on me, the Tribunal does not have the power to reject a claim for failure to include those particulars which are not mandatory. It appears to me, despite Mr Cooksey's valiant attempts to argue otherwise, that that in fact is a complete answer to the submission that the claim should have been rejected.

12. It follows that in terms of the questions I have to answer my provisional views are that (subject to the question of whether the GMB gets the benefit of the fact that the Claimants claims have been lodged in time, which in my view they have), firstly the claims were lodged in time because they were validly submitted on 28 November and were sent to a region which had primary jurisdiction to hear the claim; and secondly given that there was in fact no power to reject the claim under the provisions of Rule 12(1)(b) that there could have been no basis for rejecting the claim at that time.

13. Those as I say are my provisional conclusions and I will now hear the parties firstly as to whether they wish to seek to dissuade me from any of those provisional conclusions and or any consequential arguments that may arise from them.

14. Following my earlier provisional conclusions I have been invited by Mr Cooksey to reconsider the question of whether the decision in ***Parry*** is as stark as I originally considered and whether in fact there is any underlying decision that the Rule 12(1)(b) is effectively ultra vires and invites me to reconsider in particular the passage in ***Parry*** from paragraph 35 onwards and in particular paragraph 41. Those paragraphs set out the powers that Section 7(1) of the ETA confers on the Secretary of State and deals with the extent to which the Regulations do or do not correspond with those powers and in particular at paragraph 41 Laing J says this *"Rule 12(1)(b) was in the 2013 Regulations as first promulgated. It restricts access to justice and is an unusual provision in at least three ways. Firstly it enables a claim to be rejected and eliminated without the ET hearing from any*

party at all. If that stood alone it is doubtful whether it would authorised by Section 7. The ET will hear from only one party, the Claimant, if the Claimant exercises the right conferred by Rule 13 to ask for the rejection to be reconsidered so the second unusual feature which is authorised by Section 7 is that a final determination will potentially be made after hearing from only one party. The third is that this Rule restricts access to justice by purporting to authorise the ET to reject a claim if it cannot sensibly be responded to or is otherwise an abuse of process. The parties agree that the draftsman has assumed that presenting a claim in such a form is an abuse of process and that the Rule requires an EJ to reject such a claim and any claim which is otherwise an abuse of process."

15. She continues at paragraph 44, "*there is an overlap between the claim which the Tribunal has no jurisdiction to consider in Rule 12(1)(a) and the test in Section 7(3)(b) it appears from the application that the Claimant is not seeking any relief which an ET has power to give but he is not entitled to it. The difficulty of the Respondent is that it is clear from the ET1 that the Claimant is seeking relief which the ET has power to give and there is nothing to indicate that she is not entitled to it. It is also clear that her claims are claims over which the ET has jurisdiction. I bear in mind Miss Newbigin's correct submission that an EJ should not reject a claim unless he is sure the applicable test is met. I consider that an EJ applying the test that is authorised by statute would have been bound to conclude that the claim should not be rejected. Although I have held that applying Rule 12(1)(b) the EJ was bound to reject the ET1 the reasons I have given I consider that the test in Rule 12(1)(b) is not authorised in the context of the procedure provided for by Rule 12 by any of the provisions of Section 7 or by the general power conferred by Section 41(4) such a drastic interference with the right to bring a claim cannot be characterised as incidental supplementary or transitional provision. The application of that test however is not problematic in the context of the Rule 27 procedure and that it seems to me is the correct procedure for enforcing compliance with the requirements imposed by Rule 12. Thus the EJ erred in concluding that the Claimant could sensibly be responded to, so he erred in applying that test incorrectly to the facts. However the only provision in Rule 12 which is authorised by Section 7 is Rule 12(1)(a) the claims were in dispute of the claims which the ET had jurisdiction to consider as they were claims for unfair dismissal and for arrears of pay so its error is material*."

16. It appears to me with due deference to the subtlety of Mr Cooksey's argument that paragraphs 45 and 46 make it explicit that Rule 12(1)(b) is itself not authorised by the underlying primary legislation and that the claim should not be rejected and cannot be rejected on the basis of it. There is explicit reference in paragraph 45 to the fact that the Rule 27 procedure is the correct procedure for enforcing compliance. The

requirements imposed by Rule 12 and the Rule 27 procedure does not involve any rejection of the claim form in limine, as Laing J put it.

17. It follows that having reconsidered I remain of the view I expressed earlier that the claim form could not have been rejected for a failure to comply with Rule 12(1)(b) on the basis that that Rule itself is ultra vires and that the discretion under it could not properly be exercised by an Employment Judge and therefore I remain of the view I expressed earlier.

18. Further to my earlier decisions the point has now been reached at which the following decisions have been made;

(1) As against the 1st Respondent the claims of the individual Claimants are in time and can proceed.

(2) As against the 2nd Respondent the claims of the individual Claimants are in time and can proceed. The question of whether the Claimant union's claim is in time as against R2 has not yet been resolved.

(3) As against R3 the Claimant unions claim is out of time and as there is no claim from individual Claimants R3 will be dismissed from proceedings unless the Claimants pursue an application to retain it as a Respondent in the proceedings and/or either of the other Respondents does.

Directions

The following directions are given:

i) No later than 21 days from today the Claimants notify the Tribunal and Respondents :-

(1) Whether it seeks to pursue the claim on behalf of the GMB (Claimant union) against R2 and if so the basis of any assertion that there was a recognition agreement within the meaning of the TUPE Regulations 2006.

(2) If so, whether it pursues its submission that the claim of the GMB is in time as against R2 and if so, on what basis.

(3) Whether the claims of the individual Claimants are pursued against R1 and R2 and if so, on what basis.

(4) Whether any application to retain and or join R3 as a party to proceedings on the basis of any alleged joint and several liability with R1 and or R2 is pursued.

The case is to be listed for a Telephone Preliminary Hearing at 8.30am on 17 May in order to discuss these questions.

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Employment Judge P Cadney
Dated: 9 May 2017

JUDGMENT SENT TO THE PARTIES ON

10 May 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.