Case Number: 3301502/2013
3302543/2013
3302570/2015
3302569/2015

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Ukegheson	**v**	**London Borough of Haringey**

Heard at: Watford **On**: 25 October 2018

Before: Regional Employment Judge Byrne

Appearances

For the Claimant: No attendance
For the Respondent: Mr J Davis - Counsel

JUDGMENT

The claims brought under case numbers 3302570/2015 and 3302569/2015 are dismissed because the claimant has failed to comply with the provisions of the Section 18A of the Employment Tribunals Act 1996 and the Tribunal has no jurisdiction to deal with them.

RESERVED REASONS

Background to the preliminary hearing

1. The claimant presented claims in 2013 in case numbers 3301502/2013 and 3302543/2013. Those proceedings were the subject of lengthy appeal proceedings which were not concluded until the Supreme Court on 9 July 2018 refused the claimant's application for permission to appeal the order of the Court of Appeal of 27 July 2017. The claimant having exhausted the appeal proceeding's in relation to the 2013 proceedings, with which the 2015 proceedings had been consolidated and all proceedings stayed by consent pending determination of the appeal proceedings, the consolidate proceedings were reviewed at a case management hearing before me on 23 August 2018. That hearing made various Orders to progress the 2013 claims remaining following conclusion of the appeal process , including listing for a final hearing in July 2019, and considered the claims and

issues in the 2015 proceedings and listed for preliminary hearing the 2015 proceedings on the issue of jurisdiction., a point taken early on in those proceedings by the respondent. The following orders were made in relation to the 2015 proceedings at the August 2018 case management hearing and I set those orders out below. The paragraph numbers are the order numbers as sent to the parties.

2. A Preliminary hearing to determine jurisdiction in relation to the 2015 claims is appropriate. Accordingly, there will be an open preliminary hearing with a time allocation of **1 day** on **Thursday 25 October 2018** before the Watford Employment Tribunal sitting at Radius House, 2nd Floor, 51 Clarendon Road, Watford, Hertfordshire WD17 1HP commencing at 10am. The purpose of the preliminary hearing will be to consider whether the Tribunal has jurisdiction to consider the 2015 claims because of any failure to comply with the Early Conciliation Regulations.

3. **Preparation for the preliminary hearing**

   3.1 The parties are to exchange copies of any documents in their possession relevant to determination of the jurisdictional issue identified at paragraph 10. above by the **27 September 2018**.

   3.2 The parties are to provide each other with copies of any witness statements of any witnesses of whose evidence they intend to rely (including the claimant) at the preliminary hearing by **11 October 2018**.

   3.3 Any documents either party wishes to refer to at the preliminary hearing, including any legal arguments on which they rely are to be provided to the other by **11 October 2018.**

4. The claimant indicated in his email of 23 August 2018 to the Tribunal that he was "not available for any physical appearance until the end of November 2018 in terms of any case management orders." What that means in unclear. If the claimant's position is that he is unable to attend any hearing on 25 October 2018 and requires an adjournment he must set out to the Tribunal full details of why he is unavailable on that date together with all necessary documentary evidence which supports his non-availability such as confirmation of travel bookings no later than 11 September 2018. Upon receipt of any application for postponement together with a full explanation as to why the claimant is unable to attend an application to postpone will be considered.

REASONS

1. The claimant did not attend the hearing. By email dated 14 September 2018 Mr Ukegheson stated that he would not be available until the end of November 2018 and could not attend a hearing on 25 October 2018. He explained that he was organising a peace project in Nigeria in his capacity as the inaugural President/Chairman of the Board of Trustees of the Niger Delta Student Association of the Nigerian Law School Sixth Campus. He stated that he needed to be "on ground to supervise the last stages of the event".

2. Order 9 of the orders referred to above required that if Mr Ukegheson was unavailable on the 25 October 2018 he provide all necessary documentary evidence which supported his non-availability, such as confirmation of travel bookings, no later than 11 September 2018. No such information was provided with his email of 14 September 2018. I treated his email of 14 September as an application to postpone the hearing listed for 25 October 2018. On my direction a letter was sent to the parties by the Tribunal on 13 October. The letter stated as follows:

> *"The application for a postponement of the preliminary hearing listed for 25 October 2018 is rejected. He has not provided any documentary evidence to support his statement that he cannot attend the hearing before 1 July 2019 other than documents relevant to a potential Presidential campaign in Nigeria. The preliminary hearing remains listed for 25 October 2018 in order to determine the preliminary issues previously identified by the Tribunal as confirmed at paragraph 3 of the orders sent to the parties on 5 September 2018."*

3. At the start of the hearing on 25 October I checked with the respondent whether the respondent had received any further communication from the claimant. There are extensive delays at present in the linking of correspondence received at the Watford Employment Tribunal with the relevant files and I wanted to ensure that I was aware of all and any relevant correspondence before beginning the hearing.

4. I was provided with a copy of an email exchange which started on 10 October 2018 between the claimant and Ms Jo Beill, senior lawyer of the respondent and responsible for these proceedings on behalf of the respondent. In answer to Ms Beill's enquiry to the claimant of 10 October asking whether he would be serving a witness statement or any written argument for the Preliminary Hearing on 25 October the claimant said he did not intend to use a witness statement "*as it is purely a jurisdiction issue based on the point of law….I will send my written arguments/submissions before the hearing date."* By email dated 12 October 2018 Ms Beill commented on the claimant's reference in his email of 11 October to a

hearing bundle explaining that would be no trial bundle, only exhibits to statements or written arguments, and that if the claimant wished to refer to any documents not already enclosed in the respondent's disclosure he needed to disclose them, pointing out that the earlier Tribunal order required an exchange of witness statements by 11 October (and not for one party to send to the other in advance) . The email went on to explain that the reason why the respondent was serving a brief witness statement was because Mr Ukegheson had raised an issue of fact regarding any contact that the respondent had had with ACAS in connection with the 2015 claim. Finally, she confirmed that the respondent was content to delay exchange of statements or written arguments until the 16 October if the claimant needed more time.

5. In the absence of any further communication from the claimant on 16 October Ms Beill wrote to him by email pointing out she had not received a response from him, that correspondence had been received from the Tribunal dated 13 October which had rejected the claimant's application for postponement of the preliminary hearing on 25 October and she attached her witness statement to her email.

6. The claimant responded to that email on the same day stating *"I was not aware the Tribunal had made a decision rejecting my application for a postponement of the hearing"*, stating that he would serve by email his response by Thursday 18 October 2018 and finally asking if the Tribunal's letter of 13th October rejecting a postponement of the 25 October hearing could be forwarded to him. On 16 October at 13.43 Ms Beill emailed a copy of the Tribunal's letter of 13th October to the claimant.

7. On 18 October he sent to the Employment Tribunal and to the respondent his written submissions together with a copy of the Response prepared by the Department for Business Innovation and Skills, dated July 2013, to the consultation on proposals for the implementation of Early Conciliation. There is no trace of that email on the Employment Tribunal file and his submissions were not on my file. I was provided with copies by the respondent and there was a short adjournment whilst I read those submissions.

8. After that adjournment I heard evidence on oath from Ms Beill, solicitor and senior lawyer employed by the respondent and responsible for these proceedings from April 2017.

9. The claimant's employment with the respondent ended in January 2013. The claims brought in case number 3302569/2015 are of post-employment victimisation. The second proceedings in case number 3302570/2015 presented on the 12 August 2015, are also claims of post-employment discrimination.

10. The claims were lodged on or after 6 May 2014. In claim number 3302569/2015 in answer to the question why no ACAS early conciliation certificate number is given the claimant has ticked the box to the answer "*ACAS does not have the power to conciliate on some or all of my claim*". In claim number 3302570/2015 in answer to the question why no ACAS early conciliation certificate number is given the claimant has ticked a box to rely on the answer *"My employer has already been in touch with ACAS".*

11. The claims of post-employment victimisation are proceedings that arise under the provisions of S.108 of the Equality Act 2010, that is relationships that have ended and S.120 of the Equality Act 2010 provides an Employment Tribunal with jurisdiction to determine a complaint in relation to a contravention of S.108(S.120(1)(b)). Section 18A of the Employment Tribunals Act 1996 ("**ETA"**) provides that "*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".* Relevant proceedings are defined in S.18(1)(e) as including proceedings under S.120 of the Employment Act 2010.

12. The evidence given of Ms Beill on behalf of the respondent is that she took over conduct of this case on behalf of the respondent in 2017. Prior to that her colleague Edmund Jankowski, a Senior Lawyer employed by the respondent, had the conduct of defending the two claims brought in 2015. Ms Beill produced several emails from the respondent's correspondence file. The first was an email from Anna Redmond, ACAS conciliator, to Mr Jankowski on 12 October 2015 with a heading of case number 3302569/15 and details of the parties. It reads;

> "*Dear Edmund, I am the ACAS conciliator dealing with this matter. If you wish to make an offer to settle and discuss the case, please do give me a call. I look forward to hearing from you."*

13. On the same day Mr Jankowski replied with the heading of the case and the case number quoted by the ACAS conciliator, 3302569/2015. His email reads:

> *"Dear Anna, are you also dealing with case number 3302570/2015? Could you confirm/provide/obtain for case number 3302569/2015 (and for case number 3302570 if you are also dealing with that case) the date (if any) on which ACAS received the early conciliation form from Mr Ukegheson or the date (if any) he contacted ACAS by telephone for early conciliation."*

14. The reply from Miss Redmond by email of 13 October 2015 reads as follows:

"Dear Edmund, I am dealing with both ET claims. There is no record on our system of early conciliation claims for either case. Kind regards."

15. On 18 July 2018 Miss Beill wrote to ACAS quoting case numbers 3301502/2013, 3302543/2013, 3302569/2015 and 3302570/2015 requesting confirmation as to whether the claimant had entered early conciliation for the 2015 claims.

16. The response from Ms Redmond stated, "U*nfortunately, due to data protection I am not allowed to divulge that information. You should contact the Tribunal and they may be able to help you further."*

17. The other emails I was directed to were emails from the claimant to ACAS London copied to others, including the respondent, dated 16 September 2015. The emails were identical save for the time on which they were sent, 12:43 and 12:45, and a reversal of the list of addressees cc'd.

18. The key part of that email from the claimant to ACAS reads as follows:

*"**Do I need a certificate from ACAS?***
On 13 June 2015, I got a full-time job as a registered manager and my new employers requested reference from Haringey Council, but they refused to send a reference and kept on giving excuses. When eventually sent, they failed to provide all relevant answers. My new employers became worried and started calling me at intervals and sending emails to chase up the reference. I did but they still waited until 14 July before they finally gave me the reference. But because the reference is not "factual" it was delayed unnecessarily, I have now lodged another ET1 in August 2015 which has now been accepted on 7 September 2015.

Giving the circumstances that the case has been on-going since 2013, I have requested that all the cases be consolidated. It has been suggested that I may need an ACAS certificate for the new claim and the PHR is coming up on 7 October 2015. I am not sure if I will need the ACAS certificate but there is no harm in getting one.

Considering that Haringey Council did not engage in conciliation in 2013 and has not made any attempt to contact you since 2013, I form the belief that they are not interested in any form of conciliations or whatever else ACAS has to offer. Whilst I am open to negotiations, I would not want you to chase them please as I am not prepared to beg them like I did in 2013. It is my belief they are fully prepared to fight the legal battle and so I have conditioned my mind to fight to the very end.

However, I will need a certificate from ACAS to show that you have contacted Haringey Council and that they have declined further communications, so I can present it to the Employment Tribunal whenever my case comes up for hearing."

19. At no time has the claimant obtained an ACAS early conciliation certificate in respect of either case number 3302569/2015 or 3302570/2015. The only documentation before me today evidencing communications between either party and ACAS are the emails referred to at paragraphs 4 to 11 above.

The parties' submissions

20. It is the claimant's case he contacted ACAS when the question arose of a requirement to comply with the early conciliation provisions in 2015, his email of 16 September 2015. He submits "*The respondent has copies of the emails which they now have presented as exhibits. A fair reading would show that the claimant had complied with the requirements for early conciliation as the added claim was merely an amendment of the existing claim that started in 2013 and not a new course of action. It is this understanding that he applied for consolidation of the additional claim with the existing claims of 2013*."

21. He goes on to argue that it makes no difference that ACAS did not issue an early conciliation certificate, the purpose of S.18A of the Employment Tribunals Act 1996 being to encourage parties to resolve issues as early as possible without the need for Tribunal hearings and that in the present case the claimant did initiate several proposals for conciliation using ACAS but the respondent declined, neglected or refused to act on the olive branch offered by the claimant. No evidence of any such communications has been put before the Tribunal.

22. He further submits that "*The just and equitable way the Tribunal should proceed would be to allow the post victimisation claims to proceed to full hearing of all the relevant facts as it has now been consolidated with other cases.*" He goes on to say, "*the claimant respectfully invites the Employment Tribunal to hold that because the claims are related to an existing claim, the new claim is just an amendment of the existing claim and does not constitute a new course of action hence the order to consolidate with the previous case."*

23. It is correct that on 6 October 2015 all claims were consolidated and stayed given applications from both parties to that effect pending conclusion of the outstanding appeal process in relation to the 2013 claims. That consolidation did not determine the jurisdictional issue in relation to the 2015 proceedings, which had been raised by the respondent in the responses to both the 2015 claims when those responses were

served in 2015. A preliminary hearing was accordingly listed to determine the question of jurisdiction in the 2015 proceedings and was for hearing on 7 October 2015, but that hearing was postponed pending the conclusion of the appeal process.

24. In proceedings 3302570/2015 the claimant argues that his employer was in touch with ACAS about the dispute, which appears to be an argument that the 2015 proceedings fell within the scope of the exemption from early conciliation under Regulation 3(1)(c) of the **Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014** , "*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 ETA in relation to that dispute, and the proceedings on the claim form relate to that dispute;".*

25. In his submissions the claimant appears to argue points that would normally be argued on an amendment application. He states at paragraph 5 *"The claimant respectfully invites the Employment Tribunal to hold that because the claims are relating to an existing claim, the new claim is just an amendment of the existing claim and does not constitute a new course of action hence the order to consolidate with the previous case."* He invites the Tribunal to apply *Selkent Bus Co Ltd v Moore* and argues that under certain circumstances a Tribunal can allow an addition of post victimisation claim to an existing claim where there is no early conciliation certificate for such a claim and refers the Tribunal to *Science Warehouse Ltd v Mills [2016] IRLR 96*. He argues that the post-employment victimisation claim arose from the existing claim already before the Tribunal which is why he sought clarification from ACAS in September 2015 as to a necessity or relevance of an early conciliation certificate.

26. The respondent argues that the claimant's reliance upon Regulation 3(1)(c) of the 2014 Regulations must fail because the only contact the respondent had with ACAS in respect of the 2015 dispute was after the relevant claims had been presented and that contact was limited to ask whether ACAS had issued an early conciliation certificate.

27. With reference to the claimant's implied application for an amendment of the 2013 proceedings the respondent makes several points. The first point is that there is no application to amend before the Tribunal today. The respondent's case is that the Tribunal clearly listed this matter to determine the jurisdiction point under the Regulations. However, if the Tribunal were to be considering an application to amend the 2013 proceedings the respondents submits that it is far too late to do so. The claimant chose to present new claims in 2015. He could at that stage made an application to amend the 2013 claim but chose not to do so. To permit an amendment now is far too late applying *Selkent* principles. Turning to the claimant's reliance on *Science Warehouse and Mills* the

respondent makes a distinction between the facts of that case where proceedings had already been issued and an early conciliation certificate had been obtained and the regulations complied with , compared to the current position where the 2013 proceedings pre-date the introduction of Early Conciliation and accordingly there is no Early Conciliation Certificate in the 2013 proceedings which could be relied on in the 2015 proceedings. Mr Davis for the respondent submits that in those circumstances *Science Warehouse and Mills* does not assist the claimant and that he now seeks an amendment to avoid having to comply with the regulations.

28. Finally, Mr Davis says that no good reason is advanced in the claimant's written submissions as to why he did not apply to amend the 2013 proceedings in 2015 but presented new claims.

Conclusions

29. The first point I have to consider is whether the Early Conciliation Regulations apply to these post-employment claims of victimisation. I am entirely satisfied that they do applying the legislative analysis contained in paragraphs 3 above.

30. The next question I have to consider is whether the claimant has shown that he is entitled to the benefit of the exemption contained in Rule 3(1)(c). It is correct that there was contact between the respondent and ACAS and I refer to the email form the respondent set out at paragraph 5 above. That contact was on the 12 October 2015 after the 2015 claims had been presented. Does that amount to the respondent having "contacted ACAS in relation to a dispute?" Certainly there was contact with ACAS. However, the contact was to query as to whether the early conciliation regime had been complied with by the claimant. The email from the respondent did not provide or contain any details of the dispute. The thrust of the regulations is to encourage parties to resolve their differences without Employment Tribunal proceedings being necessary and in my view an enquiry as to the claimant's compliance or otherwise with the regulations, following the presentation of a claim and its service upon the respondent, does not amount to a situation where the respondent "*has contacted ACAS in relation to a dispute*".

31. However, there is a further hurdle for the claimant to overcome applying the wording of Regulation 3(1) provides *"A person ("A") may institute relevant proceedings without complying with the requirements for early conciliation where"* and then follow the exemptions, including Regulation 3 (1) (c). Any contact the respondent has with ACAS must therefore be prior to the institution of those relevant proceedings. In this case the respondent's contact with ACAS quite clearly post-dates the presentation of the proceedings. If contrary to my view, the respondent's enquiry of ACAS amounted to contacting ACAS in "*relation to a dispute"* it could not

provide an exemption from early conciliation for the claimant unless that contact had occurred prior to the institution of relevant proceedings. It did not.

32. In all those circumstances the claimant has not shown that he has the benefit of an exemption from early conciliation and clearly accepts on his own submission that he had not complied with the requirements of the Early Conciliation Regulations by obtaining Early Conciliation Certificates in relation to both the 2015 proceedings. Accordingly, I must dismiss the claims because the claimant has not complied with the requirement of Regulation 18A of the Employment Tribunals Act 1996 in contacting ACAS before instituting proceedings.

33. I have gone on to consider the arguments raised by the claimant about amendment. As previously stated there is no application to amend by the claimant before me today. If I am mistaken in my understanding of his written submissions provided to the Tribunal today and if what is said in those submissions is that he now seeks to amend the 2013 proceedings to add claims of post-employment victimisation then in my view applying *Selkent* principles any such application must fail. I come to that view for a number of reasons. The first reason is that the claimant expressly chose to present new claims in 2015. He could have sought to apply to amend the 2013 claims but chose not to. He cannot argue the 2015 proceedings are within the factual background set out in the 2013 proceedings, and that allowing the amendment is simply a relabelling exercise. The 2015 claims are specifically about post-employment discrimination which allegedly arose in 2015 some time after the 2013 events and the end of the claimant's employment.

34. Secondly, there is a very long delay in now making an application to amend over 3 years after the 2015 claims were originally presented and the jurisdictional point raised promptly bey the respondent in the responses to those claims. To grant an amendment after this length of time would be to drive a coach and horses through the clear failure by the claimant to comply with the Early Conciliation Regulations in permitting his claims to proceed via a different route, a route that was open to him to take in 2015 but which he chose to not to take but presented new claims. He was aware of the jurisdictional issues in the 2015 proceedings from September of that year when the Tribunal first listed a preliminary hearing to consider whether there had been compliance with the requirements of Early Conciliation. Both parties wanted the claims stayed whilst the appeal proceedings progressed. The consolidation did not, and could not, determine the jurisdictional validity of the 2015 proceedings. That was always going to have to be dealt with at a preliminary hearing. The consolidation simply kept all matters together for administrative simplicity pending conclusion of the appeal process.

35. For all those reasons the claims in the 2015 proceedings of post-employment victimisation must be dismissed because in the absence of compliance with the Early Conciliation Regulations the Tribunal has no jurisdiction to deal with them and had the claimant had brought an application to amend applying Selkent principles the application would be unsuccessful on the facts of this case.

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Regional Employment Judge Byrne

Date: 30.11.18……..

Sent to the parties on: 30.11.18.....

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For the Tribunal Office