EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Cottrell	**v**	(1) Echo Personnel Limited (2) Avon Cosmetics Limited

Heard at: Cambridge **On:** 16 January 2019

Before: Employment Judge Foxwell

Appearances

For the Claimant: In person, assisted by Mr P Bennett

For the First Respondent: Mr S Squires, Director

For the Second Respondent: Mr M Hardiman, Solicitor

PRELIMINARY HEARING JUDGMENT

The Claimant's claims against the Second Respondent are dismissed as the Tribunal does not have jurisdiction to hear them.

REASONS

1. The Claimant, Mrs Cottrell, was employed by the First Respondent, Echo Personnel Limited. between 8 and 16 January 2018 when she was dismissed.

2. On 26 March 2018, she presented claims of breach of contract and unfair dismissal and/or being subjected to detriments for making public interest ("whistleblowing") disclosures against Echo Personnel and Avon Cosmetics Ltd. Although employed by Echo Personnel, she had been engaged to work at the premises of Avon Cosmetics and her work was overseen by employees or agents of that company.

3. Prior to bringing her Tribunal claim, the Claimant contacted ACAS to commence early conciliation and ACAS issued a certificate, number R122177/18/02, naming Echo Personnel Limited as the prospective respondent. The certificate shows that early conciliation took place between 24 February 2018 and 20 March 2018. The early conciliation certificate did not name Avon Cosmetics.

4. When completing her claim form, the Claimant inserted this early conciliation certificate number in the separate boxes applying to each Respondent.

5. The Claimant was notified by letter dated 11 April 2018 that the claims had been accepted by the Tribunal. Acceptance is an administrative step and does not confer jurisdiction on the Tribunal.

6. The claims were served on both Respondents on 11 April 2018 and, in accordance with its usual practice, the Tribunal listed a case management preliminary hearing; the parties were notified that this would take place in Cambridge on 9 October 2018.

7. The Respondents each subsequently filed responses disputing the claims on their merits. The First Respondent said that it had removed the Claimant from the Avon contract because of alleged difficulties there. The Second Respondent disputed the Tribunal's jurisdiction to hear this claim on the basis that the Claimant had not obtained an early conciliation certificate naming it. The Second Respondent claimed that this was necessary under statute.

8. The claim and responses were referred to Employment Judge King for review and she directed that the preliminary hearing listed on 9 October for case management be converted to a public hearing to consider the jurisdictional question raised by the Second Respondent and to consider whether the Tribunal had jurisdiction to decide a breach of contract claim in any event. Notice of this change was given by letter dated 16 June 2018 which was sent to the parties by post. I am satisfied that this letter was correctly addressed. The First and Second Respondents received the letter but it became clear in the hearing that the Claimant either did not receive it or does not recall receiving it. She alleged that the letter had been concocted and was fake but she is wrong about that; the letter is genuine.

9. I had to consider whether it was appropriate to decide the issues identified in the letter of 16 June 2018 at this hearing when it is possible that the Claimant did not receive notice of them. I decided that it was appropriate to proceed with the first of these, namely the Tribunal's jurisdiction in respect of the claim against the Second Respondent. My reason was that this jurisdictional point had been raised in the Second Respondent's response, which the Claimant accepts she did receive, so she has been on notice that this is an issue which the Tribunal must deal with. I decided not to proceed with the other issue, jurisdiction in respect of a breach of contract claim, today because I think that there may be a linked claim of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 and, potentially, whistleblowing detriment claims too. I considered that the unrepresented parties might need an opportunity to reflect on the legal implications of this. Accordingly, I heard submissions on the points raised by Mr Hardiman on behalf of the Second Respondent but not those of Mr Squires on behalf of the First; he had hoped to persuade me to strike out the Claimant's claim against the First Respondent today.

10. Mr Hardiman's argument is based on the Early Conciliation Rules contained in the schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. Rule 4 provides that, if there is more than one prospective respondent, a claimant must present a separate early conciliation form under rule 2 in respect of each of them. Mr Hardiman said that this is a mandatory requirement which has not been complied with in this case. He referred me to two decisions of the Employment Appeal Tribunal In support of his argument (decisions of the EAT bind the Employment Tribunal). The first was the case of *Giny v SNA Transport Ltd.* [2017] EAT 317, where the EAT upheld an Employment Judge's decision to reject a claim on the basis that the early conciliation certificate wrongly named an individual officer of a company rather than the company itself. The facts of *Giny* are not the same as this case; *Giny* concerned a certificate naming the wrong person whereas here there is no certificate naming the Second Respondent, Avon Cosmetics, at all. I have noted the more recent decision of the EAT in *Chard v Trowbridge Office Cleaning Services Ltd [2017] ICR D21* which may conflict with *Giny* but not in so far as the basic requirement for a separate certificate for each prospective respondent is concerned.

11. Mr Hardiman also referred me to *Mist v Derby Community Health Services NHS Trust* [2016] ICR 543. In that case the EAT held, firstly, that a prospective claimant needed only provide sufficient information to ACAS to enable it to make contact with a prospective respondent. The EAT also held that a claimant did not have to engage in early conciliation with a prospective respondent before applying to amend existing proceedings to join it as a party. Once again, I did not consider that the facts of *Mist* were similar to those of Mrs Cottrell's case. The evidence ACAS supplies to show that it has been given sufficient information to make contact with a prospective respondent is a certificate and none exists in respect of the Second Respondent here. Furthermore, this is not a case where the Claimant has applied to amend to join the Second Respondent as a party to existing proceedings. I considered that to deem the Claimant to have made such an application would be artificial and would undermine the purpose of Rule 4 and the scheme in section 18A of the Employment Tribunals Act 1996 (see below).

12. None of the parties referred me to the case of *DeMota v ADR Network [2018] ICR D6* in argument and it is not one that I considered before giving an *ex tempore* judgment at what proved to be a difficult hearing. I am surprised that Mr Hardiman did not draw my attention to this case at the time. I shall return to it below.

13. Mr Squires told me that the First Respondent neither supported nor opposed Mr Hardiman's submissions.

14. The Claimant questioned whether the Tribunal's jurisdiction was affected at all by the lack of an early conciliation certificate naming Avon Cosmetics. She relied on the fact that the Tribunal's administration in Watford had accepted the claim and it had been processed through to what she understood to be a case management hearing. She characterised the alleged omission as minor and technical in nature and she ascribed any blame for an error (if there was an error at all) to the ACAS early conciliator who she says should have drawn her

attention to the requirement in Rule 4. The Claimant reminded me that she is not legally qualified and that all she seeks is access to justice.

15. I recognise the power of the Claimant's points, albeit they were not always put in the most courteous of terms, and it may surprise her to learn that I have sympathy with her about the technical nature of the argument raised by Mr Hardiman. Nevertheless, his point is one that affects the Tribunal's jurisdiction. Employment Tribunals exist because of statutory powers conferred on them by Parliament and they can only act within the scope of those powers. With that in mind, I turn to what those powers are.

16. The requirement for early conciliation has existed since April 2014. It is contained in section 18A of the Employment Tribunals Act 1996. Section 18A(8) reads as follows:

> *'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)."*

Subsection (1) provides that the requirements of section 18A apply *to "relevant proceedings"* and subsection (4) provides for ACAS officers to issue early conciliation certificates.

17. I find that a whistleblowing detriment claim, a claim of breach of contract and/or of automatic unfair dismissal (if such exist in this case), are all relevant proceedings to which the requirements in section 18A apply. Furthermore, where a requirement for an ACAS certificate is not met, it is mandatory under the Tribunal's Rules to reject the claim. The only circumstance where this does not apply is where there is a minor error in a name entered on a certificate; this exception requires a judicial rather than administrative decision. Those are not the facts here where for whatever reason there has been a failure to obtain a separate early conciliation certificate in respect of the Second Respondent.

18. In ***DeMota*** *(supra)* a litigant in person brought a claim against the employment agency which employed him and its client with whom he had been placed ("the principal") so the relationship of the parties there was identical to this case. When commencing early conciliation, the friend who was helping the claimant with the process named both employer and principal in the box on the ACAS form headed *"The relevant employer, person or organisation"*. ACAS subsequently issued a single certificate naming both. The EAT considered the application of Rule 4 in this context and overturned an Employment Judge's decision to reject the claim. HHJ Richardson held that the purpose of the 2014 Regulations and Rules was to provide a structured opportunity for early conciliation and not to act as a bar to access to justice.

19. ***DeMota*** undoubtedly lends support to the thrust of the Claimant's submissions but a fundamental difference remains on the facts: in that case there was a certificate naming each respondent, albeit in a composite way, in this case there is none naming the Second Respondent. In those circumstances I cannot escape the conclusion that the prohibition on presenting a claim against the

Second Respondent contained in section 18A(8) of the 1996 Act applies. It follows that the Tribunal has no jurisdiction in respect of the claim against Avon Cosmetics and this must be and is dismissed. The proceedings against the First Respondent, Echo Personnel, will continue but the Second Respondent, Avon Cosmetics, is discharged from these proceedings.

20. Having announced that decision the Claimant alleged that I was untrustworthy and had a conflict of interest in that I was standing up for big business in the face of justice. I treated this as an application that I recuse myself from these proceedings; I declined to do so as there is no factual basis for the assertion that I have a conflict of interest and the one issue I have dealt with has been dealt with in accordance with the law as I understand it to be.

21. The remaining preliminary issue will be dealt with at a further open preliminary hearing with a time estimate of 3 hours on a date to be fixed. I have reserved this hearing to myself, subject to any direction of the Regional Employment Judge to the contrary.

22. I recommended that the Claimant and First Respondent take legal advice if they are able to do so.

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Employment Judge Foxwell

Date: 29 / 1 / 2019

Sent to the parties on: 5 / 2 / 2019

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For the Tribunal Office