



EMPLOYMENT TRIBUNALS

Claimant

Mr. J.S. Miller

Respondent

Jewish Care

v

Heard at: Watford

On: 14 March 2019

Before: Employment Judge Heal

Appearances

For the Claimant: Mr. David Miller, claimant's father.

For the Respondent: Mr. M. Curtis, counsel.

JUDGMENT

The complaint of unfair dismissal is dismissed.

REASONS

1. I provide written reasons for my decision at the request of the claimant.

The issues

2. By a claim form, which both sides agree was presented on 23 May 2014, the claimant made a complaint of unfair dismissal.

3. The claim form was filled in on the claimant's behalf by the claimant's father, Mr David Miller. Mr David Miller remembers filling in the form in handwriting or online. He said that the printed version before the tribunal accurately represented what he had set out in the original claim form (a copy of which he has not kept).

4. At box 2.3 of that claim form in answer to the question,

'Do you have an Acas early conciliation certificate number?'

Mr Miller has ticked the box saying, 'No'.

The next question on the form says,

'If No, why don't you have this number?'

Mr Miller has ticked the third box down saying,

'My employer has already been in touch with Acas.'

5. Mr Curtis for the respondent gave to Mr Miller this morning a copy of a settlement agreement purporting to compromise the employment dispute between the parties. That appears to be a standard form agreement including the provisions required by section 203 of the Employment Rights Act 1996 including a signature from a solicitor stating that she has given independent legal advice to the claimant and that she is a Solicitor of the Supreme Court with a current Practising Certificate and there is and was at the time she gave the advice in force a contract of insurance.

6. Therefore, the respondent says that this claim should be struck out for two reasons, because:

- 6.1. no early conciliation certificate number was provided on the claim form;
- 6.2. the claim is an abuse of process, having previously been compromised.

The history

7. This claim has a long history which is interlinked with the evolution of recent legal changes.

8. The claimant's contract came to an end on either 4 or 5 March 2014.

9. Section 18A of the Employment Tribunals Act 1996 came into force on 6 April 2014.

10. By section 18A(1), before a 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).

11. Subsection (7) provides for exceptions to subsection (1) which include cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.

12. Subsection (8) provides,

'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).'

13. Once a prospective claimant contacts ACAS, the information is sent to a conciliation officer. That person then has an obligation to endeavour to promote settlement. If the officer concludes that conciliation is not possible or if the prescribed period of time runs out, then the conciliation officer shall issue a certificate to that effect. This is as an 'E.C. certificate' or early conciliation certificate.

14. An employment tribunal claim form requires this number save where exceptions apply.

15. Rule 8(1) of the Employment Tribunal Rules 2013 provides that a claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements rule 8.

16. Rule 10(1)(c) of the 2013 rules says that a tribunal shall reject a claim if it does not contain an early conciliation number or confirmation that the claim does not institute any relevant proceedings; or confirmation that one of the early conciliation exemptions applies.

17. Regulation 3(1)(c) of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 provides that a person ('A') may institute relevant proceedings without complying with the requirement of early conciliation where 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 relates to that dispute. It is for A to show that that exemption applies.

18. All of those provisions applied to this claim form, presented on 23 May 2014.

19. At that time the fees regime applied to the employment tribunal system. This claim was rejected because of non-payment of the issue fee.

20. On 26 July 2017 however, the Supreme Court ruled that the employment tribunal fee system was unlawful.

21. Accordingly, HMCTS wrote to the claimant on 24 November 2017 giving him the option to apply to have his claim reinstated. The claimant applied on 11 January 2018 for his claim to be re-instated.

22. The respondent submitted a response on 9 March 2018 which, besides defending the substantive claim, also raised the two jurisdictional points which now arise in this preliminary hearing.

23. About the second point, Mr Miller senior said today that the claimant entered into a settlement agreement for a '*derisory sum*' only because of the cost of bringing tribunal proceedings. This gives rise potentially to a difficult and unexpected point of law as to whether the settlement agreement might be vitiated in some way by the unlawful fee regime. Mr Curtis was not in a position to present argument on this point today. I have made no decision about it and confine this decision to the point about the early conciliation certificate.

24. If, therefore, it turns out subsequently that these proceedings continue, say because the claimant presents a new claim form and is able to persuade the tribunal to extend time for that claim, then that point about the settlement agreement remains to be decided.

Analysis

25. Mr Curtis has drawn my attention to *Sterling v United Learning Trust* UKEAT/0040/14 in which a claimant quoted an incorrect early conciliation certificate number on her claim form. She only realised her error and corrected it two days after the time limit had expired. Langstaff P held that an incomplete conciliation certificate number breached rule 10 so that the claim could not be brought.

26. I consider myself bound by this. I have also considered – because Mr Curtis touched on the point as he read out the relevant passages from *Sterling* - whether regulation 6 provides any assistance for the claimant. Under that regulation, failure to comply with any provision of the rules (except rule 8 (1), 16 (1), 23 or 25).... does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the tribunal may take such action as it considers just.

27. However, rule 6 excepts rule 8(1). Rule 8(1) says that claim shall be started by presenting a *completed* claim form. Rule 10 sets out the minimum information to be supplied in the claim form, without which a claim must be rejected. This includes the EC certificate number or confirmation of an exemption. So, a *completed* claim form contains that minimum information. I consider that I do not have the discretion therefore under rule 6 to waive or vary the requirement for an early conciliation number. Without the number, the claim form is not completed.

28. This analysis is consistent with section 18A(8) which says that a person subject to section 18A(1) *may not* present an application to institute relevant proceedings without an EC certificate. In relevant proceedings I do not have a discretion to waive the requirement that there must be an EC certificate, unless the exemptions apply.

29. There is no EC certificate in this case and claimant has not shown that the exemption relied upon applies. Not only has the claimant not shown that the respondent contacted ACAS but, on the contrary, Mr Miller has explained that he did contact ACAS and for some reason that is not now clear, ACAS would not proceed with the conciliation. There are therefore two reasons why Mr Miller cannot rely on regulation 3(1)(c) of the 2014 regulations.

30. Therefore, whatever sympathy I might feel for the claimant's situation, which he must find difficult to understand, I consider that I am bound to strike out this claim and I do so.

Employment Judge Heal

Date: 18 / 3 / 2019

Sent to the parties on: 21 / 3 / 2019

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For the Tribunal Office