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EMPLOYMENT TRIBUNALS

Claimant: **Mr A Byrne**

Respondent: **AC Sheehan Ltd**

Heard at: **East London Hearing Centre**

On: **4 October 2018**

Before: **Employment Judge Russell (sitting alone)**

Representation

Claimant: Mr S Hughes (Friend)

Respondent: Ms S Cowen (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The application for a reconsideration is allowed.

(2) Upon reconsideration the order of Employment Judge Taylor on 24 April 2018 is confirmed.

REASONS

1 The Claimant was employed by the Respondent as a fitness instructor from

2014. On the letter offering him employment it makes clear that the offer is with AC Sheehan Ltd trading as Fit for Less.

2 The Respondent operates as the franchise of a larger company known as Energy Fitness. It is a term of the franchise agreement or there are terms of the franchise agreement dealing with personnel, including an obligation upon the franchisee to ensure that the business is staffed with sufficient competent personnel and to meet minimum standards. A further obligation that the franchisee shall notify the franchisor of the details of all personnel that join or leave the business as soon as reasonably possible and finally, that the franchisee shall, at its own costs, use the nominated supplier if any, in relation to employment matters including the legal aspects of employment.

3 As Mr Sheehan explained today that external HR adviser for whom they pay are called Spikey HR and that is the company referred to in the course of these proceedings.

4 The Claimant's employment appears to have proceeded without major incident until the spring of 2017 when there arose three discrete issues, the first relating to the handling of money, the latter one to the opening of the business. These resulted in the Claimant being dismissed. He appealed against his dismissal and the dismissal was upheld. Part of the Claimant's case is that in considering whether or not he ought to have been dismissed the Respondent should have had proper regard to what he contends as his disability of dyspraxia.

5 The Claimant contacted ACAS on 3 December 2017, the effective date of termination I should say having been 5 September 2017 and he contacted ACAS in the

name of Energy Fitness, that is the franchisor. The conciliation period continued until 3 January 2018 and the ET1 was presented against Energy, the franchisor, on 12 January 2018. Ms Cowen makes the point that the Claimant had left matters very late in the day. I accept however, that this was a particularly difficult time for the Claimant whose father was terminally ill and who subsequently died shortly before the presentation of the Tribunal claim. His domestic circumstances was such that it was not reasonable to expect him to have an Employment Tribunal claim at the forefront of his mind.

6 In any event, the claim was issued, it was issued against the franchisor and the franchisor notified the Tribunal that it was not the correct Respondent, that was done in February 2018. It is also worth noting that the Respondent was aware of the Tribunal claims on 7 February 2018 when the papers arrived at the Energy office having been informed by the franchisor.

7 In any event, the Claimant made an application to amend the claim on 23 March 2018, effectively by the substitution of AC Sheehan Ltd for Energy, the franchisor. That matter was ultimately considered by Regional Employment Judge Taylor who on the 24 April 2018 made an order in which she removed Energy Fitness from the proceedings as not being the correct Respondent and identified the correct Respondent as AC Sheehan Ltd, the title of the proceedings being amended accordingly. She directed that the claim be served on the Respondent. Due to errors on the part of the Tribunal administration this was not in fact effected until June 2018.

8 The Respondent provided its ET3 response in accordance with the time limit required of it and it raised the point quite properly that it had not been part of the early conciliation process, had therefore not been aware of the conciliation period and had

indicated that the first that he knew of any claims being made was when the preliminary hearing papers arrived.

9 The Respondent then set out in considerable detail over approximately six pages his considered and detailed defence to the Claimant's complaints of disability discrimination and unfair dismissal.

10 The matter before me today following the order of Employment Judge Prichard that there be a preliminary hearing to decide whether or not the Tribunal had jurisdiction to hear the claim on two grounds; the first being time points and the second being the absence of an early conciliation certificate in the name of the Respondent.

11 Ms Cowen appeared today and indicated at the outset of the hearing that she did not pursue the time point but she did take the point on early conciliation and she directed the Tribunal's attention to the case of *Drake International Systems Ltd v Blue Arrow Ltd* UKEAT/0282/15 fairly conceding that the case appeared to go against her but nevertheless distinguishing it on the facts of this case. In essence, that case considered a decision by an Employment Judge to substitute as respondents four subsidiary companies in place of the parent company. President Langstaff considered various arguments as to the requirements of the early conciliation scheme the effect of section 18A of the Employment Tribunals Act 1996 and the case management powers of the Employment Tribunal in such circumstances. He held that the decision to substitute a party was a matter of case management, the exercise of the Tribunal's powers was within rule 34 and the exercise of that discretion should be seen in accordance with normal principles. He made the point from paragraph 23 onwards that in that case the link between the parent company and the subsidiary companies was close as indicated by the fact that the same legal team represented them. He also

considered the effect of the judgment of Her Honour Judge Eady in *Science Warehouse* and went on at paragraph 25 to set out the principles to be applied. I shall not read those out now but they will be included in the judgment when it comes out.

12 In essence, however, he decided that the Tribunal should approach the application to amend in a manner satisfying the requirements of relevance, reason, justice and fairness ?encountering? all jurisdictions applying the *Selkent Bus Co* approach. Should be alive to any abuse of process but also taking into account fairness and justice and the overriding objective to avoid unnecessary formality seeking flexibility and avoiding delay saving expense. In that particular case Judge Langstaff went on to note that it was for happy consequence of his reasoning that the appeal be dismissed. If that were not so there could be a real risk of satellite instigation in respect of the provisions of early consideration with the stultifying effect that litigation or similar to the previous statutory dispute resolution procedures.

13 I therefore approached today's hearing in consideration of the rules. It was agreed at the outset that as Judge Taylor had already made the order substituting the Respondent, the appropriate approach in accordance with the rules was for there to be a reconsideration of the judgment under rules 70 to 73 of the Tribunal Rules of Procedure. That provides that ordinarily it is the Judge who made the original decision who should undertake the reconsideration application or hearing. In this case the parties pragmatically agreed it is I who ceased of the matter today it was appropriate that I carry out the reconsideration that was in accordance with the overriding objective and is greatly to the credit of each party in the case.

14 I therefore started by a consideration of the application to amend and the

relevant factors set out in *Selkent* and also *Cocking v Sandhurst.* The overarching consideration is the balance of justice and hardship to the parties which requires consideration of the nature of the amendment, the application of time limits and possible extensions, whether or not it is a new claim or a relabelling exercise, the timing and the manner of the application including why it was not made earlier and why at this stage and bearing in mind the delay in itself should not be the sole reason for refusing an application. I add to that list of relevant factors the early conciliation point in light of the *Drake* decision. Clearly the requirement to obtain a certificate in the ordinary course of events and the need to be astute to the possibility of abuse must now be a relevant factor although it did not exist at the time of the *Selkent* or *Cocking* decisions.

15 Applying therefore the law and the rules to the facts of this case, I am satisfied that it is appropriate or was appropriate for Judge Taylor to have permitted the amendment. I accept that at the time of the amendment on application on 23 March 2018 the Claimant was out of time as against the Respondent and that there was no early conciliation certificate.

16 Dealing first with the certificate, I am satisfied that having regard to *Drake* and the facts of the matter before me that there was a sufficient relationship between franchisor and franchisee to make it just and equitable to allow the amendment without requiring a further certificate. It is not simply that there was a contract between the parties as Ms Cowen submitted, it is the nature of the obligations within that contract. The entire section upon the handling of franchisee personnel and in particular the close relationship in legal terms between franchisor and franchisee make it analogist to the relationship between a parent and a subsidiary. That is amply demonstrated by the

fact that the only document upon which AC Sheehan Ltd is mentioned is the initial offer of employment. Thereafter all matters relating to the disciplinary or a letterhead referred to Energy Group. It is perhaps even more significant that in this case the Claimant's appeal against dismissal was heard by the Divisional Operations Manager of the franchisor, the decision being reached by him that the appeal be confirmed. The nature therefore of the link between the two is such that this is firstly, not an abuse by the Claimant and secondly, is one where the relationship is sufficiently close in the *Drake* sense.

17 Turning therefore to questions of time. As I say, there is a delay in the presentation of the Claimant's claim. That, however, I find is reasonably explicable by the nature of the correspondence between the parties and the inclusion of the Energy Fitness letterhead, not only that the use of the Energy Fitness individual undertaking the appeal but perhaps primarily and most importantly in this case, the Claimant's domestic circumstances. It is, of course, an important rule within tribunals that statutory time limits are strictly observed and there is no presumption of an extension of time but whether or not one looks at the just and equitable test under discrimination law or even the reasonable practicable test under unfair dismissal law. I am satisfied that the Claimant would be entitled to such an extension or certainly that the time limits are not of sufficient import to lead to a refusal of his amendment application and that is particularly underscored by the provisions of rule 34 which make it clear that a party may be added, substituted or removed; even where time limits have expired so long as the Tribunal is satisfied that there are issues between the parties falling within the jurisdiction of the Tribunal which it is in the interest of justice to have determined. Here the Claimant wrongly brought his claim against Energy Fitness, it should have been

brought against AC Sheehan Ltd and the order of Judge Taylor is correct in amending or rectifying that error.

18 Also, relevant to time limits are the way in which the Tribunal administration has dealt with this case. It is unfortunate and regrettable for both parties that there has been significant delay. This matter was not resolved in March 2018 when it should have done. That, however, is not the fault of the Claimant nor is it the fault of the Respondent. It is to that extent a neutral factor.

19 However, in balancing the prejudice to the parties, if I were to refuse the amendment or revoke the decision, the Claimant would be debarred from bringing a discrimination claim and unfair dismissal claim in its entirety. In allowing the amendment the Respondent is prejudiced insofar as it is now required to answer a claim which it would not have to do if strict rules were applied. To some extent however, that is a windfall benefit. The Respondent is not prejudiced by its inability to meet the factual case asserted by the Claimant, that much is clear from the very detailed response in which the Respondent deals in rather more detail than is often the case of the nature of the claims advanced. A fair trial is entirely possible and the Respondent's position is not accordingly prejudiced.

20 Looking at the overriding objective therefore and also *Selkent* principles and the need to do justice in the case I am satisfied that the balance of all of that comes down in favour of permitting the amendment. I therefore confirm the order of Employment Judge Taylor and the case will proceed against the Respondent as now correctly named.

21 Note in the published judgement the franchise agreement to be referred to is

clauses 13(2), 13(3) and 13(5) without content.

Employment Judge Russell

31 October 2018