



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr D Kemp

v

**Respondent**

Mr M Skoyles

**Heard at:** Bury St Edmunds

**On:** 12 April 2019

**Before:** Employment Judge Postle

**Members:** (delete if not required)

**Appearances**

**For the Claimant:** In person.

**For the Respondent:** Mr Brown, Counsel.

## RESERVED JUDGMENT

1. The tribunal does have jurisdiction to hear the claimant's claims notwithstanding an error on the claim form citing an individual rather than the limited company.
2. The claimant's claims of constructive unfair dismissal and a claim for sexual orientation are dismissed as having no reasonable prospect of success.

## RESERVED REASONS

1. Firstly, Employment Judge Postle apologises for the delay this Reserved Judgement has taken in reaching the parties. This was due to a misunderstanding by the Judge in believing he had dictated the judgment some time ago, when it transpired the Judge was mistaken in his belief.
2. This was a preliminary hearing to consider a number of matters, particularly whether the claimant has brought his claim against the correct party and if not whether the claims should be struck out. In particular, whether the claimant has complied fully with the ACAS requirements in obtaining an ACAS certificate under the correct name, and if not whether

all the claims should be struck out. Further in the alternative, whether any parties should be added or removed. Finally, whether any of the claims have no reasonable prospects of success and therefore should be struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, and whether any of the claims have little prospect of success such that a deposit order should be made again pursuant to rule 37.

3. The background shows that the claim prior to the issue of proceedings went through the early conciliation process and obtained an early conciliation certificate dated 16 November 2018 against a prospective respondent Hammond Road Garage Ltd t/a Hammond Cars, Ormond Road, Great Yarmouth, Norfolk, NR30 1QB. The claimant then issued a claim form on 9 December 2018 and at paragraph 2 of page 1 of the claim form where it asks to give the name of your employer or the person or organisation your claim is against the claimant inserted Mark Skoyles, the Managing Director of the limited company. However, in the body of the claim form under paragraph 9.2, where the claimant set out his claim he recites the respondent as Hammond Cars on a number of occasions and in particular:-

- I was required to prepare a schedule of loss which I did – I understand that this has previously been supplied to Hammond Cars and rejected.
- I was taken back by my treatment by my employer Hammond Cars.
- I've been waiting the outcome of criminal convictions for two H Cars employees.
- The newspaper article provided background to Hammonds employees.
- From November 2016 to May 2018 my focus was helping H Cars resolve.
- I even and tried to get this individual to meet me and more importantly hand over the company laptop.
- My involvement with company diminished.
- What direction the company was taking at any given time.
- As all copies of all relevant communications, letters and emails between me and H Cars.
- I emailed my resignation letter to Mark Skoyles director at H Cars.
- My position of HR manager at H Cars.
- And to my knowledge she is still employed by H Cars.
- Whilst in the presence of three H Cars senior leaders.
- Who was the driver for the company?
- H Cars chooses when and when not.
- The company regularly and unilaterally change employees job roles.
- Disregard to how I'd helped the company.

4. It is clear throughout the claimant's particulars of claim he is referring at all times to his employer as a company or H Cars or Hammonds, not Mark Skoyles and of course that is the name his early conciliation

certificate was entered into, Hammond Road Garage Limited T/A Hammond Cars.

5. The form had been accepted by the Tribunal Office and duly served on 10 January 2019.
6. Originally the respondent's solicitors argued that the question of an acceptance of the claim form amounts to a judgment pursuant to rule 1(3)(b) as confirmed by the case of Trustees of the William Jones's Foundation v Parry UKEAT/88/16. The respondent's solicitors made an application for a reconsideration, i.e. to reject the claim form.
7. The matter came before Employment Judge Laidler who considered the respondent's application and responded as follows:-

“She considers the application of a reconsideration misconceived in the circumstances of the case. They are to be distinguished from those in the Trustees of the William Jones's School Foundation v Parry UKEAT/0088/16 to which they refer, in that case the claim form had been referred to an Employment Judge who had accepted it. In this case there has been no referral to an Employment Judge and as such there is no judgment within the meaning of rule 1(3)(b) to be considered.

The respondent should submit a response to the claim setting out his position and then the issue of the correct respondent and any issue about ACAS early conciliation can be dealt with by way of case management and further order.”

8. The claimant wrote to the Tribunal on 25 January 2019 quoting the respondent's application and confirming he had quoted in his early conciliation certificate a prospective respondent explaining that the reason Mr Skoyles the managing director was shown on the front of the ET1 was that he was the person who dismissed the claimant and regrettably that name was put on the front inadvertently and requesting that the prospective respondent's name should read Hammond Road Garage Limited T/A Hammond Cars. He asked that the claim form be amended.
9. A response was entered by the respondent's solicitors in the name of Mark Skoyles on 4 February 2019 and raised the preliminary issue as to the claim being brought against the incorrect body namely Mr Skoyles rather than the limited company. Further raising the issue of ACAS Early Conciliation Certificate citing the prospective respondent being different from that on the claim form.
10. The matter ultimately came before Employment Judge Postle for a preliminary hearing at which the claimant was in person and the respondent was represented by Mr Brown of Counsel. After some debate as to the ambit of the preliminary hearing it was agreed that Mr Brown's application could proceed on the basis that the claim should be struck out for having been issued against the wrong respondent.

11. Mr Brown recited from Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, particularly rule 12(1)(f), "One which institutes relevant proceedings and in the name of a respondent on the claim form is not the same as the name of the prospective respondent on the conciliation certificate" and also rule 12(2)(a) "The claim, or part of it be rejected if the Judge considers that the claim or any part of it is of a kind described in sub para (e) or (f) of paragraph (1) unless the Judge considers that the claimant made minor error in relation to the name or address and it would not be in the interests of justice to reject the claim.
12. Mr Brown argues strongly that this is not a minor error and clearly if it is not a minor error it should be rejected, if it is minor is it in the interests of justice to allow it through.
13. Further, Mr Brown submits the error is not a minor error and even if it is a minor error it should be rejected because it is mandatory that the name and address on the ACAS form is the same as on the claim form, if different it is a defect and should be rejected. The fact that the claimant named the wrong employer on the claim form is irrelevant and he supports this by a recent case of Mr I Giny v SNA Transport Limited UKEAT/0317/16/RN. In that case:

"The claimant notified ACAS under the early conciliation procedure, erroneously identifying an individual (Mr SN Ahmed) as his employer and "prospective respondent" (rather than Mr Ahmed's company giving the correct address) ACAS duly issued an early conciliation certificate with that information. Having taken legal advice the claimant issued his ET1 claim form with the respondent correctly named. The Employment Judge rejected the claim under 12(2)(a) on the basis that the difference between the name in the early conciliation certificate and the ET1 was not a minor error. The claimant contended that the decision was wrong in law; and that on a propitious interpretation of rule 12(2)(a) the question was whether the information given to ACAS was sufficient for it to achieve contact with the true respondent which was satisfied in this case. The respondent contended that the difference between the name of an actual person and a legal person would never be a minor error. Rejecting both contentions, the Employment Appeal Tribunal concluded that it was not appropriate to put any gloss on the simple and straight forward language of the rule; and that there was no error of law in the Employment Judges conclusion."
14. Mr Brown goes further and says that the claimant was the HR manager of the respondent and should have been aware of the correct name of his employer.
15. Mr Brown puts it quite simply, the problem for the claimant is that he sued the wrong person. It is not a minor error and invites the Tribunal to reject the claim.
16. Alternatively, Mr Brown submits if the error is considered minor it is not in the interests of justice to accept the claim. If the claims proceed, a number of necessary steps are required including:-

- 16.1 The claimant providing appropriate particulars of claim and if the Tribunal decided to substitute the respondent they will have to be served, and then there is the question of limitation and argument that the claimant has less than 2 years' service.
- 16.2 The alternative put forward by Mr Brown is that in any event the claim for discrimination should be struck out as it simply has no reasonable prospect of success, and the claim for constructive dismissal in any event the Claimant has less than 2 years' service.
17. The claimant then addressed the Tribunal, he said he had read the case law and fundamentally disagreed. He says that ACAS in November spoke to Hammond Cars and may have spoken to Mr Skoyles. He says he has difficulty with rule 12 as it does not mirror what actually happened. He does not deny that his employer is Hammond Cars, it is a human error reciting Mr Skoyles on the front of the claim form however he has interchanged Mr Skoyles and the company in the body of the claim.
18. Mr Brown argues further that in the claim form there are no particulars in relation to sexual orientation or marriage or civil partnership. The claim is pure speculation and should be struck out.
19. The claimant further responds that before resigning he had a job offer and before he resigned there were a number of triggers that made him leave.
20. The less favourable treatment the Claimant relies upon is said to be jokes were made about his number plate in May 2018. The number plate being 'AV67 WBJ', however the claimant was unable to advance any further information citing unfavourable treatment and in fact confirms before this Tribunal that there was no less favourable treatment on grounds of his sexual orientation that triggered his decision to resign.

## **Conclusions**

21. It is clear that the body of the claim form on page 1 refers to the managing director, but what is clear in the particulars of claim is that at all material times the claimant is referring to his employer as being Hammond Cars or the company. The respondents are in no doubt, by any objective assessment of the particulars of claim, who the claim was brought against and that is borne out by the early conciliation certificate. It was a minor error and therefore notwithstanding the EAT view without knowing that case of course whether that claimant had recited the company in the particulars of claim the Tribunal are satisfied that it is in the interests of justice on the facts before them the Tribunal to accept the claim, it is clear in the particulars reference is made numerous times to the company of Hammond Cars.
22. However, what does appear clear is that the claim of less favourable treatment brought under the Equality Act 2010 for sexual orientation has simply no reasonable prospect of success. The claimant was unable to

advance any cogent argument as to the less favourable treatment, indeed using his own words “less favourable treatment or any because of the claimant’s sexual orientation was not a trigger for his resignation”. That claim simply has no reasonable prospect of success.

23. Furthermore, the claimant may have been dissatisfied with what was going on within the company, but that does not appear to have been the trigger for his resignation. He decided to resign because he had found alternative employment. He did so by email on 9 July at 16:25 to Mr Mark Skoyles. His notice was effective from 10 July and originally his final day of service would have been 10 August. However, the respondent decided to invoke the payment in lieu of notice clause in the claimant’s contract of employment and the claimant was notified of the company’s intention to do so by letter of 16 July which became the claimant’s effective date of termination. The claimant received a payment in lieu of notice from the company which means the claimant would not have had sufficient continuity of employment as his commencement date started on 8 July 2016 bring a claim for unfair dismissal under s.111 of the Employment Rights Act 1996. The company are entitled to take that action by bringing the claimant’s employment to an end earlier than the notice period.
24. However, the Tribunal repeats even if they were wrong in that conclusion, on the face of the claimant’s claim he would have no reasonable prospect of success in convincing a Tribunal that there had been some fundamental breach by the respondent entitling the claimant to resign.
25. The claimant’s claims of unfair constructive dismissal and claims under the Equality Act 2010 are therefore dismissed as having no reasonable prospect of success.

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Employment Judge Postle

Date: ...15 July 2019.....

Sent to the parties on: .....

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For the Tribunal Office