Appeal No. UKEAT/0097/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 8th July 2019

Before

THE HONOURABLE MR JUSTICE SWIFT

(SITTING ALONE)

MISS L CAMPBELL — APPELLANT

JAMIE STEVENS (KENSINGTON) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS LANA CAMPBELL (The Appellant in Person)
For the Respondent	MR SHANE CRAWFORD (of Counsel) Instructed by: Irwin Mitchell LLP 40 Holborn Viaduct London EC1N 2PZ

SUMMARY

PRACTICE AND PROCEDURE – Appearance/response

PRACTICE AND PROCEDURE - Service

Meaning and effect of Rule 15 of the **2013 Employment Tribunal Rules**.

THE HONOURABLE MR JUSTICE SWIFT

1. On 7 May 2018 Lana Campbell presented her claim to the Employment Tribunal ("ET"). In summary, it was a claim that she had been forced to leave her job because she was pregnant.

2. On the ET1 form she identified the Respondent as Jamie Stevens Hair (JSH) and the Respondent's address as 79 Abbeville Road, Clapham SW4 9JN. That had been her place of work. "Jamie Stevens Hair" was the name above the door at the salon where she worked, that had been the trading name of the business since around November 2017 when the business had been bought from a previous owner.

3. Prior to presenting the ET1 form, Miss Campbell had complied with the early conciliation requirement under section 18A of the **Employment Tribunals Act 1996** ("ETA"). She had provided the same information about the Respondent to ACAS as she later set out on the ET1 form. ACAS had contacted Mr Stevens and had spoken to him, although the proposal for a reconciliation did not bear fruit. On 17 April 2018 ACAS had issued an early conciliation certificate.

4. On 15 June 2018 the ET wrote to Miss Campbell accepting her claim. For the purpose of the issue arising in this appeal this letter is significant. It is an acceptance, by the Tribunal, that for the purposes of the **Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013** ("the 2013 Rules"), Miss Campbell's claim was a valid claim, i.e it was not a claim that fell to be rejected under any of Rules 10, 11 or 12 of the **2013 Rules**. Specifically, the 15 June 2018 letter was acceptance that the claim, as presented, met the requirements

arising under Rule 10 which included that the claim included the Respondent's name and the Respondent's address.

5. Also, on 15 June 2019 the ET sent both to Miss Campbell and to JSH notice of a Case Management Hearing to take place on 7 August 2019.

6. By Rule 15 of the **2013 Rules**, if the Tribunal does not reject a claim it must send a copy of it to the Respondent together with other prescribed information. That information was sent to JSH at the Abbeville Road address, I assume that it was sent to JSH on or about 15 June 2018. A respondent to an ET claim is required to present its response to the ET office within 28 days of the date on which the ET is set, the ET1 form and accompanying information, see Rule 60 of the **2013 Rules**. In the present case the due date for presentation of the ET3 was 13 July 2018. No response was sent by that date or, it turns out, at any time prior to 3 January 2019.

7. On 3 August 2018 the Tribunal wrote to JSH as follows:

> **"I have been instructed by Employment Judge Fowell to write to you as follows:**
>
> **An application has been made for a default Judgment against you, having received no response to the claim.**
>
> **This application will be considered at the Hearing on 7 August 2018.**
>
> **..."**

Although that letter refers to a default judgment application, the notion of default judgments has been omitted from the **2013 Rules**. In its place there is Rule 21 which, if a claim is not contested, allows an Employment Judge ("EJ") to decide whether or not a determination can properly be made on the claim or any part of it, either with or without a hearing. Also, on 3 August 2018, the ET wrote to Miss Campbell as follows,

> **"....**
>
> **The Claimant's application for a default judgment will be considered at the Hearing on 7 August 2018.**
>
> **The name you have provided for the Respondent to your claim, namely Jamie Stevens Hair, appears to be only the name of a person, but your claim form also suggests there was a company involved. The wrong name may make it difficult for any decision of the Tribunal to be enforced.**
>
> **At the Hearing, you should provide the full and correct name of your former employer. If it is a company it will usually end with "Ltd" or 'Plc'. The full name can usually be found on the contract of employment, statement of terms and conditions (if you have one) or on other documents, such as a letterhead, invoice or payslip. If the employer is a sole trader or partners trading under the trading name above, then the owner or owners of the business should be named, if possible."**

Each of the 3 August letters was copied by the ET to the other party to the proceedings.

8. I note, by reference to the letter sent to Miss Campbell on 3 August, that although the Tribunal wished to clarify whether the Respondent to the claim should be properly identified as a company, the Tribunal did not at any time consider that was a matter that might give cause for the ET1 form to be rejected as an invalid claim under Rule 10 of the Tribunal Rules. Rather, and in my view, entirely appropriately, the 3 August letter indicates that the Tribunal regarded this point as a point of detail that required clarification, and nothing more.

9. On 6 August 2018, the ET wrote both to Miss Campbell and JSH to the effect that the proposed Case Management hearing could no longer take place on 7 August 2018, and would be relisted. Both parties were requested to provide dates to avoid. Mr Crawford, who appears today for Mr Stevens' company, which is Jamie Stevens (Kensington) Limited (JSKL), told me he does not know whether or not Mr Stevens provided dates to avoid, but in any event, on 30 August 2018 a new Notice of Hearing was sent to the parties. The Case Management hearing was now to take place on 3 October 2018.

10. At the hearing on 3 October 2018, both parties were present. Miss Campbell was there in person, Mr Stevens was, himself, present. He told the Tribunal that he was there alone because his solicitor had been taken unwell. I am told that the EJ first addressed what should be the correct name for the Respondent and that after some discussion, the correct name was identified as JSKL. Then there was some discussion as to whether Miss Campbell considered herself to be employed or self-employed. At the end of the hearing the EJ said that the claim form would be resent to JSKL. Overall, the hearing lasted approximately 20 minutes. The ET's conclusions were set out in an order supported by reasons that was sent to the parties on 8 November 2018. The Case Management Order made by the Tribunal was as follows:

> **(1). "The claim form shall be served on the respondent (whose name is amended to the above) at its registered office at 9 Russell Gardens, Kensington, London, W14 8EZ.**
>
> **(2). A preliminary hearing to identify the issues and make appropriate Orders for a full merits hearing will be listed in due course."**

The Respondent's name referred to above was Jamie Stevens (Kensington) Limited.

11. The Tribunal's reasons also included the following, "It seems that the Claim Form was not received by Mr Stevens at the time." However, it is apparent, from what Miss Campbell has told me today and for that matter also, from what is described in the course of the documents she has prepared for the purpose of this appeal before today, that no evidence was heard on this matter, the only discussion that took place was as I have referred above. In particular, Miss Campbell was not given an opportunity to cross-examine Mr Stevens on how it was, when he apparently received all other correspondence from the ET and from ACAS who had the same contact details for him, he had not received the ET1 form from the ET.

12. In her appeal Miss Campbell contends that the ET did not consider her application for judgment in default, that is to say, her application under Rule 21 of the **2013 Rules**. She also

A contends that the ET was wrong to make the Order it did as to sending the ET1 form to the address of JSKL, in substance allowing further time for an ET3 to be submitted.

B 13. As I see it, the course taken by the ET on 3 October 2018 flowed from the view (which it must have taken) that Rule 15 had not been complied with because the ET1 and other prescribed documents had been sent to JSH at the Abbeville Road address. Mr Crawford submitted that the Tribunal had not addressed Rule 15 in its Order, but had only considered C whether or not to allow an extension of time under Rule 20 of the **2013 Rules**. I do not think that can be correct. The only relevant Order made by the Tribunal was an Order that the ET1 form be resent. That Order could only have followed from a conclusion on the part of the D Tribunal that there had, in June 2018, been a failure to comply with Rule 15.

14. The ET was clearly right to amend the name of the Respondent to JSKL, all parties E came to agree that that was the correct Respondent. But did it follow from that that there had been a failure to comply with a Rule 15? If it did not the ET should have considered a default judgment application, i.e., the application under Rule 21 of the **2013 Rules**, and any application made by the Respondent under Rule 20 for an extension of time to present its ET3.

F

15. The submission for JSKL as set out in the skeleton argument prepared by Mr Crawford are to the following effect. *First*, that by Rule 15 of the **2013 Rules** the ET must send a copy of G the ET3 to the Respondent. *Second*, that in this case that did not happen on 6 June 2018 because the form was sent to JSH at Abbeville Road and not to JSKL in Kensington. *Third*, the EJ was entitled to reach that conclusion as to non-compliance with Rule 15 without formally hearing evidence at the hearing on 12 August 2018. She was entitled to resolve the matter H based on what she was told by Miss Campbell and Mr Stevens, respectively.

16. In support of those submissions the Respondent relies on a paragraph in the Decision of HHJ McMullen QC in **Chowles (t/a Granary Pine) v West** UKEAT/0473/08/DM, a case decided under the **2004 Rules of Procedure**. In that case Mr West started proceedings against his former employer, but on the ET1 the employer was incorrectly described as Mr Charles, not Mr Chowles. The address on the form also contained an incorrect postcode. The proceedings went ahead. The Respondent did not take part. An order for compensation was made in Mr West's favour. All this took place in August 2007. In February 2008, Mr Chowles wrote to the Tribunal saying he had not previously been aware of the proceedings. That letter was treated by the EJ as an application, out of time, to review the August 2007 Decision. That review application took place but failed.

17. At the EAT, HHJ McMullen QC concluded the Review Hearing had been defective as it had been conducted under the wrong rule in the **2004 Rules**. He went on to record at paragraph 15, that the parties agreed that when refusing the application for review, the EJ had not decided that the Respondent had received the ET1 form. In that case, there had been some question whether the Respondent had been told about the claims by an ACAS officer. HHJ McMullen QC concluded it was not necessary for him to decide whether, even if such a conversation had taken place, it amounted to notice of a claim. Then at paragraph 19 of his judgment HHJ McMullen QC stated as follows:

> **"More fundamental, however, is the requirement that proceedings be sent to the party pursuant to rule 2(2)(a). It is accepted by Mr Bradbury, on careful reflection, that it was not sent to the Respondent; it was sent to Mr Charles who is not the Respondent for the record has been corrected to show that. Thus, no claim was sent to him. It is therefore not necessary for there to be any further examination of whether the Respondent is telling the truth when he says he got nothing. The judge made no decision upon it but he would not be required to deal with that matter it since the document was not sent to him. Therefore it is not necessary for me to decide the matter (as I was invited to today since Mr Chowles is here) nor to remit it to an employment tribunal. The proceedings have now been sent and if the ET3 in the form that it is had been sent in timeously there would be no question of an examination at a default judgment stage of the reasonable prospects of success and defence. That would be matter for a PHR to be determined upon proper notice. It may well be that that would have been sought by the Claimant but in any event I have now seen the ET3; I cannot say that it has no reasonable prospect or is misconceived."**

A On that basis the Judge remitted the case to the Tribunal for final hearing. Based on paragraph 19 of that judgment, JSKL contends in its skeleton argument, that the claim was not sent to it for the purposes of Rule 15. From this it follows that the EJ in this case was correct to make the decisions she did.

B

18. I do not accept that submission. In the present case it is not clear, from the reasons provided by the EJ, precisely what reasoning process was. However, I do not consider that the

C judgment in **Chowles** is authority for the proposition that any error in the identification of the Respondent is such that there will be a failure to comply with Rule 15. In **Chowles** itself, there were two errors, the name and the postcode. Both must have contributed to the conclusion

D reached by the Judge in that case.

19. In my view, whether or not the ET1 and accompanying documents have been sent in

E accordance with the Rule 15 is a question of fact to be determined on the basis of all relevant matters. The requirement to send the documents "to each Respondent" in Rule 15 is to be applied consistently with the principles set out in Rule 2: "the overriding objective". In this case, dealing with cases "fairly and justly" is relevant as is the requirement to avoid

F unnecessary formality.

20. In the context of applying the early conciliation requirements which arise from Section

G 18A of the **Employment Tribunals Act 1996** ("ETA") and the **ET (Early Conciliation Exemptions and Rules of Procedure) Regulations 2014**, this Tribunal has been clear that undue formality is to be avoided when it comes to identification of the Respondent to proposed

H proceedings. In **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543, at the early conciliation stage the Claimant identified the Respondent as the "Royal Derby

Hospital". The respondent contended this was a misidentification which meant that the early conciliation process had not been complied with. Her Honour Judge Eady QC addressed that submission at paragraphs 54-55 of her judgment:

> **"54. It is right that section 18A of the Employment Tribunals Act 1996 requires that a prospective claimant must provide prescribed information to Acas before presenting an application to the employment tribunal. This will include the prospective respondent's name and address (see rule 2(2)(b) of the Early Conciliation Rules; rule 3(1)(b), if the information is given orally). The requirement is not for the precise or full legal title; it seems safe to assume (for example) that a trading name would be sufficient. The requirement is designed to ensure Acas is provided with sufficient information to be able to make contact with the prospective respondent *if* the claimant agrees such an attempt to conciliate should be made (Early Conciliation Rules, rule 5(2)). I do not read it as setting any higher bar.**
>
> **55. At times in oral argument, Ms Masters suggested this requirement is to protect the respondent's right to engage in the early conciliation process, although, when questioned, she accepted that would be putting it too high. I would go further and suggest that such a characterisation of the position would demonstrate a fundamental misunderstanding of the process. Early conciliation builds in an opportunity for pre-claim conciliation, but, other than the acknowledgement of that opportunity by means of the notification requirements, it does not oblige a prospective claimant to engage with the process in any substantive sense, still less does it give any rights to the prospective respondent (notably, any contact with the prospective respondent is conditional upon the claimant's consent; the respondent has no "right" to early conciliation as such). The minimal notification requirements, as I read them, are thus consistent with the general aims of early conciliation. There is no suggestion that the process was intended to set any greater threshold for a claimant before she can lodge tribunal proceedings. Indeed, the absence of the relevant information does not even result in an immediate rejection of the prospective claimant's notification: Acas *may* reject such a notification (Early Conciliation Rules, rule 2(3)), or it *may* contact the prospective claimant to obtain any missing information. That would suggest that, if Acas considers it has sufficient to permit it to make contact with the prospective respondent (should the claimant be amenable to that), it may equally choose not to reject the notification simply because there is a non-material error in providing the prospective respondent's name and address."**

21. A similar point arose in **Chard v Trowbridge Office Cleaning Services Ltd** UKEAT/0254/16/DM, also in the context of the early conciliation process. The overall conclusion in that case was that it was for the EJ to decide, on the evidence, whether or not any error was material or minor. In reaching that conclusion Kerr J said this at paragraphs 62-64, by reference to the earlier Decision of Soole J in **Giny v SNA Transport Ltd** UKEAT/0317/16,

> **"62. I also respectfully agree with Soole J that he was right to reject the Respondent's proposition that an error in the identity of the Respondent, naming an individual rather than the relevant company, could never be minor. For my part, I would place considerable emphasis on the overriding objective when Tribunals have to consider issues of this kind. In this jurisdiction, the overriding objective includes dealing with cases "fairly and justly", but unlike in the Civil Procedure Rules ("CPR"), it also includes "avoiding unnecessary formality and seeking flexibility in the proceedings"; see Rule2(c) of the Employment Tribunal Rules of Procedure.**

> **63. The need is to avoid the injustice that can result from undue formality and rigidity (absence of flexibility) in the proceedings. In my judgment, the reference to avoiding formality and seeking flexibility does not just mean avoiding an intimidating formal atmosphere during hearings; it includes the need to avoid elevating form over substance in procedural matters, especially where parties are unrepresented.**
>
> **64. I accept that to a lawyer the identity of a company as distinct from its controlling shareholder is much more than a matter of form (see, e.g. Prest v Petrodel Resources Ltd [2013] 2AC 415 SC on piercing the corporate veil in matrimonial proceedings). But to a non-lawyer, in a case such as this, the distinction can be attenuated almost to vanishing point: the UKEAT/0254/16/DM-18-address is the same, so there is no problem contacting the Respondent; and the person in control is the same, both of the previous dismissal and of any decision to conciliate or settle. It is true that in the present case the name of the company was not "Allister Belcher Limited", but it is difficult to see why, if it had been, that should make all the difference."**

22. Finally, I note the decision of this Tribunal in **Nazir v Asim** [2010] ICR 1225. The issue there was slightly different. The claimant had been CEO of an unincorporated association. She brought proceedings against the organisation itself and its board members. An issue arose as to whether the board members had been properly joined. On this matter His Honour Judge Richardson said as follows at paragraphs 44-48 of the Judgment:

> **"44. In ordinary civil proceedings, in the absence of specific statutory authority, an unincorporated association can neither sue nor be sued in its own name: see *Halsbury's Laws of England,* 5th ed, vol 11, para 227 and for a more detailed treatment *Ashton and Reid on Club Law* (2005), para 18-14. Unless representative proceedings are brought (see rule 19.6 of the Civil Procedure Rules) a claimant must make the members parties if they are to be bound by the result.**
>
> **45. We must say, however, that it is in our experience common in employment tribunals for an employee to bring a claim naming an unincorporated association as respondent. This is hardly surprising: many employees will complete their own claim forms; they will be likely to give the name of the unincorporated association as their employer (indeed often their statements of terms and conditions of employment will name the unincorporated association rather than the management committee); and they cannot be expected to know about the legal status of an unincorporated association, still less about the practice advocated in *Affleck*. Indeed it is in our experience not unusual for the whole proceedings in such a case to be conducted without any individual being named.**
>
> **46. There are reasons why the practice in employment tribunals ought to differ from the practice before civil courts. We have the following points particularly in mind. Firstly, employment tribunals are to a large extent concerned with claims by employees against their employers. As we have said, the management committee of the unincorporated association will generally have engaged an employee in the name of the association. Whether or not this is the case, we do not think a management committee has any cause for complaint if an employee brings proceedings in the name of the association. Secondly, in tribunal proceedings the time limits for commencement of proceedings are generally strict: if proceedings started in the name of an unincorporated association were liable to be dismissed, there would be potential for procedural delay if not injustice. Thirdly, undue formality is to be avoided in tribunal proceedings; see for example rule 14(2) of the Employment Tribunal Rules of Procedure 2004. Fourthly, as we have said, employees generally cannot be expected to know about the special legal position of unincorporated associations. These matters are relevant to the overriding objective of dealing with cases justly; and therefore to be taken into account in construing the Rules: see regulation 3 of the 2004 Regulations.**
>
> **47. We therefore consider that it is permissible for an employee to bring a claim against an employer who is the management committee of an unincorporated association by**

> **using the name of the association. Such a claim is not irregular. It will not (for example) be liable to be struck out, leaving an employee with a time limit problem. It follows that we reject Mr Crow's submissions on these points.**
>
> **48. Whether a claim is brought in the name of the unincorporated association, or in the name of a representative respondent in accordance with the practice in *Affleck*, there are questions which may need attention by case management. (1) Do the members of the management committee actually know of the proceedings? (2) Is there any objection (either from the association or from any representative respondent) to the proceedings continuing as they have begun? (3) Is there any conflict of interest or disagreement between committee members which may require one or more to be added as respondent? (4) Is there any likely problem of enforcement unless all or most members of the committee of the unincorporated association are made respondents?**
>
> **.....**"

23. In their different ways all these judgments have underlined the importance of the principles now stated in Rule 2 of the **2013 Rules**. Rule 15 is to be applied consistently with those principles. To the extent that it might be thought that the judgment of HHJ McMullen QC in **Chowles** suggest otherwise, I would have no hesitation in saying that it was wrongly decided.

24. Rule 15 does not require service at the registered office of a corporate Respondent. Reading-in such a requirement would be entirely unjustified. Even under the CPR there is no requirement to serve a company at its registered office, see CPR 6.9(2) which provides that where the defendant is a company registered in England and Wales, a claim form is to be served on at "the principal office of the company; or any place of business of the company within the jurisdiction which has a real connection with the claim." The context of ET proceedings certainly requires no greater degree of formality or certainty. I do not rule out the possibility that, on the facts of a specific case, service at the registered address might be what is required to comply with Rule 15, but in many other cases, including this one, a requirement that the ET1 be sent to the registered office of a corporate Respondent introduces a degree of formality that is simply unnecessary. The important matters are the practical considerations such as those canvassed in **Nazir**.

25. In the present case JSH was a trading name of JSKL; it was the name above the door of the salon in Abbeville Road; the Abbeville Road address was where Miss Campbell worked; and was one place where JSKL conducted its business. In the present case there is no logical basis for concluding that the ET1 could only be sent to the Respondent for the purposes of Rule 15, if it was sent to the Respondent's registered address. On the facts of the present case it is clear that in practice, correspondence from the ET was received by Mr Stevens. He was the only Director of JSKL. There was either no or minimal scope for confusion on his part. He must have seen the correspondence; he certainly attended the hearing in accordance with the Notice of Hearing that was sent to JSH at the Abbeville Road address.

26. What is apparent from the ET's Decision and its Reasons is that while it was undoubtedly correct to substitute JSKL as the correct Respondent (a decision not under challenge in this appeal), the ET undeniably failed to apply Rule 15 consistently with the principles at Rule 2 of the **2013 Rules**. The Tribunal looked to form and entirely ignored substance. That error was an error of principle and this Tribunal should act to correct it. The ET Hearing was also irregularly conducted. If it was that any matter of evidence was required such as on whether or not the ET1 had been received, it should have been dealt with by evidence and Miss Campbell ought to have had the opportunity to challenge that evidence. It appears that did not happen.

27. Where there has been an alleged failure to comply with Rule 15 what is likely to be required is a common sense, evidence-based enquiry as to what happened. Did what happen comprise compliance with the requirement to send the documents to the respondent? Where the Respondent is a company the question is likely to be whether the documents were sent to an appropriate address, for example, a place of business and addressed in such a manner that it was

apparent the documents were sent to the person who was the Respondent to the claim. An inaccurate name is not the be all and end all. Compliance with Rule 15 depends on an assessment of the facts.

28. There is no actual requirement, under Rule 15, that documents sent to a Respondent must be received. If documents were sent but not received that may be a matter material to any Rule 20 application to extend time for the ET3, but it is not, *per se*, relevant to the question of compliance with Rule 15 save for instances where the name and address information was so radically different from the correct information that it might, as a matter of assessment, be concluded that using that information to send the ET1 did not amount to compliance with Rule 15, but that is likely to be an extreme case.

29. For all these reasons, my conclusions are as follows. *First*, the decision that Rule 15 was not complied with when documents were sent to JSH on 6 June 2018 is a decision that must be set aside. *Second*, on the evidence available the only rational conclusion is that Rule 15 was complied with when the relevant documents were sent to the Respondent's place of business using a trading name of the Respondent. For these reasons, the appeal must be allowed. *Third*, the claim should be remitted to the ET for consideration of the presently remaining matters, specifically Miss Campbell's application under Rule 21 and any application that may be made in future by the Respondent under Rule 20. That hearing should take place before a different EJ. Once the outcome of the hearing of those matters is known, the ET can then decide how to resolve the substantive issues on the claim whether by termination under Rule 21 or by merits determination following a Final Hearing.