Appeal No. UKEAT/0217/18/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS, 7 ROLLS BUILDING, FETTER LANE, EC41 1NL

At the Tribunal
On 7 June 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR J RYAN — APPELLANT

1) PRIORY HEALTHCARE LIMITED
2) PRIORY CENTRAL SERVICES LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	No appearance or representation by or on behalf of the Appellant
For the Respondents	MR PIERS MARTIN (of Counsel) Instructed by: Priory Group 2 Barton Close Grove Park Enderby Leicester LE19 1SJ

SUMMARY

PRACTICE AND PROCEDURE – Application/claim

The Employment Tribunal ("the ET") rejected the Appellant's ET1 under rule 10(1)(c) of the Employment Tribunal Rules of Procedure. The brief reasons for the decision were not consistent with a rejection under rule 10(1)(c). In response to written questions from the Employment Appeal Tribunal ("the EAT") the Employment Judge ("the EJ") said she had applied rule 12(1)(f) when rejecting the claim. The Appellant applied for reconsideration of the rejection. The EJ did not uphold the rejection under rule 10(1)(c), or under rule 12(1)(f), but rejected the claim for abuse of process (rule 12(1)(b)). The Appellant did not appeal against that decision, or apply for it be reconsidered.

The EAT held that the rejection under rule 10(1)(c) was unlawful, as rule 10(1)(c) did not apply, and that the decision could not be interpreted as a rejection under rule 12(1)(f), as that rule was not referred to and there was no evidence that the EJ had made the judicial assessments required by rule 12(2A).

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal against the decision of acting Regional Employment Judge Harper ("the EJ") sent to the parties on 1 March 2018. The EJ rejected the Claimant's ET1 against Priory Healthcare Limited ("R1"), and Priory Central Services Limited ("R2"). The Respondent was represented on this appeal this morning Mr Martin of counsel. I am very grateful to him for his succinct skeleton argument, for his oral submissions, and for the careful way in which he took me through the Appellant's skeleton argument, identifying the matters which were potentially relevant to the grounds of appeal.

2. The Claimant did not attend the hearing of this appeal. He wrote to the Employment Appeal Tribunal ("the EAT") on 23 May 2019, submitting an attendance form showing that neither he nor his representative would be coming to the hearing. He said that this was because he was afraid that he would be subjected to "reprisals" by the EAT for making disclosures and complaints about the EAT, and because the EAT did not make "repeatedly request reasonable adjustments" for his disabilities, "showing," that the hearing would be to his detriment.

3. The Claimant repeatedly refers in this letter and elsewhere to a "pre-hearing," listed for 7 June. He also referred to this hearing as a "preliminary hearing." It is not clear to me why the Claimant thought that this was a pre-hearing or preliminary hearing. The full hearing has been listed today, and that has been made clear in the correspondence. I have read the Claimant's correspondence with the EAT about reasonable adjustments. The Registrar, in her reply to the Claimant's request said, and I agree, that his letter did not appear to be asking for any reasonable adjustment. It is not clear to me what reasonable adjustments the Claimant would have liked to have been considered. For what it is worth, I can assure the Claimant that, had he

attended the hearing, that nobody in the EAT would have subjected him to reprisals for any reason.

The Background

4. The Claimant was employed by R1 as a Health Care Assistant from 26 June 2009 until he was dismissed for misconduct on 7 January 2016. He brought proceedings in the Employment Tribunal ("the ET") against R1 and against the Royal College of Nursing, ("the RCN"). Those proceedings were numbered ET1400727/2016. His complaints included sex discrimination, public interest disclosure detriment, and disability discrimination. He named R1 incorrectly. That error was corrected by a consent order dated 16 August 2016. The proceedings against the RCN were dismissed on that day because the Claimant did not have an early conciliation certificate ("the Certificate") against them. The proceedings against R1 were disposed of after a hearing on 8 February 2017. The Claimant's claims were dismissed

5. The current ET1 was presented on 12 February 2018. The Claimant gave the same certificate number in respect of both Respondents. He ticked the boxes for unfair dismissal and disability discrimination. In the additional information box, he said that the claim was made, "In response to Tribunal closing case number 1400727/2016," and R1 and R2 were not involved in those claims. The certificate number which the Claimant gave for R1 and R2 did not apply to either of them. It was a certificate dated 19 April 2016 relating to Priory Group Limited ("PGL").

6. The papers appear to have been referred to the EJ. She decided that the claim should be rejected. That rejection was notified to the Claimant by a letter dated 1 March 2018.

The ET's Decision

7. The letter dated 1 March 2018 is headed in capital letters "Rejection of Claim". Underneath that heading, there is a further subheading, "**Employment Tribunal Rules of Procedure 2013**," and a line beneath which says in bold, "**Rule 10(1)(c)**." The text of the letter says:

> **"I am returning your claim form because you have not complied with the requirement at rule 10(1)(c) of the above Rules because it does not contain Early Conciliation Certificates for either Respondent named on the claim form.**
>
> **Acting Regional Employment Judge Harper has decided your claim must be rejected.**
>
> **I enclose some explanatory notes called, 'Claim Rejection – Early Conciliation: Your Questions Answered'."**

The Application for Reconsideration

8. On 9 March 2018, the Claimant applied to the ET for it to reconsider its decision, see page 29 of the supplementary bundle. The Claimant asked for there to be a hearing of that application. The application said:

> **"Claimant is submitting 9 March 2019, application for Reconsideration requesting the 1 March 2018 to dismiss claim be reconsidered on the grounds; (a), Employment Tribunal Rules of Procedure 2013 Rule 10(1)(c) Early conciliation rules and process was followed; and (b) Employment Tribunal Rules of Procedure 2013 Rule (2)(a) claim not dealt with fairly and; (c) Breach of law and; (d) judicial Conflict of Interest."**

9. The application also raised many issues about the earlier proceedings. The Claimant contended that the EJ had dealt with his earlier proceedings, and that she was biased and not impartial. On 27 March 2018, the ET wrote to the parties. The letter was headed in capitals "Claim Rejected – Reconsideration – Dismissed,". The subheading read, "**Employment Tribunal Rules of Procedure 2013 Rule 13(3)**." The letter erroneously said that, as the Claimant had not requested a hearing, the EJ had decided his application on the basis of the written representations. The letter said that the Judge had decided to dismiss the application for the following reasons:

> **"She has decided that the claim be rejected pursuant to Rule 12(1)(b) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the Claim is in abuse of process as it is an attempt to re-litigate a claim which was disposed of at a hearing on 8 February 2017.**
>
> **If you believe that either the Judge's decision to dismiss your application or the original decision to reject your claim was wrong in law, you may appeal to the Employment Appeal Tribunal. Details of how to do so were included in the explanatory note "Claim Rejection – Your Questions Answered" which was sent to you when your claim was first rejected."**

10. The Claimant did not take up the option to appeal against the refusal of his application for reconsideration. The Claimant submitted a notice of appeal on 9 April 2018. Ground one reads as follows, "Early conciliation certificate issued and Respondent named not on certificate are not grounds for rejecting a claim." Some history is then recited about the earlier certificates which were issued in 2016. The Claimant cited rule 10(1)(c) at paragraph 1.3. At paragraph 1.4, the Claimant argued that rule 10(1)(c) does not state that a claim can be rejected if the respondent's name is not on the certificate. He contended that the earlier proceedings were accepted when the Respondent's name was not on the certificate. At paragraph 1.6 of the grounds, the Claimant said that the decision to reject the claim in 1 March 2018 was wrong because rule 10(1)(c) does not require the Respondent's name to be on the early conciliation certificate, and the claim cannot be rejected.

11. There were many other grounds in the notice of appeal, but they are not relevant today for reasons which will become clear. The notice of appeal was considered by HHJ Richardson. He decided to stay the appeal for 28 days. He asked the EJ to answer the following questions. (1) Did the ET1 contain early conciliation and numbers in boxes 2.3 and 2.6? (2) If so, why was rule 10(1)(c) applicable? (3) Had she dealt under rule 13 with the application against the decision dated 1 March? (4) If so, how and/or for what reasons?

12. He observed that he did not understand the procedure which had been adopted by the EJ. He said that the ET1 had certificate numbers, and that, as far as he could see, the Claimant

was right to say that the decision of 1 March was wrong. Nothing in the decision on the application for reconsideration suggested that the Claimant was wrong, and HHJ Richardson would have expected the application for reconsideration to succeed. The decision of 22 March was headed "Rule 13(3)" when, in reality, it seemed that the EJ had treated the papers as having been referred to her under rule 12(1) and it was taking a fresh decision to reject under rule 12(2).

13. That decision told the Claimant that the remedy was to appeal to the EAT, when the Claimant also had a right to ask to have that decision reconsidered by the ET. HHJ Richardson was inclined to think that the EJ had not dealt with the application against the decision of 1 March under rule 13. She had, instead, taken a fresh decision under rule 12(2). If she agreed with that analysis, she should make it clear to the Claimant that he had a right to apply for reconsideration under rule 13.

The Response of the EJ

14. The EJ sent an email dated 1 August 2018 to the EAT. This said that the EJ had retired. Her comment was that the ET1 did contain a certificate number in boxes 2.3 and 2.6. That number did not relate to R1 and R2. The certificate was dated 9 April 2016 and referred to PGL. That claim had proceeded under ET number 1400727/2016. The claim against PGL was determined and dismissed by a judgment dated 22 February 2017 after a hearing on 8 February 2017. The EJ said she had given directions for the claim form to be rejected because the name on the certificate relied on was not the same as the prospective respondent's name. She said that she had applied rule 12(1)(f). The reference to rule 10(1)(c) in the ET's letter of 1 March was "an error." The letter should have referred to rule 12(1)(f).

15. In paragraph three of the email, the EJ said this:

> **"I consider that I have dealt with the Claimant's application for reconsideration of the rejection. I dealt with the application on his written representations. The Claimant was advised by letter of 22 March of my decision. The Claimant's correspondence made it clear that he was relying on the EC certificate in relation to Priory Group Limited and that he was attempting to relitigate matters which were the subject of his 2016 claim which had already been determined. He indicated that he wished the case to be, "reheard". He indicated that his 2018 claim was issued in response to the Tribunal's, "Closing case number 1400727/16". I, therefore, considered that this amounted to an abuse of process, as the doctrines of cause of action estoppel, issue estoppel, and the ruling in Henderson v Henderson applied."**

The Ground of Appeal

16. After the preliminary hearing on 14 February 2019, for which HHJ Richardson received written submissions from the Claimant, HHJ Richardson allowed one ground of appeal to proceed to a full hearing (see page 59 of the bundle). HHJ Richardson noted that the decision letter said that the EJ rejected the claim under rule 10(1)(c) of the **Employment Tribunal Rules of Procedure** ("the Rules"). HHJ Richardson said that it was reasonably arguable that rule 10(1)(c) did not apply and that the decision was, therefore, wrong in law. He noted the EJ's explanation that she had, in fact, applied rule 12(1)(f), but it was reasonably arguable that the decision should have identified that rule and have addressed rule 12(2)(a). He noted the application for reconsideration, its outcome, and the fact that the EJ's refusal of the application for reconsideration had not been appealed. He further noted that the EJ had not upheld her original decision under rule 10(1)(c), or by referring to rule (12)(1)(f). Instead, she had taken a fresh decision under rule 12(1)(b). HHJ Richardson advised the Claimant to concentrate his submissions on the ground of appeal which he had allowed to a full hearing.

The Law

17. Rule 10 of the Rules provides:

> **"Rejection: form not used or failure to supply minimum information:**
>
> **(1) The tribunal shall reject a claim if--**
>
> **(a) it is not made on a prescribed form; or**
>
> **(b) it does not contain all of the following information-**

(c) it does not contain one of the following—

(i) an early conciliation number;

(ii) confirmation that the claim does not institute any relevant proceedings; or

(iii) confirmation that one of the early conciliation exemptions applies.

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for reconsideration of rejection"

18. Rule 12 of the Rules provides:

"12. — (1) The staff of the tribunal office shall refer a claim form to an employment judge if they consider that the claim, or part of it, may be-

…

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;

…

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(2) The claim, or part of it, shall be rejected if the judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c), (d) of paragraph (1)."

(2A) The claim, or part of it, shall be rejected if the judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the Claimant made a minor error in relation to a name or address and it would not be in the interest of justice to reject the claim.

(3) If the claim is rejected, the form shall be returned to the claim together with a notice of rejection giving the judge's reasons for rejecting the claim or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

19. Rule 13 of the Rules provides:

"Reconsideration of rejection.

(1) A claimant whose claim has been rejected (in whole or in part) under Rule 10 or 12 may apply for a reconsideration on the basis either-
(a) the decision to reject was wrong; or
(b) the notified defect can be rectified.
(2) The application shall be in writing and presented to the tribunal within 14 days of the date when the notice of rejection was sent. It shall explain why the decision is said to have been wrong or to rectify the defect, and, if the claimant wishes to request for a hearing, that shall be requested in the application.
(3) If a claimant does not request a hearing or an employment judge decides, on considering the application, that the claim shall be accepted in full, the judge shall determine the application without a hearing. Otherwise, the application shall be considered at a hearing at a hearing attended only by the claimant."

Submissions

20. The Claimant's skeleton argument for the hearing was dated 18 April 2019. It was 22 pages long. He says, in paragraph 9, that he understood that has claim was being rejected because his employer's name was not on the ACAS certificate. The grounds of appeal are somewhat lengthy and, apart from grounds one and two, they are not grounds which have been permitted to proceed to this full hearing. In his skeleton argument, the Claimant made many complaints against the EAT which are not relevant to the grounds of appeal which have been permitted to proceed to this hearing.

21. The submissions which are relevant to the grounds of appeal are made, first of all, on page six of 22. He said, under the heading "Grounds of appeal" one, the EAT admitted the decision to reject the ET claim was wrong, and then, on page 7, paragraph 2 starts by saying "The ET did not follow the Rule of Procedure for rejecting a claim". The Claimant makes a number of complaints about the ET's process, only three of which appear to be relevant to me, or potentially relevant.

22. The first is a complaint, at subparagraph (b), that the EJ acted outside of her remit by dealing with February 2018 ET1 application, which should have been dealt with by Tribunal clerks. The complaint at paragraph (l) refers to HHJ Richardson's puzzlement at the procedure adopted by the ET and contends that the procedure used was wrong. The Claimant asserts at paragraph (n) that the ET "on numerous occasions" failed to follow the Rules when dealing with the Claimant's claim.

23. There are also some submissions at paragraph 11 on page 20 of 22, under the heading "Company name on ACAS certificate not grounds for rejecting claim". Those submissions are

somewhat difficult to understand. There is a reference to the EAT's order from July 2018 and a quotation from that from subparagraph (d). At subparagraph (e) the Claimant asserts that the EAT had said that the March 2018 decision was wrong and that the application would succeed. At subparagraphs (a) to (f), the Claimant asserts that the orders binding the EAT have stated that the decision to reject the claim was wrong and that the appeal was expected to be successful. There are submissions at paragraph 12 about abuse of process, but they are not relevant for the purposes of this appeal because there is appeal in front of me against the ET's decision on the application for reconsideration.

24. Mr Martin, in his helpful and, as I have said, succinct skeleton argument, makes two basic points, which are set out in paragraph five of the skeleton argument. In subparagraph (i), he says:

> **"In applying r. 12(1)(f) and r. 12(2A) EJ Harper made no error of law when exercising her discretion as there was a difference on the claim form and the name on the EC Certificate R130613/16/35 and the qualifying factor in r 12(2A) did not apply;"**

In subparagraph (ii), he says:

> **"As to any procedural irregularity, by virtue of the mis-citation of r 10(1)(C) in the letter of 1.3.18, this was a minor error, and caused no prejudice to C as he would therefore have no real prospect of avoiding the rejection of his 2018 claim, which would have been rejected in any event."**

25. In more detail, Mr Martin submitted in his skeleton argument that the EJ had said that the reference to the decision to rule 10(1)(c) "was an administrative error," and, "She had actually directed the staff to refer to rule (12)(1)(f)." He submitted that the issue was whether the EJ was entitled to reject the claim under rule (12)(1)(f). He submitted that rule 12(1)(f) required a claim to be rejected unless rule (12)(2)(a) applies. He submitted that the EJ's decision that neither limb applies is unimpeachable. He also submitted that rule (12)(2)(a) involved the exercise of a judicial discretion. The EJ's exercise of her discretion cannot be

criticised. Those submissions are elaborated in paragraphs 11 to 20 of the skeleton argument, but, with all respect to Mr Martin, some of them, at least, involve reverse-engineering so as to attribute to the original decision that which is either contained in the ET's decision on the reconsideration application, or in the EJ's email to the EAT.

26. He further submits that, if the miscitation of rule 10(1)(c) in the letter of 1 March 2018 was a procedural irregularity, it was a minor error. The Claimant suffered no prejudice in understanding the substance of why his claim had been rejected. The reasons given in the letter show that the reason why the claim was rejected was not that there was no certificate number but that there was no certificate number relating to R1 and R2. Thus, the rule (12)(1)(f) defect that was identified, even if rule (12)(1)(f) was not referred to. The Claimant's application for reconsideration showed that he understood that that was the case.

27. Finally, he submitted, that the Claimant has, in any event, suffered no prejudice as the claim would have been rejected in any event.

Discussion

28. The decision letter clearly referred to rule 10(1)(c) in two separate places. There is no express explanation in the EJ's email of the "error" which led to this mistaken reference if that, in fact, is what it was. The EJ did not say in the email that she directed the ET staff to refer to rule (12)(1)(f). I infer that the EJ may well not have given the staff a direction about which rule should be cited in the rejection letter. The EJ's contention that she herself applied rule (12)(1)(f) in considering the claim is supported by the reasons which she gave for rejecting the claim. Those reasons are reasons which suggest that rule (12)(1)(f) was engaged, but there is no express reference in the rejection letter to rule (12)(1)(f) or to rule (12)(2)(a).

29. Rule (12)(2)(a) does not provide that if rule (12)(1)(f) is engaged that the claim must be rejected automatically. Rather, it requires an exercise of judgment about three matters. First, the EJ must consider that the claim falls within rule (12)(1)(f). Second, the EJ must consider whether or not there was a minor error. Third the EJ must decide whether it would be in the interests of justice to reject the claim. It is also important in this context to refer to rules 10(2) and 12(3), both of which impose obligations on the ET to explain why the claim has been rejected, though slightly different language is used in imposing the obligations to give reasons.

30. Rule 13 is important in this context because rule 13 gives a claimant whose claim has been rejected an opportunity to apply for the decision to be reconsidered on the grounds that the decision to reject was wrong. Rule 13 also imposes an obligation on a claimant who makes such an application to explain why it is said that the decision is or was wrong. In those circumstances, I consider that it is important that a claimant should fully understand which rule has been applied by the ET in rejecting the claim and, secondly, how the ET has engaged with the requirements of the rule which it has applied. The reasons do not need to be long, but they do need to show that the ET has engaged with the relevant issues, and how.

31. I will consider next Mr Martin's principal submissions in the order in which I have described them. First, as I have already said rule (12)(2)(a) does not lead automatically to the rejection of a claim if rule (12)(1)(f) is engaged. The EJ must actively consider the matters which I have just referred to. There is no material in the decision letter which shows that those three judicial assessments were made. I of course accept Mr Martin's submissions that it would have been open to the EJ to reject the claim under rule (12)(1)(f) for the reasons given in paragraphs 11 to 20 of his skeleton argument. However, in my judgement that contention does not meet this point.

32. I reject the submission that the EJ reached an unimpeachable decision in relation to rule 12(2)(a). There is simply nothing in the decision letter that shows that the EJ made the judicial assessments which are required by rule 12(2)(a). In that situation, I cannot conclude that the EJ properly applied 12(2)(a) to this case.

33. I reject the submission that the EJ's exercise of her discretion under rule (12)(1)(f) was lawful. There is no material that shows that any discretion was exercised or what factors the EJ took into account in the exercise of any such discretion. I consider that the decision of 1 March 2018 was not lawful. There are three main reasons. First, the ET rejected the claim expressly under a provision which did not apply on the facts, as a certificate was referred to in the ET1. Second, there is no reference in the decision to the rule which *ex post facto* the EJ said (in her email of 1 August 2018) she had applied. Third, if she was applying rule (12)(1)(f), the decision does not refer to the criteria in rule 12(2A), and there is no material to show that the judicial assessments required by paragraph (2A) were made.

34. The rejection of an ET1 at this early stage in the proceedings is plainly a step with implications for access to justice. That is why rule 13 gives a claimant whose claim has been rejected at this stage an opportunity to apply for a reconsideration. A claimant cannot comply with the obligation, imposed by rule 13, to give reasons for his application for reconsideration, unless the ET complies with its obligations to give its reasons for rejecting the claim. So one purpose of those requirements to give reasons is to give a claimant an opportunity to apply for a reconsideration with full knowledge of the rule under which his claim has been rejected and with full knowledge of the reasons he has to address in order to attempt to reinstate his claim. The requirements to give reasons imposed on the ET by rules 10(2) and 12(3) are therefore

especially important. If the ET is to reject a claim at this early stage, it must do so in a way that is correct in every particular, and transparent.

Conclusion

35. I will now consider what I should do in the light of that conclusion. I consider that the rejection of the claim under rule 10(1)(c) of the Rules was unlawful. I must therefore allow the appeal. This outcome does not benefit the Claimant in any way, however, because his claim has now been rejected, in response to his application for reconsideration, and he has not appealed against that decision. Despite the outcome of this appeal, the position remains, therefore, that the claim has been rejected.