



## EMPLOYMENT TRIBUNALS

**Claimant**

**Mr M Houston**

**Respondent**

**Kuehne & Nagel Ltd**

v

## PRELIMINARY HEARING

**Heard at: Watford**

**On: 29 October 2019**

**Before: Employment Judge Finlay**

**Appearances:**

**For the Claimant: In Person**

**For the Respondents: Ms N Owen, Counsel**

## JUDGMENT

The judgment of the tribunal is that it does not have jurisdiction to hear this claim which is rejected under Rule 12(1)(d) of the Employment Tribunals Rules of Procedure 2013.

## REASONS

### Introduction

1. The claimant brings complaints of disability discrimination, unlawful deduction from wages and breach of contract. These are all complaints to which the Early Conciliation Process applies. The claim form also included a complaint of unfair dismissal but this was rejected by the tribunal at an earlier date on the grounds that the claimant did not have the requisite continuity of service.
2. This preliminary hearing was listed to deal with the following four matters:
  - 2.1 Whether the employment tribunal has jurisdiction to hear the claimant's claims because of the early conciliation requirements.

- 2.2 Whether any of the disability discrimination claims were presented out of time and if so, whether it is just and equitable to allow it/them to proceed.
  - 2.3 Whether the claims should be struck out on the basis that they have no reasonable prospect of success pursuant to Rule 37(1)(a) of the Employment Tribunal Rules); and
  - 2.4 Whether deposit orders should be issued against the claimant on the basis that the claims have little reasonable prospect of success pursuant to Rule 39(1) of the Rules.
- 3 I dealt with the jurisdictional element first, because if the employment tribunal does not have jurisdiction to hear the claim then it would not be necessary to consider the other issues.
  - 4 Ms Owen, for the respondent, had produced a bundle of documents and handed up a copy of E.ON Control Solutions Ltd v Caspall (UK EAT/0003/19). The claimant had been provided with copies of both. The claimant produced a witness statement dated 29 September 2019 dealing with events up until 27 January 2019, of which the respondent had a copy.

### Facts

- 5 The claimant had union representation throughout the relevant period. The union instructed solicitors who wrote to the claimant on 20 December 2018 (page 37 in the bundle). This letter stated that the deadline for submission of any claim for disability discrimination and unfair dismissal in the employment tribunal was 3 January 2019 but also stated that the time could be extended if the claimant contacted Acas before that deadline.
- 6 The claimant explained that he is not totally at ease with reading and that his wife deals with documents and correspondence of this nature. In any event, the claimant did contact Acas before 3 January 2019, doing so straight after Christmas on 27 December 2018. So far so good.
- 7 It seems that as is its right, the respondent then declined to engage in conciliation with Acas.
- 8 The letter to the claimant from the solicitors had also invited the claimant to make an appointment with the solicitor in the first week of January 2019. Unfortunately, for reasons unknown, the claimant did not take up this offer. Had he done so, we may not have been in the position we found ourselves in today. The letter went on to say:

“Meanwhile, you are responsible for ensuring that you submit your claim in the Employment Tribunal no later than one month (less one day) from the date of issue by Acas of the Early Conciliation Certificate.”
- 9 The claimant appears to have misinterpreted this advice to read that he had to issue his claim to the employment tribunal within one month of 27 December

2018 (which is sometimes described as Day A), rather than the date of the subsequent issue of the EC certificate (Day B).

- 10 Concerned about an apparent lack of progress, the claimant spoke to Acas on 24 January 2019 who told him that the deadline for early conciliation would expire on 26 January 2019. Again, the claimant appears to have misinterpreted the statement, believing that this meant the deadline for presenting his claim to the Employment Tribunal would expire on that day. He readily admits that he then panicked, believing that he only had until the end of that week to present his claim to the employment tribunal, 26 January being a Saturday. He therefore presented his claim on Friday 25 January 2019. Replying to the question in the claim form “Do you have an Acas Early Conciliation Certificate number?” the claimant ticked the box to say “No” and then ticked the explanatory box “My employer has already been in touch with Acas”. This was factually correct, although it does not afford the claimant exemption from the need to have an early conciliation certificate before issuing the claim. The certificate was issued by Acas on 27 January.

### The Law

- 11 The legal position is that under s.18 A (8) of the Employment Tribunals Act 1996:

“A person who is subject to the requirement (to have an Early Conciliation Certificate) may not present an application to institute relevant proceedings without a certificate”.

- 12 Rule 10 (1) (c) of the Employment Tribunal Rules states that the tribunal shall reject a claim if –

“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.”

- 13 Rule 12 deals with “substantive defects” and provides that:

“The staff of the tribunal office shall refer a claim to an Employment Judge if they consider that the claim, or part of it, may be –

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply.”

In such circumstances Rule 12 (2) provides that the claim “shall be rejected”.

- 14 Finally, Rule 6 provides (with exceptions) that in the event of non-compliance, the Tribunal may take such action it considers just, including action to vary or waive a requirement in the Rules.

- 15 In the case of E.ON referred to above, the claimant had quoted the early conciliation certificate number incorrectly. The Employment Appeal Tribunal made it clear that in these circumstances, the correct course of action is for the Employment Tribunal to reject the claim and that any Judge to whom the matter is referred is not absolved from his obligation by virtue of the fact that the claim had not been rejected at the outset of the proceedings.
- 16 The EAT also confirmed that the discretion under Rule 6 is simply not available to the Employment Tribunal in these circumstances. The Rule cannot import a discretion where there is a mandatory requirement.

Conclusions

- 17 I consider that the principles set out in E.ON are applicable in the present case, in which the claimant did not have an Early Conciliation Certificate at all. The requirements of s.18A of the Employment Tribunals Act are clear and mandatory.
- 18 I have no little sympathy for the claimant and it is easy to see how mistakes were made. Erroneously believing that time was about to run out, the claimant “jumped the gun” before the early conciliation period had been completed and before Acas had issued the required certificate.
- 19 However, I have no alternative but to reject the claim for the reasons set out above. I have explained to the claimant his right to apply for a reconsideration of this decision and this will be confirmed to him in writing.

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Employment Judge Finlay

Date: 3 November 2019

Sent to the parties on:

.....15.11.19.....

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For the Tribunal Office