Appeal No. UKEAT/0117/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 September 2019

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MRS S PEACOCK APPELLANT

MURREYFIELD LODGE LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS KATHERINE NEWTON (of Counsel) Instructed by: Thompsons Solicitors Coverdale House 15 East Parade Leeds LS1 2BH
For the Respondent	MISS LINSEY HOWES (Solicitor) Instructed by: Hamers Solicitors LLP 5 Earls Court Priory Park East Hull East Yorkshire HU4 7DY

SUMMARY

PRACTICE AND PROCEDURE – Application/claim

An Early Conciliation (EC) form was submitted by the Claimant who provided an address at which she had attended a meeting with a director of the Respondent company. That address was not the registered office of the Respondent nor one at which the Respondent itself carried out its business, although the director worked there. The Respondent was duly contacted by ACAS at that address, and it responded. An EC certificate was then provided by ACAS.

A second EC form was submitted by solicitors for the Claimant who were unaware of the earlier EC process. Proceedings were issued by them on a date which would have been in time had the second EC certificate been the one governing the proceedings, but out of time if the first certificate had been validly issued.

The EAT held that the first certificate was indeed valid, and thus the claim was brought out of time. It did so on two bases. First, there is no requirement under Rule 12 of the **ET Rules** for ET staff to refer a claim form to an Employment Judge if the *address* of the prospective respondent on a claim form is different from that on the EC certificate.

Alternatively, and having regard to the purposive and non-technical approach to the EC process which other decisions of the EAT have set out, the provision by a Claimant of an address at which business *in relation to* a Respondent is carried out is compliant with the EC regulations.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This appeal was permitted to go for a full hearing by Her Honour Judge Eady QC (as she then was) on a narrow point of law concerning the requirement for an early conciliation certificate to contain the "correct address" of a Respondent, a point which was live before, but not addressed by, the Employment Tribunal ("The ET"). In this judgment, I shall refer to the parties as they were below.

2. The appeal is against the decision of an ET sitting at Leeds (Employment Judge Cox sitting alone) which held that the Claimant's claim had been presented outside the statutory limit, that it was reasonably practicable for the claim to be presented in time, and thus that the claim was dismissed for want of jurisdiction. Reasons were sent to the parties on 14 January 2019.

3. I pay tribute to the ET for the clarity and brevity with which the legal and factual issues were summarised. I can do no better than set them out below:

> **"The relevant legislation**
>
> **2. The general rule is that a claim of unfair dismissal must be presented before the end of the period of three months beginning with the effective date of termination of the Claimant's employment. However, if the Tribunal is satisfied that it was not reasonably practicable for the claim to be presented in that time, it can still consider the claim provided it is satisfied that it has been presented within a further reasonable period (Section 111(2) of the Employment Rights Act 1996 (the ERA)).**
>
> **3. The time limit for bringing a claim is extended by section 207B ERA to facilitate the parties engaging in early conciliation (EC) before the claim is presented. The relevant parts of that section read as follows:**
>
> > **"(2) In this section –**
> >
> > **(a) Day A is the day on which the complainant …. complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and**
> >
> > **(b) Day B is the day on which the complainant …. receives …. the certificate issued under subsection (4) of that section.**
> >
> > **(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.**

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period."

4. Before presenting a claim to the Tribunal relating to "any matter", a person must provide ACAS with prescribed information about "that matter" (Section 18A (1) of the Employment Tribunals Act 1996 – the ETA). Surprisingly, the information that must be provided does not relate to the content of "that matter"; it is limited to the names and addresses of the prospective Claimant and the prospective Respondent (Section 18A(10) ETA and Rules 2(2) and 3(1) of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014). There is no requirement to identify the subject matter of the dispute between them or the basis on which a claim might be brought.

5. The prospective parties are not required to undertake any form of substantive conciliation at all. If the conciliation officer considers that settlement is not possible or the prescribed period for conciliation ends without a settlement having been reached, the officer must issue a certificate to that effect (Section 18A(4) ETA). A Claimant cannot present a claim without an EC certificate (section 18A(8) ETA).

6. Anything communicated to a conciliation officer in connection with the performance of her conciliation functions "shall not be admissible in evidence in any proceedings before an employment tribunal, except with the consent of the person who communicated it to that officer" (Section 18(7) ETA).

The issues

7. At the Preliminary Hearing, the parties agreed certain relevant facts. The effective date of termination of Mrs Peacock's employment was 6 April 2018. Mrs Peacock contacted ACAS under the EC procedure twice. The first occasion was on 6 June 2018 and she received the EC certificate on 18 June. The second occasion was on 14 June and she received the EC certificate on 25 June. She presented her claim to the Tribunal on 23 July 2018.

8. If the first EC certificate was the relevant certificate for the purposes of identifying Day B in Section 207B(2)(b) ERA, the time limit for Mrs Peacock to present her claim expired on 18 July and her claim had been presented five days out of time. On the other hand, if the second EC certificate was the relevant certificate, the time limit expired on 25 July and the claim had been presented in time.

9. In Commissioners for HM Revenue and Customs v Garau UKEAT/0348/16, the Employment Appeal Tribunal (EAT) decided that as only one EC certificate is required in order to present a claim "relating to any matter" for the purposes of Section 18A(1) ETA, Day A in Section 207B(2)(a) ERA must refer to the day the Claimant contacted ACAS to start the process that led to that EC certificate being issued under section 18A(4) ETA. And Day B in Section 207B(2)(b) must refer to the date on which that EC certificate was received. Any further EC certificate is not a certificate falling within Section 18A(4) ETA and so cannot extend time.

10. The issues for the Tribunal to decide were therefore as follows:

10.1. Which certificate was the certificate issued under Section 18A(4) ETA as a result of Mrs Peacock providing ACAS with prescribed information about "the matter" to which her claim related?

10.2. If the first EC certificate was the relevant certificate, so that the claim had been presented out of time, was it reasonably practicable for Mrs Peacock to have presented the claim in time?

10.3. If it was not reasonably practicable for Mrs Peacock to have presented the claim in time, had she had presented her claim within a further reasonable period?"

4. The Tribunal heard evidence from the Claimant and a director of the Respondent to the effect that, following her contacting ACAS the first time, the issue of holiday pay and also a

potential unfair dismissal claim were discussed, albeit the initial contact had been in connection with holiday pay. The second approach to ACAS (which resulted in the issue of a second EC certificate) was made by solicitors acting for her, who were unaware of the earlier approach to ACAS and thus of the first EC certificate. The proceedings were issued by the solicitors on a date which would have been in time had the second EC certificate been the one governing the proceedings, but out of time if the first certificate had been validly issued.

5. The parties' arguments, as summarised at paragraphs 19 to 20 of the Reasons focused mainly on the interpretation of Section 18(A) of the **ETA** and Section 207(b) of the **ERA** (adopting the ET's abbreviations) and the definition of "matter". The decision also dealt with issues of practicability. However, as HHJ Eady QC said, when allowing the case to progress, no point is now taken in relation to either of these matters. The sole issue on appeal arises from what is said to be the ET's failure to address the alternative argument that first EC certificate was invalid as it did not contain the Respondent's "correct" address.

6. Before me the Claimant was represented by Miss Katherine Newton of counsel, who did not appear below, and the Respondent by Miss Lynsey Howes, a solicitor who did. Each has submitted helpful skeleton arguments augmented by oral submissions today. In the interest of a judgment being delivered *ex tempore*, I will not recite all arguments raised before me but I have had regard to them all. Miss Howes' submission was simple. The address was one at which the Respondent did business. The Claimant must have used it for that very obvious reason. There was an overlapping second conciliation, of which the Respondent was unaware, and there was no reason why the first certificate should be invalid. The ET correctly held that where there was a valid first certificate the second was of no effect. See **Revenue and Customs Commissioners v Serra Garau** [2017] ICR 1121 referred to by the ET.

7. Written submissions had been put before the ET on the Claimant's behalf which asserted (amongst other arguments) that the first EC certificate "has the wrong address for the Respondent and is invalid." The issue was canvassed in the Respondent's submission so there is no doubt that this issue was known to be a live one.

8. It is undoubtedly the case that the ET's Reasons make no reference to this argument. Although in her skeleton argument Miss Newton contended that this issue could be resolved by this Appeal Tribunal, her position today is that there is an issue of fact which if the appeal is allowed, must be determined by the ET.

9. It has been said by this Appeal Tribunal on a number of occasions that the purpose of the Early Conciliation process is limited. **De Mota v ADR Network & The Co-Operative Group** [2017] UKEAT/0305/16/DA, His Honour David Richardson summarised the authorities as follows:

> **"30. In addition to Mist and Drake I was also taken to Science Warehouse Ltd v Mills [2016] ICR 252 and Compass Group UK & Ireland Ltd v Morgan [2017] ICR 73. These are all recent cases in which the EAT has had to consider aspects of the early conciliation provisions. They illustrate two important points about those provisions.**
>
> **31. Firstly, the purpose of the early conciliation provisions is limited. It is not to require or enforce conciliation; it is simply to build in a structured opportunity for conciliation to be considered, in the first place by a prospective claimant and then if the prospective claimant consents by the prospective respondent. In Morgan Simler P, building on what Her Honour Judge Eady QC and Langstaff J had said in earlier cases, summarised the position as follows:**
>
> > **"18. We, like the appeal tribunal in *Science Warehouse* … and *Drake* … consider it significant that Parliament used the word "matter" in section 18A(1) rather than "cause of action" or "claim" and that the prescribed information required to be provided by a prospective claimant to ACAS to fulfil the obligations under the scheme is so very limited. The word "matter" is broad and, as Langstaff J observed, may encompass not just the precise facts of a claim that bring it within a cause of action but also other events at different times and/or dates and/or involving different people. There is no obligation, as we have already indicated, when notifying ACAS to identify the matter itself nor the nature of any actual or prospective dispute, still less to provide the factual details or any background to that dispute. The only information required to be provided by a prospective claimant consists of names and addresses of the prospective parties.**
> >
> > **19. It is also significant, in our judgment, that the process of conciliation is an entirely voluntary and confidential one. Once the prospective claimant has provided ACAS with the prescribed information, there is no requirement whatever for him or her to identify to ACAS, or indeed the prospective respondent, the subject matter or issues in dispute and no obligation whatever to enter into any discussions, still less meaningful ones, with the prospective respondent. Although it is hoped that this will follow, there**

is no obligation to do so. The prescribed information need not even be complete and correct. What the process does (as Judge Eady QC explained) is to build in a structured opportunity for parties to take advantage of ACAS conciliation if they choose to do so before a matter reaches litigation."

"32. Secondly, it is no part of the purpose of the early conciliation provisions to encourage satellite litigation. Echoing Her Honour Judge Eady QC in Mist (paragraph 53), Langstaff P in Drake said:

> **"35. It is a happy consequence of my reasoning that the appeal is to be dismissed: if it were not so, there could be a real risk that satellite litigation in respect of the provisions of early consideration might proliferate, with the same stultifying effect that litigation under the Employment Act 2002 had in respect of the provisions of the dispute resolution procedures for which it provided. Since it appears to have been part of Parliament's intention in enacting the Employment Tribunals Act 1996, sections 18A, 18B and 18C, in the terms in which they were enacted, and the Rules under them, to avoid such a position (see, for instance, the broad reference to "matter", and the absence of requiring any particular detail of any particular "matter" to be specified) and to avoid formalities fettering a fast and fair process of justice, I am confident that the view I have reached better serves its purpose than would the adoption of the approach for which Ms Slarks contends."**

"33. Section 18A(8) focuses upon the existence of a certificate; the prohibition on presenting relevant proceedings applies only if the prospective claimant does not have a certificate under subsection (4). It is to my mind clear that Parliament does not intend that the process leading up to the certificate should be subject to criticism and examination by the parties or the Employment Tribunal.

34. It is, I think, sufficient to illustrate why this is the case with two reasons.

35. Firstly, as Her Honour Judge Eady QC pointed out in Mist, if the prospective claimant does not provide the prescribed information in the prescribed manner, the Rules make it plain that ACAS is not bound to reject the claim. It may contact the claimant to obtain the missing information and take the process forward. It may therefore eventually issue a certificate without the claimant ever having completed the online form correctly. She said (paragraphs 55 to 56):

> **"55. … 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.**
>
> **56. … On the face of the early conciliation certificate, the information provided to ACAS was sufficient for it to make contact with the first respondent. In those circumstances, I consider that the employment tribunal was entitled to treat the early conciliation certificate as conclusive in terms of the claimant's compliance with her section 18A obligations. …"**

36. Secondly, if it was open to the parties or the Employment Tribunal to go behind the certificate, it is difficult to see why it should only be in respect of Rule 1. There are also Rules which require ACAS during the early conciliation process to make "reasonable attempts" to contact the prospective claimant and (if the claimant consents) the prospective respondent. It is really inconceivable that Parliament intended the parties to be able to mount any challenge in the subsequent proceedings based on these Rules. For example, in Nunan the respondent sought to challenge an early conciliation certificate on the basis that ACAS had granted an extension of time unlawfully; the challenge was to my mind correctly rejected by Employment Judge Harding.

37. In this case the Employment Judge looked behind the certificate and found that the Claimant failed to provide the prescribed information in the prescribed manner on the notification form: see paragraphs 21 to 23. That was an error of law. Section 18A requires the focus to be on the early conciliation certificate."

10. The relevant rules of procedure are found in the schedule of the **Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014**:

> **Satisfying the requirement for early conciliation**
>
> **"1. To satisfy the requirement for early conciliation, a prospective claimant must—**
>
> **(a) present a completed early conciliation form to ACAS in accordance with rule 2; or**
>
> **(b) telephone ACAS in accordance with rule 3.**
>
> **2.-(1) An early conciliation form which is presented to ACAS must be—**
>
> **(a) submitted using the online form on the ACAS website; or**
>
> **(b) sent by post to the ACAS address set out on the early conciliation form.**
>
> **(2) An early conciliation form must contain—**
>
> **(a) the prospective claimant's name and address; and**
>
> **(b) the prospective respondent's name and address.**
>
> **(3) ACAS may reject a form that does not contain the information specified in paragraph (2) or may contact the prospective claimant to obtain any missing information.**
>
> **….."**

11. It is not in dispute that the Respondent was able to be contacted by ACAS following the submission by the Claimant of the EC form online, which was an address at which he had attended to see Mr Proudfoot, the owner and director of the Respondent. Had the Respondent not been contactable at that address, no doubt ACAS would, under Rule 3, have contacted her to obtain a "correct address."

12. The Claimant's argument that the address on the first EC form is "the wrong address" is a difficult one to run, when it was an address at which ACAS was able to contact the Respondent. The Claimant's witness statement made clear that her contention that she used the "wrong address" is based on it being different from the registered office shown on Companies House records. There is no requirement in the Early Conciliation Rules that the address has to be, for example, the registered office of a limited company. Indeed, I would observe that, as many smaller limited companies use the addresses of firms of solicitors or accountants as their

registered offices, the use of a registered office could well case delays. Today, Miss Newton resiles from that strict approach accepting that an address at which the Respondent had a place of business would be acceptable.

13. At paragraph 54 of **Mist v Derby Community Health Services NHS Trust** [2016] UKEAT/0170/15/MC, referred to above in Judge Richardson's Judgment in **De Mota**, HHJ Eady QC said this, in relation to the requirement that a prospective Claimant notify ACAS of the Respondent:

> **"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 at reconciliation should be made (EC Rules 5(2)). I do not read it as setting any higher bar."**

14. In **Giny v SNA Transport Ltd** [2017] UKEAT/0317/16/RN the EAT (Soole J) was concerned with a case in which the Claimant gave to ACAS the name of a private individual and not a company owned by that individual as the employer. The individual's name appeared on the EC certificate. The ET rejected the claim under Rule 12(2)(A) of the **ET Rules** on the basis that the difference between the name on the certificate and the Claim form was not minor. Soole J dismissed the appeal but made certain comments as to the potential effect of a minor error in the *address*, such as a wrong street number. These comments are obiter as the address was in fact correct.

15. I mention this because there is an oddity in Rule 12 of the **2013 ET Rules**. So far as relevant, Rule 12 reads as follows:

> **"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-**
>
> **(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] (a)**

Rule 12(2)(A) reads as follows:

> **"[(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 interests of justice to reject the claim."**

16. Therefore, 12(1)(f) refers solely to the *name* being different while the saving provision in (2)(A) allows a judge to determine whether 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.

17. Miss Newton argues, as she must, that for (2)(A) to have any valid meaning, 12(1)(f) must be read as including the word "address".

18. I reject that submission. Rule 12(1) is addressed to Tribunal staff requiring them to refer a claim to a Judge in certain events. A defect in the address, or a difference between an address in the EC certificate and the claim form is not something which the Tribunal staff is required to refer to a Judge. Therefore, the different wording in (2)(A), which concerns matters to which a Judge must have regard in exercising a discretion cannot be a matter for the tribunal staff to consider.

19. If I am wrong in that conclusion, and having regard to the purpose of a non-technical construction which **Mist** and **De Mota** have urged upon ETs, I would hold that the provision of an address, known to be an address at which business in relation to a prospective respondent is carried out is an address which is compliant with the Early Conciliation regulations. In the present case, the address was one at which the Claimant attended a meeting with the Respondent's Director, Mr Proudfoot, which is why she provided it to ACAS in the EC form.

20. In reply to Miss Howes' submissions Miss Newton used as a somewhat extreme example a scenario where an employee is asked to a disciplinary meeting in a pub which is also

owned by a director of the employer and argues that this could not possibly constitute "the Respondent's address". She says, therefore, that the issue involves variables which must be for a Tribunal to determine. In the light of my finding in relation to Rule 12(f), the point becomes secondary. I observe that it could work harshly against a claimant who used such an address in good faith as being a place at which he or she knew that his or her former employer could be - and was - contacted for the purpose of conciliation.

21. I find that the ET erred in law in failing to consider the question of whether the first EC certificate was invalid, by reference to the address of the respondent. However, in allowing the appeal to that extent and having regard to the principle in **Jafri v Lincoln College** [2014] EWCA Civ 449, I find that there is only one possible answer that the ET could have validly reached.

22. For the reasons set out above I reject the submissions on the part of the Claimant that the certificate was invalid as not containing the correct address of the Respondent. Consequently, the certificate was valid and, as the ET held on other grounds, the claim was brought out of time.