



## **EMPLOYMENT TRIBUNALS**

**Claimant:** Mr G Irons  
**Respondent:** H W Fisher & Co t/a Fisher Partners

**Heard at:** Croydon **On:** 3/12/2019

**Before:** Employment Judge Wright

### **Representation**

**Claimant:** In person  
**Respondent:** Mr J Lewis - counsel

## **JUDGMENT ON PRELIMINARY HEARING**

The Judgment of the Tribunal is that the claimant's claim should be rejected and/or struck out under Rule 10(1)(c)(i) and Rule 12(1)(a)(c) and (d) of the ET Rules.

### **REASONS**

1. At the conclusion of an open preliminary hearing, oral judgment was provided. In accordance with the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and Rule 62(3) (the ET Rules) the claimant requested written reasons.
2. The respondent's application was referred to as a strike out application. It however, covered three areas, two of which fall within the definition of a strike out and the other is an application that the Tribunal should reject the ET1 claim form. Mr Lewis set out his arguments orally, his position however was set out in the respondent's ET3 dated 16/8/2019 and in his skeleton argument. In response, the claimant set out his position. No oral evidence was heard.

3. The claimant had some documents which he wished to rely upon, however he did not have extra copies with him for the Tribunal and respondent. Mr Lewis had sight of the documents and was able to address them and the Tribunal considered them when deliberating. Only limited notice was taken of these documents as; firstly, they were not relevant to the issues to be determined and; secondly, they were articles, commentaries or extracts from cases (one from the Leeds Employment Tribunal which is not binding in any event). The claimant had had the respondent's bundle and so he could see how its authorities were presented. The respondent's solicitor offered to provide copies of any documents which the claimant wished to refer to, but they were not received in time for the respondent's solicitor to action.
4. The chronology is the claimant started to work for Home Fundraising Ltd (HFL) on 15/7/2008. HFL started to experience financial difficulties and entered into a Company Voluntary Agreement (CVA) in May 2018. David Birne was appointed. HFL went into administration on 1/3/2019 and Mr Birne was again appointed this time as Administrator.
5. The claimant was dismissed as redundant on 12/3/2019. He presented a claim to the Tribunal naming the respondent as H W Fishers, which is in fact H W Fisher & Co, t/a Fisher Partners, that entity, (the respondent) was the employer of Mr Birne at the relevant time.
6. The first point to be considered was whether the claim should be rejected. The Employment Tribunals Act 1996 at s.18A(1)(a) sets out the mandatory requirements of Acas early conciliation (EC) notification. The claim, which is a claim for a protective award under s.189 of the Trade Union Labour Relations (Consolidation) Act 1992 (TULRCA) is subject to the mandatory Acas EC regime. A claim for a protective award under s.189 TULRCA does not fall within the exemptions set out in the ET (EC: Exemption and Rules of Procedure) Regulations 2014.
7. The claimant has ticked the box at 2.3 on the ET1 form to say that 'Acas does not have the power to conciliate on some or all of my claim'. This is incorrect for the reason set out in the preceding paragraph.
8. The claim form was presented on 7/5/2019.
9. In accordance with Rule 12(1) of the ET Rules, the file was referred to an Employment Judge and the claim was rejected on 18/6/2019. The claimant was sent the Tribunal's standard rejection letter and the covering letter states that the explanatory notes were included (this was sent by email).
10. In response, the claimant produced an Acas EC form which named the prospective respondent as 'H W Fishers (Insolvency Practitioners) c/o HFL (insolvent Co)'. The dates on the certificate are the date of receipt by Acas was

3/5/2019 and the date the cert was issued was 8/5/2019. The date the certificate was issued post-dates the presentation of the ET1. The claimant referred to the 'claim number' (HACZ-ZGC3), however this reference number has nothing to do with the EC process and is merely a reference number for tracing an electronically submitted claim form (it appeared on the receipt when the ET1 was submitted).

11. The claim was then accepted on 19/7/2019 and the Tribunal finds that it should not have been.
12. Irrespective of the difference in time being one day or 24 hours (the ET1 was presented on the 7/5/2019 and the EC certificate was issued on the 8/5/2019, the Tribunal finds that the claim form did not contain an Acas EC certificate number and as no exemption applies, it should have remained rejected. It is therefore rejected under Rules 12(1)(c) and (d) of the ET Rules. Furthermore, the claim should have been rejected under Rule 10(1)(c)(i).
13. As per the authority of the EAT in E.ON v Caspall UKEAT/0003/19/JOJ there is no discretion for the Tribunal and the rejection is mandatory. There is therefore no proceeding before the Tribunal to then amend, or to be struck out as the claim has been rejected.
14. For the sake of completeness, it is incorrect to say that Acas could not get involved in EC as per the ET1. Clearly, the claimant was engaging with Acas from the 3/5/2019. The correct procedure would have been for EC to take place (Acas can issue the certificate without even speaking to the prospective respondent), for the claim to be presented, served on the respondent and it would then be stayed as subject to an application; it cannot be pursued whilst the respondent is in administration without permission.
15. The claim for a protective award has been brought against the Administrator's employer, not the claimant's employer HFL. The Administrator acts as the agent of HFL, not as the principal; the principal remains HFL (as per Insolvency Act 1986 schedule B1 para 69). The claimant expressly said that he did not wish to bring a claim against HFL and that he was not confused about who he wished to claim against. That may be the case from his perspective, but the result is that the Tribunal has no jurisdiction to hear the claim against the Administrator's employer. In addition, due to the fact from 1/3/2019 HFL was in administration, no claim may be presented against it without either the permission of the court or of the Administrator and no such permission was sought. The claim is therefore rejected for the substantive defect of the Tribunal not having jurisdiction under Rule 12(1)(a) of the ET Rules.
16. Turning then to the final part of respondent's application, the respondent argues that claimant has no standing to bring a claim in relation to the consultation period as employee representatives were elected at the site the claimant said he was based at. As per s.188 TULRCA.

17. The only issue which the claimant references in his ET1 was the insufficiency of the consultation. As a representative had been elected, the claimant has no standing to bring a claim under s.189(1)(b) TULRCA as the complaint may be presented by the representative(s), not by the individual employee.
18. The Tribunal finds there is no claim referenced in the ET1 in respect of a failure to elect representatives (as opposed to a claim for insufficient consultation), as that is simply not set out. If that was what the claimant had in mind when he presented his ET1, he has not included it and there is no application to amend. If there was any failure under s.188, based upon the claim as pleaded, the recourse is for the representative under s.189(1)(b) and as pleaded, there is no cause of action open to the claimant under s.189(1)(c) or (d) TULRCA.
19. The claim therefore is rejected for the failure to comply with the Acas EC provisions Rules 12(1)(c) or (d), and 10(1)(c)(i) of the ET Rules. In the alternative is struck out under Rule 12(1)(a) as there is no jurisdiction in respect of the claim against the Administrator's firm (this respondent) and due to the lack of standing for the claimant to bring a claim under s.189 TULRCA as the claim was pleaded, again the ET has no jurisdiction and so it is struck out under Rule 12(1)(a) ET Rules.

Employment Judge Wright

Date: 4/12/2019

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