EMPLOYMENT TRIBUNALS

Claimant: **Mr M Dumny**

Respondent: **Mr A Pledger**

JUDGMENT

The Employment Tribunal has jurisdiction to hear the claimant's claim.

REASONS

Background

1. On 2 August 2019 the claimant started Acas early conciliation. It came to an end on 30 August 2019 when Acas issued a certificate naming the prospective respondent as "Park House Restaurant and Wine Bar, 20 Park Place, Cardiff, CF10 3DQ."

2 On 25 September 2019 the claimant commenced these proceedings by presenting an ET1 claim form. The box for respondent's details (box 2), said "Adam Pledger, 20 Park Place, Cardiff, South Glamorgan, CF10 3DQ." The type of claim in box 8.1 of the form was said to be disability discrimination, and arrears of pay. Attached to the claim form was a document entitled "ET1 Claim Form Rider". In its header the rider form stated that the respondent was "Park House 20 Ltd." It sets out the background to the claimant's resignation on 5 March 2019 stating that the claimant gave the respondent 2 months' notice with his employment ending on 4 May 2019. The rider states that the claimant was bringing complaints of disability discrimination (a failure to make reasonable adjustments, and discrimination arising from disability) as well as a claim for unlawful deduction of wages in respect of wages due from March and April 2019 and service charges dating back to May 2018. My understanding is that the ET1 rider, at least, was drafted by a caseworker (not Mr Leong) at Newport CAB. I do not know the position about the ET1 form itself. At the time of presenting the claim the CAB did not go on the record for the claimant.

3. Due to the way in which box 2 on the claim form was completed the claim was processed by the Tribunal with the respondent cited as Mr Pledger. The claim was served under cover of a letter of 3 October 2019 giving Mr Pledger until 31 October 2019 to file an ET3 response. Notification was also given that the claim was listed for a 1 day hearing on 24 January 2020 and standard case management orders were issued. Nothing was said by the Tribunal to the parties about the fact that the Acas certificate was in a different name to the respondent, Mr Pledger.

4. No ET3 response was filed. On 17 December 2019 Mr Pledger was sent a letter stating: "You did not present a response to the claim. Under rule 21 of the above Rules, because you have not entered a response, a judgment may now be issued. You are entitled to receive notice of any hearing but you may only participate in any hearing to the extent permitted by the Employment Judge who hears the case." Mr Leong, who had by then come on the record as the claimant's representative was sent a letter stating that a judgment could now potentially be issued without the need for a hearing but that an Employment Judge would need more detail as to the exact amounts claimed and how they had been calculated.

5. A schedule of loss was provided on 7 January 2020, the header to which cited Mr Pledger as the respondent. On review by an Employment Judge it was decided that a hearing was necessary and the claimant was told that the hearing would be converted to a remedy hearing and to bring a witness statement on remedy, including injury to feelings, to the hearing. A notice of remedy hearing was sent to the claimant, copied by post to Mr Pledger. Listing the case just for remedy was, in fact, an error, as whilst the respondent was debarred from participating in the proceedings a judgment on liability issues had not been issued.

6. The matter came before me on 24 January 2020. On reviewing the file in advance of the hearing I noted the situation with regard to liability. The claimant also provided a remedy bundle. Within that is a statement of main terms of employment which states that the claimant's employer was "20 Park House Limited T/A Park House." It would appear to be signed on behalf of the employer by Mr Pledger. The employee handbook is also issued in the name of "Park House 20 Ltd T/A Park House Restaurant." There are also payslips in the bundle with the name of the employer given as "Park House 20 Ltd."

7. Mr Pledger attended the hearing, as he was entitled to do. I explained to him that he could only participate to the extent I permitted. He had handed in to the clerk a document called "response to Schedule of Loss for Remedies Hearing" in which he stated that certain amounts for unpaid

wages, statutory sick pay, and tips were not contested. The document said that holiday pay, notice pay and injury to feelings were contested.

8. At the start of the hearing on 24 January 2020 I explained to Mr Leong that whilst no ET3 had been filed by the respondent and the respondent was debarred from participating unless I allow participation, in fact a liability judgment had never been entered, albeit on the face of it, it could be dealt with at that hearing. However, I also informed Mr Leong that I had noticed the claimant's remedy bundle included a contract of employment with "20 Park House Limited T/A Park House." I raised this with Mr Leong, identifying my concerns that the employer may have been a Limited company rather than Mr Pledger personally. I also identified that the only Acas certificate I had was in the name of Park House Restaurant and Wine Bar. I explained I was concerned with ensuring that there were no inherent jurisdictional issues with my entering a liability judgment against Mr Pledger and with assessing and awarding a financial remedy against him if in fact he was not the employer.

9. These were issues the claimant/Mr Leong understandably did not anticipate would have to be addressed; they were expecting a remedy hearing. I adjourned and gave the parties copies of <u>Eon Control Solutions Ltd v Caspall</u>, <u>Chard v Trowbridge Office Cleaning Services Ltd</u> and <u>Giny v SNA Transport Limited</u> together with time to consider them.

10. On the return to Tribunal Mr Leong accepted that there were potential jurisdictional issues here. He was not the caseworker who drafted or issued the claim and I accepted that he needed more time in which to advise and seek instructions from the claimant. I directed that the claimant should file written submissions on jurisdictional issues (which should include the correct identity of the respondent, the implications of the Acas certificate, whether there is any application to add or amend the name of a respondent, and which complaints it is said can proceed against any particular respondent) within 14 days. The written submissions were to include whether the claimant considered that a further in person hearing was required or whether the claimant considered that a decision on the jurisdictional issues could be made on the papers. I explained in brief terms to Mr Pledger what was happening and that he remained debarred from participating in the proceedings at that time but that he would receive notice of any hearing and a copy of any decisions reached. I explained he remained entitled to attend any future hearing and to participate to the extent permitted by the Judge.

11. The written submissions were filed on 27 January 2020 with a request for the matter to be dealt with on the papers alone.

The legal framework

12. Under section 18A of the Employment Tribunals Act 1996 before a prospective claimant presents an application to an employment tribunal for certain prescribed claims he has to engage in the process of Acas early conciliation. That obligation to engage in early conciliation includes complaints of unauthorised deduction from wages and discrimination complaints under the Equality Act 2010.

13. Rule 12 of the Employment Tribunal Rules ("ET 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 –
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> (a) one which the Tribunal has no jurisdiction to consider;
> (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;
> (c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
> (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;
> (e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or
> (f) one which institutes relevant proceedings and the name of the respondent on the claim is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.
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> 12(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) or (d) of paragraph (1).
>
> 12 (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."

14. Rule 13 provides the right to apply for reconsideration of a rejection under Rule 12 either on the basis that the notice to reject was wrong or that the notified defect can be rectified. The application has to be made in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. Under Rule 13(4), if the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.

15. Rule 15 states:

> "Unless the claim is rejected, the Tribunal shall send a copy of the claim form, together with the prescribed response form, to each respondent with a notice which includes information on –
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> (a) whether any part of the claim has been rejected; and
> (b) how to submit a response to the claim, the time limit for doing so and what will happen if a response is not received by the Tribunal within that time limit."

16. Under Rule 16 the response has to be presented within 28 days of the date that the copy of the claim form was sent by the Tribunal.

17. Rule 21 is concerned with the effect of non-presentation of a response and says:

> "(1) Where on expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.
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> (2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.
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> (3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."

18. Rule 29 gives the Tribunal the general power to make, at any stage of the proceedings, and either on its own initiative or on application, a case management order.

19. Rule 34 states:

> "The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."

The claimant's position

20. In the written submissions filed by Mr Leong the claimant asks me to find that the Employment Tribunal does have jurisdiction to hear the claimant's claim. Further, I am asked to:

    (a) Amend the name of the existing respondent to Park House Restaurant and Wine Bar;
    (b) Add Mr Pledger as a second named respondent for the purposes of the disability discrimination claim.

Application to amend the name of the existing respondent

21. A claim for an unauthorised deduction from wages under Sections 13 and 23 of the Employment Rights Act lies against the employer. A disability discrimination claim under the Equality Act 2010 lies against an employer under section 39 and under section 109 an employer is vicariously liable (subject to the exception at section 39(4)) for discriminatory acts committed by an employee on the course of their employment. But it is also possible to bring a discrimination claim against a named individual employee under section 110.

22. The documentation clearly suggests that the employer was a limited company: either "20 Park House Limited T/a Park House" or "Park House 20 Ltd." In fact, on the Companies House register "20 Park House Limited" (the name in the statement of main terms of employment) does not exist. "Park House 20 Limited" does, however, exist. The one active director is Mr Pledger.

23. I find it likely that the reference to "20 Park House Limited" in the statement of main terms of employment was a typographical error and that the claimant's employer was "Park House 20 Limited", as shown in the

employee handbook and the claimant's pay slips. The claimant's unauthorised deduction from wages claim could only be directed against that limited company as employer.

24. It is not clear from the face of the claimant's claim form rider whether the allegations of a failure to make reasonable adjustments and discrimination arising from disability are levelled against Park House 20 Limited and/or Mr Pledger personally. In relation to the discrimination arising from disability claim, the claimant relies on a comment allegedly said to him, when he was absent from work due to alleged depression, of "you're letting everyone down and its not on. I am losing patience with this." In his witness statement the claimant says it was Mr Pledger who said this.

25. In his written submissions the claimant submits that the existing respondent in his case should be "Park House Restaurant and Wine Bar." That is the body named on the Acas certificate. "Park House Restaurant and Wine Bar" is not, as far as I can see, a legal entity that can in fact be a respondent to the proceedings. I therefore cannot amend the name of the existing respondent to "Park House Restaurant and Wine Bar." I can, however, consider on my own initiative whether the name of the existing respondent should be amended to "Park House 20 Limited." An application to amend involves consideration of the principles outlined in Selkent Bus Company Ltd v Moore [1996] ICR 836 which includes weighing factors such as the nature of the amendment, the timing and nature of the application, time limits, and the balance of prejudice and hardship to the parties if the amendment were permitted or not permitted.

26. I have decided, on my own initiative, under Rule 29, to amend the name of the existing respondent from "Adam Pledger" to "Park House 20 Limited" being the correct identity of the claimant's employer. I am satisfied that it is likely that this what the claimant or those representing him intended when issuing the claim given that "Park House 20 Ltd" is set out as the respondent in the header to the claim form rider and given that, for the unauthorised deduction from wages claim at least, the employer would have to be named as respondent. I am satisfied it is likely that the naming of Mr Pledger in box 2 was a genuine mistake and is one which, in my experience, fairly regularly occurs on the issue of proceedings given that the instructions for completion of box 2 states: "Give the name of your employer or the person or organisation you are claiming against". It is common practice when mistakes of that nature are made to amend the identity of the employer to the correct legal entity. As was said in Chard v Trowbridge Office Cleaning Services Ltd UKEAT/0254/16/DM at paragraph 75:

> "Mr Leech accepted that if the ET1 claim form had named Mr Belcher personally, the claim would have been valid and in time.

> An application to amend, even outside the limitation period, so as to correct the name of the Respondent to that of the company, could then have been made and, Mr Leech accepted, such applications are commonplace and frequently granted after expiry of the three month limitation period."

27. The nature of the amendment is minor and commonplace. The timing of the application was made promptly once the situation was brought to the claimant's attention. Prior to that time the Tribunal had not queried the correct identity of the respondent or the prospective respondent in the Acas certificate with the claimant or his representative and the claimant and Mr Leong were anticipating attending and were engaged in preparing for a remedy hearing. In terms of time limits, these have not as yet been adjudicated in the case and if the amendment is allowed the claim would stand presented as at 25 September 2019. Park House 20 Ltd would therefore remain in the same position in terms of time limits as they would always have been if the claim had been clearly presented against them at the outset. The balance of prejudice and hardship is in favour of granting the amendment. If the amendment is not allowed the claimant would be unable to continue with his existing claim against anyone. Neither Mr Pledger or Park House 20 Ltd suffer any prejudice as I am satisfied that Mr Pledger is the controlling mind behind Park House 20 Ltd and has been aware of the proceedings throughout. Overall I am satisfied that to allow the amendment is a just result.

Acas certificate for the existing respondent

28. An added complication to the above amendment is that the Acas certificate is in the name of "Park House Restaurant and Wine Bar." On the face of it this would mean that 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, which would fall foul of Rule 12 which mandates rejection of the claim form.

29. However, Rule 12(2A) allows me to accept a claim where I consider 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. I have taken into account in this regard the guidance in case law such as E.on Control Solutions Limited v Caspall EAT/0003/19/ JOJ, Chard v Trowbridge Office Cleaning Services Ltd UKEAT/0254/16/DM, Giny v SNA Transport Limited UKEAT/0317/16/RN, Mist v Derby Community Health Services NHS Trust [2010] ICR543[1]. In particular, in Mist it was said the requirement for an Acas certificate:

[1] On the facts of that case the difference in names between Royal Derby Hospital and Derby Hospitals NHS Foundation Trust was said to be plainly minor in nature.

> "is not for the precise or full 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… I do not read it as setting any higher bar."

30. I am satisfied here that the difference between "Park House Restaurant and Wine Bar" and "Park House 20 Ltd" is a minor error. The address is the same. They are in reality the same establishment. The statement of main terms of employment shows that a trading name of "Park House" was being used and the handbook shows a trading name of "Park House Restaurant" being used. I am satisfied the Acas certificate was issued in the form of a trading name that relates to the same entity. Mr Pledger is the controlling individual behind the establishment in question and I am satisfied that it is likely that efforts made by Acas to conciliate via the Park House Restaurant and Wine Bar would have been likely to reach the correct individual behind Park House 20 Ltd. There is therefore no prejudice to the respondent.

31. I am satisfied that the combination of the above steps in resolving the identity of the existing respondent (Park House 20 Ltd) and accepting that the Tribunal has jurisdiction to hear the claim against that respondent is in accordance with the administration of justice, the overriding objective (in particular to deal with the case fairly and justly avoiding unnecessary formality and seeking flexibility in the proceedings) and avoids eliminating form over substance in procedural matters.

Application to add Mr Pledger as a second respondent to the disability discrimination claim

32. The claimant also makes an application to add Mr Pledger into the proceedings afresh as a second, named respondent in relation to the disability discrimination complaints. I have a discretion to do so under Rule 34 and again must apply the Selkent principles to the application to amend.

33. I grant the application. The nature of the amendment is not to add new allegations of discrimination but to add a second named respondent who has in any event known about the allegations throughout. As discussed above, the application was made promptly once the jurisdictional difficulties were brought to the claimant's attention. In terms of time limits, the claim against Mr Pledger (as well as the first respondent) would stand presented as at 25 September 2019[2] and therefore all parties remain in the same position they would always have been in in terms of limitation.

[2] See Cocking v Sandhurst (Solutions) Ltd & Anor [1974] ICR850 NIRC

Mr Pledger knows about the proceedings and it is likely that he has always known about them and the allegations personally levelled against him. He therefore does not suffer prejudice in what becomes in technical terms, his addition as a party at a later date.

34. I have a discretion to add Mr Pledger as an additional respondent without there being an Acas certificate naming him as a prospective respondent if I consider it is in the interests of justice to do so[3] as following the above steps there are extant proceedings that the Tribunal is able to add a second respondent to. I find it is in the interests of justice to allow the addition of Mr Pledger as a second respondent without there being an Acas certificate. Again, it is likely he has known about the proceedings throughout and indeed efforts to conciliate via Acas on the existing certificate would have been likely to come through him in any event.

35. The consequence of all of the above steps is that I will direct the proceedings be re-served against Park House 20 Limited (R1) and Mr Pledger (R2) (which the claimant acknowledges should happen within his written submissions).

36. I therefore order:

    (a) That the existing respondent in this case be amended to “Park House 20 Limited” (20 Park Place, Cardiff, CF10 3DQ);
    (b) that Mr Adam Pledger (served at the business address of 20 Park Place, Cardiff, CF10 3DQ) be added as a named respondent only in respect of the disability discrimination complaints;
    (c) In these proceedings Park House 20 Limited will be known as the first respondent and Mr Pledger as the second respondent;
    (d) The proceedings are to be re-served on both the first and second respondents;
    (e) For time limit purposes, the claim against both respondents remains with a presentation date of 25 September 2019.

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Employment Judge Harfield
Dated: 6 March 2020

JUDGMENT SENT TO THE PARTIES ON 6 March 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

[3] See Science Warehouse Ltd v Mills UKEAT/0224/15/DA and Mist