EMPLOYMENT TRIBUNALS

Claimant: **Mr P Dunckley**

Respondent: **ELAS**

Heard at: **Cardiff** **On: 13 March 2020**

Before: **Employment Judge S Jenkins (sitting alone)**

JUDGMENT

1. The Claimant's claim against the Respondent was validly lodged and will therefore proceed to a final hearing.

2. The Claimant's application to amend the claim to include an additional respondent is refused.

REASONS

1. The application to strike out

Background

1. At a telephone preliminary hearing before Employment Judge Sharp on 13 January 2020 it was noted that the Respondent was looking to pursue an application that the claim be struck out due to lack of compliance with the early conciliation requirements. It was also apparent that the Claimant wished to amend his claim to add in a further individual respondent. Those matters could not be dealt with by Judge Sharp at that hearing but the parties agreed to make submissions on them in writing and that the decisions on them could be determined on the papers by an employment judge. Judge Sharp then issued directions as to the submissions to be made on the strike out point

and the parties also sent in their submissions in relation to the application to amend.

2. The background to the applications is that the claim form was submitted on 10 May 2019 with the respondent being named as "Essential Solicitors LLP t/a Elas Business Support" ("Essential"). That followed the publication by ACAS of the early conciliation certificate in this case on 13 April 2019, where the same respondent was named as the prospective respondent. The same address was also recorded in each case, i.e. First Floor, Charles House, Albert Street, Manchester M30 0PW.

3. The Tribunal, dealing with, on its face, an application which complied with the requirements to provide a name and address of the respondent and an early conciliation number to confirm that ACAS early conciliation requirements had been completed, acknowledged receipt of the claim, and served it on Essential via the standard ET2 form on 16 May 2019. Bearing in mind that the claim involved disability discrimination as well as unfair dismissal, the standard telephone preliminary hearing was arranged for 26 July 2019.

4. The ET3 Response was received from Essential on 13 June 2019, within the specified time. The claims were defended on the basis that the Claimant had not been employed by Essential, but had been employed by Employment Law Advisory Services Limited ("ELAS"). The Response noted that Essential had become part of the ELAS group of companies in September 2018, but at no time had it employed the Claimant. It further noted that Emma O'Leary of Essential had been asked by ELAS to chair a grievance appeal for the Claimant, and that she was a partner of Essential but also carried out HR and consultancy work for ELAS. She had been asked to conduct the appeal as an independent person who had no knowledge of or involvement in the Claimant's grievance prior to the appeal. The Response concluded that Essential should be removed as a respondent.

5. The Response was accepted and sent to the Claimant on 5 July 2019 together with a letter requesting his comments on the contention that he had at all times been employed by ELAS. The Claimant responded on 12 July 2019 and confirmed that he had indeed been employed by ELAS and requested permission to change the name of the Respondent to the name of ELAS.

6. The Claimant explained that he had not noticed the error when the claim form had been submitted, it having been prepared by his trade union's solicitors and having only been presented to him the day before it was due to be lodged. He stated that he already suffered from high levels of anxiety, was conscious that he might miss the Tribunal deadline, and therefore must have missed the detail in his haste to get the claim lodged. He also noted in this letter that he had had the benefit of more detailed legal advice from the

Citizens' Advice Bureau and believed that he had also been discriminated against by Mr Andrew Hewitt, the Managing Director of ELAS, and by Mrs Pam Rogerson, its HR Director, and therefore requested that the Tribunal grant permission for these parties to be joined in addition to the change of the name of the respondent.

7. The matter was discussed at the telephone hearing on 26 July 2019 before Employment Judge Moore. The Claimant confirmed his agreement that he was employed by ELAS and agreed that his claim against Essential should be dismissed and a Judgment to that effect was issued.

8. As the representative of Essential was not instructed by ELAS at that time, she left the call at that point, but subsequent directions were issued that the claim should be served on ELAS and that a further telephone hearing would be listed after receipt of its Response.

9. The Response from ELAS, the currently named respondent, was then received on 23 August 2019 in which it raised the procedural issue of the lack of compliance with the early conciliation requirements and therefore contended that the claims against it should be struck out.

10. A telephone hearing was then scheduled for 13 January 2020 when the issue was discussed further. As noted, Judge Sharp was not able to make any Order at that time and directed that the matter was to be addressed on the papers following written submissions.

Issues and law

11. Section 18A of the Employment Tribunals Act 1996 introduced the obligation that claimants to employment tribunals should, in the vast majority of cases, undergo a process of early conciliation with ACAS. Early Conciliation rules then specify how that conciliation is to be undertaken.

12. Once early conciliation has been completed and the claim submitted, the Employment Tribunals Rules of Procedure confirm that 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 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 (Rule 12(1)(e)).

13. Rule 12(2A) goes on to say that the claim shall be rejected if the judge considers that the claim is of a kind described in sub paragraph 12(1)(e) 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. The issue of the difference of the name of the prospective respondent on the early conciliation certificate and the name of the respondent in the tribunal claim form has been addressed by the Employment Appeal Tribunal in two cases in 2017, Giny -v- SNA Transport Limited (UK EAT/0317/16) and in Chard -v- Trowbridge Office Cleaning Services Limited (UK EAT/0254/16).

15. The facts of those claims were the same as each other, which are not quite the same as those involved in this particular case. In both cases, the individual claimant had named the controlling shareholder of the company which employed him in the early conciliation certificate and then named, correctly, the name of the employing company in the tribunal claim form. In both cases therefore the name of the claimant on the claim form was not the same as the name of the prospective claimant on the early conciliation certificate and the claims were therefore referred to employment judges.

16. In both cases the employment judges considered that the claims should be rejected on the basis that there was an error which was not minor and appeals were pursued. The EAT in both cases reached different conclusions, with Soole J upholding the rejection decision in the case of Giny, but with Kerr J overturning it in the case of Chard. The principles set out by Soole J and Kerr J in the two cases however were similar, noting that the issue of considering rejection under Rule 12 is one of fact and judgement for the employment tribunal. They confirmed that it is not the case that naming an individual rather than a company could never be considered to be minor, or indeed that such a mistake was necessarily always minor.

17. The only fundamental difference of approach between the two cases was that Soole J in Giny outlined that the test when considering Rule 12(2A) was in two stages, i.e. whether an error was minor, and then whether it would not be in the interests of justice to reject the claim. Kerr J in Chard however, indicated that he felt that applying a two-stage process would be too purist; would be inconsistent with the overriding objective, which includes "avoiding unnecessary formality in seeking flexibility in the proceedings"; and risked causing injustice.

18. In terms of other case law, another EAT decision, that of Mist -v- Derby Community Health Services NHS Trust (UK EAT/0170/15), whilst dealing more generally with amendments, also noted that, in the opinion of HHJ Eady QC (as she then was) including a trading name for a respondent, rather than its correct corporate name, would usually be sufficient.

Background facts

19. As this was only the consideration of an application on the papers, it was not appropriate for me to make any formal findings, but it is appropriate to set out

the background facts, which do not appear to be in dispute, insofar as they are relevant to the applications.

20. The Claimant commenced employment with the Respondent on 20 November 2015, and he was issued with a Statement of Terms and Conditions of Employment showing that his employment was with ELAS, which he signed to accept on 24 November 2015. Various payslips also record the Respondent, ELAS, as the Claimant's employer, as did his P45. When the correct identity of the respondent was pointed out to the Claimant he quickly accepted the situation, providing the explanation noted above. The precise identity of the employer, and consequently the precise identity of the correct respondent, was therefore never in doubt.

21. The Respondent and Essential are separate legal entities although, as noted above, Essential does now form part of the ELAS group. Essential never traded as ELAS Business Support although, as a member of the ELAS group, it does appear that Essential carried out work for the ELAS group and its clients.

The parties' submissions

22. The focus of the parties' submissions was on the question of whether the error in the recording of the respondent's name in the early conciliation certificate and the claim form was minor or more than minor. The Claimant submitted that it was minor and that it would therefore be in the interests of justice not to reject the claim, whereas the Respondent contended that the error was a grave one.

23. On the Claimant's part, he noted that Essential was part of the Respondent's group and that both operated from the same address. He also noted that both companies are ultimately owned by the same person, Mr Andrew Hewitt who is also the Managing Director of the Respondent. I observed however, that whilst Essential was part of the ELAS group, as it was a limited liability partnership, it cannot have been formally owned by it or by Mr Hewitt, who was, at most, an LLP member of Essential, with the precise share of ownership, in terms of entitlement to profit and capital, not known.

24. The Claimant's contentions were focussed on the cases of Mist, and another EAT decision of Drake, which he contended indicated that there was no need to go through any fresh early conciliation process to amend a claim. The Claimant noted that he had indeed referred to "ELAS Business Support" as a respondent, in both the early conciliation certificate and the claim form, albeit as a trading name and not as a limited company.

25. The Respondent contended that Essential was a separate legal entity to the Respondent and that that had always been clear to the Claimant. It

contended that the Claimant also had clear knowledge of his ability to bring claims against multiple respondents as noted by the fact that he had initially sought to bring a claim against two named individuals (which were rejected) and has subsequently also sought to add another named individual as a respondent.

26. The Respondent noted that the Claimant was represented at the time that the contact was made with ACAS and the claim form submitted, and that a fundamental error was made over the correct name of the Respondent.

27. The Respondent also noted that the Claimant's employment contract clearly stated the correct name of the employer, as did his payslips and his P45.

Conclusions

28. As noted above, Rule 12 provides that a referral shall be made to an employment judge if 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. In this case, once it became clear that the Claimant accepted that his employer was ELAS, i.e. that that should have been the name of the respondent in the claim form, the state of affairs envisaged by Rule 12(1)(e) prevailed. i.e. the name on the claim form as amended was not the same as the name of the respondent on the early conciliation certificate. Had that happened at the outset, the claim form would have been referred to an employment judge to consider whether or not it should be rejected.

29. In those circumstances the issue would then have moved on to Rule 12(2A), which would have provided that the claim was to be rejected unless the judge considered that the Claimant had made a minor error in relation to the name and that it would not be in the interests of justice to reject the claim.

30. As noted above, the guidance in relation to the application of Rule 12(2A) is primarily found in the cases of Giny and Chard. As also noted above, the outcome of those cases was the opposite, with the ultimate outcome being that the claim in Giny was rejected due to the error whereas the ultimate outcome in Chard was that the error was a minor one. The underlying principles to be applied however are as set out at paragraphs 16 and 17 above.

31. The Claimant's mistake in recording the correct name appears to have been caused by the fact that a partner in Essential dealt with his appeal on behalf of the Respondent, and it seems that that was the last occasion when the Claimant received correspondence in relation to his grievance appeal. Nevertheless, it is clear that the recording of the correct name of the respondent was an error, as the other documents, such as the contract, payslips and P45, all show the Respondent as the employer. Had therefore

the name in the early conciliation certificate been Essential alone, I would have concluded that the error was not a minor one and therefore that the claim was to be rejected.

32. However, the recorded name, whilst clearly incorrect as far as the recording of the underlying legal entity, also referred to "t/a Elas Business Support" which is the style under which the Respondent trades. I could also see from correspondence submitted by the Claimant that the telephone number given to ACAS for the purpose of conciliation was that of the ELAS group, and also that the address was correct, i.e. in terms of being the address of the ELAS group.

33. I noted the direction provided by Kerr J in Chard that considerable emphasis should be placed on the overriding objective when considering issues of this kind, and that there is a need to avoid the injustice that can result from undue formality and rigidity in the proceedings. Kerr J noted that this includes the need to avoid elevating form over substance in procedural matters.

34. In the circumstances, and bearing in mind that the early conciliation certificate did contain a reference to the ELAS group, I concluded that the error in the recording of the respondent' name was a minor one and that it would not be in the interests of justice to reject the claim.

2. The application to add a second respondent

The application

35. The Claimant contended that elements of his claim as originally submitted indicated that the Respondent's former HR Director, Mrs Pamela Rogerson, should be held personally liable. He contended that it had not been possible to issue the claim against Mrs Rogerson before now as she had left the Respondent's employment, and until just prior to the preliminary hearing on 26 July 2019 he was not aware that the Respondent was instructed to take service of any claim form for Mrs Rogerson and, having made reasonable enquiries, was unable to locate her and could find no other address upon which to serve documents upon her.

36. The Claimant also contended that he was unwell as a result of depression and anxiety which had made it somewhat difficult for him to finalise the claim form and, also that he was not formally legally represented until later in the proceedings, and it was only at that stage that he became aware that he was able to pursue a claim against Mrs Rogerson personally.

37. The Respondent contended that the Claimant had been represented by a trade union at the time that he submitted his claim, and also that the Claimant could have asked the Respondent for disclosure of the address or could have

made an application to the Tribunal for such an Order. However that had not been done for some six months despite the fact that the issue was discussed at the telephone hearing on 26 July 2019, when the Claimant was legally represented.

38. The Respondent also contended that the Claimant had failed to provide any medical evidence to explain why his medical condition meant that it had not been possible for him to make the application earlier. The Respondent also noted that the Claimant had had assistance from his trade union up to and including submitting the claim to the Tribunal and also had been legally represented at the hearing on 26 July 2019. It noted that the Claimant had been advised at that hearing that he would need to make an application to add Mrs Rogerson as a respondent and yet had not done so for a 6-month period.

39. The Respondent also noted that the Claimant had not undertaken any form of early conciliation with regard to Mrs Rogerson.

Issues and law

40. It has been long established, since the case of Cocking -v- Sandhurst (Stationers) Limited [1974] ICR 650, that the key principle when deciding whether to allow amendments to claim forms was that tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to amend.

41. That test was restated by the EAT in the case of Selkent Bus Company Limited -v- Moore [1996] ICR 836, which noted that the tribunal must carry out a balancing exercise of the relevant factors which can include; the nature of the amendment, the applicability of time limits, and the timing and manner of the application. That guidance has been reiterated more recently in the Presidential Guidance on making amendments.

Conclusions

42. The claim was to add in a wholly new respondent which, whilst relating to the originally pleaded facts, was, in my view a substantial amendment.

43. With regard to time limits, the claim against the proposed additional respondent was substantially out of time. In that regard, I noted the direction provided by the case of British Coal Corporation -v- Keeble [1997] IRLR 336, which identified that tribunals would be assisted by considering the factors listed in Section 33 of the Limitation Act 1980 dealing with the exercise of discretion by civil courts. That again involved having regard to all the circumstances of the case but in particular to; the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be

affected by the delay, the extent to which the party sued has cooperated with any requests of information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

44. Of those, I did not consider the cogency of the evidence was likely to be affected by the delay, as it is likely that Mrs Rogerson will need to give evidence as a witness on behalf of the Respondent. However, the delay in seeking to add Mrs Rogerson was significant and, during the entirety of that period the Claimant was formally legally represented, and indeed at the time the claim was submitted the Claimant was represented by a trade union. I did not therefore consider that the Claimant acted appropriately swiftly to pursue a claim against Mrs Rogerson once he became aware of the facts giving rise to the possibility of such a claim.

45. With regard to relevant hardship, I noted that the refusal of the application to add in Mrs Rogerson as a respondent would not impact upon the Claimant's claim against the Respondent which will continue in any event. I also noted that the Claimant had initially brought and then withdrawn claims against two named individuals. Conversely, with regard to the proposed additional respondent, she would now be faced with having to respond to a claim, and potentially get legal advice in respect of such a claim, long after the events said to give rise to it. In my view therefore the balance of hardship lay with the proposed additional respondent and I therefore consider that the Claimant's application to amend should be refused.

_____

Employment Judge S Jenkins
Dated: 25 March 2020

JUDGMENT SENT TO THE PARTIES ON

…….28 March 2020……..

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS