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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110945/18

Held by telephone conference call in Glasgow on 14 March 2019

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Employment Judge: Susan Walker (sitting alone)

Mrs L Reid

Claimant
Represented by:
Mr Hickford, counsel

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Bute House Limited

Respondent
Represented by:
Mr Khan, solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal was not required to reject the claim under rule 10 of the Employment Tribunal Rules of Procedure.

25 The Tribunal issues the following orders:

- 1 By 28 March 2019, Mr Khan will provide to the Tribunal and the respondent the response to the claimant's application for expenses.
- 2 The claimant will indicate by 11 April 2019 whether the application is insisted on. If so, it will be considered at the hearing to be listed in

E.T. Z4 (WR)

accordance with order 3. Alternatively, if either party wishes to lead evidence, the application will be considered at the next hearing in person.

- 3 Parties are asked to provide availability in April for a 1-hour case
5 management preliminary hearing, by telephone conference call, to
determine further procedure in this case.

REASONS

1 There was some confusion as to the scope of this preliminary hearing. Judge
Whitcombe had indicated in correspondence that the claimant's application
10 from expenses would be considered but the preliminary issue identified in
the Notice of Hearing was simply "To resolve the dispute about the
application of Rule 10 and early conciliation". I directed that in these
circumstances, the claimant's application for expenses would be held over
until the next hearing in the case.

15 2 This preliminary hearing therefore considered only the respondent's
application made by email on 29 October 2018 and supplemented by email
on 20 December 2018 (including copies of relevant cases). The claimant's
representative had set out the position on her behalf by letter dated 5
November 2018.

20 3 Mr Khan and Mr Hickford made oral submissions and there was some
discussion following that.

Findings of fact

- 4 The essential facts were not in dispute and are as follows:
- 25 5 The claimant obtained an early conciliation certificate with the prospective
respondent named as "Bute House".
- 6 During her contact with Acas, she came to realise that the name of her
employer was "Bute House Limited".

7 Acas would not amend the certificate and so she made a second notification
and obtained a second certificate with the prospective respondent named as
“Bute House Limited”.

8 The claimant presented her claim of unfair dismissal, disability discrimination
5 and failure to pay notice pay to the Tribunal. She named Bute House Limited
as the respondent. In the box where she was asked to provide the early
conciliation certificate number, she put the number from the second EC
certificate.

9 The respondent raised the issue of compliance with the early conciliation
10 requirement. The claimant submitted a second ET1 including the number
relating to the first EC certificate.

Relevant law

10 Section 18A of the Employment Tribunals Act 1996 provides that before
15 instituting relevant proceedings in the employment tribunal, a prospective
claimant must provide certain prescribed information to Acas and obtain a
certificate in the prescribed form from Acas.

11 The details of the process, including the information to be provided, are set
out in the Early Conciliation Rules of Procedure attached as a schedule to
20 SI 2014/254. The information to be given is very limited and is simply the
name and address of the prospective claimant and the name and address
of the prospective respondent. The certificate issued by Acas at the end of
the process (“the early conciliation certificate”) contains the name and
address of the prospective claimant and the prospective respondent, the
25 date of notification and the date of issue of the certificate. It also contains a
unique reference number.

12 The Employment Tribunals Rules of Procedure 2013 in Rule 10 sets out a
number of grounds for rejection of a claim as follows:

(1) The Tribunal shall reject a claim if

(a)

(b)

(c) it does not contain all of the following information

(i) an early conciliation number

5 (ii) confirmation that the claim does not institute any relevant proceedings; or

(iii) confirmation that one of the early conciliation exemptions applies.

13 Section 1 of the 2013 Rules of Procedure states that “early conciliation
10 number” means the unique reference number which appears on an early conciliation certificate.

14 Rule 12 sets out some further grounds for rejection including where 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
15 early conciliation number relates (rule 12(1)(f)). There is a saving provision
in rule 12(2A) whereby the claim will not be rejected if 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.

Submissions for the respondent

20 15 For the respondent, Mr Khan’s application is as follows:

16 This is a case where there are multiple EC certificates relating to the same
matter. The second of the certificates (which has been included in the ET1)
is not a valid certificate following the cases of **Revenue and Customs
Commissioners v Serra Garau UKEAT/348/16** and **Romero v
25 Nottingham City Council UKEAT/0303/17/DM.**

17 The EC certificate number on the ET1 must be accurate (reference to
Sterling v United Learning Trust UKEAT/0439/14/DM and **Adams v**

British telecommunications plc UKEAT/342/15.) In the present case the EC number entered is not a valid EC number.

18 The first certificate clearly relates to the same parties on any common sense approach (**Mist v Derby Community Health Services NHS Trust UKEAT/170/15**).

19 Rule 10 requires the Tribunal to reject a claim if it does not contain an early conciliation number. The Tribunal has no discretion to disapply Rule 10 (**Cranwell v Cullen UKEATPAS/0046/14/SM**).

20 The claimant should not be allowed to amend the claim. Any claim should be lodged as of new as there can be no amendment to a non-existent claim.

Submissions for the claimant

21 For the claimant, Mr Hickford responded as follows:

22 The claim form is properly constituted and contains all the information prescribed by Rule 10 (in particular Rule 10(1)(c)(i)).

23 Before a claimant can present a form they must provide to Acas “prescribed information”. This includes, *inter alia*, the prospective respondent’s name and address.

24 Bute House is not a legal entity, did not employ the claimant and could not, properly be a prospective respondent. A failure to identify a legal person on an EC certificate is not a minor error but one of substance. A distinction is clearly drawn between the name of a natural person and a legal person. (**Giny v SNA Transport Ltd UKEAT/0317/16/RN**).

25 In this case there was a second provision of required information in respect of Bute House Limited. There were 2 separate, albeit related, early conciliation processes. EC certificate 2 is not a second EC certificate but the first EC certificate arising from the early conciliation process against Bute House Limited.

26 **Serra Garau** is distinguishable, in any event, on the facts as

- it was a case considering only the extension of time and the impact of section 18A of the Employment Tribunals Act 1996 on section 207B of the Employment Rights Act 1996; and
- 5 • it considers a second EC certificate issued against the same prospective respondent, and not, as in the present case, against different prospective respondents.

27 The claim form bears the correct EC number being the EC number on the EC certificate issued against the named respondent, Bute House Limited.

10 28 There are not 2 certificates relating to the same matter. There is one certificate against Bute House (which is not a legal entity) and one against Bute House Limited (which is a legal entity and employed the claimant). There is no reason to conflate the two. They are separate.

15 29 The reliance upon the EC certificate against Bute House is misconceived. If the respondent's submission were to be accepted, it would amount to a claimant who in error names the wrong respondent being left with the unpalatable choice of proceeding with the EC certificate which names the wrong respondent or seeking an EC certificate against the properly named prospective respondent which would later be considered void.

20 30 Insofar as the respondent relies on **Adams** (incomplete EC number), and **Zhou** (incorrect EC number), the claim in this case has the correct EC number. The respondent's suggestion that it does not is predicated on the second certificate being void, which is not accepted for the reasons given.

25 31 If the Tribunal accepts the respondent's submission, then it should exercise its discretion to correct the irregularity under rule 6.

32 In the alternative, the claimant provided an amended ET1 using the original EC certificate number and applied to amend the claim and for the claim to be given an extension of time.

Issues to be determined

33 The issues in relation to this preliminary issue were agreed in advance as follows:

- 5 (i) Does, for the purposes of Rule 10, the creation of an EC certificate naming the wrong respondent invalidate a second EC certificate which names the correct respondent in circumstances where only one claim is brought and it is against the correct respondent?
- (ii) If so, should the Tribunal have rejected the claimant's claim form under rule 10?
- 10 (iii) If so, should the claimant be allowed to amend the claim form to substitute the EC reference number R253902/18/11 for the original EC reference number?
- (iv) If not, should the claimant be allowed to admit the claim as a new claim with an extension of time on the grounds that it was not
15 reasonably practicable to file the claim in time and/or that it is just an equitable for time to be extended?

34 There were other identified issues in relation to expenses but these will be held over to a further hearing.

Decision

20 35 I agree with Mr Khan that, based on **Cranwell**, I have no discretion under rule 10. It is a prescriptive requirement and if the requirements have not been met, for whatever reason, the Tribunal has no option but to reject the claim however unsatisfactory or unjust that may be. The reason for the failure to comply cannot be taken into account and rule 6 cannot be used to cure the
25 irregularity. That is contrasted with the position if I were considering a second claim submitted out of time when the circumstances surrounding the rejection would be a relevant factor to be considered.

36 Mr Khan's essential submission is that the second certificate, whose number was set out in the original ET1, is invalid and so the requirements of Rule 10 have not been met.

37 If he is correct that the certificate is invalid, it must follow from the decision
5 of the Employment Appeal Tribunal in **Sterling** that the number on the ET1 is not an "early conciliation number" in terms of rule 10. If the second certificate is invalid, then the claim should have been rejected under rule 10.

38 In making the submission that the second certificate is invalid, Mr Khan relies on the decision of the Employment Appeal Tribunal in **Serau**. Mr Hickford asks me to consider the context of the present case compared to **Serau**.
10 **Serau** was concerned with whether a second certificate could be relied on to obtain an extension of time to present a claim under section 207B of the Employment Rights Act 1996. Mr Hickford stresses that the present case is not about obtaining an extension of time. The claimant is not trying to get
15 any benefit from the second certificate. Conversely **Serau** was not concerned with the validity of the second certificate for the purposes of rule 10. Having considered the decision in **Serau**, I do not think the matter is quite as simple as that.

39 Judge Kerr, in **Serau**, found that the reference in section 207B to "the
20 certificate issued" referred to the mandatory certificate obtained under section 18A (4) of the Employment Tribunals Act 1996 and not to a purely voluntary second certificate. That voluntary second certificate, he concluded, does not trigger the modification to the limitation periods. So far that is not relevant to the present case. However Judge Kerr went on to say
25 (paragraph 21) that "*a second certificate is not a "certificate" falling within section 18A (4).*" If there are two EC certificates naming the same respondent, then as I am bound by the decision in **Serau**, I would agree with Mr Khan that I would have to find that the second certificate was not an early conciliation certificate and the number related to that certificate would not be
30 an "early conciliation number" for the purposes of Rule 10.

40 However, in **Serau**, the Employment Appeal Tribunal was considering two
EC certificates obtained against the same respondent. In the present case,
one EC certificate names Bute House and the other Bute House Limited.

41 Mr Hickford in his oral submissions suggested a hypothetical scenario where
5 a claimant named “Steele Law” as the prospective respondent and then
understood her employer was “Bute House Limited”. He submitted that it
cannot be right that that claimant would be denied the opportunity to present
a claim against the correct employer because she had made an error when
notifying Acas. I agree. Where the claimant has an EC certificate which
10 names one respondent and then a second EC certificate that names an
entirely different respondent, it cannot be the case that the claimant is
prevented from bringing a claim using the second certificate.

42 Mr Khan, however, urges me to find that the two certificates in the present
case are issued against the same prospective respondent. He submitted that
15 Bute House Limited was known colloquially by staff simply as “Bute House”
and they were effectively the same thing. He relied on the decision of Judge
Eady in **Mist** as support for the need to take a commonsense view of the
matter.

43 I do not consider the decision in **Mist** is applicable here. That case was
20 concerned with a claimant who did not accurately identify the name of the
respondent when they contacted Acas, the application of rule 12(2A) and
the possibility of subsequent amendment. Judge Eady clearly had in mind
the general aims of early conciliation and a desire to avoid the technical legal
arguments that best the abandoned pre-action requirements in the
25 Employment Act 2002 (para 53). I do not think that decision can be relied on
to preclude a claimant progressing with her claim because she obtained two
early conciliation certificates against similarly named prospective
respondents.

44 The critical question for me, therefore, is whether these two named
30 prospective respondents are the same “prospective respondent.” On one
view of it, in reality they clearly are. The claimant was intending to commence

early conciliation against her employer which she understood to be called Bute House. She then found that it was “Bute House Limited”. Bute House as a legal entity does not exist.

45 However, I accept Mr Hickford’s submission that Bute House and Bute
5 House Limited for the purposes of Rule 10 are not the same prospective
respondent. Quite simply, the names are not identical. In my judgment that
is sufficient to make them different prospective respondents.

46 Had the claimant presented her ET1 claim form naming Bute House Limited
and the first early conciliation certificate that named Bute House, the claim
10 would have been referred to a Judge under rule 12(1)(f) to consider rejection
because the name of the respondent on the claim form was not the same as
the name of the prospective respondent on the EC certificate. There is, of
course, a saving provision in rule 12 (2A) and a Judge may have considered
this to be a “minor error” and exercised their discretion under that rule.
15 Nonetheless, to ensure that a claim is not at risk of rejection under rule 12,
the name of the respondent and the prospective respondent must be “the
same”. “Bute House” is not the same as “Bute House Limited”.

47 I do not consider that this present case is not then the same as **Garau** as I
do not consider there are two EC certificates against the same respondent.
20 I do not consider that the claim should have been rejected under rule 10 and
the claim shall now proceed.

48 I do not therefore have to consider the other issues.

Further procedure

49 Parties wished time to consider further steps so a case management
25 preliminary hearing in private will be fixed to determine further procedure. I
am conscious that there has already been significant delay and so parties
are directed to provide availability for a short telephone hearing by
conference call in April.

50 The outstanding application for expenses, if insisted on, will be considered at that hearing unless either party intends to call witnesses, in which case it will be considered at the next substantive hearing.

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Employment Judge:
Date of Judgement:

Susan Walker
15 March 2019

10 Entered in Register,
Copied to Parties:

19 March 2019

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