



EMPLOYMENT TRIBUNALS

At an Open Attended Preliminary Hearing

Claimant: Miss K Wells

Respondent: Sytner BMW Nottingham

Heard at: Leicester by Cloud Video Platform

On: 2 June 2020

Before: Employment Judge Adkinson (sitting alone)

Representation

Claimant: Ms N Owen of Counsel

Respondent: No attendance or representation

For Sytner Group Ltd Mr D Brown of Counsel

JUDGMENT

The Tribunal concludes that:

1. The Claimant was employed by Sytner Group Ltd;
2. Sytner Group Limited is added as Respondent;
3. Sytner BMW Nottingham is removed as a Respondent; and
4. Sytner BMW Nottingham's application to strike the claim out is dismissed.

REASONS

1. This is an Open Preliminary Hearing to determine issues that were identified by Employment Judge Heap on 23 March 2020 in her order.
2. Those issues were to identify the Claimant's former employer and, if that former employer is The Sytner Group Ltd, to consider the Claimant's application to amend the claim to add The Sytner Group Ltd as a further Respondent.
3. If the Claimant's former employer was The Sytner Group Ltd but the application

to amend is refused, the Tribunal was to consider the Respondent's application to strike out the claim.

The hearing

4. The Claimant was represented at the hearing by Ms N Owen, Counsel. The Respondent was represented at the hearing by Mr D Brown, Counsel.
5. The hearing took place by a remote video link. All parties attended using the Cloud Video Platform service which HMCTS is using in the Employment Tribunal to enable hearings to take place.
6. Miss Wells connected through the video system and gave evidence. She had prepared in advance a witness statement and, with the agreement of the parties, that witness statement stood as the evidence-in-chief. Both parties were conscious of the rule that members of the public are allowed to inspect witness statements that have been adopted as evidence-in-chief. However, there were no members of the public in attendance at the hearing.
7. There was also a bundle of documents that had been prepared by the parties. With the agreement of the Tribunal, they have been filed electronically in a PDF format.
8. In spite of some initial connection difficulties at the beginning with Miss Wells joining the hearing, and in spite of some difficulties through the course of her evidence remaining connected to the hearing, Miss Wells was able to give oral evidence and Mr Brown was able to cross-examine her effectively. Miss Wells confirmed that she was happy to continue giving evidence when the connection difficulties happened and Mr Brown confirmed he was happy to continue with his cross-examination. So far as I can tell, I could detect no unfairness caused to either party by those connection difficulties.
9. Both advocates had prepared skeleton arguments explaining their position and I am very grateful for those skeleton arguments. Both advocates have also referred to the relevant legislation and case law and I am most grateful for their efforts doing that.
10. At the beginning of the hearing, and in particular whilst waiting for Miss Wells to resolve some of the technical difficulties at her end of the connection, we discussed the actual practical issues that I have to resolve.
11. In essence, the only two issues I have to resolve are the first and second issues: that is the identity of the employer and consideration of the application to amend. It is agreed that if the application to amend succeeds, then the strike out application must necessarily fall away. If the application to amend fails, then the claim falls to be struck out in any event because there is nothing else to keep it going.

Issues

12. The first issue therefore that I must determine is who employed Miss Wells.

13. The second issue is, if it were The Sytner Group Ltd, should I allow Miss Wells to add or substitute them as a Respondent to the proceedings?
14. At the conclusion of the hearing, the parties agreed that if the case was to continue, I should give directions on paper with permission to the parties to apply for those directions to be varied or discharged if they felt they were otherwise inappropriate.

Issue number one – the correct employer of the Claimant

Findings of fact

15. From 12 May 2003 until 10 October 2019, Miss Wells worked with what can conveniently be called The Sytner Family of companies, and latterly worked as a Sales Adviser.
16. On 10 October 2019 she was summarily dismissed for alleged gross misconduct. The details of why she says that that dismissal was unfair and the details of why the Respondent says that it is not unfair do not matter for the purposes of this hearing.
17. So far as the history of her employment is concerned, the documents disclose the following.
18. On 22 April 2003, she was sent a letter offering her employment in the position of Accounts Administrator at Sytner Nottingham to commence on 6 May 2003. The letter was signed by her on 23 April 2003. The letter does not identify expressly who the legal entity is that will be employing her. However, in the top left-hand corner it says: "Sytner Nottingham Authorised Dealer for BMW cars". Next to that in larger text is the word "Sytner".
19. Accompanying that letter were a number of documents. One was a request for references from current employers. That letter does not identify which member of the Sytner Family is employing her.
20. Another document which accompanied the offer was a document headed: "STATEMENT OF THE MAIN TERMS AND CONDITIONS OF EMPLOYMENT PURSUANT TO SECTION 1 OF THE EMPLOYMENT RIGHTS ACT 1996". This document is also on the same headed notepaper as the offer of employment. Ms Wells signed it on 22 April 2003. It says that she was required to work at the Company's premises at 51 Union Road in Nottingham and at Lenton Lane, Nottingham from summer 2003. It refers throughout to the Company with a capital "C" implying that Company has some definition associated with it and it also in paragraph 9 says: "The Company's Handbook also forms part of your terms and conditions of employment and deals with matters not covered in this document". Although the document purported to be a statement of the main terms and conditions of employment, pursuant to Section 1 of the Employment Rights Act 1996 it is defective in one important respect in that it does not actually identify who the employer is.
21. She was also asked to fill in a driver's questionnaire, which again does not identify the employer.

22. No document defines what is meant by “Company” with a capital C.
23. On 23 April 2003, she also signed a document saying that she acknowledged receipt of company policies. That document read as follows (page 51 in the bundle):
- “...

As an employee of Sytner Group Plc, I acknowledge receipt of Sytner Plc’s Employee Handbook which includes the Company Health and Safety Policy.

I have read this document and sign this acknowledgement as confirmation that I understand its contents and the nature of the obligations placed upon both the Sytner Group and myself.

...”
24. At the same time, she also signed documents confirming she was prepared to work in excess of an average of 48 hours per week, and which she provided further information as to her next of kin. At the same time, she received a Driver Training Programme and details of the Code of Practice that Sytner operated under. These documents are all headed in exactly the same way, that is in the top left-hand corner they say “Sytner Nottingham Authorised Dealing for BMW cars” and next to it in larger letters the word “Sytner”. None of those identify what is meant by the word “Company” with a capital C or who is her employer.
25. On 8 May 2003 she completed the Health and Safety Induction Programme. It refers to employee responsibilities and Company responsibilities but, sadly, again does not identify who the Company is or who the employer is. From that point onwards, she then continued her employment working with the Sytner Family.
26. During the course of her employment, there were a number of updates to the Employee Guide and Handbook and I have seen a number of receipts for these:
- On 6 August 2003, she acknowledged receipt and that she was “an employee of Sytner Group”. Nowhere in that notice does it say whether the Sytner Group is a trading style or a separate Company.
 - However, later on, on 2 March 2006 she signed as an employee of Sytner Group Ltd acknowledging receipt of an update to the Handbook.
 - On 9 October 2008, she again signed as an employee of Sytner Group Ltd acknowledging receipt of an update to the Handbook.
 - Likewise, she did the same on 20 August 2013 and 4 March 2016.
27. Miss Wells was also a member of the pension scheme and the introduction to the Sytner Group pension plan identifies that the Company is Sytner Group Ltd.
28. During her employment Miss Wells was paid and so received payslips.

Although she says she was paid the same amount each month, a cursory glance at the payslips show that this is not the case.

29. The payslips appeared to identify different entities as paying her. On 24 September 2015, for example, the payslip records only that she was paid by BMW Nottingham. On 24 October 2019, that being her final payslip, the payslip identified that her employer is Sytner Group Ltd. Likewise, her P45 identifies that her employer is Sytner Group Ltd.
30. In the payslips that were provided late by the Respondent and which the parties agreed could be put before the Tribunal, those payslips that contain bare information (that is to say they do not contain the information in the proforma onto which the printer prints the pay and deduction details) simply record that she is paid by BMW Nottingham.
31. However, her 24 September 2019 appears on the pro-forma used by payroll. Her payslip clearly identifies that the payer is Sytner Group Ltd. The same is true of the 24 August payslip and 24 July payslip.
32. Companies House records confirm that Sytner Group Ltd is exactly the same Company as Sytner Group plc. It appears that Sytner Group plc ceased to be a plc and became a private limited company on 29 January 2003.
33. On 27 September 2019, Miss Wells was suspended from her employment on full pay pending an investigation. The letter suspending her was signed by Chris Peat, the Dealership Accountant. The letter in the top says: "BMW Centre Sytner Nottingham". On the left-hand side in the bottom corner it identifies the registered office of Sytner Nottingham as being: "Sytner Ltd T/A Sytner Nottingham, 2 Penman Way, Grove Park, Leicester LE19 1ST." The letter then goes on to identify that Sytner Ltd is an: "Appointed Representative of Sytner Group Ltd, which is Authorised and Regulated by the Financial Conduct Authority".
34. On 17 October 2019, David Maplestone, the Aftersales Manager, sent a letter detailing the outcome of the disciplinary hearing process. The details of that do not matter for present purposes, suffice to say the letter contains the same heading and the same information about Sytner that I have referred to in the previous suspension letter.
35. Companies House confirms that Sytner Ltd is indeed a separate and distinct company.
36. On 18 October 2019, Miss Wells made a Subject Access Request under the Data Protection Act of 2018. Details of the request do not matter. She received a reply on 21 October 2019 from Sytner Group Ltd.
37. On 4 December 2019, Miss Wells commenced early conciliation through ACAS naming the prospective Respondent as "Sytner BMW Nottingham".
38. On 20 December 2019 during the early conciliation, Miss Wells chased up the outcome to her appeal against dismissal. It was a Nathan Ellinor, who identified himself in his email as Divisional Head of Human Resources at Sytner Group

Ltd, who replied to that request for an outcome.

39. On 2 January 2020, Mr Ellinor contacted Miss Wells's solicitor saying that he had had no communication from ACAS in the matter and asking if she had details of the ACAS conciliator in order that he could engage with them. Again, he identified himself as the Divisional Head of Human Resources at Sytner Group Ltd.
40. On 2 January 2020, ACAS contacted Miss Wells's Solicitor, Natalie Thomson, to say:

“We have been contacted by the Respondent contact who has requested an Early Conciliation Extension of 14 days to investigate the situation. This has to be by mutual consent so please contact us at the earliest opportunity if wishing to extend as will otherwise expire tomorrow 3/1/20.
...”

The Claimant did consent and the early conciliation was extended.

41. On 6 January 2020, Sytner dismissed in writing Miss Wells's formal appeal. Again, that letter is set out in the same way as the suspension letter and the outcome of the disciplinary letter that identifies it as being from Sytner Ltd, who is an Appointed Representative of Sytner Group Ltd. The details of that appeal and outcome do not matter for these purposes.
42. Finally, in terms of findings of fact, I am satisfied that Sytner Nottingham is a trading style of Sytner Ltd. I come to that conclusion because I have been shown the entries for the Financial Conduct Authority and Prudential Regulation Authority registers. They identify Sytner Ltd's trading styles and “Sytner Nottingham” is one of them.
43. Finally, it has been suggested that the Claimant's Solicitor has some particular knowledge of Sytner and how the various companies are structured within the Sytner Family. This is because she used to work at the firm of solicitors now instructed by the Respondent. The Respondent's solicitors' website simply identifies that their clients include, amongst other clients, Sytner but it does not identify which member or members of the Sytner Group. Although the Claimant's Solicitor has given no evidence as to her involvement with Sytner proceedings or knowledge of the structure of the Sytner Family, neither has the Respondent produced any evidence to show that she would have had any particular special knowledge that she could bear to bring on these proceedings. Whether or not there is a conflict of interest seems to me to be no issue for me to delve into or to resolve and I say nothing more about it. However, in my view it is for the Respondent to prove that the Claimant's solicitor has this knowledge because they are making the assertion. They have failed even to try to do so in my opinion.
44. Finally, the Claimant relies upon a document that is the BMW and Mini Employee Car Scheme in which her employer is identified as Sytner Nottingham. Sadly, on the copy available to me, that document is not dated.

45. Ms Wells always thought the Respondent was her employer. It was when she received the P45 with Sytner Group Ltd written upon it after early conciliation had ended, that she became unsure as to who her employer was and therefore named both.

Law and conclusions

46. In terms of the law, there is very little help available from the statutes. The term “employer” is defined in the Employment Rights Act 1996 s230 as follows:

“230 Employees, workers etc.

- (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

...

- (4) In this Act “employer”, in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

...”

47. Because it is a contractual issue it seems to me that the appropriate starting point is look at who made the offer of employment that Miss Wells eventually accepted. I say that because in this case there has been no suggestion and no evidence advanced that there has ever been any form of transfer of employment or change of identity of the employer, whether under the TUPE Regulations or otherwise. It follows therefore as a matter of logic that whoever employed her in the first place must be the person who employed her at the end of her employment.
48. In my view, therefore, the answer to the question ‘who is the employer?’ can only be determined by objectively judging the documents that brought the employment relationship into being back on 22 April 2003. It is unfortunate that the main terms and conditions of employment actually do not comply with the law because, if they did, we could simply read it and find out. Looking at the documents at that time, it is immediately striking that Miss Wells signed the key documents on 23 April 2003. It seems to me a reasonable inference that she returned them to her new employer all on the same occasion.
49. The only document from that time that identifies by whom she is employed is the document headed: “EMPLOYEES ACKNOWLEDGMENT OF RECEIPT OF POLICY INFORMATION” in which she has signed it “As an employee of Sytner Group Plc”.
50. In that document, the word Company is capitalised and the context of documents suggests that the only reasonable interpretation of “Company” throughout is a reference to Sytner Group Plc.
51. I acknowledge that the other documents all have the heading which says:

“Sytner Nottingham Authorised Dealer for BMW Cars”. However, it seems to me that where there is a clear deliberate typed statement prepared by the employer and which she has signed and returned back as the employer had requested and which says she is an employee of Sytner Group Plc, that presents far more compelling evidence of who her employer was than the format of the letter heading that was used by the Dealership where she was going to work.

52. There is nothing else in those contemporary documents from the beginning of her employment that suggests there could be any other legal entity who was her employer. I do not believe, as I say, letter headings are sufficient to point to a different conclusion.
53. It seems to me that conclusion is fortified by the repeated acknowledgments that she signed confirming receipts of updates to the various Company policies. With the exception of one that simply says “Sytner Group” not identifying the legal entity, they all identify her as being an employee of Sytner Group Ltd and so the words “Sytner Group” without the qualification as to whether it is the Plc Ltd or a trading style must objectively refer to Sytner Group Ltd.
54. I also believe the conclusion is fortified by the fact that her payslips which incorporate the full pro forma onto which the information for pay and deductions, tax and so forth is printed, confirm that her employer and payer was Sytner Group Ltd. There is no reason to believe that Sytner Group Ltd would be paying her simply because they were the head office or they processed the payroll as she suggested during the course of the evidence. They would be able to process it through the different corporate entities that form part of the Sytner Family.
55. Furthermore, to that, the P45 also identifies Sytner Group Ltd as being the employer.
56. The documents therefore show a consistent reference to Sytner Group Ltd as the employer throughout. This is consistent with what information is available from the start of her employment.
57. I acknowledge that the letters of suspension, outcome of the disciplinary process and outcome of the appeal all refer to Sytner Nottingham and identify themselves as being written on the face of it by and on behalf of Sytner Ltd. It seems to me that in the context of this case, that is an unfortunate use of an inappropriate letterhead for conveying information relating to Miss Wells’s employment.
58. At the beginning of the employment, it was Sytner Group Plc (later Sytner Group Ltd) who are identified as the employer. A different letter head cannot change that.
59. The Claimant suggested that a key test for identifying the employer is who could carry out the dismissal? That of course is an important factor but it cannot be the case that the fact that the letters are signed off as Sytner Ltd (which we know has Sytner Nottingham as a trading a trading style) can become the employer simply because of the choice of stationery used.

60. I feel further supported in a conclusion it must be Sytner Group Ltd because the liaisons with ACAS were all conducted by someone acting on behalf of Sytner Group Ltd. This again shows a consistency throughout.
61. Therefore, on the first issue, the conclusion of the Tribunal is that the Claimant's employer is Sytner Group Ltd.

Issue number two – the application to amend

62. In her original claim, the Claimant sued both Sytner BMW Nottingham and Sytner Group Ltd. That claim was presented on 6 February 2020.
63. On 11 February 2020, the Tribunal rejected the claim against Sytner Group Ltd because it failed to comply with early conciliation. For what it is worth, I agree that rejection was correct.
64. The Claimant then obtained an early conciliation certificate on 13 February 2020 and submitted the application to amend.
65. Rules 10 to 13 of the Employment Tribunals Rules of Procedure provide for the rejection of claims that fail to provide early conciliation numbers and for the Tribunal to have the power to allow a claim to proceed when the defect has been rectified or if the decision to reject was wrong. It is clear in this case that the defect has now been rectified by the provision of a new early conciliation certificate on 13 February 2020.
66. Rule 34 of the Employment Tribunals Rules of Procedure provides as follows:

“Addition, substitution and removal of parties

34. 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.”

67. In the Grounds of Resistance, the Respondent makes the point that the Claimant was employed by Sytner Group Ltd and not by Sytner BMW Nottingham. The Respondent then goes in those Grounds of Resistance, notwithstanding saying that the wrong party has been identified as the employer, to describe the background and give a substantive Response to the proceedings.
68. I have been referred to the following cases.
69. In **Cocking v Sandhurst (Stationer) Ltd & another [1974] ICR 650 NIRC** the National Industrial Relations Court said that in deciding whether or not to exercise discretion to allow an amendment which would add or substitute a new party, the Employment Tribunal should only do so if it is satisfied that a mistake sought to be corrected is a genuine mistake and is not misleading or such as to

cause reasonable doubt as to identity of the person intending to claim or be claimed against.

70. The court went on to say that the Tribunal in every case should have regard to all the circumstances of the case and in particular they should consider any injustice or hardship that may be caused to any of the parties, including those proposed to be added, if the proposed amendments were allowed or refused.
71. The **Cocking** guidelines are of general application as confirmed in the case of **Gillick v BP Chemicals Ltd [1993] IRLR 437 EAT**.
72. In relation to the issues of early conciliation and the impact on the ability to add or substitute a Respondent, the Employment Appeal Tribunal has confirmed that it is perfectly possible to add a Respondent to the proceedings, notwithstanding the fact that those Respondents have not been the parties to the early conciliation.
73. In **Mist v Derby Community Health Services NHS Trust [2016] ICR 543 EAT** the Employment Appeal Tribunal (EAT) made it clear that the power to amend a claim, including adding a Respondent, is a general power. So far as early conciliation is concerned, the EAT said that all that is necessary is for ACAS to have sufficient information to be able to contact the prospective Respondent.
74. **Mist** was applied again and approved by the EAT in **Drake International Systems Ltd & others v Blue Arrow Ltd [2016] ICR 445 EAT**. The EAT said that the word “matter” in the Employment Tribunals Act 1996 Section 18A is of broad application and that the principle applicable was that the matter should not be brought to litigation without consideration of early conciliation being formally certified. However, there is no obligation to engage in such conciliation and the requirement to conciliate was specifically in respect of prospective Respondents. The EAT emphasised that a decision to allow substitution of Respondents was a case management decision which had to be exercised considering relevance, fairness and justice in accordance with the overriding objective in Rule 2. The EAT said that if there were any sustained suggestion of abuse of the procedures of the Tribunal, then the Tribunal could be expected to decline the amendment. In that particular case, the company who was proposed to be substituted was closely linked to the one currently named in the proceedings. The Tribunal had added them. The EAT dismissed their appeal.
75. I have been referred to a decision of the EAT called **Patel v Specsavers Optical Group Ltd [UKEAT/0286/18] 13 September 2019** (otherwise unreported). In that particular case, the Claimant had decided he wished to bring a claim against two Respondents for various acts of discrimination and victimisation. However, he deliberately decided to embark on early conciliation only in relation to one of those potential Respondents. The only matter of concern to the Tribunal, taken at paragraph 24, was this:

“... I will only consider the specific challenge set out in the grounds of appeal of whether there is an error in the Tribunal’s finding that the Claimant had not informed ACAS of the proposed second Respondent and whether the written Reasons departed from the reasons given orally so as to amount to an error of law.”

76. The Tribunal therefore was not concerned with the general case management powers and specifically the one under Rule 34 to allow the Tribunal to add parties. That said, the decision of the Employment Tribunal was quoted at paragraph 25. The Employment Tribunal in essence found that it amounted to an abuse of process to try and add the party because he was essentially trying to get around the need for early conciliation and to allow him to add the party would have put him in a more favourable position. Whilst of course I have due regard to decisions of the Employment Tribunal, I do remind myself that I am not bound by such decisions. I also remind myself that these are case specific matters for me to consider.
77. Finally, I have had regard to the case of **Selkent Bus Company Ltd v Moore [1996] ICR 836**, a decision of the Employment Appeal Tribunal which confirms again that the Employment Tribunal has a general discretion to allow amendments. That in deciding whether or not to exercise that discretion, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Particular factors which the Tribunal would want to consider are the nature of the amendment, the applicability of time limits and the timing and manner of the application.
78. I have also borne in mind the guidance given by the President of the Employment Tribunal in relation to amendments in which the **Selkent** guidelines are amplified.
79. In my conclusion, the Respondent Sytner BMW Nottingham should be removed since they are not the employer and Sytner Group Ltd should be added as a Respondent. I come to that conclusion for the following reasons.
80. Firstly, it is quite apparent that the Claimant intended to commence early conciliation against her employer. There is no reason why she would seek to keep Sytner Group Ltd away from early conciliation. It seems to me it is quite obvious that the only person she intended to sue was her employer, a single entity. That there was ambiguity as to her employer was because they never set it out in the Statement of Employment Particulars as the law requires them to do is not her fault.
81. Secondly, I give weight to the fact that Mr Ellinor did not highlight that the Claimant had identified the wrong prospective Respondent in the early conciliation. Instead it seems he took an active role. There may be merit to the argument that it is not the job of a potential Respondent to say, "you have got the wrong person". However, if they choose to keep their potentially cast-iron defence under wraps they cannot then it seems to me expect sympathy from a Tribunal.
82. Thirdly, Mr Ellinor must have been clearly aware of the matter in dispute, and through him Sytner Group Ltd, because he stepped into the shoes of the person who the Claimant clearly identified as her employer in the ACAS process.
83. Fourthly, Mr Ellinor sought an extension of the early conciliation process. As the Claimant points out, this took her past the primary time limit for bringing a claim against Sytner Group Ltd. It would seem to be the case that it is his own actions,

whether deliberate or accidental (and for what it is worth, I am satisfied it was accidental), puts Miss Wells in a position where any claim against Sytner Group Ltd would, on the face of it, now be out of time. I am satisfied she was engaged genuinely in early conciliation too with whom she thought was her employer.

84. The only time that the Respondent raises the argument that they are not the employer is for the first time in the ET3. It seems to me that it hardly furthers the overriding objective of saving expense or allowing a proportionate use of the Tribunal's resources if during early conciliation, whose whole purpose is to see if a legal dispute and so need to involve the Tribunal can be avoided, one keeps the proverbial smoking gun hidden until after the proceedings have started.
85. The application to add Sytner Group Ltd was made promptly. I also accept Miss Wells's argument that there is clearly a very strong link between the Sytner BMW Nottingham name or Sytner Nottingham (which is the trading style of Sytner Ltd) and Sytner Group Ltd. They are clearly part of the Sytner Family. Whether or not one is a parent or subsidiary of the other, I do not know but it seems to me not to matter. They all operate from the same address and they all appear to work with the same contacts and the same people.
86. Considering the question of the balance of hardship from Sytner Group Ltd, it seems to me it comes down firmly in favour of Miss Wells. The only hardship that Sytner Group Ltd would suffer is the inability to rely upon the jurisdictional point of the claim being out of time and having to respond to a claim they hoped to avoid on a technicality. Otherwise, they suffer no hardship whatsoever. Firstly, they have involved themselves in the early conciliation process. They are clearly aware of the matter that was proposed to be brought to the Employment Tribunal. Secondly, the Grounds of Resistance clearly present a substantive and substantial Response. Sytner Group Ltd filed this ET3 (the ET3 identifies them as the respondent). They are clearly the party who are driving it and they are clearly able to defend the Claimant's allegations that she makes against them.
87. As Miss Wells points out, there is no issue here about a loss of memory or documents that are relevant given the short passage of time. On the other hand, if I were not to allow the application to amend, then the Claimant would not be able to resolve a dispute that clearly exists between the parties and which it otherwise is in the interests of justice to have the Tribunal resolve since it clearly falls within the Tribunal's jurisdiction.
88. Sytner Group Ltd on the other hand would avoid litigation entirely in what, on the face of it at least, appears to be arguable claim against them just as it seems their defence on the substantive issues appears to be arguable.
89. It has been suggested that Miss Wells could sue her solicitor. That seems to me to be an unrealistic argument because of the obvious prejudice of having to go find new solicitors, fund it and go on to prove a loss of chance of a successful claim.
90. I also rely on the fact that this is a claim where although the Respondent says it should have been obvious who the employer was, I do not think is an argument that is particularly attractive. Although I have come to the conclusion that Sytner

Group Ltd is the true employer, that is not based on the most obvious document which should have provided the answer to this case before it had even started, which is the statement of the main terms and conditions of employment. That is required to identify the employer and the employee; it certainly does not identify the employer and arguably reading it, for that matter it does not identify the employee. It is clearly defective. The only way one has been able to find out who the true employer is, is by construing other documents at the time, of which there was only one that identifies Miss Wells as being an employee of Sytner Group Ltd and other documents following after the event and inferring from those that it must have been Sytner Group Ltd who were the true employer. It is not a case where it is patently obvious who the employer was or that this should have been obvious to the Claimant or to her solicitors. The confusion is also compounded by the correspondence suspending her, dismissing her and dismissing of the appeal.

91. There are a couple of points that Sytner Group Ltd make, which I think I should explain why I do not find them ultimately conclusive. The first is the suggestion that the Claimant's solicitors should have known of the structure based on her previous employment with the Respondent's solicitors. It is true there is no evidence from the Claimant but there is equally no evidence from the Respondent on that matter. It seems to me that the Respondent's solicitors would have been best placed to explain what the Claimant's solicitor was actually exposed to during the course of her employment to suggest that she would have had the knowledge necessary to know that the employer of anyone working in the Sytner Family, or at least of the Claimant working in the Sytner Family, must have been Sytner Group Ltd. I do not think that that point is particularly persuasive at all, for what it is worth.
92. Of more significance though is the proposition that by allowing the amendment, I am in danger of circumventing the Tribunal's Rules of Procedure and in particular allowing the Claimant to get around the fact that her claim was validly rejected. However, I believe on balance the ruling must come down in favour of adding Sytner Group Ltd as a party.
93. Firstly, I notice that Rule 34 and Rule 29, which is the provision providing the power to the Tribunals to make general management orders, are general in their terms. They are not excluded by the operation of Rules 10 through to 13. The Employment Appeal Tribunal has confirmed that there is no legal requirement to go through early conciliation with a prospective Respondent before that Respondent can be added to the proceedings. If it is the case that one can add a Respondent without even attempting to go through early conciliation, then it seems to me that there is no logical reason as to why one cannot add a Respondent who was initially named in the ET1 but against whom the claim was rejected. That simply is not provided for in the Rules and to say that is not possible seems to me to require a rather restrictive interpretation of Rule 29 or Rule 34, which the wording of the Rules and case law explaining them simply does not lend themselves to.
94. The real argument then is whether or not it amounts to an abuse of process. In my judgement in this particular case it does not amount to an abuse of process. This is not like the situation in **Patel** where the Claimant in **Patel** clearly intended

to bring a claim against two distinct legal entities but deliberately decided to only pursue early conciliation in respect of one of them. In this case, Miss Wells only wanted to sue her employer. The fact was that when she received the P45 with Sytner Group Ltd written upon it, she became unsure as to who her employer was and therefore named both.

95. If the Respondent were correct then there would have been no procedural obstacle to Miss Wells claiming only against Sytner BMW Nottingham and then later on applying to add Sytner Group Ltd (or the Tribunal doing so of its own motion). It makes no sense to me that it should then be a problem simply because Sytner Group Limited was named on the original claim form albeit the Tribunal rightly rejected it.
96. This is a case in which Sytner Group Ltd has been involved in the early conciliation, as is quite apparent from the emails that were sent by Sytner Group Ltd to ACAS and indeed the one asking for the extension of the early conciliation period. They clearly know what their substantive response would be if they had to defend the case. In all the circumstances, this is not an abuse of process; this is simply tidying up the proceedings. It is a genuine error within the meaning of the guidelines set out in **Cocking** and is therefore one that clearly in my mind does not undermine any application to amend.
97. The reality is anybody reading the claim would know that she was bringing a claim against her employer. they could not possibly have been misled or caused reasonable doubt as the person against whom she was intending to really make the claim.
98. To rule otherwise is to provide a technical defeat to these claims that seems to me is not justified in this particular case. It would be contrary to the interests of justice as required by Rule 34. I also think that it would be contrary to the overriding objective in Rule 2 because it would otherwise require unnecessary formality; it would be contrary to seeking flexibility; it would require further proceedings to have been issued which would therefore prolong delay rather than avoid it and it certainly would not save expense. As things stand, allowing the amendment by adding Sytner Group Ltd as a Respondent certainly ensures that the parties are on an equal footing because both parties are able to argue the case on the substantive merits.
99. In all the circumstances, therefore, I allow the application. I will issue directions to progress this case on paper and each party will have opportunity to make an application if those directions for some reason prove unsuitable.

100. It follows of course that the application to strike out the Claimant's claim is dismissed.

Employment Judge Adkinson

Date: 3 July 2020

JUDGMENT SENT TO THE PARTIES ON

10/07/2020.....

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FOR THE TRIBUNAL OFFICE

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