

**Case Number: 3319915/2019
3323491/2019
3302331/2020
3302421/2020
3302686/2020**



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr D Butti

v

Kier Ltd

PRELIMINARY HEARING

Heard at: Watford

On: 25 September 2020

Before: Employment Judge Smail

Appearances:

For the Claimant: Mr C Kennedy, Counsel

For the Respondents: Mr C Kelly, Counsel

JUDGMENT

1. Pursuant to reconsideration under rule 13 of the Employment Tribunal Rules 2013, the Judgment dated 27 January 2020 and promulgated on 17 February 2020 that the Tribunal has no jurisdiction to hear the claimant's claims in case no. 3319915/2019 on the grounds that there was no ACAS Early Conciliation Certificate extant at the time of the presentation of the claim whether mentioned on the claim form or at all is revoked.
2. Under rule 13(4) The time for the presentation of claim number 3319915/2019 is treated as 26 July 2020 when the Claimant submitted an Early Conciliation Certificate and number which was extant at the date of presentation of the claim, thereby rectifying the defect of not providing the number on the claim form in the first place.

REASONS

1. There are a number of preliminary issues before me. It was agreed that I would first consider the claimant's application to reconsider the judgment of Judge Palmer dated 27 January 2020 and promulgated on 17 February 2020 that the tribunal has no jurisdiction to hear the claimant's claims in case no. 3319915/2019 on the grounds that there was no ACAS Early Conciliation Certificate extant at the time of the presentation of the claim whether mentioned on the claim form or at all. This is a separate issue from whether any otherwise ACAS-conciliation-certificate-valid claim should be dismissed as having been presented out of time. We are part-heard on the other preliminary issues but it seems to me important to promulgate the judgment and reasons on this first issue so as accurately to describe the subsequent preliminary issues I must decide.
2. By claim no. 3319915/2019 presented on 1 July 2019 the claimant claimed unfair dismissal, disability discrimination, notice pay, holiday pay, arrears of pay and other payments. The claimant was employed by the respondent as a building surveyor between 23 August 1993 and 12 April 2019. On his claim form he did not enter the number of an ACAS Early Conciliation Certificate. Instead he ticked the box that ACAS did not have the power to conciliate on some or all of his claims. That was a mistaken position.
3. The matter came before Employment Judge K Palmer on 27 January 2020 at a preliminary hearing. The matter of jurisdiction was raised. It was common ground that an ACAS Conciliation Certificate number was needed and that the certificate needed to be in existence prior to the presentation of the claim. The judge was told that there was a certificate but it was dated 19 July 2019, that is to say after the presentation of the claim. It was common ground that the claim had to be rejected and it was. Neither the claimant nor the respondent informed Employment Judge Palmer that there were in fact two earlier ACAS certificates, one dated 4 April 2019 and another dated 23 June 2019. It is accepted before me that the April certificate related to matters of pay only because it was in existence prior to termination. The 23 June 2019 certificate, it appears to be common ground, relates to the subject matter of the present set of claims. The claimant says he did not have a copy of the April certificate. He accepts that he did have a copy of the June certificate. Indeed, he sent a copy to the respondent's solicitors on 13 January 2020, some 14 days before the hearing with Judge Palmer.
4. The claimant applies for a reconsideration of Judge Palmer's judgment or order or decision, dated 27 January 2020. He does so by email dated, I believe, 26 July 2020. He points to the 23 June 2019 certificate and therefore the mistaken information given to the judge.

5. The claimant did respond earlier to the order rejecting his claim, not by applying for a reconsideration but by issuing one or more new claims. The third claim before me from him was issued on 3 February 2020 and bears the 23 June 2019 certificate number. It, no doubt, had not helped that an employment judge had purported to accept the first claim form on 23 July 2019 when the claimant sent in a certificate date 19 July 2019. That of course post-dated the claim form, but interestingly in his covering email under which the claimant sent in the certificate dated 19 July 2019 he referred to it as the 'updated' reference number. Terminology which suggests earlier certificates.
6. The claimant has given evidence before me. He displays profound confusion about the early conciliation rules. He will not be alone in that regard. It is troubling that a qualified building surveyor does not understand the rules. If he does not understand them many, many claimants also will not understand them. The rules are, of course, notorious for being difficult to follow. It was his clear understanding, explored under cross-examination, that time limits and the certificates are linked such that it was his belief that you have to renew the certificate every three months and their effect lasts 30 days. There is a confusion there between the validity of a certificate on the one hand and the law of time limits on the other. I do note that the explanation does not account for why he ticked the box that he did not need a certificate in the first place, but the confusion goes some way to explain why he did not insist to his barrister on 27 January 2020 that both counsel and the judge were getting it wrong. He was in a state of confusion. He decided to issue a fresh claim instead.
7. The need for an application to reconsider, it seems, first occurred to him after the first listing of the respondent's present applications which was on 10 July 2020. The claimant is criticised by Mr Kelly for not applying for a reconsideration within 14 days of the promulgation of Judge Palmer's judgment and reasons on 17 February 2020. Mr Kelly submits there should have been an application for reconsideration by 4 March 2020. It was submitted that the error was plainly apparent from the judgment and the reasons.
8. I note, equally, that the respondent and its solicitors have not corrected the judge on his and their counsel's clear mistake either. I regard this as unfortunate. Someone within or representing the respondent will have known that an error was made.
9. Under Rule 13 of the ET Rules I do reconsider Judge Palmer's rejection of the claim on the basis of no ACAS Early Conciliation Certificate. The claimant did engage with the conciliation process and he did have a certificate dated 23 June 2019. I extend time beyond the 14 days to the date of the application, believed to be 26 July 2020. I do so pursuant to Rule 5. I do so because it is in the interests of justice to do so for the following reasons:
 - 9.1 The claimant was muddled about the application of the early conciliation rules to the extent described above.

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- 9.2 That confusion only began to dissipate after the first listing of this preliminary hearing on 10 July 2020.
- 9.3 The claimant had responded to the rejection of his claim by issuing fresh proceedings promptly, bearing the correct certificate number. That may not have been as appropriate as seeking a reconsideration but it certainly put the respondent on notice that the claimant was not accepting the position.
- 9.4 The respondent has played its own role in this unsatisfactory sequence of events. First, it was party to the inadvertent (I am sure) misleading of the judge at the preliminary hearing. Secondly, it did not correct the judge when it saw the judgment and reasons. That I doubt was inadvertent - that was likely to be deliberate. I have seen no letter sent in to disabuse the Judge from the mistake. I wish to make it clear I make no criticism of Mr Kelly who has been painstakingly fair throughout this process.
10. For those reasons I reconsider the order, decision or judgment of Judge Palmer and in its place I exercise my discretion to extend time and accept this claim form from 26 July 2020.

Employment Judge Smail

Dated : 29th September 2020

Sent to the parties on:

29th September 2020.....

For the Tribunal: T Yeo.....