



EMPLOYMENT TRIBUNALS

Claimant: Mr K Harriman

Respondent: TF & SL Textiles Limited

Heard at: Nottingham

On: Wednesday 9 September 2020

Before: Employment Judge Faulkner (sitting alone)

Representation: Claimant - in person
Respondent - Mr D Van Heck (of counsel)

JUDGMENT

1. The Claim is rejected on the ground that it instituted relevant proceedings, was made on a claim form which contained confirmation that one of the early conciliation exemptions applied (namely that the Respondent had contacted ACAS) and an early conciliation exemption did not apply.

2. The Claim Form shall be returned to the Claimant together with notice of rejection in the terms set out above. The notice shall contain information about how to apply for a reconsideration of the rejection.

REASONS

1. Reasons for the above Judgment were given orally at the Hearing on 9 September 2020. On 10 September 2020, the Tribunal sent to the parties a copy of the above Judgment, and to the Claimant a copy of his original Claim Form, with a notice of rejection confirming as above why it had been rejected.

2. From several of the emails the Claimant has sent to the Tribunal since then, it appears that he is unclear why I reached the decision to reject his Claim. I have treated those emails as a request for written reasons for my decision. I will keep these written reasons as brief as I can, in the hope that they provide helpful clarification.

3. As is well-known, it is a condition of bringing a claim to the employment tribunal that a potential claimant must approach ACAS first. This is set out in section 18A of the Employment Tribunals Act 1996 and is known as Early Conciliation (which I will refer to below as “EC”).

4. When contacting ACAS in this way before bringing a claim, usually a claimant will want to see if the respondent is interested in negotiating a settlement before a claim is made to the Tribunal. That said, if a claimant simply wants to proceed with their claim without seeking a settlement, they are entitled to do so. Either way, as a result of section 18A(1) of the Employment Tribunals Act 1996, when contacting ACAS for the purposes of EC a claimant must provide certain information to ACAS, namely their name and address, and the potential respondent’s name and address. The EC period, during which the ACAS officer will seek to promote a settlement is currently 4 weeks, though this can be extended by up to a further 2 weeks.

4. Where it is the potential claimant who contacts ACAS first, ACAS will issue to that potential claimant a copy of an EC certificate, either at the point at which it is clear that negotiation of a settlement is not possible, or where the EC period expires without a settlement. The EC certificate confirms that the potential claimant has complied with the EC requirements and provides an EC certificate number.

5. When the potential claimant then completes a claim form for submission to the employment tribunal, they must tick box 2.3 to say that they have an EC certificate and insert the EC certificate number.

6. What I have described above can fairly be said to be the most common way in which a claim to the tribunal is started. There are though, a number of exceptions to this general rule, known as exemptions. These are set out in legislation called the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

7. One of those exemptions is if, before the prospective claimant contacts ACAS as above, the potential respondent (i.e. the employer or former employer) contacts ACAS first with a view to trying to resolve the dispute. If that happens, then a claimant does not need an EC certificate in order to bring their claim to the tribunal. Instead, at box 2.3, they may state that they do not have an EC certificate, and tick the box saying that this is because the employer has already been in touch with ACAS.

8. Where a claim form is filled in without an EC certificate number, and without the claimant ticking the box to say that one of the exemptions applies (such as the employer already having been in touch with ACAS), the tribunal will reject the claim when it is received and send it back to the claimant. This is done in accordance with the Tribunal’s Rules of Procedure, which are formally called the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1. Where a claim form is completed as set out in paragraph 7 above however, that is with no Early Conciliation number but ticking a box saying that an exemption applies, at that stage the claim will not be rejected, because it is unknown to the tribunal whether an exemption applies or not.

9. It is rule 12 of the Rules of Procedure that led to my decision in this case. I will refer only to those parts of the rule that are relevant.

10. The rule provides at rule 12(1)(d) that a claim form should be referred to an employment judge if the tribunal staff consider that the claim or part of it may have been made on a claim form which contains confirmation that one of the exemptions applies, but in fact that exemption does not apply. Rule 12(2) says that if that happens, the claim, or part of it, shall be rejected if the judge considers that the claim, or part of it, falls within rule 12(1)(d). That is a mandatory requirement, in other words the judge has no discretion in these circumstances; the claim must be rejected.

11. It is true to say that usually an issue of this nature would be picked up at a very early stage after the claim form had been submitted, perhaps once the response had been presented by the respondent. That is what rule 12 envisages. There is however a decision of the Employment Appeal Tribunal ("EAT") which says that the rule goes further than that.

12. All employment tribunals are bound to follow decisions of the EAT. The decision referred to above is in a case called **E.ON Control Solutions Ltd v Caspall [2020] ICR 552**. That case made clear that rule 12 sets out mandatory provisions and that the Tribunal is unable to waive the requirement to comply with them. It also made clear that the requirement to reject a claim in the circumstances I have outlined above not only applies when the matter comes before an employment judge on the claim form first being received, but at any time an employment judge considers the case. In **Caspall** this was at a preliminary hearing, but I do not see how the judgment in that case can be read in any other way than that this also applies if the matter arises even at a final hearing. I note in particular:

12.1. At paragraph 42, the judge in that case, Her Honour Judge Eady QC, said, "On its face, rule 12 ... would seem to envisage that the input of the Judge (under paragraph (2)) will arise after the claim form has been the subject of a reference under paragraph (1). I am unable, however, to see that this is a necessary requirement. The language of rule 12 obliges the [tribunal] to reject the claim if the Judge considers sub-paragraphs (a), (b), (c), or (d) apply; the obligation is not stated to be limited to a particular stage in the process but is expressed in general terms, so as to arise at whatever stage the relevant judicial consideration is undertaken".

12.2. At paragraph 53 she said, "Although the matter had not been referred to [the judge in that case] under rule 12(1) ... I cannot see that the obligation arising under rule 12(2) had ceased to apply", by which she means the obligation to reject the claim.

13. In the case before me, the essential facts were as follows:

13.1. The Claimant, Mr Harriman, made the first contact with ACAS. That is not to say that the Respondent did not have discussions with ACAS at one or more points after that. Indeed, ACAS can continue to try to help the parties reach a settlement after EC has concluded, and of course after a claim form has been sent to the Tribunal.

13.2. With some uncertainty and reluctance, the Claimant agreed that it was he who had initiated contact with ACAS. That was beyond doubt in my judgment

because the ACAS EC Certificate issued to him on 27 December 2019 stated, using the standard wording of such certificates:

“Date of receipt by ACAS of the EC notification - 23 December 2019

Date of issue by ACAS of this Certificate - 27 December 2019

Method of issue - Email

This Certificate is to confirm that the prospective claimant has complied with the requirement under ETA 1996 s18A to contact ACAS before instituting proceedings in the Employment Tribunal.

Please keep this Certificate securely as you will need to quote the reference number (exactly as it appears above) in any Employment Tribunal application concerning this matter”.

13.3. The Claimant presented his Claim Form to the Tribunal on the date the EC certificate was issued, 27 December 2019. At box 2.3, he ticked to say that he did not have an EC Certificate number, ticking a further box to say that the reason was, “My employer has been in touch with ACAS”, in other words the exemption I have referred to above applied.

13.4. As the Respondent set out in its Response, and as is plain from the ACAS EC Certificate, the Respondent had not been in touch with ACAS to initiate EC. The Claimant had initiated it. The relevant exemption therefore did not apply.

14. In summary, the Claimant had complied with the requirement to contact ACAS, and had been issued with an EC Certificate. What went wrong was that, for whatever reason, he stated on his Claim Form that he did not have an EC Certificate, and ticked the box to say that the reason for this was that the Respondent had been in touch with ACAS. This was not correct. The case therefore fell within rule 12(1)(d) of the Rules of Procedure, because of that defect, that mistake, in the Claim Form. However harsh the rule may seem, and as I indicated to the parties at the Hearing, I very much regret its consequences, rule 12(2) mandates that the Claim be rejected. I therefore arranged for the Claim Form to be returned to the Claimant, in accordance with rule 12(3).

15. I went on to explain to the Claimant that under rule 13 of the Rules of Procedure he was entitled in those circumstances to apply for reconsideration of the rejection either on the basis that my decision was wrong or that the defect (the missing ACAS EC number and the incorrect reference to the Respondent having contacted ACAS) can be rectified. As rule 13 provides, any such application should be in writing and is required to be presented to the Tribunal within 14 days of the date that the notice of rejection of the Claim Form is sent out by the Tribunal.

16. Any such application should either explain why the decision to reject the Claim was wrong or rectify the defect; a claimant in this position may also request a hearing. An employment judge is then required to consider the application and may do so without a hearing. If that judge decides that my decision to reject the Claim was correct but the defect has been rectified, the claim is treated as presented on the date that the defect was rectified.

17. The Rules of Procedure do not seem to me to make clear precisely how a defect in a Claim Form should be corrected, whether by simply returning the Claim Form to the Tribunal with any defect corrected, that is with the EC number included and the correct boxes ticked, or whether a new Claim Form should be completed online with the correct details within it. It seems to me that the former, that is simply returning the corrected Claim Form to the Tribunal, is sufficient.

18. If the Claim is then accepted as above, in other words because the defect (the missing ACAS EC number on the Claim Form) is corrected, the Tribunal may well then need to fix a date for an Open Preliminary Hearing ("OPH") to determine issues related to time limits, unless the Respondent accepts that time should be extended to allow the Claim to proceed by consent. Short of that, the OPH will need to determine whether it was not reasonably practicable for the Claimant to present his complaint in time (that is, by my calculation, by no later than 17 March 2020) and if it was not, whether he presented it in such further time as the Tribunal considers reasonable.

19. As I indicated in giving my reasons at the Hearing it may be relevant for the Tribunal to consider in doing so the progress of this case to date, including that the problem with the Claim Form was only addressed with the Claimant at this very late stage.

20. In conclusion I should mention two issues raised by the Claimant:

20.1. After a brief adjournment, and before I gave my decision as above, he said that he had spoken to the ACAS conciliator he had dealt with and that she was willing to speak to me by telephone about her dealings with the parties. That would have been an unusual step, partly to do so by telephone, but principally because it seems to me the Tribunal should not get involved in discussions with ACAS about what has gone on during an EC period. More importantly however, I cannot see how anything the ACAS officer could have said could contradict what is plainly stated in the ACAS EC Certificate. The crucial issue, as I have tried to explain, is that the Claimant initiated EC and was given an EC Certificate accordingly, but said on his Claim Form that he did not. The ACAS officer could not possibly say anything to change those facts.

20.2. The Claimant also said the Respondent had stated certain things incorrectly on Form ET3 (its Response), such as his job title. That may or may not be the case, and if it had been relevant, this was something the Claimant could have questioned the Respondent's witnesses about had the Final Hearing gone ahead beyond the issues outlined above. That said however, matters such as confirming the Claimant's job title are not sections of the ET3 Response which the Respondent was obliged to complete, and unlike the problem with the Claim Form is not something which would require the Response to be rejected. If the Response was inaccurate, it was therefore, as I explained, in a completely different category to the issue outlined above in relation to the Claim Form.

21. For the reasons given above, the Claim was rejected and arrangements made for it to be returned to the Claimant together with notice of rejection summarising the reasons given more fully above. The notice was required to contain information about how to apply for a reconsideration of the rejection.

Employment Judge Faulkner

Date: 29 September 2020

JUDGMENT SENT TO THE PARTIES ON

30/09/2020.....

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FOR THE TRIBUNAL OFFICE

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