



EMPLOYMENT TRIBUNALS

Claimant: Ms M Boatswain-Tomkin

Respondent: Kirklees Neighbourhood Housing Limited

Heard at: Leeds **On:** 24 September 2020
19 October 2020 (reserved decision in chambers)

Before: Employment Judge Cox

Representation:

Claimant: Mr Phillips, legal representative

Respondent: Ms Blythe, solicitor

RESERVED JUDGMENT

1. The Order that the Claimant's email of 2 March 2020 be viewed as correcting a defect in the claim is set aside.
2. The claim is struck out.

REASONS

1. Ms Boatswain-Tomkin's claim is against Kirklees Neighbourhood Housing Limited, her former employer. Various aspects of the claim were dismissed on withdrawal by the Claimant. By the end of the Preliminary Hearing, the remaining claims were of unfair dismissal and direct race discrimination by dismissal only. At the Preliminary Hearing the parties agreed that the decision to dismiss the Claimant was made by Ms Sarah Clayton and communicated to the Claimant by 22 October 2019 at the latest.
2. The Preliminary Hearing was to decide the following matters:

- 2.1 whether, pursuant to an application made by the Respondent on 2 September 2020, the whole claim should be struck out as having no reasonable prospect of success because of defects in the way in which it had been presented;
- 2.2 whether one or both aspects of the claim should be struck out because they had been presented out of time;
- 2.3 whether one or both aspects of the claim should be the subject of a deposit order or struck out because they had little or no reasonable prospect of success.

Presentation of claim: the background

3. On 14 February 2020, Mr Neckles, the Claimant's trade union representative and at that point her representative in this claim, presented a claim to the Tribunal. The Claimant's name and address in the claim form were not those of this Claimant but of another person, AP. The Respondent's name and address were correct. The attached particulars of claim gave the Claimant's name, not AP's. The claim form gave an early conciliation certificate (ECC) number for a certificate that had been issued in the names of the Claimant and the Respondent, not AP.
4. Notwithstanding the difference between the Claimant's name in the claim form and on the ECC, the claim was not rejected. The administrative staff should have either rejected the claim under Rule 10(1)(c)(i) of the Tribunal's Rules of Procedure because it did not contain the correct ECC number for AP or referred the claim to an Employment Judge under Rule 12 because the name of the Claimant on the ECC with the ECC number provided did not match the name of the prospective Claimant on the claim form. Had that been done, a Judge would have directed that the claim be rejected. (Although a Judge may decide under Rule 12(2A) that a claim should not be rejected if the Claimant has 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, the error in this case was not minor.)
5. On 19 February 2020, the claim form and attached particulars of claim were served on the Respondent by post.
6. Prompted by a telephone call from the Respondent, the administrative staff noticed that the particulars of claim referred to the Claimant, not AP. On the direction of an Employment Judge, the administrative staff wrote to Mr Neckles on 25 February 2020 and asked him to provide the correct particulars of claim for AP. From the notes on the Tribunal file, it appears that the Judge's intention was that, once the correct particulars were received, this

could be considered as an application by AP to amend her claim to include those particulars. It was not brought to the Judge's attention, and he did not notice, that the ECC was not in AP's name.

7. On 2 March 2020, Mr Neckles emailed the Leeds Tribunal office attaching another claim form with the same particulars of claim as before, but giving the Claimant's name, date of birth and address rather than that of AP. He apologised for the inconvenience caused.
8. This email and attachment were referred to an Employment Judge and at this point it was noticed for the first time that AP, the claimant on the claim form, was not the prospective claimant named on the ECC. The Judge directed that the parties should be notified that the claim was rejected because the names on the claim form and the ECC did not match. At the same time, the Judge directed that the parties should be notified that the new claim form giving the Claimant's name that was sent to the Tribunal on 2 March was being viewed as correcting the defect in the claim and that the claim was being treated as having been presented on that date. On 5 March 2020 the Tribunal wrote to the parties informing them of these decisions.

Analysis

9. The Tribunal analyses these events as follows.
10. The original claim was in the name of AP. As it did not include a valid ECC number in her name, it had to be, and eventually was, rejected under Rule 12(2A). At the point of rejection, there was no longer a claim by AP and no claim by the Claimant. The Tribunal does not accept that a claim containing the name and address of a person A can be viewed retrospectively as a claim by person B. For reasons of legal certainty and practicability, the status of the claim must be assessed at the point at which the Tribunal decides whether to reject the claim. (Indeed, the Judge who rejected the claim must have accepted that this was a claim by AP since, if she had viewed it as a claim by the Claimant, she would not have directed that it be rejected, because the ECC was in the Claimant's name.)
11. This Tribunal considers that the Judge's decision to view the claim form emailed to the Tribunal on 2 March as amending the original claim to correct a defect in a claim by the Claimant was misconceived. There was at that point no claim by the Claimant in existence that was capable of being amended. Further, the Tribunal's Rules do not provide for a Judge to make a decision to reconsider the rejection of a claim on his or her own initiative: an application for reconsideration is required under Rule 13(1). No such application was made in this case and could not have been, because the parties were not informed of the initial decision to reject the claim.

12. As both parties at the Preliminary Hearing accepted, the claim form containing the Claimant's details sent to the Tribunal by email on 2 March 2020 was a nullity if it was in fact a new claim, since it had not been presented in accordance with the Presidential practice direction on presentation of claims, as required by Rule 8(1).
13. The Tribunal has considered whether it has power to strike out the claim in circumstances where an Employment Judge has already made a decision on whether the claim should be accepted.
14. Any decision of the Tribunal must be either a case management order or a judgment (see Rule 1(3)). A decision under Rule 13 to reconsider a decision to reject a claim is not within the definition of a judgment (see Rule 1(3)(b)). The decision to reconsider the rejection of the claim was not, however, made under Rule 13 in this case, since no application for reconsideration had been made. On the other hand, the definition of a Judgment is any decision that finally determines the claim or any issue which is capable of finally disposing of it. In this case, the Employment Judge's decision was not capable of finally disposing of the claim. If the decision had been to reject the claim, there was no claim in existence to dispose of. As it was, the decision was to not reject the claim, but that did not dispose of it. The Tribunal has concluded that the decision to treat the Claimant's email of 2 March as correcting a defect in the original claim was a case management order.
15. Under Rule 29, a Tribunal may set aside an earlier case management order where it is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.
16. The Tribunal accepts that it is not normally permissible for one Tribunal to set aside or vary the case management order made by another, unless there has been a material change in circumstances since the order was made or where the order was based on a misstatement of fact or possibly, in very rare cases, of law (Serco Ltd v Wells [2016] UKEAT 0330/15/1301).
17. In this case, the Respondent did not have the opportunity to make representations before the order was made. The Respondent's application for the claim to be struck out has given the Tribunal an opportunity to consider at a Hearing, with the benefit of submissions from both parties' legal representatives, whether the claim has in fact been validly presented. The appellate decisions on the application of Rules 8, 10 and 12 indicate that a failure to comply with the mandatory requirements on the manner of presentation of a claim form and the minimum information it must contain can be raised as a matter of jurisdiction at any stage of the proceedings (see for example E.ON Control Solutions Limited v Caspall UKEAT/0003/19).

Conclusion

18. Bearing in mind that the Respondent had no opportunity to make representations before the order was made and that the Tribunal has now had the opportunity to give the issue full consideration at a Hearing, and since the order goes to a fundamental question on the status of the claim and whether it should have been accepted at all, the Tribunal considers that in all the circumstances this case is one of those rare cases where it would be in the interests of justice to set aside a case management order that was based on a mistake of law. The Tribunal does not consider that it would be in the interests of dealing with this claim fairly and justly to allow it to proceed when the error is clear.
19. The order that the Claimant's email of 2 March be viewed as correcting a defect in the original claim is set aside. The decision to reject the claim was correct. The claim technically now no longer exists, but for the avoidance of doubt it is struck out.
20. As the claim has been struck out, the Tribunal makes no decision on the remaining issues relating to whether either aspect of the claim was presented out of time or should be the subject of a deposit order or struck out on the basis of its prospects of success.

Employment Judge Cox
Date: 19 October 2020