



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Lovelady

Respondent: Fedex UK Limited

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: London South Employment Tribunal (by video conference)

On: 27 October 2020

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: Mr Lewis-Bale of counsel

For the respondent: Mr Wright of counsel

JUDGEMENT

The Judgment of the Tribunal is that the claimant's claim is dismissed.

REASONS

1. The hearing was to determine whether or not the claim should be dismissed because of the claimant's failure to name the respondent on an ACAS early conciliation certificate prior to presenting her claim.
2. The claim was presented on 2 Sep 2018 claiming notice pay and statutory redundancy payment, and named two respondents, Idealquick Ltd and Fedex UK Ltd (the respondent). The ACAS early conciliation certificate R293707/18/84 issued on 30 Aug 2018 named only Idealquick Ltd. Under rule 10(1)(c)(i) of Schedule 1 of the 2013 Regulations, the claim against the respondent should have been rejected. It appears that it was not rejected because of a mistaken understanding that there was a minor error in the identity of the respondent, rather than an intention to name two distinct companies as respondents. The claim against the respondent has never been rejected.

3. In a letter of 21 December 2018 headed “Acknowledgment of Correspondence”, the tribunal wrote to the claimant on the instructions of EJ Baron that the claim against the respondent should have been rejected and cannot now proceed because the claimant had not utilised the early conciliation process before presenting a claim against the respondent. The letter continued, ‘You may now notify ACAS under the early conciliation process to remedy the defect if you wish. If that is done, the claim will be deemed to have been presented on the date that the procedural defect has been rectified. If that step is not taken then the judge will give notice that he proposes to strike out the claim as against FedEx UK Limited’.
4. There was a hearing on 21 January 2019 before EJ Corrigan. The claim against Idealquick Ltd was dismissed on 21 January 2019. A case management order gave the claimant 14 days to provide an ACAS early conciliation certificate in respect of the respondent. The reasons stated: ‘The claimant was given additional time in order to obtain the certificate. It is not clear whether ACAS may yet issue a certificate with the original date of contact or whether the claimant will need to notify ACAS afresh. If a certificate is issued from the date the claimant notifies ACAS afresh then there are time limit issues in respect of the notice claim. In respect of the redundancy pay the claimant only needed to give the employer notice of her claim for redundancy pay within the first 6 months of dismissal. In any event, if she brings a claim within a further 6 months... of the dismissal she will not be deprived of the right to a redundancy pay claim if it appears to the tribunal that it is just and equitable that she receives payment.’ The reasons also noted that the claimant stated that when she first contacted ACAS, she gave the names of Idealquick Ltd and the respondent.
5. On 23 Jan 2020, ACAS issued a fresh early conciliation certificate in respect of the respondent only. The claimant did not present a new claim form.
6. By 31 March 2020, the claimant had instructed solicitors who wrote to the tribunal on that date arguing that the effect of the order of 21 Jan 2019 was that the claims against the respondent would continue if an ACAS EC certificate was provided within 14 days.
7. Under s18A of the Employment Tribunals Act 1996, there is a requirement to provide to ACAS prescribed information before instituting employment tribunal proceedings for a payment of notice pay or a statutory redundancy payment.
8. Under rule 10 of the 2013 Rules of Procedure, the tribunal shall reject a claim if it does not contain an early conciliation number.
9. Under rule 13 of the 2013 Rules of Procedure, a claimant whose claim has been rejected may apply for reconsideration on the basis that either the decision to reject was wrong or the notified defect can be rectified. If the judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.

10. The respondent argued that rule 13 was inapplicable in the current circumstances because the claimant's claim had not been rejected. It argued that there was no statutory basis for the defect to be rectified and for the claim to proceed. The case may be different had ACAS issued a new certificate with the original date naming both Idealquick Ltd and the respondent as prospective respondents, or if the claimant had issued a new claim after having obtained a ACAS certificate in respect of the respondent.
11. The respondent argued that neither EJ Corrigan nor EJ Baron had referred to rule 13 and that EJ Corrigan had expressly referred to the claimant bringing a claim within a further 6 months, that being the way for the claimant to proceed if ACAS did not issue a certificate with the original date of contact.
12. The claimant argued that rule 13 was applicable and could be used to rectify the defect. While accepting that there was no formal rejection of the claim, she considered that the statement in the letter of 21 December 2018 that the claim could not now proceed was as good as a rejection, and that the letter was envisaging a rectification of a defect under rule 13(4). She argued that EJ Corrigan's reasons envisaged that, if a new ACAS certificate were issued, the only point in issue would be time limitation. This was also what was being said by EJ Baron on 21 Dec 2019. She argued that it was consistent with the overriding objective to deal with the issue by obtaining a new ACAS certificate which would rectify the defect, rather than issuing new proceedings which would create more work for the tribunal and parties.
13. The respondent relied on *Giny v SNA Transport Ltd UKEAT/0137/16* and the claimant on *Chard v Trowbridge Office Cleaning Services Ltd (UKEAT/0254/16/DM)*. However, neither case had the same facts as this one because both those claims were rejected. Further, both those cases concerned the misnaming of a particular respondent whereas this case deals with the failure to obtain an ACAS certificate in relation to a second, different respondent. Both parties accepted that there is no authority on the specific issues in this case.

Conclusions

14. We consider that the letter of 21 December 2018 is not a Judgment or an Order and it does not bind this tribunal. We do not consider that the claimant has pointed to any statutory or case law basis for the assertion in that letter that, if the claimant now notified ACAS under the early conciliation process to remedy the defect, the claim will be deemed to have been presented on the date that the defect is rectified. (The respondent conceded that, had ACAS amended the original certificate to add the respondent, this may have rectified the defect, but this is not what happened.) The claimant has not referred us to any rule or case which states that an ACAS certificate may be applied for after the claim is presented and, once issued, the claim may proceed. It seems to us that any such procedure would go against the intention of the ACAS certification process which is to encourage the parties to settle before issuing proceedings.

15. We note that the reconsideration process in Rule 13 is expressly only applicable where the claimant's claim has been rejected in whole or in part. The claimant's claim has not been rejected. We do not consider that the statement in the letter of 21 Dec 2018 that the claim cannot now proceed is a rejection of the claim because it is not a judgment or order. While the overriding objective may suggest that formalities should in some instances be dispensed with, we do not consider that it gives the tribunal leeway to ignore the express working of the rules. Therefore, we consider that Rule 13 is not applicable to the current situation.
16. The claimant has not argued before us that the original conciliation certificate actually applied to Idealquick Ltd and the respondent. We note that the claimant had opportunity to try to get the certificate changed, so that it did, as envisaged as one possibility by EJ Corrigan. However, this is not what happened.
17. We disagree that EJ Corrigan's reasons of 21 Jan 2019 envisaged that, if a new certificate were issued, the defect would be remedied and the only outstanding point would be time limitation. EJ Corrigan foresaw two possible outcomes from the claimant approaching ACAS. One was that the originally dated certificate would be reissued with the respondent's name on it, and the other was that a new certificate would be issued. She also referred to the claimant bringing a claim within a further 6 months of dismissal. Therefore, the point being made appears to be that, if a new certificate were issued, the claimant would have to bring a new claim on the back of that certificate.
18. We consider that the current claim is defective, due to the lack of a pre issued ACAS early conciliation certificate naming the respondent as a prospective respondent, and that it is not possible to rectify this defect under rule 13 because the claim was not rejected. Therefore, we dismiss the claim.

19. The claimant may consider it harsh that she cannot rely on the apparent meaning of the letter of 21 December 2018. However, the claimant did not act on that letter. The issues were considered afresh at the hearing of 21 January 2019. The consequent order did not state what the effect would be of the claimant providing a new ACAS early conciliation certificate and referred to her bringing a new claim. It is not the role of the employment tribunal to provide legal advice to the parties.

Employment Judge Kelly

Signed on: 27 October 2020