



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case Nos: Case Nos: 4102738/20 & Others (V)

10

Held on 3 December 2020

Employment Judge J M Hendry

15

Mr C I Nunez Medina & Others

**Claimants
Represented by
Ms K Fraser,
Aberdeen CAB**

20

Rox Hotel LLP

**Respondents
Represented by
Mr S Morris,
Peninsula**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30

The Tribunal refuses the Respondent's application for strike out as not being well founded and allows the Claimant Mr Nunez Medina to amend the ET1 to add his Early Conciliation number.

Reasons

35

1. This matter came before the Tribunal on the 3 December 2020 when the Respondent's agent's application for strike out was considered at a CVP

E.T. Z4 (WR)

hearing. That hearing also dealt with case management matters which are recorded in a separate Note.

2. The factual position was straightforward and not in dispute. Staff at the Rox Hotel lodged what is commonly known as a 'multiple' claim seeking payment of various sums such as accrued wages and redundancy payments. Mr Medina as the Manager organised this for the staff. He also had claims. He completed the ET1 without legal advice. The claims were defended.
3. An objection was taken to Mr Nunez Medina's claim by the Respondents who had observed that he had not lodged the application along with an ACAS Early Conciliation Certificate Number ('EC' number). He had not been included in the Schedule submitted to ACAS when a "multiple" number had been assigned. In fact, he had applied on his own behalf and had obtained a valid ACAS Certificate.
4. The Respondents defended the claims that were being made and lodged an ET3.

Strike out application/amendment

5. Both parties had set out their legal position in correspondence specifically in the Claimants' representative's email of the 4 September (JB25) and 19 October (JB27) and the Respondents' e-mail of 6 October 2020 (JB26).
6. Ms Fraser at the outset indicated that her position was that Mr Nunez Medina was in the same position as one of the Claimants in the case of **Walsh v. Govia Thames Link Railway Ltd** and that I should adopt the reasoning of the Employment Judge there to allow his claim to proceed. In that case, one of the Claimants, Mr Brooks was in an analogous position to that of Mr Medina. It was held there that Mr Brooks was entitled to rely on the group claim and also on his own ACAS Certificate. The Claimant's representative asked me in particular to consider paragraphs 4, 5, 7, 15, 17, 20, 21 and 22 of the Judgment. She also relied on section 3 of the Employment Tribunal

(Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 Regulation 3 which allows parties to join a validly raised group or multiple claim.

- 5 7. Mr Morris referred me to his submissions contained in correspondence. He accepted that a summary of his clients' position was that the failure by Mr Nunez Medina to make reference to his Early Conciliation Certificate in the ET1 meant that the claim in so far as it related to him had not been properly raised. There was no continuing process in relation to the claim on his behalf.
- 10 I asked if he was taking any point in relation to there being any difference in the fundamental acts being relied on by the Claimants and Mr Medina. He accepted that the claim arose out of the same matters. However, his position was that Mr Nunez Medina could not use the section the way Ms Fraser intended.
- 15 8. I put to him that the situation here was that irrespective of Mr Nunez Medina's position there were continuing proceedings and I queried whether or not he accepted that I had power to allow amendment either to allow the Conciliation Certificate to be added to the process or indeed the Claimant to be added.
- 20 His position was that amendment was not an appropriate procedure as it was an amendment on behalf of the current Claimants and Mr Medina had no locus to make such an application.
- 25 9. Mr Morris referred me to the recent case of ***E.ON Control Solutions Ltd v Caspall*** **UKEAT/0003/19/JOJ** which confirmed that if an inaccurate Early Conciliation number was used the Tribunal had no discretion except to reject the claim.
- 30 10. The law was, he said, to be judged at the point at which the claims were made namely in May 2020. The claimant could not take advantage of the recent change in the rules (October 2020) which allowed the Tribunal to rectify minor errors. The Tribunal had no option but to reject the claim (***Sterling v. United Learning Trust*** UKEAT/0439/14). The claim form submitted on behalf of the first Claimant without the correct Early Conciliation Number fell,

he said, within the scope of those claims described under Rule 12(1)(c) and must be rejected under 12(2). The Claimant did not fall within the scope of Rule 12(2)(a) and accordingly the Tribunal has no discretion in the matter.

5 11. Ms Fraser had also referred me to her email of 4 September. She had set out various facts there which were accepted by both parties as not being in dispute. She also made reference to the **Caspall** which in her submission had no bearing on the current situation because there was a valid “properly instituted claim on which Mr Nunez Medina could rely. She also made
10 reference to the reasoning in the case of **Walsh & Others v. Govia Thames Link Railway Ltd** which is available on the Employment Tribunal Website. In that case one of the Claimants, Mr Brooks, was not noted in the Group ACAS Certificate. The Certificate reference on the ET1 was relied on by him. Mr Brooks undertook conciliation within the time periods and initiated the
15 ACAS Early Conciliation Process. His ACAS Certificate Number was not noted on the ET1 form. In that case Mr Brooks claims were allowed to proceed on the basis of the exemption set out in Regulation 3(1)(a) allowing on Mr Brooks to rely on the Group Conciliation Certificate despite that he was not noted in the schedule of names on the Group ACAS Conciliation
20 Certificate.

12. Mr Morris had responded by email on 6 October (JB26) to Ms Fraser’s submissions and pointed to the requirement for the Tribunal to reject the claim and indicating that to do otherwise would not be to follow the statutory regime.
25 Mr Morris submitted that in terms of Regulation 3(1)(a) which allows a prospective Claimant to present a claim in relevant proceedings without having participated in Early Conciliation applies only in prescribed cases (Section 18(a)(7) ET 1996) and Regulation 3 of the Early Conciliation Regulations. None of these prescribed cases apply in his view. The **Walsh**
30 case was he concluded not binding authority.

Discussion and Decision

13. Since 2014 Claimants are required to take part in a process called Early Conciliation and the issue by ACAS of an Early Conciliation ('EC') number is a necessary preliminary to being able to raise Tribunal proceedings (Section 18A of the Employment Tribunals Act 1996). The Tribunal also has to have regard both to the Employment Tribunal Rules and to the Regulations contained in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 ("Exemption Regulations").

14. Rule 2.2 of the Tribunal Rules (the Overriding Objective) provides:

10 *"2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a). ensuring that the parties are on an equal footing; (b). dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c). avoiding unnecessary formality and seeking flexibility in the proceedings; (d). avoiding delay, so far as compatible with proper consideration of the issues; and (e). saving expense. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

15. Rule 6 addresses "Irregularities and non-compliance". The Rule provides that:

25 *"6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following— (a). waiving or varying the requirement; (b). striking out the claim or the response, in whole or in part, in accordance with rule 37; (c). barring*

or restricting a party's participation in the proceedings; (d). awarding costs in accordance with rules 74 to 84."

16. The Tribunal Rules also set out the process for starting a claim (Rules 8-14). Rule 8 states:

5 *"(1). - A claim shall be started by presenting a completed claim form (using a prescribed form)"*

17. In Rule 10, provision is made for a claim to be rejected. The Rule is headed *"Rejection: form not used or failure to supply minimum information"*. At Para
10 (1), it provides in mandatory terms that a Tribunal *"10.- ... shall reject a claim if- (a). it is not made on a prescribed form; (b). ... (c). it does not contain all of the following information- (i). an early conciliation number; ..."* If the form is missing this information it is required to be returned to the claimant. Para (2) says: *"The form shall be returned to the claimant with a notice of rejection
15 explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection."*

18. There are a number of authorities dealing with the situation where the EC number is wrong or inaccurate (***Sterling v United Learning Trust UKEAT/0439/14***) Where the Tribunal finds that the claim form did not have
20 an EC number or an accurate EC number then it was obliged to reject it. In the present case the Tribunal did not reject the claim as it was a 'Multiple' and was, in respect to the other Claimants, properly presented containing as it does their Early Conciliation number.

19. The Claimant argued that he can take advantage of the fact that there is a
25 valid claim to 'piggyback' on it and amend that claim to include his EC number if required to. The Employment Tribunal has wide powers of amendment which includes the power to remove, substitute and add parties (Rule 34)

20. The Claimant principally relies on Regulation 3 of the Exemption Regulations which is in these terms:

30

"Exemptions from early conciliation

3.—(1) A person (“A”) may institute relevant proceedings without complying with the requirement for early conciliation where—

(a) another person (“B”) has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B;”

5

21. In the case **Cranwell v Cullen** UKEATPAS/0046/14 the claim had been rejected because the Claimant had failed to comply with Early Conciliation and could not demonstrate that her case fell within any of the exempted categories in Regulation 3. Amendment was deemed incompetent as the claim (the proceedings) had come to an end. There was no “multiple” for her to rely upon.

10

22. In the present case the Respondents did not argue that the claims being made by the first Claimant (redundancy pay, notice etc) did not arise from the same situation that he found himself in as the other Claimants had namely the closure of the Hotel. This words ‘same dispute’ seems sufficiently wide to cover this situation.

15

23. In the present case, the Claimant did contact ACAS and obtained an EC certificate pursuant to section 18A(4) Employment Tribunals Act 1996. That could have enabled him to begin his own claim against the Respondent but, in order to be able to do so, he still needed to comply with the relevant regulations by including an accurate EC number. This he did not do. Interestingly Ms Fraser commented that there was no clear ‘space’ on the form for him to do so.

20

24. The obligation arising under Rule 12(2) continues to apply. The issue is whether the claim in respect of Mr Medina should be rejected. The situation here is different from the case of **Caspall** as there would still be a competent claim before the Tribunal in which proceedings the Tribunal would have the power to amend as we have seen to add or remove parties.

25

25. It seems clear that irrespective of the Respondent’s misgivings and hope for what could be described as a technical knockout the ambit of Regulation 3

30

appears to apply in this case and Mr Medina is entitled to rely on that Regulation to 'piggyback' on the Multiple or group claim. There was no failure to comply with the principles of Early Conciliation as he underwent the process in good time. If there was any failure or rather ambiguity then it occurs
5 when he does not put his conciliation number on the ET1. I do not regard that as being fatal to his claim and in any event, I am of the view that I have the power to allow the ET1 to be amended, as I have been requested, to allow, the ET1 to include his Early Conciliation number. This I do in order to put the matter beyond doubt.

10

Employment Judge	James Hendry
Date of Judgement	10 December 2020
Date sent to parties	10 December 2020

20