EMPLOYMENT TRIBUNALS

Claimant: Mr H. Davidson

Respondent: City Facilities Management Holdings Ltd

Heard at: Watford (by telephone) **On:** 9 December 2020

Before: Employment Judge McNeill QC

Appearances
For the Claimant: Mr M. Seaka, Solicitor
For the Respondent: Mr P. Singh, Solicitor

REASONS
for judgment sent to the parties on 11 January 2021 provided pursuant to a request by the Claimant dated 13 January 2021

1. The application before me on 9 December 2020 was an application made by the Respondent, City Facilities Management Limited ("CFML"), that I should set aside an order which I made on 20 April 2020, when CFML was neither present nor represented, joining it as respondent to the Claimant's proceedings. CFML also intimated an application for costs against the Claimant but such an application was not pursued at the hearing.

Background

2. By a claim form presented to the Tribunal on 6 August 2019, the Claimant brought claims for unfair dismissal, wrongful dismissal and race discrimination.

3. The Claimant's claims were brought against "ASDA".

4. Notice of a Preliminary Hearing to identify the issues and to make case management orders was given to the Claimant and ASDA on 2 September 2019.

5. Following a question as to whether "ASDA" had been properly served, the Tribunal (Employment Judge Manley) directed that the claim should be sent to "Asda Stores Limited" at the address of their head office. That direction was complied with on 23 December 2019.

6. By an email dated 8 January 2020, Addleshaw Goddard solicitors, who act for Asda Stores Limited (ASDA), informed the Tribunal that they were not the Claimant's employers and that the Claimant was employed by CFML as an "ASDA Ace" providing cleaning services in ASDA stores. They confirmed that they had been in contact with CFML the previous day and that CFML's representatives would confirm that they were acting for CFML in due course. CFML and the Claimant's representative were also copied in to that letter.

7. By a letter dated 22 January 2020, CFML's representatives wrote to the Tribunal, copying in the Claimant, asking the Tribunal to reject the Claimant's claim pursuant to rule 10(1)(b)(iii) of the Employment Tribunals Rules of Procedure. The Claimant had had two opportunities to join the correct respondent and had simply failed to do so.

8. By a direction of Employment Judge R. Lewis sent to the Claimant's representative, CFML and ASDA in an email dated 1 February 2020, it was directed that ASDA's email of 8 January 2020 was not accepted as a response as it was not on form ET3 and that if the Claimant wished to join another, different respondent it was for the Claimant to apply to do so. It was pointed out that CFML was not a party to the proceedings and had not been joined or served.

9. Following that clear direction that the Claimant would need to apply to join CFML as a party to the proceedings if he wished to pursue a claim against CFML, the Claimant made no such application for more than two months.

10. Time was extended for ASDA to present an ET3 and its ET3 was presented, in compliance with that extension, on 6 March 2020. ASDA's primary defence was that it did not employ the Claimant. On the same date, ASDA applied by email for an order that the Claimant's claim should be struck out (or in the alternative for a deposit order) on the basis that the claim had no reasonable prospect of success. The Claimant's representatives were copied in to this email.

11. On 15 April 2020, the Claimant and ASDA were informed by the Tribunal that the response had been accepted.

12. The preliminary hearing which had been listed on 2 September 2019 went ahead by telephone on 20 April 2020.

13. On Sunday 19 April 2020, the Claimant sent an electronic bundle of documents to the Tribunal which included an application to amend his claim to add CFML as a respondent. The application was dated 17 April 2020. The Claimant asked the Tribunal to consider this application at the preliminary hearing although CFML was not present and had not had notice of the application.

14. At the preliminary hearing, the Claimant, by his solicitor, withdrew his claim of race discrimination and, with his agreement, that claim was dismissed on withdrawal. He also conceded that ASDA was not his employer and that his claims against ASDA had no reasonable prospect of success and should be dismissed on withdrawal.

15. In the absence of CFML, I allowed the Claimant's application to join CFML as respondent and directed that CFML should file and serve its response within 28 days of receipt of the claim form. I also provided in my order that CFML could apply to set aside my order joining it as a respondent as the order had been made in the absence of CFML and without any opportunity for CFML to make representations.

16. The judgment dismissing the claims which were withdrawn was sent to the Claimant, ASDA and CFML on 24 April 2020. It is not clear from the Tribunal file whether and when the Case Management Summary and Orders were sent to CFML but it appears that these were provided to CFML by ASDA on 27 April 2020.

17. On 28 April 2020, CFML applied to set aside the order joining CFML as respondent. It set out its reasons for its application in a detailed email to the Tribunal of that date to which the Claimant's representatives replied on 1 May 2020.

18. On 15 August 2020, a further hearing was listed for 25 September 2020 to determine CFML's application. This was subsequently postponed to 9 December 2020.

Hearing on 9 December 2020

19. CFML submitted that I should set aside my order of 20 April 2020 joining CFML for the following reasons, which I summarise.

    (i) The Claimant was dismissed on 6 May 2019 and notified his claim to Acas on 31 May 2019. ASDA was the only entity named by the Claimant for the purposes of Acas early conciliation, even though the Claimant had payslips which showed CFML as his employer and not ASDA.

    (ii) The Claimant was represented by the same professional representatives throughout the proceedings. His representatives were named on the claim form. Those representatives were required to make sure that they were bringing proceedings against the correct employer.

    (iii) CFML was aware of the proceedings from 8 January 2020. On 22 January 2020, CFML's representative wrote to the Tribunal, copying in the Claimant, stating that CMFL had not been served with any claim.

    (iv) On 1 February 2020, the Tribunal wrote to the Claimant's representative stating that CFML was not a party to the proceedings and that if the Claimant wished to add CFML as a party to the proceedings, the Claimant would be required to make an application to amend.

(v) The Claimant's representative made no application to amend the claim to join CMFL until the Preliminary Hearing on 20 April 2020. CFML was not informed of the application dated 17 April 2020. Nor was CMFL copied in to the application letter to the Tribunal. It therefore had no opportunity to respond to the application at the hearing.

(vi) CFML had no opportunity to conciliate during the early conciliation process, even though the Claimant had payslips and a contract of employment which would enable him to know who his employer was.

(vii) In accordance with the overriding objective, the order of 20 April 2020 allowing the amendment should be set aside. It did not accord with **Selkent** principles and CFML would be materially prejudiced if the order to amend were not set aside. By the time of the amendment, the claim was considerably out of time. The Claimant would not be prejudiced if the order were set aside because he had a remedy against his legal representatives.

20. CFML's representative suggested that one of its key witnesses may have left CFML but he could not confirm this and I did not take this into account in reaching my decision.

21. In response, the Claimant submitted, in summary, that:

(i) CFML knew about the proceedings from 7 January 2020. The name on the early conciliation certificate was "ASDA Ace" and ASDA notified the Tribunal on 8 January 2020 that CFML was "ASDA Ace" and that CFML should provide a response within 28 days.

(ii) If CFML had followed the Acas Code, the Claimant's representatives would not have been in the position they were, referring to the respondent as "ASDA Ace" when dealing with Acas.

(iii) CFML was relying on a procedural point rather than dealing with the substantive claims against it. Any reasonable employer would engage with the substantive issues.

(iv) The Claimant's representatives had problems getting instructions from the Claimant, including payslips and his contract of employment.

22. Both parties referred to the case of **Patel v Specsavers Optical Group Ltd** UKEAT/0286/18/JOJ in correspondence but neither party relied on this authority in making oral submissions before me.

23. I was also referred to the decision of the Employment Appeal Tribunal (EAT) in **Pontoon v Shinh** UKEAT/0094/18/LA in which the EAT (Lavender J) considered the amendment of a claim to add a second respondent and confirming that the Tribunal should have regard to all the circumstances of the case, including the injustice and hardship to the parties respectively if the amendment were allowed or refused.

Discussion and conclusions

24. During the course of submissions by the Claimant's representative, I sought clarification as to when the Claimant's representative was first provided with the Claimant's contract of employment and payslips but the Claimant's representative was unable to assist me with this information.

25. I accepted CFML's submission that legal representatives had been involved on behalf of the Claimant from the start of this claim. One of the primary steps that representatives would be expected to take was to ascertain who was the Claimant's employer.

26. No explanation was given as to why this posed any particular difficulty where, at the very least, the Claimant had payslips which named CFML as the party that paid him.

27. Information provided to the Tribunal by Acas indicated that the name of the employer provided to Acas at the early conciliation stage was "ASDA". But even if it was "ASDA Ace", this was not the same as naming CFML and CFML did not have the opportunity to engage in early conciliation.

28. The Claimant knew as early as 8 January 2020 that ASDA was saying that it had been wrongly joined as Respondent and that the correct Respondent was CFML. The Claimant knew on 22 January 2020 that CFML was saying that the claim should be rejected because CFML had not been named as Respondent.

29. The Tribunal, of its own motion, made it clear to the Claimant by its email of 1 February 2020 that if it wished to join CFML to the proceedings, it would need to apply for CFML to be joined. As stated in that email, CFML was not a party to the proceedings and had not been joined or served.

30. No application was made to join CFML until the Sunday before the hearing on 20 April 2020. Even then, CFML was given no notice of the application.

31. In exercising my discretion as to whether to set aside the order made on 20 April 2020, I took into account the overriding objective of dealing with cases justly. I considered the relevant circumstances of the case and the interests of justice and hardship to each of the parties if the amendment were permitted or refused.

32. The Claimant's employment terminated on 6 May 2019. The early conciliation period was from 31 May 2019 to 17 June 2019. He presented his claim to the Tribunal on 6 August 2019. His claims were all claims which were subject to a three month time limit.

33. No explanation has been given as to why the correct name of the Claimant's employer could not be ascertained by the time that the claim was presented. But if it could not be ascertained by then, the Claimant was told the correct name of his employer in January 2020 and specifically told by the Tribunal's email of 1 February 2020 that if he wished to bring a claim against CFML, he would need to apply to join CFML.

34. The Claimant took no action in response to that email until 19 April 2020, the night before the preliminary hearing. Even then, he did not give notice of the application to CFML.

35. I did not accept the Claimant's criticism of CFML's conduct. It had taken steps which were appropriate when it was not a named party to the proceedings and those steps should have made it clear to the Claimant that he would need to apply to join CFML if he wished to pursue a claim against CFML.

36. I took into account that, if I set aside my order, the Claimant would lose the benefit of what might be a meritorious claim. That constituted significant prejudice. A potential claim against his legal advisors did not neutralise that prejudice to him as the bringing of such a claim would involve time, potential expense and risk.

37. On the other hand, employment tribunal rules are there to be followed. The Claimant's representatives were clearly told by the Tribunal on 1 February 2020 what the Claimant needed to do if he wished to pursue the claim against CFML. No action was taken following that email until 19 April 2020. Even then, the application was without notice to CFML.

38. The Claimant's delay in applying to join CFML was a serious delay and the delays are unexplained. The Claimant's representative was unable to put any information before me which would explain when the Claimant provided his paylips and/or contract of employment to CFML and why there was a delay. If the Claimant did delay in providing the relevant information to his solicitors, without further explanation, that could not assist him.

39. CFML's actions in relation to the claim do not demonstrate any opportunistic reliance on procedural matters, as the Claimant appeared to suggest. The Claimant's defaults have caused expense to CFML, not just in this application to set aside but also in earlier correspondence to the Tribunal in relation to the claim. The policy of finality in litigation is important. If I were to refuse the application, CFML would be required to meet and prepare a response to a claim relating to a dismissal which occurred more than 18 months previously. The Claimant's conduct of the action to date could provide no confidence that he appreciated the importance of complying with the Tribunal rules.

40. Weighing up the interests of justice and the potential hardship to both parties, depending on my decision, and the need to deal with matters fairly in accordance with the overriding objective, I concluded that my order of 20 April 2020 should be set aside, with the consequence that the claim against CFML could not be pursued.

Employment Judge McNeill QC

Dated: 18 January 2021

Sent to the parties on:

………03/02/2021

For the Tribunal:

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