Case No: 1305030/ 2020V

EMPLOYMENT TRIBUNALS

Claimant: Mrs Lisa Jones

Respondent: National Westminster Bank Plc

Heard at: Birmingham remotely by CVP **On:** 6 May 2021

Before: Employment Judge Battisby (sitting alone)

Representation
Claimant: In person (audio only)
Respondent: Ms l Usher, solicitor

JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claims.

2. It is directed that the ET1 Claim Form be rejected under Rule 12(1)(d), in that no early conciliation number was given and the explanation for claiming an exemption from this requirement was wrong, and be returned to the Claimant with information about how to apply for a reconsideration of the rejection.

REASONS

Background

1. The purpose of this preliminary hearing was to consider: -

    a) The jurisdictional issue raised by the Respondent in relation to early conciliation ('the EC requirement')

    b) The Claimant's amendment application

    c) Further case management as required.

2. The hearing was conducted remotely via the Cloud Video Platform, but unfortunately the claimant was unable to use the video connection on her mobile phone, so we could hear, but not see her. She was able to see and hear me and Ms Usher, the respondent's representative. This meant it would have been impossible to hear the claimant's evidence, had that been necessary.

3. I received from the respondent a bundle of documents running to 117 pages and extensive written submissions, which helpfully set out the relevant procedural history to this case. Where I refer to documents with page numbers in this judgment, those are in the bundle.

4. The claimant had possession of these and confirmed she was fully aware of, and understood, the arguments being put forward by the respondent as to why the Tribunal should not accept jurisdiction to hear the claim.

5. Whilst the claimant was not represented before me, she has been advised by Equality and Employment Law Centre ('EELC'). In response to the respondent's application for the claim to be rejected, which was first made in its original grounds of resistance dated 5 June 2020 (24 at 25-26), then repeated in its amended grounds of resistance dated 16 October 2020 (74 at 78) and finally made in a letter to the Tribunal dated 13 November 2020 (111), EELC responded on the claimant's behalf in an email to the Tribunal dated 24 November 2020 (114). The claimant relied on the content of that email to resist the application.

6. In essence, the application was made on the following basis. The Claimant presented her claim form on 19 March 2020 (4). At section 2.3 of the claim form, the Claimant ticked the box to indicate that she did not have an Acas early conciliation certificate number (5). In response to the question "*If No, why don't you have this number?*", the Claimant ticked a box to indicate that *"another person I'm making the claim with has an Acas early conciliation certificate number."* This was an incorrect statement and wrong. The claimant received her early conciliation certificate from Acas on 20 March 2020 (16): the day <u>after</u> she had lodged her claim form. On this basis the respondent argues the claim should have been rejected. No letter of rejection has ever been sent. Accordingly, the application is for the claim to be rejected now.

7. It is highly unfortunate that the claim has progressed this far without the matter having been resolved. There was a preliminary hearing on 7 August 2020 (37). Neither party could explain why the issue does not appear to have been raised on that occasion, if not before, even though it had been pleaded in the grounds of resistance.

8. It was only at the next preliminary hearing on 4 December 2020 (85) that it was discussed and, as a result, the application was listed to be heard.

The Law

9. In the Respondent's written submissions, the relevant Rules and case law are set out. I approve and adopt those statements of the law and can do no better than repeat them here (with some minor changes), whilst adding that I gave the claimant every opportunity to challenge or add to what was stated, but she said she accepted them.

10. Rule 10 of the Employment Tribunal Rules of Procedure 2013 (the "ET Rules") provides that:

Rejection: form not used or failure to supply minimum information

10(1) The Tribunal shall reject a claim if—

…

(c) it does not contain all of the following information— (i) an early conciliation number; (ii) confirmation that the claim does not institute any relevant proceedings; or (iii) confirmation that one of the early conciliation exemptions applies.

10(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.

2. Rule 12(1) of the Employment Tribunal Rules of Procedure 2013 (the "Rules") provides that: -

Rejection: substantive defects

12(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be –

…

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply.

…

11. Rule 12(2) of the Rules provides that:

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs…. (d) of paragraph (1).

12. Rule 12(3) of the Rules provide that:

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

13. The above Rules set out what is referred to in this case as the EC requirement. In *Thomas v Nationwide Building Society* ET/1601342/14, an Employment Judge held that an ET1 should have been rejected under rule 12(1)(d) of the ET rules because it suggested, in error, that the claimant was exempt from the EC requirement. Employment Judge Clarke held at [20] and [21]:

"*The power to reject this claimant's claim arises under this provision. Her claim instituted relevant proceedings on a claim form*

> *that incorrectly asserted that they were covered by an early conciliation exemption. Being of a kind described in Rule 12(1)(d), this triggered Rule 12(2).* ***Under Rule 12(2), the rejection of her claim was mandatory: it "shall" be rejected*** *(emphasis added).*
>
> *I do not think that anything turns on the point that the respondent has effectively referred this matter to a Judge, whereas Rule 12 appears to presuppose that the members of the tribunal staff are the ones doing the referring. The crucial point is that the respondent has raised a jurisdictional objection and it must be addressed. Regardless of how it has been brought to the tribunal's attention,* ***the mandatory rejection of the claim under Rule 12(2) has been triggered*** *(emphasis added)*."

14. In the EAT's decision in *Cranwell v Cullen* UKEAT/0046/14, the EAT considered a similar situation, where a claimant indicated on her claim form that she was exempt from the EC requirement, but none of the statutory exemptions applied to her and an employment judge rejected the claim under Rule 12(1)(d).

15. The EAT held that the requirement to comply with the EC procedures, in section 18A of the Employment Tribunals Act 1996, is an absolute requirement, which can only be departed from in the specific cases prescribed by the ET Rules. There is nothing in the ET Rules that allows for any discretion in this regard, even in cases where the Tribunal has considerable sympathy for the claimant's position.

16. The Honourable Mr Justice Langstaff, the then President of the EAT, held, at paragraph 12, that:

> "*It follows that in this case the Claimant's claim was rightly rejected by Judge Gall because there was nothing else he could do. The fact that the merits of the case might suggest an exception for conciliation might be made have nothing to do with the case*."

17. Langstaff J also held that Rule 6 of the ET Rules, which affords Tribunals a power to waive or vary a requirement in cases of non-compliance, could not be used to relieve the Tribunal's own obligation to reject a claim where the EC requirement had not been complied with. He held that Rule 6 only permitted the tribunal to excuse a party's non-compliance; it was not open to the Tribunal to rely on Rule 6 to permit its own non-compliance with a mandatory requirement in an ET Rule such as Rule 12(1)(d) and Rule 12(2).

18. In *E.ON Control Solutions Ltd v Caspall* UKEAT/003/19, the EAT held that where the claim is erroneously accepted by the Tribunal, it remains incumbent on an Employment Judge considering the claim at a later stage to reject the claim under Rule 12 as it was not validly presented. This obligation was described at paragraph 42 as not being *'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*.'

19. Rule 6 was considered again by the EAT in *E.ON Control Solutions Ltd v Caspall* UKEAT/003/19, and it was held (agreeing with the EAT's reasoning

in *Cranwell* and *Baisley v South Lanarkshire Council* [2017] ICR 365*),* that Rule 6 does not import a discretion for the Tribunal when considering failures to comply with Rules 10 and 12, when no discretion exists under the mandatory terms of those Rules. HHJ Eady QC stated at paragraph 57 that:

> *'I do not consider it can have been intended that a mandatory requirement to reject a claim under Rule 12(2) should be made subject to an exercise of judicial discretion by means of Rule 6: to paraphrase Lady Wise in Baisley, it would be inapposite and illogical to seek to invoke Rule 6 such that something that Rule 12(2) has brought to an end is not then brought to an end'.*

20. In *Caspall,* the EAT also concluded that there was nothing in the overriding objective that would assist Mr Caspall's case. It could not be said that ignoring a mandatory requirement in the ET Rules could be fair or just and, although importing a discretion into Rule 12(2) that could apply to claims of a kind described at Rule 12(1)(c) might well assist the tribunal in avoiding "unnecessary formality and seeking flexibility", that would be contrary to the express language of the rule and the EAT could not see that it was open to the Tribunal or the EAT to effectively re-write Rule 12 to allow for an exercise of judicial discretion in that way.

The procedural history

21. The Claimant presented her claim form on 19 March 2020 (4). She was and remains an employee of the respondent. Her claims were then stated in box 8.2 of the claim form (10) to be 'discrimination after returning from maternity, no pay rise due to lack of training and being part-time, breach of contract, harassment, bullying, discrimination due to long-term mental illness'.

22. The Claimant had been in touch with Acas, but had not received the EC certificate at the time she presented her ET1. The EC certificate was sent to her by e mail on 20 March 2020 showing that early conciliation had taken place between 19 and 20 March 2020. She did not wait to receive it before presenting her claim. Accordingly, at section 2.3 of the ET1, the Claimant ticked the box to indicate that she did not have an Acas early conciliation certificate number (5). In response to the question "*If No, why don't you have this number?*", the Claimant ticked a box to indicate that *"another person I'm making the claim with has an Acas early conciliation certificate number."*

23. The Claimant accepts that she wrongly ticked this box in her claim form to say that an exemption from conciliation applied when it did not.

24. The Claimant confirmed the claim form had never been rejected, but says she was asked by the Tribunal to provide an EC certificate number and that she did so straightaway and provided a copy of the certificate to the Tribunal. I have not seen the Tribunal file, but have no reason to doubt this.

25. The procedural history has been described in the Case Management Summary of EJ Jones following the preliminary hearing on 7 August 2020. The Claimant has on numerous occasions provided further particulars of her claim and some claims have been withdrawn. The second preliminary hearing on 4 December 2020 was initially to determine whether or not the Claimant was a disabled person at the relevant time/s. However, this was

conceded in terms by the Respondent and the hearing dealt with disposing of some other claims on withdrawal and listing for this hearing to deal with the matters identified at paragraph 1 above.

Submissions

26. In essence the Respondent submits that, applying the Rules and following the case law cited, I have no choice in the matter and must reject the claim.

27. I asked the claimant if she had anything to add to what EELC stated in their email of 24 November 2020. She did not. In essence, their argument is that it would be contrary to the overriding objective under Rule 2 of the ET Rules to reject the claim at this stage. They point out that the Claimant is a litigant in person and, at the time of presenting her claim, she had wanted to avoid any possibility that delay would count against her in applying the limitation rules and further she was unaware of the effect of the Acas early conciliation process on computing time. Once she was asked for the reference number, she provided it immediately and her slight delay in providing it did not cause the Respondent any prejudice. They argue, therefore, that it would not be in the interests of justice to reject her claim at this stage and that, to do so, would prevent her claim from being dealt with fairly and justly.

Conclusions

28. There is no dispute that, at the time of presentation of the claim, the Claimant did not provide an Acas early conciliation certificate number and she was not entitled, as she claimed at the time, to an exemption from the EC requirement. A member of the Tribunal staff should have been able to check if there was, as stated, another person with whom the claimant was making a claim against the Respondent who had a certificate number and, as there was none, should have referred the claim form to an Employment Judge to consider its rejection. I do not know if this was done, but it is clear no rejection of the claim was made and it seems the Claimant was simply asked to provide an Acas certificate reference number. Why that should be the case is unclear, since she had declared she did not have a number.

29. Whilst I am not bound by the judgment of EJ Clarke in *Thomas,* I agree with his reasoning that it matters not whether the referral is made by a member of staff or brought to the Tribunal's attention by the Respondent. The EC requirement is of fundamental concern regarding the question of the Tribunal's jurisdiction to hear the case. Further the EAT judgment in *Caspell* confirms it matters not at what stage of the proceedings judicial consideration is given to the EC requirement, even if it happens somewhat late in the day. The right to question the legitimacy of jurisdiction must remain throughout the case.

30. The points made in submissions for the Claimant are not relevant in my judgment. The Tribunal is not required to consider, as far as this particular issue (the EC requirement) is concerned, questions of fairness or equity. The Rules do not give the Tribunal any scope to apply such principles at the rejection stage. They provide a straightforward requirement on presenting the claim and mandate the Tribunal to reject the claim if the EC requirement is not met. The protection for any Claimant in such a situation is to apply for a reconsideration of the rejection if the notified defect can be rectified.

31. As an aside, a potential problem for a Claimant whose claim has been rejected is that, in the event the reconsideration application is successful, the date of presentation of the claim is treated as being the date on which the defect is rectified – Rule 13(4). However, in a claim alleging unlawful discrimination, it will then be open to such a Claimant to argue that it would be just and equitable in all the circumstances of the case to allow a claim, which would otherwise be out of time, an extension of time up to the revised date of presentation. Further, in any claim where there is an unbroken course of conduct amounting to ongoing discrimination, the moving of the date of presentation may not be prejudicial. However, I make these comments in passing only as they are not relevant at all to my decision.

32. As far as the overriding objective in dealing with cases fairly and justly is concerned, this cannot in my judgment come into play when there is no jurisdiction and therefore no claim in which to argue it should apply.

33. The fact that the certificate reference number and the certificate itself appear to have been provided shortly after presentation of the claim is irrelevant. Under the Rules, the claim should have been rejected before that and the later compliance cannot overcome the statutory procedure, save where exercised under the Rule 13 reconsideration procedure.

34. Accordingly, I reject the Claimant's submissions and allow the Respondent's application. I am obliged to reject the ET1 Claim Form under Rule 12(2), in that, under Rule 12(1)(d), the confirmation that an exemption from the requirement to provide an early conciliation number was wrong and the exemption did not apply.

35. Even though personally I might have wished to have been able to reach another conclusion, I cannot do so for the reasons I have given.

Employment Judge Battisby
Date: 10 May 2021