EMPLOYMENT TRIBUNALS

Claimant: Russell John Curtis

Respondent: Curtiss Wright T/A E/M Coating Services

Heard at: by CVP **On:** 15 November 2021 and 13 December 2021 (in Chambers)

Before: Employment Judge Britton

Appearances
For the claimant: Mr N Kennan - Counsel
For the respondent: Mr T Dracass - Counsel

RESERVED JUDGMENT

The Claimant's Application to amend the name of the Respondent to Metal Improvement Company LLC T/A E M Coating Services is granted

Written Reasons

Introduction

1. The Preliminary Hearing was held on 15 November 2021 to consider whether to grant the Claimant's application to amend the name of the Respondent to Metal Improvement Company LLC T/A E M Coating Services.

2. I heard no live evidence but had regard to a Witness Statement from the Claimant dated 4th November 2020 (page 86 to 89) and a Witness Statement from Mr R Lopuc on behalf of the Respondent, also dated 4th November 2020 (pages 90-94). I was provided with a Consolidated Pre-Hearing Bundle, which was an agreed Bundle, consisting of 327 pages.

3. Both parties were ably represented by Counsel and I had the assistance of Skeleton Arguments and a revised/Supplementary Skeleton Argument, which have referred me to a number of authorities.

Procedural Factual Background

4. On 3rd December 2019, the Claimant presented his Claim to the Employment Tribunal. The Claimant brought claims of unfair dismissal and disability discrimination against the current Respondent "Curtiss-Wright T/A EM Coating Services" (R1). Prior to presenting the ET1 Form, the Claimant had complied with the early conciliation requirement under Section 18A of the Employment Tribunals Act 1996. On 24th October 2019 ACAS had issued an Early Conciliation Certificate and the Claimant provided the reference number for that Certificate, relating only to R1 on his ET1 Form.

5. The Claimant also named two further Respondents on the ET1 Form, namely, "Metal Improvement Company LLC" (registered in the UK) (R2) and "Metal Improvement Company LLC" (the US company) (R3). The Claims in respect of R2 and R3 were rejected by the Tribunal pursuant to Rule 10 (1)(c) of The Employment Tribunal Rules of Procedure 2013 (the ET Rules) because the ET1 Form did not contain an early conciliation (EC) reference number for R2 or R3. Instead, the Claimant had erroneously ticked the box to indicate that one of the EC exemptions applied to the proposed Claims against them.

6. The Claimant's representative was informed by letter from the Tribunal dated 5th May 2020 that the Claim against the Respondent (R1) had been accepted, but the Claims against R2 and R3 had been rejected. This correspondence included an explanation of how to apply for a reconsideration of that rejection under Rule 13, but the Claimant did not make an application for reconsideration and the 14 day time limit for doing so has now long since expired.

7. An ET3 Response was entered in the name of "Metal Improvement Company LLC T/A EM Coating Services" (R1) on 28th May 2020. The Claimant was asked to provide comments regarding the correct name of the Respondent, which were provided by letter from his representative dated 3rd August 2020. It was asserted that the Claimant believed that his employer was "Curtiss-Wright E/M Coating Services". However, it is recorded within the Case Management Summary following the Preliminary Hearing held on 3rd September 2020 that it was accepted on behalf of the Claimant that the correct identity of his employer was in fact "Metal Improvement Company LLC (MIC) and not R1. This change of position on the part of the claimant appears to have been prompted by the early disclosure of a copy of the claimant's Contract of Employment. In other words, the correct Respondent was in fact R2/R3, but the Claim against this Respondent had been rejected by the Tribunal pursuant to Rule 10(1)(c) of the ET Rules.

8. The only claim in existence is the one that has been brought against R1, which is not the correct corporate name of the Claimant's employer and is not the name of any legal entity in existence.

Findings of Fact relevant to the Preliminary issue

9. The Claimant commenced employment with P T Coating Limited on 9th March 1998 as a Production Supervisor. Thereafter, his employer was subject to a change of ownership and as a consequence became E/M Coatings Limited in

either 1998 or 1999 (this date is not material to the issue that I have to decide). The Claimant entered into a Contract of Employment with E/M Coatings Limited which he signed on 23rd December 1999. The business of E/M Coatings Limited was then acquired by Curtiss-Wright Corporation, which is a diversified Company, Headquartered in Roseland, New Jersey, USA. The Claimant's employer then became MIC.

10. However, on 24th February 2004 a press release referred to an acquisition of E/M Coatings Limited by Curtiss-Wright Corporation and made no reference to MIC. The Claimant entered into a Contract of Employment with MIC, which he signed on 19th July 2005. Throughout the period of the Claimant's employment by MIC, the business adopted the trading name of "Curtiss-Wright E/M Coating Services". The Claimant's Witness Statement references numerous documents which illustrate the fact that MIC's adopted training name continued to be widely used. Namely:

    (i)The Claimant's 15 years' service award on 9th March 2013 (pages 54-55).

    (ii)Claimant's Certificate of Completion of the course "Global Trade Compliance Overview" on 10th February 2018 (page 57).

    (iii)The Claimant's Certificate of grateful Recognition for 20 years' service on 9th March 2018 (page 60).

    (iv)Correspondence sent to the Claimant during the redundancy process (pages 64-72).

    (v)The Claimant's business card (page 78).

    (vi)Photographs of the Claimant's polo shirt and work shirt (pages 84-85)

11. In addition, the Claimant has produced documentation to demonstrate that he was a member of the Curtiss-Wright Pension Plan, an excerpt from the Respondent's Website which refers to the business as "Curtiss-Wright E/M Coating Services" and three photographs of the premises in which he worked at that show Curtiss-Wright signage.

12. It is agreed by the Claimant that he did enter into an Employment Contract with MIC, a subsidiary of the Curtiss-Wright Corporation, and his payslips (page 77) his P60 (page 62) and P45 (page 74) all refer to MIC as the Claimant's employer.

The Relevant Statutory Provisions

13. Employment Tribunals Act 1996 (ETA 96)

"7. Employment Tribunal procedure regulations.

(3A) Employment tribunal procedure regulations may authorise the determination of proceedings without any hearing in such circumstances as the regulations may prescribe.
(3AA) Employment tribunal procedure regulations under subsection (3A) may only authorise the determination of proceedings without any hearing in circumstances where:

(a) all the parties to the proceedings consent in writing to the determination without a hearing, or
(b) the person (or, where more than one, each of the persons) against whom the proceedings are brought;
    (i) has presented no response in the proceedings, or
    (ii) does not contest the case.

…
18. (1) This section applies in the case of employment tribunal proceedings and claims which could be the subject of employment tribunal proceedings
….
(b) arising out of a contravention, or alleged contravention, of section 64, 68 86, 137, 138, 145A, 15B, 146, 168, 168A, 169, 170, 174, 188 or 190 of the Trade Union and Labour Relations (Consolidation) Act 1992,
…….
18A (1) Before a person (“the prospective claimant”) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

(2)On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.

(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(4) If –

(a) during the prescribed period the conciliation officer concludes that a settlement is not possible,
(b) the prescribed period expires without a settlement having been reached,
the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.

(5) The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.

(6) In subsections (3) to (5) “settlement” means a settlement that avoids proceedings being instituted.

…
(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)

….

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations."

14. Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014:

"Regulation 2
In these Regulations and in the Schedule -
…

"prospective respondent" means the person who would be the respondent on the claim form which the prospective claimant is considering presenting to an Employment Tribunal;
Schedule

1. Satisfying the requirement for early conciliation.

To satisfy the requirement for early conciliation, a prospective claimant must –
(a) present a completed early conciliation form to ACAS in accordance with rule 2; or
(b) telephone ACAS in accordance with rule 3.

2. (2) An early conciliation form must contain

(b)the prospective respondent's name and address.

3. (1) A prospective claimant telephoning ACAS for early conciliation must call the telephone number set out on the early conciliation form and tell ACAS –

…
(b) the prospective respondent's name and address.

4. If there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form under rule 2 in respect of each respondent or, the in the case of a telephone call made under rule 3, must name each prospective respondent.

6. Period for early conciliation

(1) For up to one calendar month starting on the date –

(a) of receipt by ACAS of the early conciliation form presented in accordance with rule 2; or
(b) the prospective claimant telephoned ACAS in accordance with rule 3, the conciliation officer must endeavour to promote a settlement between the prospective claimant and the prospective respondent.

7. Early conciliation certificate

(1) If at any point during the period for early conciliation, or during any extension of that period, the conciliation officer concludes that a settlement of a dispute, or part of it, is not possible, ACAS must issue an early conciliation certificate.

8. An early conciliation certificate must contain -
….

(b)the name and address of the prospective respondent;…"

15.Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

"Schedule 1

2. Overriding objective
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 –
…
(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;

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.

…

10. Rejection: form not used or failure to supply minimum information

(1) The Tribunal shall reject a claim if –

…

(c) it does not contain one of the following –
(i) an early conciliation number;…

12. Rejection: substantive defects

(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 –

…

(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;

…

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

…..

(2A) The Claim, or part of it, shall be rejected if the Judge considers that the claim, or part if it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant 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.

…

NB Form 8 October 202, the word “minor” has been removed from r12(2A).

34. Addition, substitution and Removal of Parties

The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.”

The Claimant’s Skeleton Argument and Revised Skeleton Argument

16. For the Claimant, Mr Kennan submits that whilst the Claimant commenced early conciliation in person on 25th September 2019 and he identified the prospective Respondent as R1, it was his Solicitors who prepared his ET1 Form. The ET1 Form named R1 and also MIC at different trading locations as R2 and R3 but failed to provide corresponding EC Certificate Numbers. It is not clear why the Claimant’s Solicitors did not obtain EC Certificate Numbers for R2 and R3.

17. Mr Kennan submits that there are numerous documents and photographs of the site where the Claimant worked which demonstrate that the Claimant reasonably believed that his employer was correctly named as R1. It is difficult to understand, therefore, why MIC was named at all on the Claim Form.

18. It is also contended by Mr Kennan, on behalf of the Claimant, that MIC has not been prejudiced as they entered an ET3 response, without raising any point that the Claim that had been accepted by the Tribunal had been brought against the wrong entity.

19. It is submitted by Mr Kennan that it is irrelevant that MIC was named in the ET1 as R2 and R3 because those claims were rejected by the Tribunal and the correct approach is to consider the true identity of R1, albeit named erroneously in the EC Certificate and the ET1 Form.

20. He submitted that there is no breach of Rule 12 (1) as, in so far as the Claim has been accepted, the name of R1 on the EC Certificate and the ET1 is the same and that the Claimant has validly instituted relevant proceedings against the entity he thought to be his employer.

21. He also submitted on behalf of the Claimant that the rejection under Rule 10 (1)(c) was not a determination because the Tribunal had no discretion and the rejection involved no adjudication or consideration of the merits of the Claim.

22. Mr Kennan's submission is supported by the decision of the Court of Appeal in Trustees of the William Jones's Schools Foundation v Parry [2018] EWCA Civ 672 which held that the rejection by an Employment Tribunal of a claim pursuant to Rule 12(1)(b) of the ET Rules was not a "determination of the proceedings, since it did not go to the substance of the claim or involve a resolution of issues". The Court of Appeal accepted submissions on behalf of the Respondent that a rejection under Rule 12 is a response to the fact that a claim has not been properly made and, as such, does not give rise to a cause of action or issue estoppel. The Court of Appeal decision in Nayif v High Commission of Brunei Darussalam [2014] EWCA Civ 1521 is relied upon by the Claimant in support of the submission that there is no justification for applying the principle of estoppel in circumstances where there had been no actual adjudication of a relevant issue.

23. Mr Kennan's previous Skeleton Argument was that the Tribunal should substitute MIC for R1 pursuant to Rule 34 and then deal with the matter as a breach of Rule 12(1)(f). However, it is now contended that this approach is mistaken and that the correct approach is to consider whether it is appropriate for the Tribunal, exercising judicial discretion, to substitute MIC for R1 in circumstances where

    (a) There has been no EC with MIC, and
    (b) Where a claim against MIC has already been rejected in accordance with Rule 10(1)(c)

24. From the Claimant's perspective the revised Skeleton Argument has the attraction of avoiding any consideration of Rule 12. The issue is confined to the exercise of judicial discretion under Rule 34 in the particular circumstances of this case.

25. Mr Kennan relies upon Mist v Derby Community Health Services NHS Trust [2016] ICR 543 in support of his submission that Section 18A of the Employment Tribunals Act 1996 does not require a prospective Claimant to provide the precise or full legal title for their employer and that a trading name would be sufficient. In that case HHJ Eady QC held that the requirement under Section 18A was "designed to ensure ACAS is provided with sufficient information to be able to make contact with the prospective Respondent if the Claimant agrees such an attempt to conciliate should be made." It is submitted by Mr Kennan that the prospective Respondent's address given by the Claimant to ACAS was identical to the address given by the Respondent in their ET3 Response Form, which he contends is sufficient for the Tribunal to infer that the Respondent was not in fact denied the opportunity to participate in the early conciliation process.

26. Mr Kennan has further submitted that Section 18A is unlikely to apply because a Claimant is not required to have obtained an EC Certificate in relation to a prospective Respondent in circumstances where that Respondent is being joined into relevant proceedings that have already been instituted. In support of this proposition he relies upon Drake International Systems Limited and others v Blue Arrow Limited UK EAT/028/15. In Drake, the EAT held that the discretionary power under Rule 34 can be used to substitute a new respondent (a subsidiary) for an existing respondent (the parent company), notwithstanding that the EC requirements under Section 18A of the Employment Tribunals Act 1996 had not been complied with in relation to the proposed new respondent.

27. Within his submission Mr Kennan reminded me that, as observed in Mist, "an Employment Tribunal has a general power to amend a Claim before it, including adding a Respondent, under its general Case Management powers under Rule 29 of the ET Rules 2013, and whether or not to do so is a matter of judicial discretion to be exercised in a judicial manner having regard to all of the circumstances. In the Mist case it was held that the fact that the Claim to be added was out of time was a relevant, though not determinative, consideration.

28. Mr Kennan unsurprisingly also relies upon Selkent Bus Co Limited v Moore [1996] ICR 836 and the well known principles that when considering an amendment application, the Tribunal should take into account all of the circumstances and should balance the injustice and hardship of allowing an amendment against the injustice and hardship of refusing it. Typically, those circumstances will include, but are not limited to, the nature of the amendment, the applicability of time limits and the timing and manner of the application. In addition, Mr Kennan referred me to the relevant passage within Drake which not only endorsed the Selkent principles but applied them in the context of an application to allow substitution of a party. In Drake the President of the Employment Tribunals, Langstaff J, said

> "If the Claim against the current Respondents was entirely unrelated to the proceedings against the parent company I can well see that the Tribunal might have declined to permit the amendment. It had a discretion. That discretion was to be exercised in a manner satisfying the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions" (Selkent Bus Co Limited v Moore 1996 ICR 836, per Mummery J). If there were any sustained suggestion of abuse of the procedures, I would expect a Judge to be alert to it and to decline amendment. There may be other occasions upon which he might choose, for proper reason, within the Selkent rubric to do so. But it seems to me that in exercising any discretion the Judge would have in addition to be bound by the overriding objective which applies now to the Rules in a way in which it did not even apply at the time that Mummery J decided to Selkent. Fairness and justice which the overriding objective seeks to promote include (Rule 2 (c)) avoiding unnecessary formality and seeking flexibility in the proceedings, and "(d) avoiding delay so far as compatible with proper consideration of the issues; and (e) saving expense".

Respondent's Skeleton Argument and Supplementary Skeleton Argument

29. The overarching submission on behalf of the Claimant is that it would be contrary to common sense if the Claimant is denied the opportunity to pursue a Claim against MIC simply because his Solicitor had included MIC as R2 and R3 and those claims are now extinct.

30. Mr Kennan also invites me not to lose sight of the fact that the Tribunal should avoid unnecessary formalities and seek flexibility in the proceedings in accordance with the overriding objective. He has referred me to paragraph 21 of Guidance Note figure 1 to the presidential guidance on Case Management which makes it clear that there is no limit to the power under Rule 34:

> "The Tribunal may permit any person to participate in proceedings on such terms as may be specified in respect of any matter in which that person has a legitimate interest. This could involve where they will be liable for any remedy awarded as well as other situations where the findings made may directly affect them".

The Respondent's Skeleton Argument and Supplementary Skeleton Argument

31. It was submitted by Mr Dracass, on behalf of the Respondent, that by naming MIC as R2 and/or R3 but without an EC Certificate Number, there had been a breach of Rule 12(1)(c) which could not be cured by Rule 12 (2A). This meant that, following E.ON Control Solutions Limited v Caspall [2020] ICR 552 the Employment Tribunal had no discretion to allow the Claim to proceed.

32. It was submitted that the Tribunal has no jurisdiction to hear the Claim against R1 as currently named and as such, the entire Claim should now be dismissed. He submitted that the fact that R2 and R3 were added to the ET1 Form is a strong indicator that the Claimant (or his Solicitors) were fully aware that MIC may well be his employer and therefore the correct Respondent in this case. Mr Dracass asserts that had the most basic and routine of checks been undertaken (e.g., an examination of the Claimant's Contract, P60, P45, dismissal letter) prior to submitting the ET1 Form, the identity of the correct Respondent would have been clear to the Claimant and his Solicitors.

33. He submitted that it is not permissible to exercise any discretion under Rule 34 in the circumstances of this case because the Claim against MIC (R2 and R3) has already been rejected by the Tribunal due to the failure by the Claimant to comply with the EC requirements and that the discretionary rules may not be used to circumvent the mandatory provisions of Rules 10 and 12 of the ET Rules.

34. Mr Dracass asserts that once the Tribunal had rejected the claims against R2 and R3 under Rule 10, the only viable "escape route" for the Claimant was to apply within 14 days of the notification of rejection for a re-consideration of the Tribunal's decision under Rule 13.

35. In support of his submission, Mr Dracass placed reliance upon E.ON and also Cranwell v Cullen UK EAT/0046/14 and Baisley v South Lanarkshire Council 2017 [ICR 365] which were cases in which the Employment Tribunal made it clear that Rule 6 (which gives the Tribunal the power to waive or vary a requirement of the

rules, subject to some exceptions) may not be used to circumvent the mandatory effect of mandatory rules 10-12.

36. Mr Dracass submitted, on behalf of the Respondent, that the three authorities on which he relies, namely, E.ON, Cranwell and Baisley, support his proposition that Rule 34 should not be used to relieve the Claimant of the consequences of having failed to comply with Rule 10, albeit those cases all relate to the Tribunal's power to exercise discretion under Rule 6, rather than Rule 34.

37. The Respondent also relies upon Patel v Specsavers Optical Group Limited UK EAT 0286/18 which held that the Tribunal had not heard in refusing an application by the Claimant to add a further Respondent to a Claim in circumstances where he did not have an EC Certificate in respect of the proposed Second Respondent. In that case, the Claimant sought to substitute a new Respondent in place of the Second Respondent, in circumstances where the Claimant had not complied with the EC requirements in respect of the Second Respondent and that Claim had therefore been rejected by the Tribunal. The Tribunal's decision, which was upheld by the EAT, made the point that had it been found that C was employed by the Second Respondent, the rejection of the Claim would have been confirmed because of his failure to comply with the EC requirements. Therefore, it would be nonsensical and unjust to allow the Claimant to add or substitute a new Second Respondent into the proceedings, because to do so would put the Claimant in a better position than if he had not made the clerical mistake regarding the name of the Second Respondent in the first place.

38. Mr Dracass submits that by an analogy in the present case, if C had brought his Claim against R2/R3 only, the Tribunal would have been compelled to reject his Claim under Rule 10 (or Rule 12) and, in the absence of an application for a reconsideration, that would have been an end of the matter. There would be no basis for the Claimant then being able to apply to vary the requirements of Rule 10 by reference to Rule 6 or to make an application to substitute under Rule 34. It is contended by Mr Dracass that it must therefore be nonsensical and unjust if the Claimant is in a better position by virtue of having wrongfully brought unsustainable proceedings against R1, so as to then provide a platform for him substituting R2/R3 back into the proceedings.

39. I have also noted the detailed Submissions that Mr Dracass set out within his Skeleton Argument at paragraphs 23 and 24, which address the claimant's original argument in respect of Rule 12(1)(f). However, this argument is no longer being pursued by the Claimant.

40. Within his supplementary Skeleton Argument, and during oral submissions, Mr Dracass maintained his primary argument that the Tribunal should not permit Rule 34 to be used as a means of circumventing the mandatory rejection of the claimant's claims against R2 and/or R3. The Submission from Mr Dracass regarding the Drake case is that the facts in Drake can be easily distinguished from the present case. In Drake, the proposed new respondents had not been named in the original Claim Form, nor had the claims against them already been rejected by the Tribunal under the mandatory provisions of Rules 10-12. Mr Dracass therefore submits that Drake is more about the general interplay between Rule 34 and the requirements under

Section 18A than the interplay between Rule 34 and the mandatory provisions under Rules 10-12.

41. Mr Dracass concedes that the principle of Res Judicata is unlikely to apply to the facts of this case. He acknowledges that the Court of Appeal in Secretary of State for Business, Energy and Industrial Strategy v Perry [2018] ICR 1807 confirm that a rejection of a claim under Rule 10 or 12 is not a "determination of proceedings" and that it does not give rise to a cause of action or issue estoppel. However, he submits that the resurrection of the claim against a respondent by way of an application to substitute them back into the same proceedings in which claims against him have already been correctly rejected by the Tribunal would be tantamount to an abuse of the Tribunal's process under the Henderson v Henderson principles.

42. If the Tribunal does not accept the primary argument put forward by Mr Dracass on behalf of the respondent and considers that the discretionary power under Rule 34 can be invoked, Mr Dracass submitted that the discretion should be exercised in favour of not allowing R2 (MIC) to be substituted back into the proceedings in place of R1. Whilst acknowledging the wide discretion of the Tribunal under Rule 34, Mr Dracass submits that the application under Rule 34 to substitute R2 as the correct respondent in this case should be refused for the following reasons:

    a. The claim against R2 in these proceedings has already been rejected under Rule 10(1)(c) and no application at the time was made for a reconsideration of the decision to reject the claim. It is therefore contended by Mr Dracass that it is against the interests of justice to allow the claimant to reinstate the rejected claim by the process of substitution;

    b. It was open to the claimant to seek to correct the defect before either resubmitting the Claim Form and/or seeking a reconsideration but he did neither of these things;

    c. The application to amend/substitute R back into the proceedings pursuant to Rule 34 should have been made promptly and that the delay of 9 months leading up to the Preliminary Hearing on 9 September 2020, when the application was first raised, has not been explained;

    d. The fact that R2 was cited as a second respondent on his ET1 demonstrated that the claimant (or his solicitors) were aware of R2's existence and that it may be the correct employer in this case. Had the most basic enquiries been made prior to submitting the ET1 the position regarding the correct identity of the claimant's employer would have been clarified. As such, the factual scenario suggests that this is not a case where the claimant made a "genuine mistake" after the identity of his employer. The mistake that was made was in failing to commence EC procedures against R2. It is submitted that the Guidance set out within Cocking v Sandhurst (Stationers) Limited was qualified by the EAT to the extent that it stated that the Tribunal should only allow an application to substitute a new party if it is satisfied that mistakes ought to be corrected was a "genuine mistake";

e. The 3 month time limit for bringing an ET claim against R2 has long since expired and, given that the claimant has been legally represented throughout the proceedings, it would be extremely difficult for him to overcome the "reasonable practicability" task for unfair dismissal. Whilst a Tribunal would have the "just and equitable" discretion to extend time in respect of the disability discrimination claim, the fact that the claimant was represented, was aware of the fact that R2 may have been his employer in lieu of his right to bring a claim against R2 before the discrimination time limit had expired would make it difficult for the claimant to succeed with an application to extend the time limit to enable him to pursue a claim against R2 under the "just and equitable" test;

f. It is logical that the claimant is in the better position by having brought a claim against a party that was neither his employer nor a known legal entity (R1) than if he had simply brought the claim against the correct respondent in the first place without having complied with the EC procedures because otherwise there would be no extant claim before the Tribunal upon which to substitute a new party;

g. That it was acknowledged by Langstaff J in Drake that a Rule 34 application may be declined where there is a "sustained suggestion of abuse of procedures" and in this case the use of Rule 34 to circumvent the mandatory provisions under Rule 10 and Rule 12 would be tantamount to an abuse of the Tribunal's process and procedures;

h. Allowing the substitution will cause injustice and hardship to R2 because they would have to face a claim that it had believed had been brought to an end and R2 would be deprived of a time limit argument that would have arisen had the claimant sought to bring a new claim against R2 following the rejection of the first one. This outweighs the injustice and hardship that was caused to the claimant in refusing the application, bearing in mind that the claimant may still have a remedy against his solicitors.

DISCUSSION AND CONCLUSIONS

43. The Claimant got the legal identity of his employer wrong when applying for an Early Conciliation Certificate at a time when he was not represented. It is now common ground that it was MIC and not R1 that employed the Claimant. When the Claimant became represented, his Solicitors perpetuated the error in the Early Conciliation Certificate, which named the wrong party as the prospective Respondent and commenced a Claim using the usual ET1 Form, naming R1 and MIC (at two different locations) as the Respondent (R2 and R3).

44. It is unfortunate, but in my view not determinative or fatal to the claimant's application, that the claimant has not put forward any explanation for the decision to name MIC as R2 and R3 within the ET1 Form, in circumstances where (according to his Witness Statement) the claimant appears to have been reasonably confident that R1 was in fact his employer. That confidence was manifested within the letter that was sent to the Tribunal by the claimant's representative dated 3 August 2020 and it seems to me that this, as it turned out, misplaced confidence, was the most

likely reason why neither the claimant or his representative failed to make an application for a reconsideration of the decision not to accept the claims against R2/R3/MIC.

45. However, the Claims in respect of R2 and R3 were (in my view, correctly) rejected by the Tribunal subject to Rule 10(1)(c) because the ET1 did not contain an EC reference number for R2 or R3. This is now conceded by the Claimant.

46. The Claims against MIC as R2 and R3 were never validly instituted and their rejection means that they never formed part of the proceedings.

47. The ET1 Form was received by MIC on 19th December 2019. They took no issue with the name then used by the Claimant when they received the documents because they knew or ought reasonably to have known that the Claim by the Claimant was against his employer and it knew the case that they had to meet. MIC entered a response to the Claim.

48. I agree with the observations expressed by Employment Judge Algazy, QC at the adjourned Preliminary Hearing on 11th November 2020 in that:

    a. The focus of my attention at this stage is primarily on the Tribunal's discretionary power to allow the substitution of a Respondent under Rule 34 of the ET Rules.

    b. The Drake case does provide a clear answer as to how this question should be approached in the context of a failure to comply with the EC requirements. In Drake, the EAT held that the discretionary power under Rule 34 can be used to substitute a new Respondent (a subsidiary) for an existing Respondent (the parent Company), notwithstanding that the EC requirements under Section 18A of the Employment Tribunals Act 1996 have not been complied with in relation to the proposed new Respondent.

    c. On the particular facts of this case, Res Judicata and abuse of process, are relevant issues because (unlike the facts in Drake) the claims against the proposed substitute Respondent have already been correctly rejected under Rule 10.

49. On the facts of this case, in my view, the principle of Res Judicata and/or estoppel does not apply because there has been no determination of the claimant's claim against R2. This seems to me to be the clear principle to be taken from the case authorities relied upon by both parties namely, Trustees of the William Jones' Schools Foundation v Parry and Secretary of State for Business, Energy and Industrial Strategy v Parry. I do not accept the respondent's submission that allowing an application to substitute R2 back into the proceedings would be tantamount to an abuse of process under Henderson v Henderson principles, or otherwise. Whilst the public interest that underlines the doctrine of abuse of process is that there should be finality in litigation, in my judgment the fact that there has been no determination of the proceedings, or repetitive abuse of process, assists the claimant to overcome this hurdle. The Nayif authority relied upon by the claimant supports this conclusion

and place reliance upon the passage at paragraph 27 of that judgment as per Elias LJ as follows:-

"The underlying principle is that there should be finality in matters which have been litigated, or would have been but for a party unwilling to put them to the test, should not be re-opened. But I see no justification for the principle applying in circumstances where there has been no actual adjudication of any issue and no action by a party which would justify treating him as having consented, either expressly or by implication, to having conceded the issue by choosing not to have the matter formally determined."

50. In my view, the application falls to be considered fairly and squarely as a matter of whether or not I should exercise my discretion under Rule 34, having regard to the established principles set out in the well known case law of Cocking and Selkent, and also the relevant Presidential guidance. Where the claimant wishes to amend their claim to add or substitute a new respondent, the legislation is not explicit as to whether they must first comply with the Early Conciliation requirements. However, the EAT has held that it is not necessary for a claimant to undergo early conciliation:

    a. Before applying to add a new claim arising after early conciliation has concluded and an ET1 presented to the Tribunal;

    b. Before applying to add a new respondent (see Mist above);

    c. Before applying to substitute respondents (see Drake above);

51. In Cocking the EAT held that regard should be had to all the circumstances of the case and in particular, "consider any injustice or hardship which may be caused to any of the parties…if the proposed amendment were allowed, or as the case may be, refused". Cocking was followed by the EAT in Selkent which held that when faced with an application to amend a Tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions". The EAT considered that the relevant circumstances would include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

52. When exercising the discretion of Rule 34 a Tribunal must also take into account ints duty under the overriding objective set out in Rule 2 to deal with cases fairly and justly, which includes amongst other things, avoiding unnecessary formality and seeking flexibility in the proceedings.

53. In this case, the application is to substitute the correct legal name for R1. The claimant has already included the correct trading name for the proposed substituted respondent (MIC) within his ET1 Form. The proposed substituted respondent has already entered a response to the claim. There is no new cause of action and, on the face of it, it appears that the proposed substituted respondent were fully aware when they were served with the ET1 Claim Form that the claimant had intended to bring his claim against them.

54. As noted above, the application to amend to substitute the respondent does not involve the bringing of a new cause of action and is also clear that the substitution of MIC as the respondent would not require any amendment to the factual details pleaded by either the claimant or MIC as the proposed second respondent. Whilst time limits are particularly relevant if a new complaint is sought to be added by way of an amendment, that is not the situation in this case. The extant claim was presented in time. I therefore do not consider that the respondent's submission that if the claimant were to commence a fresh claim it would be substantially out of time to be particularly persuasive when considering the power to exercise discretion under Rule 34 on the facts of this particular case.

55. Applications to amend a pleading can be made at any stage in the proceedings and an application should not be refused solely because there has been delay in seeking the amendment. However, I do take cognisance of the delay in making the application. The Presidential guidance states that the applicant will need to show why the application was not made earlier and why it is now being made. The Guidance gives the example of the discovery of new facts or information that only came to light from disclosure of documents. In the present case I accept that the claimant genuinely believed that the correct identity of his employer was R1. It seems clear from the documentation with which I have been provided that for the purposes of its day to day activities MIC relied very heavily upon its trading name. It is this trading name that the claimant used when he presented the proceedings and when he erroneously believed that the correct legal name of his employer was "Curtiss Wright".

56. In this case, there is no suggestion that the claimant did not institute proceedings against the entity that he thought to be his employer, only that he has not used the correct legal name of his employer. As indicated above, I have accepted that the claimant was genuinely mistaken as to the true legal name of his employer. There was certainly an element of confusion. I have taken notice of the views expressed by EJ Pritchard in Soares v Serco Limited, Case No. 2303303/2020, but I do not consider that the exercise of discretion under Rule 34 is an impermissible use of discretion notwithstanding the mandatory nature of Rules 10 and 12, or the intention behind Section 18A of the Employment Tribunals Act 1996. When considering the exercise of discretion, I have been able to satisfy myself that this is not a case where the claimant has deliberately set out to abuse or manipulate the Tribunal process or circumvent mandatory rules. In this case there has been no sustained suggestion of abuse of procedures in the sense that I understood Langstaff J to have referred in Drake and the cases referred to by EJ Pritchard in Soares all concerned mandatory Rule 6 which has an entirely different purpose to Rules 10 and 12 and different jurisprudence.

57. I accept that there was an unfortunate delay between the claim against R1/R2/MIC being rejected and this application to substitute the correct respondent and that it had been open to the claimant to seek a reconsideration of the rejection. However, as referred to in paragraph 44 above, I accept that the claimant was confident that he had correctly named R1 as the respondent and until such time as he obtained a copy of his Contract of Employment from the respondent's solicitor by way of early disclosure. This is the explanation for the delay. I accept this explanation as being genuine and whilst the delay has been far from ideal, the respondent has not been

prejudiced by it because the question of substitution arose at the Case Management hearing specifically set up for the purpose of addressing procedural matters and dealing with interlocutory applications.

58. If the application is refused the hardship to the claimant is significant because he will no longer be able to pursue his claim. On the other hand, the hardship to the respondent is that they will lose the ability to rely upon the claimant's procedural error in order to defeat the claim without having to deal with any of the substantive issues. In my judgment the injustice to the claimant in refusing the amendment would outweigh the injustice and hard ship caused to the respondent in refusing the application. I do not think that it is realistic for the Tribunal to accept that the claim has no hardship because he may have a remedy against his solicitors. It is not at all clear to me that the claimant would have such a remedy or that it would be in the interests of justice to put the claimant in the position of having to embark upon potentially difficult professional negligence proceedings against his solicitors.

59. For the reasons set out above, taking into account the principle established in the relevant case authorities and in particular, bearing in mind the requirement of Rule 2, which requires the Tribunal to act in the interests of justice avoiding unnecessary formality, in my judgment the balance of injustice or hardship weighs in favour of allowing the application to substitute MIC as the respondent in these proceedings.

Employment Judge Britton
10 January 2022