EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104534/2017

Held at Glasgow on 7 February 2018

Employment Judge: Mr D O'Dempsey

Mr U Dar — **Claimant In Person**

Mr McAteer — **Respondent Represented by:- Mr Smith - Solicitor**

JUDGMENT

The following orders were made:

1 That the decision of 12 September 2017 to accept the Claim form because it contains a minor error as to the Respondent's name (as compared to the name on the ECC) is reconsidered and confirmed.

2 That the Claimant's application to substitute Beltrami and Company Limited for Mr McAteer is granted without prejudice to any limitation defence the Respondent wishes to deploy.

3 That Beltrami and Company limited be served with the relevant papers and have the usual period to submit an ET3 if so advised.

4 Once the period for Beltrami and Company Limited present its ET3 has passed the tribunal list the case for a preliminary hearing to discuss case

management, including any applications for amendments, strike out and or deposit orders arising from the contents of the Scott Schedule from the Claimant. The parties are to liaise and indicate to the tribunal the length of hearing needed for any such preliminary hearing.

REASONS

1 I heard the parties on 7 February 2018. I told them at the end of the hearing day that I would consider my judgment. I now give written reasons for the above orders and directions.

2 I considered the Respondent's application for reconsideration of an employment judge's decision of 12 September 2017 to accept the claim form and that although there was an error under rule 12 in relation to the Respondent's name, the error was a minor one and it was not in the interests of justice to reject the Claim.

3 I also considered the Claimant's application to substitute parties.

The application for reconsideration

4 On 12 September 2017 the Claimant's claim form was referred to an employment judge because the administrative staff thought that the Claimant's address and/or the Respondent's name on ET1 differed from those given in the ACAS Early Conciliation Certificate (ECC).

5 The judge directed that the claim form should be accepted because the Claimant made a minor error in relation to the name/address and it would not be in the interests of justice to reject the claim form. On 14 September 2017 Gary McAteer was notified that a claim had been accepted against him. No notification was sent to Beltrami & Co Limited (which occupies the same address as that to which Mr McAteer's notification was sent).

6 On 14 October 2017 the tribunal wrote to the Respondent's solicitors stating that where the name given by the Respondent on the Response differs from that given on the claim, the tribunal will assume that the name given by the Respondent was correct. The letter went on to say that the file would be considered by an EJ with a view to confirming that there are arguable complaints.

7 On 18 October 2017 the parties were notified by the tribunal that Employment Judge Gall had considered the file and had not dismissed the claim or response on initial consideration. The clear implication of that, in the context of this case, is that the Respondent must have been aware that if there was an error of name on the form compared to the ECC it had not impeded the progress of the claim to acceptance. The Respondent appears to have taken no action at that point.

8 There was a preliminary hearing on 19 December 2017. When filling in the agenda for the preliminary hearing, the Claimant said that the name of the Respondent was not correct. He said that

> "The ET1 was submitted on line there are two inadvertent errors on the form. The first is that the principal Respondent should be designated as Beltrami & Company, as identified by the Respondent. However, many of the criticisms are levelled against Gary McAteer ("GM") in a personal capacity and it may therefore also be appropriate to name him as a 2nd Respondent. The motion to amend is formally made. (The second error is that this is not a redundancy case)."

9 The putative dismissal occurred on 5 July 2017. The relevant time limit for unfair dismissal will have expired no earlier than 4th October 2017 in this case. The application formally to amend was made within three months of the time limit for unfair dismissal.

10 The Respondent made an application to dismiss the claim on the basis that no pre-action conciliation was carried out in respect of Mr McAteer, and that any such claim would now be out of time.

11 In his response to that application, the Claimant stated that whilst the majority of the conduct relates to matters in recent years some of the conduct complained of relates to historic matters "(mentioned to evidence a pattern of behaviour or course of conduct)" which predates the incorporation of the company on 9 February 2012.

12 There was an application for amendment of the ET1 to substitute Beltrami & Company Ltd for the current Respondent.

The application for reconsideration,

13 The Respondent seeks reconsideration of the judgment reached on 12 September 2017.

14 The first question is whether in law what happened on 12 September 2017 constitutes a judgment. The case of **Trustees of the William Jones's Schools Foundation** v **Parry** is currently to be heard by the England and Wales Court of Appeal on 21 or 22 February 2018. The obiter reasoning of the EAT is set out in the UKEAT judgment at [2016] ICR 1140 at paragraphs 49 and following.

15 I do not consider that I am bound by that reasoning but even so it seems to me that what happened on 12 September 2017 was capable of determining the claim finally although it did not necessarily do so. A decision which determines that an error is a minor error, therefore, and goes on to determine that it is not in the interests of justice to reject the claim is, in my view a judgment for the purposes of rule 1(3). I have proceeded therefore on the basis that I have jurisdiction to consider whether to reconsider that decision as a judgment under the Tribunal Rules.

16 The Respondent says that it first became aware of this judgment on 19 December 2017 at the preliminary hearing. This was communicated in writing to it on 22 December 2017, and the application for reconsideration was made on 5 January 2017. Accordingly there does not appear to be any

problem for the Respondent arising from the time limit for making an application for reconsideration of the decision taken on 12 September 201 7.

17 The Respondent argues for reconsideration on the basis of written submissions, amplified orally. I do not set those out fully. I am grateful to Mr Smith for taking me through them.

18 It was not practicable for the judge who made the original decision to reconsider that decision, and I have been appointed to conduct any reconsideration that may be appropriate. Rule 70 requires me first to ask whether it is necessary in the interests of justice to reconsider the judgment.

19 If I conclude that it is not necessary in the interests of justice to reconsider, then that is the end of the question.

20 However if I decide that it is necessary in the interests of justice to reconsider I then have to decide whether the judgment should be confirmed, varied or revoked. If I revoke I may take the decision afresh.

21 The application was made under rule 71. I must therefore also consider the terms of rule 72. I do consider it arguable that the original decision might be varied or revoked. The matter has been listed for consideration at today's preliminary hearing and I consider that this was an appropriate listing.

22 In brief, in relation to these preliminary points, I consider that it is in the interests of justice to hear what the Respondent has to say by way of submissions on the decision that was taken, so I consider it in the interests of justice to reconsider the earlier decision. I have therefore proceeded to take the decision being reconsidered afresh.

Substance of the application for reconsideration

23 The Respondent's argument is essentially that the employment judge was wrong to categorise the deficiencies in the claim form as minor. Of course

this is not the test that an employment judge must apply (and there is nothing to suggest that this was the approach in fact adopted by the earlier judge on the file). It is worth remembering that what brings the Claim form to the attention of the judge is that the form appears to be

> "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."

24 Rule 12(2A) of the Tribunal's procedure rules provides that a judge is bound to reject the claim "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".

25 That states the correct test for me to apply. There are accordingly only a limited number of defects which are relevant to my consideration.

26 The Respondent complained about many "defects" in the ET1. For example the Respondent complained that the Claimant had given not his personal address but a work address. Mr Smith was not able to point to any basis for saying that the Claimant needs to give his "home address". There seems to be no warrant for such a gloss on the words of the rules. I should add that if I am wrong about that not being a relevant defect, I regard it as an utterly minor error. In those circumstances I would have concluded that this "error" was minor and that it was not in the interests of justice to reject the claim for that error.

27 Only the following potential defects appear to me to be relevant to the question I am being asked to reconsider:

(A) That the name of the Respondent was given as Gary McAteer (differing from the ECC which refers to Beltrami & Company Limited) and

(B) The address for the Respondent was given as "Beltrami & Co" together with an address.

28 As to (B), I do not regard this in reality as an error of address. The address given on the ECC and the address given on the Claim form is the same address. The only difference is that an organisation identified as Beltrami & Co is added at the start of the "address" boxes. It not added as a "care of address for Mr McAteer.

29 The error in (B) therefore can be described more aptly as being that the prospective Respondent is described as Beltrami & Company Limited on the ECC and appears as Beltrami & Co on the ET 1.

30 Thus the ET1 gives Beltrami & Co and names Mr McAteer as the Respondent.

31 Although it was submitted to me that it would be within judicial knowledge that Beltrami and Co and Beltrami and Company Limited are different legal personalities, this does not assist me in determining whether the error was a minor error. However the Respondent argues that on no proper interpretation of the law and facts could the error be regarded as minor.

32 I was referred by the Respondent to **Giny v SNA Transport Limited** UKEAT 0317/16/RN and to **Chard v Trowbridge Office Cleaning Limited** UKEAT 0254/16/DM. It was submitted that these two cases stood for different and incompatible approaches and that Giny was to be preferred to Chard. I do not agree that there is any substantial difference between the two approaches, but if I have to choose, it seems to me that the case of Chard (which considered Giny and referred to the overriding objective for its interpretation) is to be preferred.

33 I agree with Mr Smith that there are a series of questions that I need to ask when reconsidering the decision, I must ask:

(1) Was there an error in relation to the name of the Respondent on the claim form such that it is not the same as the name of the prospective Respondent on the early conciliation certificate to which the early conciliation number relates? Clearly there was.

(2) What was that error? The error was that the ECC identifies the prospective Respondent as Beltrami and Company Limited, whereas the claim form puts Mr McAteer in the box next to "Respondent" and then immediately afterwards (in the next both and purportedly as part of the address gives) "Beltrami & Co". The error in the name of the Respondent therefore is that there is no naming of Mr McAteer in the ECC, and there is a difference between Beltrami and Company limited (ECC) and Beltrami & Co (ET1).

(3) Was that error minor or not? Mr Smith urges me to have regard to Giny and Chard to interpret this concept.

(4) If the error in relation to the name of the Respondent on the claim form (such that it is not the same as the name of the prospective Respondent on the early conciliation certificate) is minor, is it in the interests of justice to accept the claim?

The guidance from the cases

34 Mr Smith took me to Giny, paragraph 21 of which sets out the Claimant's submissions in that case. The Claimant argued that the concept of minor error should be construed in the light of the purpose of the requirement to provide the name and address of the prospective Respondent, namely to ensure that ACAS can made contact with that person. The test suggested was whether even if the wrong information had been given it would still have been possible for ACAS to make contact with the employer expressed on the claim form. It was submitted that short shrift should be given to technical legal arguments.

35 The EAT decided that there was no error in the judge's approach to rejecting that claim. At paragraph 33, Soole J stated that even if it were legitimate to import the purposive interpretation test (i.e. could ACAS make contact?), it was capable of producing anomalous results. Soole J (see paragraph 35) in rejecting that purposive interpretation was not rejecting all purposive interpretations of the rule (something that could only have been achieved per incuriam rule 2). Rather he was pointing out that there might be some cases where, even if the ACAS purpose test proposed by the Claimant was not satisfied, a judge might reach the conclusion that the error was minor and that it was not in the interests of justice to reject the claim.

36 I note the type of example that Soole J uses to illustrate the point; however I also note that the EAT was explicitly not trying to put limits on the approach to be adopted. At paragraph 35 Soole J states that the question should be left to the Employment Judge using their good sense and experience, and that each case involves a judgment on its own facts (paragraph 38). Soole J rejected the idea that the difference between the name of a natural person and a legal person could never (as a matter of law) be a minor error within the meaning and context of rule 12(2A). Thus knowledge that there is a difference between one form of legal entity and another is not going to have the talismanic effect urged on me by Mr Smith. It is a factor to be taken into account and I do take account in this case of the fact that a solicitor has not apparently drawn a distinction between an incorporated entity and another form of non-natural person. However I am not prepared to promote it out of the ranks to be a highly significant factor.

37 Mr Smith also referred me to Chard. Chard refers to Giny (see paragraph 56). It agrees that the issue is one of fact and judgment for the tribunal (para 61). There is, in my opinion, no conflict between the two cases. Soole J was not proposing any limitation of words of the tribunal rules to be interpreted without regard to rule 2.

38 As Chard points out (paragraph 62) the overriding objective must be taken into account. In considering whether an error is minor I have to interpret rule

12(2A) in such a manner as to avoid unnecessary formality. This means (as Chard points out at paragraph 63) avoiding elevating form over substance in procedural matters. I note that Chard (paragraph 68) encourages me to consider as minor errors ones which are likely to be such that it will not be in the interests of justice to reject the claim on the strength of them. However I take the view that I should apply the wording of the rule as it stands. That is consistent with the approach in Chard. I evaluate whether the error as to name is minor and then evaluate whether it is in the interests of justice that the claim be rejected.

Discussion and conclusions

39 Applying my common sense to what happened in this case and asking whether it is unnecessarily formalistic to regard the error as more than minor or trivial, I conclude without any doubt that the decision made by the previous judge was correct and I confirm it. Engaging in that same decision making process I reach the same conclusion: there was a minor error and it is not in the interests of justice to reject the claim form.

40 The Claim form intended to bring a claim against the employer. It refers to the actions of the employer throughout. Instead of putting in a number or name as part of an address, the Claimant put Beltrami & Co into the box (under 2.2 on the Claim form) which is the start of the details of the address.

41 There was an error in relation to the identity of the Respondent. However it is minor because

(1) Beltrami & Co was given on the Claimant form; this could only be the organisation against whom the claim was being made. It was not a c/o address.

(2) The slight difference between Beltrami and Co and Beltrami and Company Limited, is not significant but is trivial in this context.

(3) Is it in the interests of justice to reject the claim? No it would not. It would be an utterly formalistic approach to the requirements of the rules to consider it in the interests of justice to reject this claim. I do not consider that the potential for ambiguity created by the fact that it is possible to bring a free standing claim against an individual under the Equality Act 2010 makes any difference to this point. What I have to look at is the error as to name in the context of the claim form. The claim form clearly refers to the claim being against the employer and the error appears to me to have been a purely formal one in the following sense. If the Claimant had put the words "Beltrami & Co" in the same box as the one which bears Mr McAteers's name there could be no ambiguity at all that the claim was brought against him and the organisation.

42 Mr Smith sought to pray in aid what he said were many other significant errors in the ET1. Mr Dar concedes that he made an error by ticking a box saying that the case concerned redundancy, and he makes the point that he put "Beltrami & Co" in the wrong place. However I take the view that the other "errors" or "defects" alleged by Mr Smith are irrelevant to the consideration now in hand, however relevant they may be for other purposes.

43 Mr Smith argued that the claim form was one which could not be sensibly responded to. The Claim form like many claim forms, lacked specificity. There was an attempt to include a lengthy grievance document as part of the claim form. The claim form explicitly mentions the fact that the Claimant had attempted to attach it. However in any event the Claims were intelligible without the inclusion of that document, albeit they required a great deal more specification. I take the view that in the circumstances of this case the claim could be sensibly responded to, given that the Claimant clearly intended to rely on the contents of the grievance and all the Respondent needed to do to respond was to refer to its position on that grievance and that matters raised in it.

44 I consider that the lack of specification in the original claim form does not mean that it could not be sensibly responded to. Whilst I was prepared to consider this submission it does not seem to me to have merit.

45 I therefore confirm the original decision having carried out the reconsideration for the above reasons.

The Claimants application for amendment of the Claim form

46 Mr Dar applies for an amendment of the Claim form. He now no longer seeks to pursue his claim both against Mr Mcateer and Beltrami & Co (or as he intended, Beltrami and company limited). He now seeks to substitute Beltrami and Company Limited (as set out on the ECC) for Mr McAteer (and to clarify Beltrami and Co in fact means Beltrami and Company Limited).

47 The test I must apply is that set out in **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** at page 657. The amendment application was made within the relevant limitation period for unfair dismissal claims, and subject to the just and equitable extension applicable to Equality Act 2010 claims. As limitation may be an issue in respect of some of the claims against Beltrami and Co Limited, I do not here make a final determination that those claims, as amended or otherwise, have been presented within the relevant period of time. It is open to the Respondent to argue that they were not presented timeously if so advised. As now set out (including the Scott Schedule voluntary specification or further information) they are capable of forming an allegation of a continuing state of affairs for the limitation period under the Equality Act 2010.

48 The question I have to answer is whether the proposed substitution corrects a genuine error which was not one that was likely to cause reasonable doubt as to the identity of the person against whom a claim is being made.

49 The error was a genuine mistake in my view for the identity of the correct employer was on the form (subject to the minor error already noted). The

wording of the form clearly shows that the Claimant intended to claim against his employer (see the box setting out the Claimant's factual claims) for the employer's actions and omissions. The Claim appears to name two possible entities: Mr McAteer and Beltrami & Co (the latter being a minor error for Beltrami and Company Limited).

50 In those circumstances I do not think that any doubts about who the claim was against would have been reasonable. I remind myself that Cocking was determined before the amendment rule needed to be construed in accordance with the overriding objective. The overriding objective does not change the law, but makes clearer that the question needs to be determined so as to give effect to the need to deal with cases justly and without unnecessary formality in respect of the procedural aspects of a case. I accept that under the Equality Act 2010 it is possible to have claims against an individual. However even on the unamended form it seems to me clear that the Claimant intended to claim against the organisation in addition to Mr McAteer.

51 In relation to substitution Mr Smith argued at paragraph 59 of his written argument that there was some significance in the fact that on 14 December 2017 the Claimant had, in opposing the reconsideration application by the Respondent written that some conduct related to historic matters. Mr Smith urged on me the idea that the Claimant was suggestion that there might be liability against a third legal entity.

52 I reject that submission. Even on its own face the Claimant's written response makes the point that the "historic matters" [are] "(mentioned to evidence a pattern of behaviour or course of conduct)". That is a very long way from asserting any claim against a third Respondent.

53 The Respondent then complains that the Claimant has said that Mr McAteer was named in error, on 19 December 2017 and today. I do not regard that as a "volte face" albeit it is a change of position.

54 The Claimant did want to pursue both Mr McAteer and Beltrami and Company Limited. Now he only wants to pursue Beltrami and Company Limited.

55 I have considered the other factors which Mr Smith urged on me. He referred me to **Heald Nickinson v Summer** EAT 1504/00. With Mr Smith's assistance the principle being advanced in that case appears to me to amount to this: I should look to see whether there had been a genuine mistake in the sense of asking whether the Claimant made a conscious decision not to proceed against the organisational employer Beltrami and Company Limited, as the Claimants **in Heald Nickinson** had done.

56 The Respondent submits that the Claimant was not in a quandary as to who to pursue. I agree. He made a mistake on the form. The Respondent makes a number of factual assertions about the Claimant's state of mind, asserting that the Claimant must have known the identity of his employer. However these assertions miss the point. Even assuming that they are right, it does not follow that an error by the Claimant was not a genuine error. Attributing all of the professional acumen the Respondent attributes to the Claimant in order to make this point one has to ask whether it is more likely that the Claimant erred in putting the name of the organisational employer into the correct box (whilst using the generic term "my employer" in the parts of the form describing what happened), or whether (for reasons noone appears to want to speculate upon) he deliberately chose not to proceed against the organisation against whom he had obtained an ECC. I conclude that it is far more likely that the Claimant made a genuine error due to the way in which he filled out the online form. For that reason I reject the idea that this was not a genuine error.

57 I have had regard to all of the circumstances of the case relating to this application. The Respondent has engaged in work which it would not otherwise have done in order to raise its objection to the amendment. The Respondent did not indicate any level of wasted expenditure in this process, but I accept there may be some, and that time has been taken in resisting

the Claimant's application. However that appears to me to be outweighed by the fact that the amendment substitutes the organisational employer for Mr McAteer. The latter no longer has to face any liability as an individual. The amendment corrects a minor error on the form. The amendment furthers the overriding objective.

58 Previously Respondent was inserted at the wrong place on the form, and the minor error dealt with above existed on the form.

59 I am therefore prepared to grant the amendment to substitute the words "Beltrami and Company Limited" for the words "Mr McAteer" on the claim form.

Other matters: the Scott Schedule

60 Mr Smith spent some time addressing me in writing on the Scott Schedule. I have sympathy for at least some of the Respondent's position on this. I have not gone through it in detail. It plainly provides some specification of the existing claims. Mr Smith did not attempt to argue otherwise. However it is clear that the document contains other material which has not yet been pled under any cause of action on the Claim form.

61 In the course of oral argument the Respondent relied on and took me to **Chandok** v **Tirkey** for the proposition, among others, that the starting point and end point, should be what is pled. The pleading sets out the essential case. It is not a starting point for a case which seems to suit the Claimant at any particular time. Of course that is right.

62 If the Claimant decides to apply to amend his pleadings to reflect those parts of his extensive and at times vague Scott Schedule which are not simply voluntary specification of his existing claims, this may become more relevant. Whilst I am not assisted by those principles in relation to the narrow question before on amendment of the parties, I see the force of the Respondent's point in relation to the state of the Claimant's current pleadings.

63 The Respondent should indicate to which parts of the schedule it objects (as introducing new causes of action) and for which it argues an amendment will be needed. A practical approach should be adopted to this question by both parties in accordance with their mutual duty to further the overriding objective of the tribunal. They should not adopt the approach they might adopt if this case was being brought under the civil courts* rules in this jurisdiction. They should co-operate to achieve the overriding objective.

64 If a matter needs further specification, that should be sought. It should not become a pretext for taking a technical and sterile points or bogging the litigation down in satellite applications.

65 If, on the other hand, there is nothing in the original pleading to which the part if the schedule can relate this will plainly need an amendment application. If none is made and granted, the tribunal will not be able to make a finding of liability concerning that matter. It is up to the Claimant to make any such application and it would assist the tribunal if the parties would co-operate to identify the points in the Scott schedule which are subject to that dispute between them.

66 I therefore order:

a. That the decision of 14 September 2017 to accept the Claim form because it contains a minor error as to the Respondent's name (as compared to the name on the ECC) is reconsidered and confirmed.

b. That the Claimant's application to substitute Beltrami and Company Limited for Mr McAteer is granted without prejudice to any limitation defence the Respondent wishes to deploy;

c. That Beltrami and Company limited be served with the relevant papers and have the usual period to submit an ET3 if so advised.

d. Once the period for Beltrami and Company Limited present its ET3 has passed the tribunal list the case for a preliminary hearing to

discuss case management, including any applications for amendments, strike out and or deposit orders arising from the contents of the Scott Schedule from the Claimant. The parties should indicate within the period for the presentation of the ET3 the listing that they consider is needed for any such preliminary hearing.

Employment Judge: Declan O'Dempsey
Date of Judgment: 22 February 2018
Entered in register: 26 February 2018
and copied to parties