EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Akhigbe **v** **St Edward Homes Limited**

Heard at: Watford Employment Tribunal **On**: 21 January 2022

Before: Employment Judge George

Appearances

For the Claimant: In person
For the Respondent: No attendance, not served with the proceedings.

RECONSIDERATION APPLICATION JUDGMENT

1. The claimant's application for a postponement of the reconsideration hearing is refused.

2. The claimant's application for reconsideration of the rejection of his claim by Employment Judge R Lewis is refused.

REASONS

1. The claimant presented this claim on 23 February 2021. Within the body of the claim form he stated that he had an early conciliation certificate with certificate number R292823/18/86. On request by the tribunal, he provided a copy of this certificate which shows that Day A, the date on which he contacted ACAS, was 26 July 2018 and Day B, the date on which the certificate was issued was 26 August 2018.

2. This is fifth of six claims that the claimant has presented against companies in the St Edward Homes Group of companies. Although the initial decision to reject the claim was made by Employment Judge Lewis, the reconsideration application was allocated to me by the Regional Employment Judge. There are outstanding issues in two of the claims involving this respondent which are

waiting to be listed for a hearing (Case No: 2303263/2018 and Case No: 3306927/2018). Since I determined a number of applications in those claims and am therefore aware of the detail of the lengthy and relatively involved procedural history it was convenient that I should deal with all of the cases in relation to which there appear to be common legal and factual issues.

3. The difficulties that the claimant has experienced in the past in attending and remaining in attendance to the conclusion of tribunal hearings is documented in the records of those earlier hearings. In summary, for reasons which were not at the time explained by medical evidence, the claimant has experienced collapses and episodes of extreme anxiety at the tribunal which have led to some hearings being adjourned, or ineffective, or achieving less than full consideration of the issues.

4. At midnight on 21 January 2022 the claimant applied for a postponement of the hearing due to start at 10am that morning. As was his right, since it related to a claim that has not been accepted and not serve on the respondent, he did not copy that application or the medical evidence enclosed with it to the respondent. I have read it in full and take it into account in full. I do not refer to all of the details in it because of the personal nature of it but that does not mean that I have not taken it into account.

5. In summary, the claimant's consultant psychiatrist describes him as suffering from Mixed Anxiety Depression and Complex PTSD. He has been referred for EDMR and prescribed medication following a consultation on 12 January 2022. However, through some delay, the claimant explained that the prescription had not made it to his General Practitioner and, I presume, he had not yet started the medication. He described attempting to obtain paid representation and had apparently been quoted £3,000 plus VAT to attend the reconsideration hearing. Although he did not say so in so many words, I understood his application to be for the reconsideration hearing to be postponed until the course of medication and/or therapy had had sufficient effect upon him that he was able to attend tribunal without the degree of anxiety which has caused the collapses/episodes which have meant that some hearings have been unable to proceed.

6. He attached a skeleton argument relating to the reconsideration application, presumably as security against the prospect that the application would be unsuccessful. However, he pointed out in his application for a postponement that written submissions have been described by the higher courts as very much second best. He cites in particular the dicta of Lord Bingham in Smith v Parole Board [2005] UK HL1 approving an earlier decision to the effect that the lack of oral submissions deprives the litigant of the opportunity to mould their argument to the issues which appear to be important to the decision maker.

7. The claimant attended the hearing in person. I asked him if he was able to tell me when he thought he was likely to start on the medication and for how long the postponement was anticipated to be needed. He told me he thought he would probably be able to see his GP on Monday (in other words, 24 January

2022) but he became anxious and visibly uncomfortable in the hearing. He said that he needed to walk rather than to sit down. When it became apparent that continuing the hearing was only going to continue the anxiety of the claimant and that even those few questions relevant to his postponement application appeared to increase his agitation, I stopped the live hearing and told the claimant that I would send my decision on his postponement application and, if that was not successful, my decision on his reconsideration application in writing. So, in effect the hearing was suspended before a decision was made on his postponement application. The claimant was given time to compose himself in the tribunal room with the clerk in attendance should he need to call for any medical attention and later was able to leave the tribunal building.

8. The consultant psychiatrist's report describes recurrent episodes of symptoms since 2017 related to anxiety and flashback related to childhood trauma. Without going into more detail than is necessary for these reasons, that childhood trauma is something that he has described in the past to this tribunal. However, the medical report states that a trigger of the onset of the claimant's symptoms in 2017 was a court appearance related to his son. The consultant also describes "fear of being wrongly accused because of non-disclosure of full facts and being unfairly blamed has been an issue for" the claimant. This provides some support for his position that attending court brings up the fear and the flashbacks and anxiety associated with the trauma. This letter provides a degree of explanation for the difficulties the claimant has experienced in continuing with hearings to their conclusion as has happened at some of the hearings I have conducted and on at least two occasions documented by employment judges in Watford and Reading Employment Tribunals.

9. I accept that at the hearing on 21 January 2022 the claimant became unwell and was not well enough to continue. Given that the medical evidence to which I have referred provides a degree of explanation for that, it would be a very rare case in which I would think it nonetheless just and equitable not to postpone the hearing. However, for reasons which I will explain this appears to be a plain and obvious case in which the claim form was rightly rejected but, in my opinion, not for the reasons given by Employment Judge R Lewis.

10. My view is that the claimant did not comply with the requirements for early conciliation and I have concluded that the claim form in this case should have been rejected under Employment Tribunals Rules of Procedure 2013 Rule 12(1)(b), because it was an abuse of process to present a claim without complying with the early conciliation requirements. The claimant himself, as I explain below, appears to believe that these proceedings were instituted in reliance upon an early conciliation certificate which does not relate to the subject matter of the claim. There are a multiplicity of claims before this Tribunal and if it is plain and obvious that a particular claim should not take up scarce Tribunal resources that a relisted reconsideration application would involve, then it is in accordance with the overriding objective of saving cost and Tribunal resources that there should not be a postponement.

11. I am aware that essentially identical allegations as those in the present case have been made the subject of a different claim which was accepted by the London South Employment Tribunal and has been transferred to Watford. The respondent to that claim (which is the same as the respondent to the present) has entered a response and applied for it to be struck out. No hearing has yet been listed. That second claim includes a different early conciliation certificate number dating from 2021 and therefore that claim does not stand to be rejected for failure to comply with early conciliation. To all intents and purposes the case before me at this reconsideration application (Case No: 3301405/2021) is a duplicate claim. There therefore seems to me that there is no prejudice to the claimant in all of these circumstances in me continuing with this hearing despite the fact that he was too unwell to remain at it.

12. As to the merits of the reconsideration application I start by giving some details of the complaint. The claimant was employed by the respondent (at least according to page 4 of the claim form, and subject to disputes about the identity of his employer which are documented elsewhere) between 22 September 2014 and 13 February 2015. He has been involved in litigation with the respondent for a considerable period of time.

13. The present claim complains of post-employment detriment on the basis of protected disclosure. It appears to be the case that the claimant alleges that he made a protected disclosure to the respondent thorough an email dated 14 November 2020 to their legal representative. He appears to complain of two detriments. Firstly, that of drawing the email to the attention of the Judge in order to cause the judge to look unfavourably upon him (I should say that the judge in question was myself since I was seized of conduct of the application to strike out the claims then proceeding before the tribunal), and, secondly, asking the judge to award costs against the claimant because of that email. That costs application remains outstanding.

14. As I have already explained, the early conciliation certificate that was relied on by the claimant within the present proceedings was issued on 26 August 2018 – more than 2 years before the alleged disclosure of information relied upon. Within the body of the claim for the claimant says the following:

> "I don't believe that this claim is the same "matter" as the previous claim but I suspect that the respondent will try and argue it is the same hence I have issued this claim with the old ACAS number to protect my position".

15. When the claim was rejected by Judge R Lewis, he said that he had rejected it under rule 12(1)(b) as an abuse of process and, on 12 March 2021, said "If the claimant has issues about events in another case he must deal with them in that case, not in a new case."

16. The claimant's application for reconsideration dated 25 March 2021 argued that bringing a second claim which could have been part of an earlier one or which conflicts with an earlier one should not in itself be regarded as an abuse of

process in reliance on Bradford and Bingley Building Society v Seddon [1999] 1 WLR 14 82. However, he also pointed out the following:

> "The judge didn't check if he had jurisdiction in this case as I was using an old Acas number in a new unrelated matter. I believe the judge should have determined that first before going on to other issues".

17. The requirement to contact ACAS is set out in s.18A(1) of the Employment Tribunals Act 1996:

> "(1) Before any person ("the perspective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS the prescribed information in the prescribed manner about that matter."

18. The circumstances in which the Tribunal shall reject a claim form on presentation are set out in rules 10 and 12 of the Rules of Procedure 2013 which, so far as is material for the present case, provide:

10.— Rejection: form not used or failure to supply minimum information
(1) The Tribunal shall reject a claim if—
(a) …
(c) it does not contain one of the following—
(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.
(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.

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—
(a) ...
(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;
(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;
(d) …
(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 (a), (b), (c) or (d) of paragraph (1).

19. These rules have been considered in a number of cases and there are a number of principles derived from the EAT authorities. First, a claim which post-dates the date on which information was provided to ACAS under s.18A may still be permitted to proceed, provided that there is sufficient link between that claim and the dispute that led to the contact with ACAS. Such a claim may simply be included in an ET1 or added by amendment where the ET permits

the claimant to do so according to the usual principles: Compass Group UK & Ireland Limited v Morgan [2017] ICR 73.

20. In Morgan Mrs Justice Simler, as she then was, said at paragraph 20 and 23:

> "The question, accordingly, is: what is meant by "relating to any matter"? In our judgment, these are ordinary English words that have their ordinary meaning. Parliament has deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and the matter and by reference to the word "matter" itself. We do not consider it useful to provide synonyms for the words used by Parliament. Provided that there are or were matters between the parties whose names and addresses were notified in the prescribed manner and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of section 18A(1) . …
>
> Ultimately, we can see no reason artificially to restrict the scope of the phrase "relating to any matter". That does not mean that a certificate affords a prospective claimant a free pass to bring proceedings about any unrelated matter; it does not. In our judgment, it will be a question of fact and degree in every case where there is a challenge (and we hope and anticipate that there will be very few such challenges) to be determined by the good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided the requisite information to Acas."

21. Also relevant is the case of Akhigbe v St Edwards Homes Limited [2019] ICR D6 between these present parties. A claim for automatic unfair dismissal for the reason or principal reason that the claimant had made a protected disclosure was struck out on the basis that it had no reasonable prospect of success. The claimant then brought a second claim citing the same early conciliation number but adding a claim for race discrimination. The second claim was rejected on the basis that the claimant did not have a new early conciliation certificate in respect of the race discrimination claim which was based on the same factual allegations. The EAT held that that was the wrong basis to reject the claim but that it should have been rejected on the basis that the relationship to the first and second claims meant that the second claim was an abuse of process.

22. In paragraphs 49 to 51 Mr Justice Kerr gave a number of examples to illustrate the point, but accepted the guidance of Mrs Justice Simler that it would be a question of fact and degree for the tribunal to determine whether the proceedings instituted by an individual are proceedings "relating to" any matter in respect of which the individual has provided the requisite information to ACAS. The examples given include that of an individual who brings a discrimination claim followed later by a victimisation claim founded on the protected act of bringing the discrimination claim. This, Mr Justice Kerr thought, probably related to the same matter as the original discrimination claim. Another example was a disability discrimination claim relying on alleged detriments during employment and a further disability claim relying on dismissal for reasons connected with the disability. He said that cases falling

the other side of the line would be where the connection between the first and second claims is merely that the parties happen to be the same, such as a whistleblowing claim followed by a claim for unpaid wages where the withholding of wages was a separate issue. He said that, "In such a case there is merit in a further conciliation opportunity that may help settle the unpaid wages claim". It was of course the present respondents who were arguing in that appeal that there should be one claim, one certificate.

23. It therefore seems to me that I need to consider whether as a matter of fact and degree, applying my common sense, the matters which are the subject of the present claim can be said to be related to the matter that was the subject of conciliation between these parties in the summer of 2018. The present claim is founded upon an alleged protected disclosure in 2020 and alleged detriments also in 2020 which, on the face of it, appear to rely upon correspondence between parties to the litigation about the matters that were the subject of early conciliation in 2018. Apart from that litigation being the background to the alleged incidents, and the parties being the same, the matters which are the subject of the present claim do not relate in any way to the dispute between the parties in 2018 which was the subject of early conciliation at that date.

24. The claimant is fully aware of this because firstly, in the claim form he says that he does not believe that the claim is the same matter and, secondly, he drew attention to this matter in the reconsideration application. It seems to me to be absolutely clear that in the present case the claimant has presented a claim relying upon an early conciliation certificate which does not relate to the matter which is the subject of the claim. According to the EAT in Sterling v United Learning Trust, it is implicit in the provisions of rule 12 (1)(c) that the early conciliation certificate number included in the claim form should be the correct number. There may be questions about whether the tribunal has jurisdiction to consider complaints if they arise solely out of actions taken within the course of litigation or whether that is precluded by judicial immunity from suit. However, whether that is the case in relation to these complaints is not something which I need or do consider today.

25. So far as the information available on the face of the claim form is concerned the claimant has not conciliated in this matter. He has provided a conciliation certificate that does not relate to the matter that is the subject of the claim. The wording of rule 12(1)(c) is that the claim should be referred to an Employment Judge and shall be rejected under sub rule (2) if it 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. This claim form did include a valid early conciliation number but not one which related to this matter. I do not think that rule 12(1)(c) is applicable in this situation.

26. However, I consider it to be an abuse of process to commence proceedings without contacting ACAS. Section 18A(8) ETA says:

> "A Person who is subject to the requirement in sub section (1) may not present an application to institute relevant proceedings without a certificate under sub section (4)".

27. To all intents and purposes based on the certificate that he is relying on within these proceedings, the claimant presented a claim form despite that prohibition and that seems to me to be an abuse of process.

28. So, for those reasons I reject the application for reconsideration.

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Employment Judge George

Date: …18 February 2022 ……..

Sent to the parties on:

25 February 2022

For the Tribunal Office