EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100713/17 and others

Held in Glasgow on 7 August 2018

Employment Judge: Susan Walker (sitting alone)

Mr D Allen & 19 others	**Claimant** **Represented by:** **Mr Lawson - Solicitor**
Interserve Industrial Services Limited	**Respondent** **Represented by:** **Mr Murphie - Counsel**

DECISION OF THE EMPLOYMENT TRIBUNAL

The Tribunal orders that the decision issued by Judge Macleod on 6 March 2018 is varied under Rule 29 so that all the claims will be deemed to have been presented on 28 April 2017.

REASONS

Introduction

1. The procedural background leading to this hearing is complex and has led to an application by Mr Lawson which is the subject of this preliminary hearing. I will return later to the precise nature of that application.

2. The hearing was largely based on submissions and documents provided by the claimants' representative. However an issue of disputed fact arose and the hearing adjourned to arrange for evidence to be given by Daniel Thomson,

an employee of HMCTS. The hearing then resumed and Mr Thomson gave evidence by telephone.

-3. While the hearing was adjourned, I arranged for the parties to be provided with copies of two Employment Appeal Tribunal ("EAT") decisions **(Tyne and Wear Austic Society v Smith UKEAT/0652/04 and Yellow Pages Sales Limited v Davie UKEATS/0017/11).** As these decisions might be relevant to the issues to be determined, I wished to give the parties the opportunity to comment.

Procedure to date

4. The procedure to date has been unfortunately lengthy and complex.

5. Mr Lawson completed an ET1 claim form using the Employment Tribunals online system. Mr Allen's name and address were included in Box 1 of the ET1. As there were more than 6 claimants in total, Mr Lawson was required to fill in the additional claimants' details and upload these as a separate "csv" file.

6. There was no csv file showing on the system when the ET 1 was downloaded by the Tribunal administration in Glasgow although the pdf cover sheet to the ET1, generated by the system, showed the number of claimants as "20". The paper apart also referred to "claimants".

7. The claim was rejected by the administration on 2 May 2017 with the reason given that the information required by Rule 10 of the Employment Tribunal Rules of Procedure 2013 was not provided, specifically the name and address of each claimant. As there were no details given for a representative, the claim was returned to Mr Allen explaining that the claim had been rejected and explaining how to apply for reconsideration.

8. Mr Allen did not respond to that letter or apply for reconsideration.

9. There was no further correspondence until Mr Lawson contacted the T ribunal on 20 February 201 8. He noted that the claim did not appear to have been acknowledged and attached a copy of the ET1, the paper apart and the csv file that he said had been submitted. He also said that he had contacted the Tribunal on 2 May 2017 as he had not received an email acknowledgment and been told that the ET 1 had been received but there had been technical issues.

10. Mr Lawson was advised on 26 February 201 7 that the claim had been rejected under Rule 10.

11. On 27 February 2017, Mr Lawson applied for reconsideration under Rule 13(1)(a) on the ground that the decision to reject the claim was wrong. He also applied for the 14 day period to present such an application to be extended under Rule 5. He asked for a hearing to be granted in the event that his application was not successful.

12. Employment Judge Macleod granted the extension of time and considered the application. He concluded that the original decision to reject was correct, on the basis that the names and addresses were not attached to the ET 1, but that that had now been rectified. He said that *"the claim will be treated as presented as at 27 February 2018".* That decision was intimated to Mr Lawson on 6 March 2018. The claimant was not offered a hearing.

13. The claims were served on the respondent on 15 March 2018.

14. On 19 March 201 8, Mr Lawson wrote to the Tribunal and pointed out that his application had been made under Rule 13(1) (a) but that the claim had been accepted under Rule 13(1)(b) with the result that it was treated as having been presented outwith the primary limitation period. He again asserted that the csv file containing the names and addresses of the 19 other claimants had been uploaded at the time of presentation of the ET1 . He said that the number of 20 claimants on the front page of the pdf copy of the ET 1 had been generated by the online system. As it was not possible for an applicant to include this

number, he said there must have been a csv file. He also said that it was not possible to present a csv file unless the name and address fields had been completed. He said, *"If any information is missing from the csv file, an error prompt appears which prevents the applicant from progressing through the online application".* He asked that the Tribunal investigate how this had happened. He asked that his email be treated as an application under rule 70 for reconsideration of the decision of 6 March 2018.

15. The file was then referred to me for directions. On reviewing the file, it was clear that Mr Allen's details had been on the ET1 that had been presented and that his claim, at least, should not have been rejected. I directed that the decision to reject Mr Allen's file be revoked and his claim accepted as at 27 April 201 7. That decision was intimated to the parties on 12 April 2018. 1also directed that the administration carry out an investigation into the matters raised by Mr Lawson in his application of 19 March and that a preliminary hearing be listed to hear his application (in respect of the other 19 claimants.)

16. I further suggested that it would be possible to simply add the 19 claims to Mr Allen's claim under Rule 34 if the parties were in agreement and this would remove the need for that preliminary hearing. I understood parties had agreed to that and this was done and intimated by letter dated 15 May 2018.

17. A preliminary hearing was fixed to consider Mr Lawson's application and issues of timebar.

18. The Tribunal, having carried out an initial investigation, advised the parties that *"Mr Dan Thomson (IT/Digital Manager) stated in his reply that we never received a csv file with this claim (meaning we only received 1 ET1 with a paper apart), It would appear that the csv file was not uploaded correctly at the time of the ET1 submission on the 28 April 201 8."* Mr Lawson was asked to confirm whether he still insisted on his application for reconsideration.

19. Mr Lawson confirmed that he did insist on the application and he requested a witness order for Mr Thomson. He suggested that Mr Thomson have an

opportunity to comment on the matters raised by Mr Lawson in advance of the hearing.

20. This led to Mr Thomson interrogating the system at a deeper level and a further report being sent to the parties as follows:

"Following the request from the solicitor involved in this case, I've had technical resource looking at the data for this case. Please note; logs are only maintained for a period of 3 months.

In this case the database has a value of 19 in the additional claimants csv record count field. This field is only calculated when a user uploads a csv with additional claimants. No records are created in the database for these additional claimants (such as names, addresses) as the system relies of the csv to create the records upon submission. These values are used to calculate the number of claimants for the purpose of the ET 1 cover sheet and for the fee payable.

The claim was a protective award claim that was in the higher fees category at the time. The system, calculating the number of claimants (1 primary +19 additional) gets the predefined fee amounts correlated to the number of claimants- that being £1000.

It is reasonable to assume that a csv with 19 additional claimants was uploaded as part of this claim. What we cannot explain, unfortunately, is what happened to what csv from point of being uploaded to the ultimate point of submission of the claim. It is clear that the details contained within the csv and the csv did not make it through to the database to enable the additional claimant records to be created. The submission confirmation sent shows that the 'attachments included' section only contains the rtf file, and not the csv."

21. In light of the report and Mr Lawson's application for a witness order, a further preliminary hearing was convened before me by telephone on 2 August 2018 to clarify matters for the forthcoming hearing on 7 August. At that preliminary hearing, Mr Conley agreed that Mr Thomson's second report appeared to show that Mr Lawson had indeed uploaded the csv file. Parties agreed that Mr Thomson was not required to attend to give evidence. Mr Conley agreed to confirm in writing the basis of the respondent's opposition to Mr Lawson's application which he did. This led to Mr Lawson renewing his application for Mr Thomson to appear as a witness and for the hearing to be postponed. Both applications were refused.

22. At the start of the present hearing there was discussion as to which rule the application was properly made under. Rule 70 relates to reconsideration of "judgments". However, the definition of a "judgment" in Rule 1(3)(b) excludes decisions under Rule 13. It seemed to me that the application therefore could not properly be made under Rule 70. One possibility was that this was a fresh application under Rule 13 (albeit late) for reconsideration of the original decision to reject. However, Mr Lawson was clear that it was Judge Macleod's decision that he sought to vary. It was agreed that in terms of the Rules (and in particular Rule 1(3)(a)) Judge Macleod's decision was a "case management order" and that Mr Lawson's application was therefore one under Rule 29 to vary an existing case management order. Mr Murphie helpfully agreed that, although this was not exactly what was set out in the Notice of the preliminary hearing, the application could still be considered. Both parties were agreed that this was not an appropriate hearing to consider issues of timebar, if these remained outstanding. It is not disputed that if the claims were submitted on 28 April 2017 they were in time (taking account of time spent on early conciliation).

Findings in fact

23. I make the following relevant findings in fact:

(i) When submitting the ET1, Mr Lawson completed and uploaded a CSV file on 28 April 2017 which included the names and addresses of the 19 additional claimants.

(ii) If the name and address of a claimant is not completed on any required line of the csv file, the online system would not allow the claim to proceed and would prompt the user to correct the error.

(iii) The online system calculated a fee of £1000 which was paid. This fee is for 20 claimants and is based on the number of claimants whose details are in the ET1 (including any csv file). It is calculated by the system and not by the user. The front page of the pdf version of the ET1 automatically includes the number of claimants. In the present case it included the number 20. This number cannot be input by the person submitting the form.

(iv) The system them generated a page headed "Claim submitted" for the user to print off. This confirmed that the fee of £1000 had been paid.

(v) For a reason which cannot be explained, when the claim was accessed and printed off by the Glasgow Tribunal office, the details from the csv file were not in the database. Although the cover sheet generated by the online system referred to 20 claimants, only Mr Alien's details were present (as they were on the body of the ET1 itself).

Relevant law

24. The relevant Rules are contained in the Employment Tribunal Rules of Procedure contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

25. Rule 8 provides that a claim shall be started by presenting a completed claim form.

26. Rule 10 provides that the Tribunal shall reject a claim if it does not contain the required information (which includes each claimant's name and address).

27. Rule 13 provides that a claimant whose claim has been rejected may apply for reconsideration within 14 days of the date that the notice of rejection as sent. Tb*< may be on the basis that eith sr (a) the decision to reject was wrong or (b) the notified defect has been rectified. If the Judge decides that the original rejection was correct but that the defect has now been rectified, the claim shall be treated as presented on the date that the defect was rectified. (Rule 13(4)).

28. If the claimant does not reque t a h earing or an Employment J[1] dge decides that the claim shall be accept n full, the J Hermine the application without a hearing. Otherwise the applicati shall be considered at a hearing attended only by the claimant. (Rule 13(3)).

29. Rule 29 provides that the Tribunal ma* at ' orecordings, vary, rhe interests of justice and in particular whetu a party a ffected by the e* >rder did not have a reasonable opportunity to make represei. ns before it was made.

30. The EAT stressed in **Goldman Sachs Services Limited** v Mon **ali 2002 ICR** 1251 that tribunals should not vary or revoke case management orders in the absence of a material change of circumstances. This approach was confirmed in **Serco Ltd v Wells 2016 ICR 768,** a case brought under the 2013 Rules of Procedure.

31. In **Tyne and Wear Austic Society v Smith, UKEAT/0652/04,** the EAT confirmed that a claim is presented when it is received by the Tribunal. In that case, which related to an issue around online presentation, the EAT concluded that where the Employment Tribunal Service (as it then was) holds out the facility for making an online application as a means whereby it will receive communications, an application is presented when it is successfully submitted online to the Employment Tribunal website. They said, "Once

successful submission has been achieved the complaint will have been presented even if there are subsequent problems within the computer of the website host or within the computer of the tribunal office or in communications between the two".

Claimant's submissions

32. For the claimants, Mr Lawson submitted that it was now clear from Mr Thomson's evidence that the decision to reject under Rule 10 was wrong and that Judge Macleod's decision was predicated on the same error (that the claim did not contain the names and addresses of the claimants). The Tribunal was invited to revoke the decision of 6 March 2018 and to determine the original application under Rule 13(1) (a).

33. He further submitted that the decision to reconsider the decision to reject Mr Alien's claim was confirmed by letter of 12 April 2018 and has not been challenged. There can be no issue of time bar in relation to Mr Allen's claim and this will be litigated regardless.

34. Irrespective of the outcome of the application, having added the 19 claimants to Mr Allen's case under Rule 34, he submitted that the Tribunal has no power to do anything other than allow the claims to proceed. Delay and time bar may be relevant to the exercise of discretion under Rule 34 but having exercised that discretion no issue of limitation exists. If the respondent disagrees, the only course of action would be to seek reconsideration of the tribunal's decision or to appeal the decision to the EAT. It has done neither.

35. Having considered the case of **Tyne and Wear,** Mr Lawson relied on paragraphs 24 - 26 of the judgment and submitted that the claim in the present case had been presented on 28 April 201 7.

Respondent's submissions

36. Mr Murphie's principal submission was that the decisions that had been taken in this case were correct on the information that was available at the time. The ET1 did not contain the names and addresses of the claimants. There was no

basis for interfering with these decisions. What was required was a preliminary hearing on timebar.

37. There is a critical distinction between a claim being “sent" and “received”. No one doubts that the information was sent. The question is whether it was received by the Tribunal.

38. Mr Thomson’s evidence was that there was information that there were 19 additional claimants but whether their names and addresses were submitted will never be established.

39. Judge Macleod’s decision was correct and the presentation of the claims is therefore out of time. Nothing Mr Thomson says can change that.

40. Mr Murphie asked me to consider the case of **Sterling v United Learning Trust UKEAT/0439/14,** a decision of the EAT. In that case the Tribunal had inferred that the required information was not in the claim form. The EAT concluded it was entitled to do so and that having made that conclusion, the Tribunal was obliged to reject the claim under Rule 10 as it did not contain the required information.

Decision

41. Having heard from Mr Thomson, I am satisfied that, on the balance of probabilities, the names and addresses of the 19 additional claimants were entered into the online system by Mr Lawson on the 27 April 201 7 when he was submitting the claim. Mr Thomson’s evidence was clear that the system will prevent the submission of claim if the relevant fields (name and address) are not populated into the csv file and that the count of “20” would be taken from the csv file that had been uploaded.

42. What then happened is unexplained. However, it seems clear that there was some error in the online system. The online system is held out as a means by which claims may be properly be presented. Taking account of the guidance of the EAT in **Tyne and Wear,** I find that the claims in this case were

presented on 27 April 201 7 and that the required information in Rule 10 was included for all the claimants when presented.

43. This was not information that was not before Judge Macleod when he made his decision on 6 March 2018. On the contrary, Judge Macleod understood that the claimants had not uploaded a csv file. That fact was critical to his decision. I have no doubt that had Judge Macleod had the evidence I now have before me, he would have granted the claimants application under Rule 13(1)(a).

44. The availability of such significant new evidence, I consider to be a material change in circumstances in terms of the principles set out in **Goldman Sachs** so as to permit me to vary, suspend or set aside the decision of Judge Macleod under Rule 29 if it is in the interests of justice to do so.

45. I do have sympathy for the respondent who is facing a claim which relates to events in December 201 6 and which it had no notice it was facing until March 2018. It is also unfortunate that the claimants did not act sooner when the claim was rejected and that the representative's details were not included on the ET 1. Against that, however, is the fact that if Judge Macieod's decision stands, claimants who submitted their claims in time will be treated as having presented them late because of a computer malfunction. The claimants will be faced with seeking an extension of time on the basis of "reasonable practicability". That is a notoriously difficult extension to achieve. It seems unlikely they would be able to establish negligence by their solicitors.

46. Further, the respondents will have to defend Mr Allen's case in any event. I also note that the claimants were not allowed to make representations in respect of the reconsideration application at a hearing as required by Rule 13. Any breach of the Rules is properly a matter for the EAT. However, in terms of Rule 29, the fact that there was no hearing or other opportunity to make representations is a matter I consider I can properly take into account, and in this case there was no opportunity provided for Mr Lawson to give evidence himself or seek to obtain any report as has now been done.

47. On balance, I consider that it is in the interests of justice that Judge Macleod's decision is varied so that the claims are treated as having as presented on 27 April 2017.

48. That being so, it is not necessary to consider the effect of the order that has been made under Rule 34. Had I had to do so, I would have concluded that the effect of that order was that the claims were all treated as being in time. However, I would also have decided that that order under Rule 34 would have had to be revoked in the interests of justice. The respondent had made it clear that they were reserving issues of timebar. I accept that I misunderstood their position and that they had not intended to consent to the claims being treated as in time. Had I understood that to be their position, I would not have made the order under Rule 34.

49. The claims will now proceed to be considered at a hearing unless either party seeks a preliminary hearing for case management or the determination of any preliminary issues.

Employment Judge: S Walker
Date of Judgment: 10 August 2018
Entered in register: 15 August 2018
and copied to parties