EMPLOYMENT TRIBUNALS

Claimant: **Ms K Stiles**

Respondent: **Mitie Limited**

Heard at: **Bristol (By video)** **On:** **8 February 2022**

Before: **Employment Judge Midgley**

Representation
Claimant: In person
Respondent: Mr F Mortin, Counsel

JUDGMENT having been sent to the parties on 8 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

(RECONSIDERATION OF REJECTION OF CLAIM AND JURISDICTION: TIME LIMITS)

The Preliminary Hearing

1. The preliminary hearing was listed to determine whether the claimant's claims under the Employment Rights Act 1996 of constructive unfair dismissal, and discrimination of various forms under the Equality Act 2010 were presented within the statutory time limit and if not whether the Tribunal should exercise its discretion to permit them to be accepted within time. However, during the course of the hearing I reconsidered of my own motion the rejection of the claim by a Judgment dated 21 January 2021.

2. These reasons should be read in conjunction with the Case Management Summary produced in respect of the hearing.

The Procedural History

<u>The claim</u>

3. By a claim form presented on 13 November 2020, the claimant brought disability discrimination claims in respect of two conversations which occurred

in approximately May and June 2020, when she was on maternity leave, and had anxiety, depression and PTSD. Those conditions are admitted to be disabilities for the purpose of the claim. She alleged that she had raised a grievance about the comments, but the respondent failed to address it. She alleged that that failure was a further incident of discrimination. As a consequence, she says "due to being mistreated I felt like I could not work for Mitie anymore which is why I handed in my resignation". That was the final straw for her constructive unfair dismissal claim.

4. The claimant contacted ACAS to start the early conciliation process on 3 September 2020 and a certificate was issued on 18 September 2020. The last date of the claimant's employment for the purposes of these claims was 30 July 2020.

5. The identity of the respondent on the claim form was recorded as "Mitie" and its address was given at premises in Swindon in Wiltshire, which was the claimant's workplace. The identity of the respondent on the ACAS Early Conciliation Form was recorded as "MCES Limited, The Shard, Level 12, 32 London Bridge Street, London." MCES is an acronym for 'Mitie Cleaning and Environmental Services Limited.' The registered addresses of both Mitie and MCES are at the same address in the Shard as that recorded on the early conciliation form.

6. On 1 December 2020 in accordance with Rule 10, I reviewed the claim form and, noting the difference in the names for the respondent, directed that the claimant should clarify the correct title of the respondent. That direction was sent to the claimant on 7 December 2020. She replied on the same day by email, clarifying that the correct company name was 'Mitie Limited.'

7. On or about 30 December 2020 in accordance with Rule 12, the matter was referred to Employment Judge Christensen. The Judge rejected the claim; the reasons for her decision were recorded as follows:

> "…although you have given an early conciliation number in section 2 of the claim form, the name of the prospective respondent on the early conciliation certificate is not the same as the name of the respondent on the claim form."

8. The letter identified that the rejection was made under Rule 12 but did not identify the specific subsection which was involved.

9. On 27 January 2021, a Judgment rejecting the claim was emailed to the claimant.

10. On 4 February 2021, the claimant wrote seeking reconsideration of the decision to reject her claim under Rule 13. She attached a new early conciliation certificate for Mitie Limited and gave the number. In consequence, Employment Judge Cadney considered the application for reconsideration and accepted that the provision of the ACAS certificate rectified the error and therefore accepted the claim. The date of acceptance was deemed to be 4 February 2021.

11. The claim was served on the respondent, and on 6 May 2021 the respondent entered a response.

The Grounds of Response

12. The grounds of response reveal that the respondent accepted that on 20 May 2020 the claimant had submitted a grievance complaining about the conduct of Mr Barrington Castle who, she said, had made comments to the claimant during a telephone discussion. It is those comments that form the first allegation of disability discrimination.

13. The response further accepted that on 21 May the claimant's grievance was acknowledged by the respondent, and she was subsequently met with Christopher Walker to discuss it in more detail, and that the claimant alleged that Mr Walker made discriminatory comments to her during that meeting and consequently objected to him conducting the grievance investigation. Those comments formed the subject of the second alleged of discrimination. Miss Horn was therefore instructed to conduct the claimant's grievance.

14. The respondent accepts that by letter of 30 July, the claimant provided notice of her resignation with immediate effect, prior to an outcome for the grievance having been provided to her.

The Listing of the Preliminary Hearing

15. The case was listed for a case management hearing before Employment Judge Self on 30 September 2021. During the hearing, the Judge reviewed the history of the proceedings and observed (at paragraph 12 of his case management order) that "by rejecting the claim Employment Judge Christensen must have concluded that she considered it was in the interest of justice to reject the claim pursuant to Rule 12(3) of the Tribunal Rules". He therefore listed a further preliminary hearing to determine whether or not the claims were presented in time, given that the date of acceptance was deemed to be 4 February 2021, the date of rectification, which had the effect that her claims were potentially out of time.

Procedure and Hearing

16. I was provided with an agreed bundle of documents, and a skeleton argument setting out the respondent's application for the claims to be struck out on the basis that the Tribunal had no jurisdiction to hear them, alternatively seeking a deposit order on the grounds that the claimant had little reasonable prospect of establishing that the discrimination claims were linked so that the allegations in respect of the comments made in May and June 2020 were in time.

17. The claimant gave evidence by affirmation and answered questions from Mr Mortin and from me, explaining why she presented her claims when she did.

18. Following her evidence, I raised with Mr Mortin my concern that there was no basis for EJ Self's assumption that the EJ Christensen must have considered that it was in the interests of justice to reject the claim as there was no reasoning to support that conclusion, and that I had in mind to reconsider it of my own motion. I explained the basis of that concern (as detailed below) and referred Mr Mortin to the authorities cited below, and adjourned so that Mr Mortin could review them and take instructions as to whether the respondent consented to

a reconsideration of the Judgment or objected and invited me instead to consider the consequence of the potential error in the Judgment when determining whether it was reasonably feasible for the unfair dismissal claim to have been submitted in time, and whether it would be just and equitable to extend time to accept the discrimination claims.

19. After the adjournment Mr Mortin indicated he had considered the authorities and had instructions that the respondent's position was that I should not reconsider the Judgment.

The Law

20. I turn to the relevant rules and the applicable law. Rule 12 provides as follows:

> *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 -
>
> (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.
>
> (2) The claim or part of it shall be rejected of the Judge considers that the claim or part of it, is of a kind described in sub-paragraph (a) (b) (c) (d).
>
> (2A) 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-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim.

21. That wording reflected a change to the Employment Tribunal Rules that was brought about as a consequence of the Employment Tribunals Constitution and Rules of Procedure (Early Conciliation Exemptions and Rules of Procedure Amendment) Regulations 2020 which came into effect on 8 October 2020. The change in the rules was as a consequence of a series of observations that had been made by the Employment Appeal Tribunal and user groups in relation to the complex and technical nature of the rules relating to the Early Conciliation provisions that existed previously.

22. The prior wording of Rule 12 required that an Employment Judge should reject the claim unless they considered that the error was a minor error and it was not in the interests of justice to reject the claim. That rule had been reviewed three times by the Employment Appeal Tribunal as detailed below:

23. In Mist v Derby Community Health Services NHS Trust UKEAT/0170/15 the Trust argued that there was no valid EC certificate because the correct Community Hospital Trust had not been named, and no EC process had been commenced against the correctly name Trust. HHJ Eady QC held: in relation to the differences between the name of the hospital trust on the EC certificate

and that set out in the ET1, the tribunal had been entitled to treat the discrepancy as minor, and there was no strict requirement that the full legal title is given to ACAS before commencing EC when reaching that decision. Indeed, a trading name could be sufficient. The following observations HHJ Eady QC are worthy of note for their general application to the discretion now provided under rule 12:

23.1. At para [53] HHJ Eady QC cautioned against the risk of the EC procedure "*giving rise to the kind of technical legal arguments that beset the abandoned statutory discipline and grievance pre-action requirements under the Employment Act 2002.* …"

23.2. At [54] she noted that the requirement under the EC Rules to provide the name and address of the prospective respondent "… *is not for the precise or full legal title; it seems safe to assume (for example) that a trading name would be sufficient. The requirement is 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 (Early Conciliation Rules, rule 5(2)). I do not read it as setting any higher bar*."

(Original emphasis)

24. The second decision was Giny v SNA Transport Ltd UKEAT/0317/16/DM. In that case the ECC (completed by claimant) named the sole Director of respondent using the company's address. The claimant subsequently instructed solicitors who filed ET1 identifying the company as the respondent. The claim was rejected, as was an application for reconsideration, on the grounds that the difference in names was 'more than a minor error.' In its discussion of the issues, the EAT cited Mist (see paras [18-20]) and found that the decision to reject the claim was not perverse, whilst observing at [35] "…*Circumstances in which it would be in the interests of justice to reject a claim where a minor error has been made are not easy to envisage, but the second stage allows for that possibility."*

25. Lastly, in Chard v Trowbridge Office Cleaning Ltd UKEAT/0254/16/DM the claimant named the controlling shareholder of respondent on the ECC. The claimant instructed solicitors who filed ET1 in the name of the correct respondent, without spotting the error in ECC. The tribunal rejected the claim on the basis that there were "different names". The claimant's solicitors applied for reconsideration of that decision, identifying the individual named on the ECC as the controlling shareholder of the correct respondent (which was named in the ET1). It rejecting that application, the Tribunal held that error in the name wrong was not a minor error. The EAT reviewed Mist amongst others and concluded:

25.1. The Judge who initially rejected the claim had failed to apply the correct test because he failed to consider whether the error was a minor error and whether it would not be in the interest of justice to reject the claim; and therefore failed to provide sufficient reasons [48-50]

25.2. whether something is a minor error is a question of fact and judgment for the Tribunal Judge [61]

25.3. Citing Giny (above): an error in the identity of the respondent, naming an individual rather than company could not be said never to be a minor error [62] adding at [63]- [64]

The need is to avoid the injustice that can result from undue formality and rigidity (absence of flexibility) in the proceedings. In my judgment, the reference to avoiding formality and seeking flexibility does not just mean avoiding an intimidating formal atmosphere during hearings; it includes the need to avoid elevating form over substance in procedural matters, especially where parties are unrepresented.

to a non-lawyer, in a case such as this, the distinction [identity of company distinct from controlling shared holder] can be attenuated almost to vanishing point: the address is the same, so there is no problem contacting the respondent; and the person in control is the same, both of the previous dismissal and of any decision to conciliate or settle. It is true that in the present case the name of the company was not "Allister Belcher Limited", but it is difficult to see why, if it had been, that should make all the difference.

25.4. [68] "*I … read Rule 12(2A) as indicating that the "interests of justice" part of the Rule is a useful pointer to what sort of errors ought to be considered minor. To put the point another way*, *minor errors are ones that are likely to be such that it will not be in the interests of justice to reject the claim on the strength of them*."

25.5. The error here was 'clearly minor'… *An error will often be… minor if it causes no prejudice to the other side beyond the defeat of what would otherwise be a windfall limitation defence, in a case such as this where, subject to the error, the claim was issued in time and not out of time*. [72-74]

Discussion and conclusions

26. I turn then to the arguments in this case and what should be done. The respondent through Mr Mortin argues that it would not be appropriate for me to reconsider the Judgment of Employment Judge Christensen but rather invites me to consider the consequence of the Judgment when assessing whether it was reasonably feasible for the claimant to present her claims in time and/or whether it would be just and equitable to extend time if they were not.

27. I address the first issue: should the Judgment of 27 January 2021 be reconsidered? In my judgement it is in the interests of justice to do so. I bear in mind the observations in Chard (para 48 – 50) that if a Judge fails to reference the appropriate rule or test when rejecting a claim then, firstly, the Judgment fails to comply with requirement in Rule 62 to provide adequate reasons for a decision; and secondly, there is no evidence that the appropriate test has in fact been considered. That is the case here. It seems to me, therefore, that it is in the interests of justice that the Judgment of Employment Judge Christensen of 27 January 2021 should be reconsidered as it cannot sensibly stand as it is and there was no evidential basis for EJ Self to conclude that the Judge had considered the appropriate test.

28. Rule 72 requires that in so far as reasonably practicable the Judge who made the decision should conduct the reconsideration. Employment Judge Christensen was not available in the week of the hearing and in those circumstances, it was not reasonably practicable for her to reconsider the Judgment. It is appropriate for me to do so: the overriding objective requires that cases are conducted without undue delay; I am in a position to reconsider the Judgment and, if appropriate, conduct consequent case management. There would inevitably be considerable delay in relisting the matter before EJ Christensen as well as unnecessary duplication of work with the consequent waste of judicial resource. In my judgment it is in the interest of justice for me to reconsider the Judgment.

29. I then turn to consider Mr Mortin's arguments as to the appropriate outcome of that exercise. He argues that I should not overturn the decision of EJ Christensen to reject the claim on two grounds:

    29.1. First, the cases that I have referred to were decided before the change in the rules on 8 October 2020 and so are of no application. I reject that argument: it was those decisions that led to the change in the rules. The principles within them remain good law.

    29.2. Secondly, there is a distinction to be drawn between 'a minor error' as was stipulated in the original rules and 'an error' in the amended rules. I reject that argument: that is to seek to draw a distinction which creates no sensible difference. The purpose of removing the reference to 'minor' was to simplify the nature of the test so that *any* error in the name of the respondent is now sufficient to fall within Rule 12(f); and what needs to be considered is whether the effect of that error is that it is not in the interest of justice to permit the claim.

30. It seems to me that there is an overwhelming argument that it would be in the interests of justice for the Judgment to be varied or revoked. The Judgment does not demonstrate that the Judge considered whether the effect of the error in the respondent's name had the consequence that it would be not in the interest of justice for the claim to proceed. The Judgment therefore fails to comply with Rule 62. Accordingly, I revoke the Judgment and conduct the assessment under Rule 12(1)(f).

31. The relevant facts are as follows: the claimant is a litigant in person. The condition which she relies upon and which is accepted to be a disability is a mental health condition. She presented her claim having looked up the respondent's details. She was aware that MCES was the 'Mitie Cleaning and Environmental Services company.' She noted that that company operated from the same address as Mitie and thought therefore they were one and the same company. That is a common mistake made by litigants in person. The purpose of the rules is not to create unnecessary barriers for those who are not legally qualified but rather, as HHJ Eady made clear in Giny and Mist, to enable ACAS to have sufficient details to contact the respondent. I am satisfied that the difference in the names was an error on the claimant's part.

32. I then have to consider whether it would be not of the interest of justice to permit the claim to proceed and to accept it.

33. In my judgement it is clearly not in the interest of justice to reject the claim because there is no prejudice to the respondent in permitting the claim to proceed. The prejudice to the respondent in this case falls squarely into the category that was identified in Mist of the loss of a technical windfall to the respondent on a limitation point. It is the only prejudice to the respondent. The claim relates to two conversations that occurred in approximately May and June 2020 which were the subject of a grievance. The respondent pleads in its response that the grievances were investigated in or about the months in which they were raised. The respondent was aware therefore of the nature of the claims, and the identities of the individual who was making them and those who they were made against. There is and was no forensic prejudice to the respondent caused by the difference in names and their ability to respond to the allegations.

34. Even if I am wrong in the approach that I have taken, I would have reached the same conclusion concerning the unfair dismissal claim on the basis of the reasonable feasibility test, had I adopted the date of 4 February 2021 as the date of its presentation. It could not be said that it was reasonably feasible for the claimant to present a claim in time in circumstances where the Tribunal had rejected that claim on an erroneous basis in circumstances where it had not set out its reasons for doing so.

35. The consequence is that the claim is to be treated as presented on 13 November 2020 when it was first received by the Tribunal and should have been accepted. The primary time limit in respect of the constructive unfair dismissal claim expired on 29 October 2020. By virtue of s.207B(3) ERA 1996, the 16-day period between 3 and 18 September 2020 is not to be counted for limitation purposes. The extended limitation period therefore expired on 15 November 2020, and the claim was therefore presented in time. The tribunal therefore has jurisdiction to hear it.

Strike out / deposit application (jurisdiction) discrimination claims.

36. However, Mr Mortin argues that even if the discrimination claims are treated as being presented on 13 November 2020 the claims are on their face out of time. He argues that as the claims of discrimination relate to conversations in either April or May, the claim should have been presented in August 2020 and the claimant cannot avail herself of the extension of time through the early conciliation provisions because she initiated the early conciliation on 3 September 2020. He argues that the comments cannot be linked to the failure to provide a grievance outcome, the last applicable date of which was 30 July 2020 and I should therefore either strike out the discrimination claims or order a deposit in respect of them.

37. When assessing applications for strike out on the basis of limitation the authorities clearly identify two key factors: First, where there is a significant need for a finding of fact relevant to limitation, the proper forum for that assessment is the final hearing (see E v X, L, and Z UKEAT/0079/20/RN at [50] point 13 in which the approach that the Tribunal should take to those matters was helpfully articulated, and Lyfar v Brighton and Sussex University Hospital Trust [2006] EWCA Civ 1548). Secondly, if the tribunal is determining whether the claimant has little reasonable prospect of establishing the necessary link between pleaded events, so as to that the earlier events are

brought in time by the last event, in conducting the assessment the Tribunal must take as its start point the view that the claimant will establish the matters that are set out in the claim form, (otherwise known as 'taking the claim form at its highest.')

38. Here the claimant says that there were two conversations. The first led her to raise a grievance, the second occurred in the course of a meeting about that grievance. Finally, she argues that the respondent's failure to address the grievance in an outcome letter led her to resign. The nature of her claim is clear: these matters were all linked. This is clearly articulated in the claim form itself, but as identified in E v X, L and Z, applying Sridhar, it does not need to be.

39. Mr Mortin relies on the decision of the Court of Appeal in Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA, in which it was held that there should be some link between the events in order to establish that they form actions that extend over a period for the purpose of Section 123 of the Equality Act. In particular there needs to be a discriminatory practice, rule, scheme, or regime in place. He argues that there is no evidence or articulation of such a practice or rule in this case, even when it is taken at its highest, and therefore I should find that the claims are out of time.

40. The question of the extent to which acts are linked was considered in Azis v FDA [2010] EWCA Civ 304 where it was held that the main issue for the Tribunal is whether it is possible to identify some fact or feature linking a series of acts such that they may properly be regarded as amounting to a single continuing state of affairs rather than a series of unconnected or isolated acts. A single person being responsible for discriminatory acts may be a relevant factor but equally there can be a general underlying mind set (eg. Lyfar). The test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: Aziz; Sridhar.

41. Turning to the facts in this case the claimant says that negative discriminatory comments were made both by a line manager subsequently by an individual tasked to investigate those comments, and, lastly, the respondent failed to conclude the grievance in relation to them. It seems to me taking those matters at its highest that it could be said that that forms a state of affairs that is continuing, in the sense that she argues the respondent's failure to address her grievance or offer her redress demonstrates a discriminatory mindset in the grievance process, because the first grievance manager adopted a discriminatory mindset, and the second sought to bury events by failing to produce an outcome addressing those matters.

42. In those circumstances I cannot say that the claimant has no reasonable prospect or little reasonable prospect of establishing the link and therefore I reject the respondent's application for strike out or a deposit order on that basis. I cannot say that she has got no little prospect of establishing that the matters are linked such that the applicable time limit begins to run from the date of her resignation rather than the date of the conversations in question. Indeed, the test which I would have to apply in relation to the earlier complaints of discrimination is whether it would be just and equitable to extend time and the

fact that a claimant has issued a grievance and is awaiting the outcome is a factor that can be regarded as making it just and equitable. The authorities on that point are well known, but see in particular Robertson v The Post Office.

43. This leaves open to the respondent the opportunity to argue that same issue (whether any discriminatory acts which are proved are in fact linked) at the final hearing. Part of my reason for rejecting the respondent's application for a deposit order or for the claims to be struck out is that ultimately it is for the Tribunal that hears all the evidence to reach a decision on whether or not alleged acts of discrimination are linked.

Employment Judge Midgley
Date 11 March 2022

Reasons sent to parties: 23 March 2022

FOR THE TRIBUNAL OFFICE

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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