Case Number: 3327633/2019

THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Storey	**v**	(1) Leisure Employment Services Limited (2) Bourne Leisure Limited (3) Bourne Holidays Limited

Heard at: Norwich (by CVP) **On:** 11 May 2022

Before: Employment Judge M Warren

Appearances

For the Claimant: Mr D Frame, Solicitor.

For the Respondent: Miss R Thomas Counsel.

JUDGMENT ON AN APPLICATION FOR RECONSIDERATION

1. I refuse the application by the Claimant that I reconsider my Judgment of 14 January 2022 in respect of my decision to strike out the claims against the Second and Third Respondents.

2. I grant the application by the Claimant that I reconsider my Judgment of 14 January 2022 refusing the application of the Claimant to substitute the First Respondent for the Second and Third Respondent.

3. Upon taking the decision again in respect of the Claimant's application to substitute the First Respondent for the Second and Third Respondents, I grant the application.

4. Accordingly, the Claimant's claims of unfair dismissal and for breach of contract against the First Respondent will be heard on 10 to 12 August 2022.

REASONS

Background

1. This is an application by the Claimant for reconsideration of my Judgment at an open preliminary hearing given orally to the parties at the hearing on 14 January 2022, written reasons sent to the parties on 11 February 2022. The application was received by the tribunal by email on 19 January 2022.

2. The Reasons attached to my Judgment of 14 January set out the procedural history of the case. I will not repeat that here. The following points are important for today's purposes:

    2.1. In her ET1, Ms Storey stated that she was uncertain who her employer was.

    2.2. The Respondents stated in their Grounds of Resistance that her employer was the First Respondent.

    2.3. Because of the dates on the conciliation certificates, the claims of unfair dismissal and for breach of contract against the First Respondent were on the face of it, out of time. Such claims against the Second and Third Respondents were in time.

    2.4. On 26 September 2021, the parties were notified that the case was listed for an open preliminary hearing to determine, "whether it was reasonably practical to have issued in time".

    2.5. By an email with attached submissions dated 6 October 2021, Ms Storey applied for the name of the First Respondent to be substituted for the name of the Second or Third Respondent, (the application does not stipulate which).

    2.6. By email dated 21 December 2021, the parties were notified that the open preliminary hearing would also consider, "whether the tribunal has jurisdiction to hear the claim, namely who is the correct employer".

    2.7. At the outset of the open preliminary hearing before me on 14 January 2022, Mr Frame on behalf of Ms Storey, conceded that her employer was the First Respondent.

    2.8. At that hearing, I struck out the claims of unfair dismissal and for breach of contract against the First Respondent, finding that they were issued out of time and that it had been reasonably practicable for them to have been issued in time. I refused Mr Frame's application that in effect, having struck out the First Respondent, I should substitute the First Respondent as a Respondent for one of the Second and Third Respondents. I also struck out all claims against the Second and Third Respondents, on the grounds that

such claims had no reasonable prospects of success, given that neither were Ms Storey's employer.

2.9. After the hearing, Mr Frame conducted a search at Companies House and established that the First Respondent is a dormant company. By an email on 19 February 2022 Mr Frame applied for a reconsideration of the decisions that the First Respondent was the Claimant's employer, (there was no such decision, the Claimant conceded that it was) that the claim was out of time and that the claims against the Second and Third Respondents be struck out.

2.10. In my Judgment with Reasons, I dealt with the application. I decided that this was not a case where one could say that the application had no reasonable prospect of succeeding and that the application would therefore be heard. I expressed my provisional views in accordance with Rule 72 that the time point decision was correct but that the decision to strike out the claims against the Second and Third Respondents may not have been. I also expressed my reservations about my decision not to substitute the First Respondent, having re-read Drake International Systems Limited & Others v Blue Arrow Limited UKEAT/0282/15/DM.

Documents Before Me

3. In accordance with directions that I had given, I had before me today:

3.1. Witness Statement from Ms Storey;

3.2. Witness Statement from Mr Trott, (the Respondent' Head of People);

3.3. The Claimant's Skeleton Argument, (incorrectly entitled, "Claimant's Application for Costs");

3.4. The Respondent's Skeleton Argument;

3.5. A Bundle prepared by the Respondents, for which I am grateful;

3.6. Various authorities from both parties;

3.7. A screen shot of the government's website providing information on dormant companies, and

3.8. A letter from HMRC dated 1 March 2022 setting out the Claimant's sources of income tax for 2017 to 2020.

Evidence

4. I heard evidence from Ms Storey and Mr Trott.

The Issues

5. The issues before me today were:

5.1. Derived from Mr Frame's email of 19 February 2022: in light of the news that,the First Respondent was a dormant company, the Claimant withdrew her concession that it was her employer, (although Mr Frame did not actually say so) meaning that the Second or Third Respondent must have been. He submits that I should therefore reconsider and revoke my strike out of all claims against those respondents, as one of them was the employer and it could therefore no longer be said that the claims against them had no reasonable prospects of success.

5.2. If I do not do that, derived from my expressed concerns on the application of Drake, that I should reconsider and vary my decision to refuse the Claimant's application that having struck out the claim against the First Respondent for being out of time, I should substitute the First Respondent for the Second or Third Respondent and thereby allow the claims of unfair dismissal and for breach of contract to proceed against that company.

The Law on Reconsiderations

6. Rules 70 of the Employment Tribunal's Rules of Procedure 2013, make provision for the reconsideration of Tribunal Judgments as follows:

> *"**Principles***
>
> ***70***
>
> *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*

7. In exercising my discretion I must have regard to the Overriding Objective and must seek to balance the relative prejudice to the parties. Rule 2 sets out the Overriding Objective as follows:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

8. In Outasight VB Ltd v Brown UKEAT/0253/14 the EAT held the Rule 70 ground for reconsidering Judgments, (the interests of justice) did not represent a broadening of discretion from the provisions of Rule 34 contained in the replaced 2004 rules, (paragraphs 46 to 48). HHJ Eady QC, (as she then was) explained that the previous specified categories under the old rules were but examples of where it would be in the interests of justice to reconsider. The 2014 rules remove the unnecessary specified grounds, leaving only what was in truth always the fundamental consideration, the interests of justice. This means that decisions under the old rules remain pertinent under the new rules.

9. At paragraph 33 of Outasight, HHJ Eady QC said:

"The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interest of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation."

10. It is not the purpose of the reconsideration provisions to give an unsuccessful party an opportunity to reargue their case. If there has been a hearing at which both parties have been in attendance, where all material evidence had been available for consideration, where both parties have had their opportunity to present their evidence and their arguments before a decision was reached and at which no error of law was made, then the interests of justice are that there should be finality in litigation. An unsuccessful litigant in such circumstances, without something more, is not permitted to simply reargue his or her case, to have, "a second bite at the cherry", (see Phillips J in Flint v Eastern Electricity board [1975] IRLR 277).

11. Nor will it usually be in the interests of justice to reconsider a Judgment because a representative has made an error, see Lindsay v Ironsides Ray and Vials [1993} ICR 384, EAT.

12. Outasite reiterated that as to an application to introduce fresh evidence, the approach laid down in Ladd v Marshall [1954] 3 All ER 745 will usually encapsulate what is meant by, "the interests of justice". The interests of

justice might on occasion permit fresh evidence to be adduced where the requirements of Ladd v Marshall are not strictly met. Those requirements are:

12.1. The evidence could not with reasonable diligence have been obtained before the hearing;

12.2. The evidence is so important, it would probably have had an important influence on the result, and

12.3. The evidence is apparently credible.

Strike Out of Claims against Second and Third Respondents

13. They key here is the implications of the First Respondent's status at Companies House as a, "dormant company".

14. My instinctive reaction to that news was that the First Respondent could not therefore, be the employer. Should I allow the additional evidence and reconsider?

15. Employment Judge Prichard had the same instinct as I in the first instance Judgment Mr Frame referred me to, Parmenter v HQ Worldwide Ltd 3200393/2017: a remedy hearing at which the respondent was unrepresented and at which there appears to have been no legal or factual analysis of the respondent's dormant status.

16. From the information provided by Mr Frame, I can see that there is a distinction in the meaning attributed to dormant status in the context of Companies House and for tax purposes. The evidence before me is in relation to the First Respondent's status as dormant at Companies House, there is no evidence before me in relation to its status for tax purposes.

17. A company is dormant for Companies House's purposes, if it has, "no significant transactions". Mr Frame refers me to s386 of the Companies Act 2006 for a definition of what that means. In summary, s386 sets out the requirement for companies to keep accounting records of all of its payments and receipts, its assets and liabilities.

18. I accept the evidence of Mr Trott. The Respondents have an arrangement in place whereby the people who work for all of the Group's subsidiary companies enter into employment contracts with the First Respondent, but are paid by the individual subsidiary company for which they in fact work. No financial transaction between the subsidiary company and the First Respondent takes place in respect of that arrangement, which has been in place for many years. There is nothing before me to suggest that this is an illegal arrangement.

19. Who pays an individual's wages is evidence of the identify of the employer, but it is not conclusive. Ms Storey was paid variously over the years by Parkdean Resorts UK Ltd, Park Resorts Limited and Bourne Leisure Limited, (the Second Respondent). The payslips showed the employer as being the First Respondent.

20. Ms Storey entered into a contract of employment with the First Respondent. Whilst it may be, "dormant" for accounting purposes, it is a legal entity and capable of entering into a contract. Is the contract a sham? Does it represent the true intention of the parties? The documents are consistent: the contract of employment, the 48 – Hour Waiver and the payslips all refer to the First Respondent as being the employer, but they, (and other documents, such as the handbook) allude to her working for the Bourne Group. The contract with the First Respondent appears to be valid and binding and reflect the true intention of the parties.

21. It appears that my first instincts, (and of EJ Prichard, and of Mr Frame) are wrong; it is possible for a dormant company to employ people.

22. Where there is a dispute about the identity of the employer, it would be standard practice in my experience, to carry out a search against the name or names of the prospective respondents: to establish the correct name and the registered office for the purposes of service, to check that the company is not the subject of insolvency proceedings or application to remove from the register. Such a search would reveal whether or not a company was dormant. The evidence of the First Respondent's dormant status could with due diligence, have been obtained before the hearing in January.

23. Whilst at first blush the proposed new evidence would appear to potentially have had a significant impact of the result of the hearing on 14 January 2022, on further enquiry, I conclude that is not the case. Mr Frame was right to have conceded that the First Respondent was Ms Storey's employer.

24. For these reasons I do not consider it in the interests of justice that I should reconsider my decision that the unfair dismissal and breach of contract claims against the First Respondent should be struck out, having been made out of time, and I decline to do so.

Early Conciliation, Amendment and Substitution

25. Pursuant to Rules 29 and 34, as a matter of case management, a tribunal may add any person as a party to proceedings:

> *"if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings …"*

26. Deciding whether or not to substitute respondents is therefore a matter of judicial discretion. I referred to the balancing exercise, to Selkent and to the overriding objective, in my decision of 14 July 2022.

27. Pursuant to the Enterprise and Regulatory Reform Act 2013 and section 18A of the Employment Tribunals Act 1996, claimants are, (broadly speaking) required to enter into a conciliation process with the prospective respondent, under the auspices of ACAS, before issuing proceedings. Whilst such conciliation is underway, the clock stops running in terms of

the time limit within which claims must be issued.

28. The requirement to conciliate is in respect of a, "matter". That has a broad meaning which may include many different events and people, linked in some way, (Science Warehouse Ltd v Mills [2015]UKEAT/224/15).

29. In Drake International Systems Ltd & Others v Blue Arrow Ltd UKEAT/0282/15/DM there was a transfer of undertaking situation and the claimant company had been unable to identify which of a number of possible subsidiary company respondents, employees had been transferred from. Drake International, the parent company, was named as the respondent when the claim was issued, although the claimant specifically stated that there was difficulty in identifying the correct respondent and that it might need to apply to amend. In due course, the Employment Tribunal allowed an application to replace the parent company with a number of subsidiary companies, even though claims against those companies would have been out of time and the claimant had not engaged in early conciliation with them. The EAT upheld that decision; whether or not to allow an application to substitute respondents is a matter of discretion to be exercised judicially. The President at the time, Mr Justice Langstaff observed:

> "*The present case is typical of many, in which the precise identity of an employing subsidiary which is one amongst others in a group of companies may not be clear to its employees, and for whom it may be a matter which until making a claim, has assumed little significance in their life"*

As is this case.

30. On the point that the claim against the substituted respondents was out of time, Langstaff P said:

> *"… I do not see how, in principle, this differs from those cases in which it has been held, consistently, that the power under Rule 34 may be used to add a Respondent outside the limitation period…".*

31. My decision of 14 January 2022 was *ex tempore*. I was persuaded by Mr Liberadzi, counsel for the Respondent, that Drake should be distinguished on the basis that in this case, the claimant has issued proceedings against the proposed respondent, but has done so out of time. It is certainly an odd proposition: to strike out a claim on the grounds that it is out of time and then to reinstate it by bringing the respondent back in as a substitute.

32. Miss Thomas' submission on this aspect to the proposed reconsideration, is simply to observe, at paragraph 12 of her Skeleton Argument, that Drake is authority for the principle that there is no requirement for a further reference to ACAS for early conciliation.

33. Mr Frame submits that I should reconsider my decision, revoke it and substitute the First Respondent for the Second or Third Respondent.

34. I sought to exercise my discretion judicially, I applied the guidance of Mummery J in Selkent and the overriding objective. Having had the benefit of re-reading Drake, I fear I may have failed to take into account, or gave insufficient consideration to:

    34.1. Not being able to identify the correct respondent amongst a myriad of subsidiary companies is a common scenario. It is not in the interests of justice that employers should escape liability by adopting corporate structures that obscure the identity of the employer;

    34.2. There is a contrast between the decision to strike out as out of time a claim that is subject to the, "not reasonably practicable" test and the decision to bring in a respondent in circumstances where, if a fresh claim were issued, it would be out of time. Once a decision is made that it was reasonably practical to issue in time, there is no discretion. Amending or substituting however, even for a claim that would otherwise be out of time, entails the exercise of discretion, per Selkent and the overriding objective.

    34.3. It is not in the interests of justice to allow a respondent group of companies to engage in early conciliation but later benefit from not having drawn to the attention of the claimant that she has failed to correctly identify her employer in the referral to ACAS. There is no obligation on them to do so, but their not doing so seems to me a significant factor to bear in mind when exercising discretion.

    34.4. If Ms Storey had issued proceedings against the Second and Third Respondents only on 16 December 2019, without obtaining an early conciliation certificate in respect of the First Respondent and had later applied to add or substitute the First Respondent, applying Drake, that application would very likely have been granted.

35. For these reasons, whilst I acknowledge the need generally for finality in litigation, I am of the view that it is in the interests of justice to reconsider my decision of 14 January 2022 and I do so.

36. In considering again the application to substitute the First Respondent for the Second or Third Respondent, I have regard to the overring objective:

    36.1. The parties are on an equal footing.

    36.2. It might be regarded as disproportionate not to allow a case to proceed simply because a claimant had not named a potential respondent, one amongst many, when initially referring to early conciliation. It might be regarded as proportionate not to allow amendment in circumstances where one has found that it was reasonably practicable for the claim to have been issued in time. There are arguments both ways on the question of proportionality.

    36.3. Avoiding formality and allowing flexibility favours granting the application.

36.4. A decision one way or the other, ought not to entail any delay.

36.5. Allowing the application will entail a degree of further expense, in considering an additional head of claim – was the claimant dismissed for having made a protected disclosure? I do not think there would be any need to change the existing 3 day listing though.

37. In balancing the relative prejudice or hardship to either side, I considered:

37.1. Allowing the application will deprive the First Respondent of the benefit of a limitation period parliament saw fit to impose. On the other hand, a claim was issued in time, (taking into account the extension of time afforded by early conciliation).

37.2. The Claimant had the opportunity to issue her claim in time; it was reasonably practicable for her to have identified the First Respondent as her employer, name it in the reference to ACAS for early conciliation and thereby, to have issued in time. That ameliorates prejudice to her. This is a factor to be born in mind, an important one, but not determinative, when exercising my discretion.

37.3. On the other hand, the prejudice is greater to the Claimant for the fact that the Respondents' corporate structures and paperwork issued to employees obfuscates the identity of the employing entity.

37.4. The prejudice is also the greater to the Claimant because the Respondents did not draw to her attention that those named in the reference to ACAS for early conciliation, were not in fact the employer.

37.5. Although it seems counterintuitive to strike a claim out on one ground and then let it back in on another ground, if the application is not granted, the Claimant is prejudiced by her having sought a reference to early conciliation on receipt of a copy of her contract of employment, rather than having simply issued against the Second and Third Respondents in the first place and then later making the application to amend, which would likely have been granted.

37.6. Whilst as things stand, the Claimant would still have her sex discrimination claim extant against the First Respondent, which includes a claim that her dismissal was an act of direct sex discrimination, a claim that she was automatically unfairly dismissed for making a protected disclosure is quite a different point and she is prejudiced if she is not able to argue that aspect of her complaint. The reverse prejudice to the First Respondent if the application is granted is of course, equally true.

38. Weighing these matters in the balance, the conclusion I reach is that the greater prejudice is to the Claimant if I do not grant her application and that it is in the interests of justice to grant her application. To put it shortly,

it would in my judgment, be unjust, against the interests of justice, not to do so.

39. The claims against the Second and Third Respondents remain struck out, the First Respondent is substituted in their place, in respect of the claims of unfair dismissal and breach of contract.

Case Management

40. I will deal with the issues in the case and other case management issues, in a separate Summary.

Dated: 18 May 2022.

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Employment Judge M Warren

JUDGMENT SENT TO THE PARTIES ON

27/5/2022

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FOR THE TRIBUNAL OFFICE