Neutral Citation Number: [2022] EAT 89

Case No: EA-2019-000373-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 June 2022

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MRS E COTTRELL	**Appellant**
- and -	
AVON COSMETICS LTD	**Respondent**

- -
- -

The **Appellant** in person
Ms J Connolly (instructed by Eversheds Sutherland (International) LLP) for the **Respondent**

Hearing date: 31 May 2022

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JUDGMENT

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SUMMARY

PRACTICE AND PROCEDURE

The employment judge did not err in law in refusing the claimant's application for reconsideration of his decision to dismiss the claim against Avon because the claimant had failed to comply with ACAS early conciliation requirements.

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His Honour Judge James Tayler:

1. This is an appeal against the judgment of Employment Judge Foxwell, signed by the employment judge on 18 March 2019, and sent to the parties on 22 March 2019, refusing to reconsider his previous judgment, signed on 29 January 2019, and sent to the parties on 5 February 2019, after a hearing on 16 January 2019, in which the claim against Avon Cosmetics Ltd ("Avon") was dismissed because the claimant had failed to comply with the requirement for ACAS early conciliation.

2. I shall refer to the parties to this appeal as the claimant and Avon.

3. The documentation produced by the claimant can be hard to follow. It is largely made up of invective against Avon and the judges and administration of the employment tribunal and EAT, often in offensive and incoherent terms, in which she claims that there is a criminal conspiracy against her. It is important to keep a focus on what this appeal is about.

4. The claimant was employed by an agency, Echo Personnel Limited ("Echo"), between 8 and 16 January 2018, when she was dismissed. The claimant asserts that she was dismissed because she had made protected disclosures about the time allocated to clean offices and whether it was sufficient to permit her to clean to an acceptable standard. Avon contend that she was dismissed because she had been confrontational, argumentative and, at times, had refused to carry out the duties assigned to her.

5. On 26 March 2018, the claimant presented claims against Echo and Avon alleging breach of contract, unfair dismissal and/or that she had been subjected to detriments for making public interest disclosures. The claimant had obtained an ACAS early conciliation certificate ("EC certificate") in relation to Echo, but not Avon. On the claim form the claimant used the EC certificate number for Echo in the box in which she should have given an EC certificate number for Avon.

6. On 11 April 2018 the employment tribunal wrote to the claimant. The letter referred to "Mrs E Cottrell" as "Claimant" and "Echo Personnel Ltd & Others" as "Respondent". The letter was in a standard form and included the wording "Your claim has been accepted". It is unfortunate that this

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wording was used in this standard letter as it can cause confusion. There is, in fact, no concept of "acceptance" in the Employment Tribunal Rules 2013 ("ET Rules"). The letter means no more than that the claim has been received and has not, at that stage, been rejected for a failure to comply with a mandatory provision of the ET Rules. It does not mean that all jurisdictional issues have been decided in the claimant's favour.

7. It is not surprising that claimants sometimes assume that the standard letter means that the claim has been accepted in a jurisdictional sense and so believe that there cannot be any valid later challenge to the claim on jurisdictional grounds. The claimant's real point is that she feels the letter of 11 April 2018 meant that Echo and Avon were now lawful respondents to the claim and this could not be changed.

8. The claimant's submission in this appeal demonstrated a tendency to accept conspiracy theories and to assume the worst against those she disagrees with. To the claimant, the only possible explanation for a claim that had been "accepted" subsequently being rejected (as against Avon), is that there has been a criminal conspiracy and that correspondence has been forged. The claimant is wrong, but clearly feels very strongly about her perceived unfair treatment.

9. Avon asserted in their response that the claimant had failed to comply with the requirement for ACAS early conciliation in respect of the claim against them. Avon relied on s18A Employment Tribunals Act 1996 ("ETA") that provides:

> 18A Requirement to contact ACAS before instituting proceedings
>
> (1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7). …
>
> (2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.
>
> (3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

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> (4) If—
>
> (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or
> (b) the prescribed period expires without a settlement having been reached,
> the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant. …
>
> (8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
>
> (12) Employment tribunal procedure regulations may (in particular) make provision—
>
> (a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4);

10. At the relevant time, Rule 4 of the Early Conciliation Rules of Procedure that are a schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, provided:

> If there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form under rule 2 in respect of each respondent or, in the case of a telephone call made under rule 3, must name each prospective respondent.

11. A preliminary hearing for case management had been fixed for 16 January 2019. Because of the response submitted by Avon asserting a failure by the claimant to comply with ACAS early conciliation, Employment Judge King directed by a letter dated 16 June 2018, which was sent to the parties by post, that the hearing would be converted to a public hearing to consider the jurisdictional issues raised by Avon.

12. The preliminary hearing took place before Employment Judge Foxwell on 16 January 2019. The claimant said that she had not received the letter of 16 June 2018 (which she now asserts is a forgery). The employment judge considered whether he should hear the application despite this assertion:

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> 9. I had to consider whether it was appropriate to decide the issues identified in the letter of 16 June 2018 at this hearing when it is possible that the Claimant did not receive notice of them. I decided that it was appropriate to proceed with the first of these, namely the Tribunal's jurisdiction in respect of the claim against the Second Respondent. My reason was that this jurisdictional point had been raised in the Second Respondent's response, which the Claimant accepts she did receive, so she has been on notice that this is an issue which the Tribunal must deal with.

13. The claimant contended that the claim had already been accepted by the employment tribunal as against Avon. The employment judge stated:

> 5. The Claimant was notified by letter dated 11 April 2018 that the claims had been accepted by the Tribunal. Acceptance is an administrative step and does not confer jurisdiction on the Tribunal.

14. The employment judge concluded that the requirement for ACAS early conciliation in respect of Avon was mandatory, and that because it had not been complied with, the claim against Avon must be rejected and dismissed.

15. The employment judge considered whether the claimant should be treated as having made an application to amend the claim form to add Avon as a party, but rejected that possibility:

> 11.Mr Hardiman also referred me to Mist v Derby Community Health Services NHS Trust [2016] ICR 543. In that case the EAT held, firstly, that a prospective claimant needed only provide sufficient information to ACAS to enable it to make contact with a prospective respondent. The EAT also held that a claimant did not have to engage in early conciliation with a prospective respondent before applying to amend existing proceedings to join it as a party. Once again, I did not consider that the facts of Mist were similar to those of Mrs Cottrell's case. The evidence ACAS supplies to show that it has been given sufficient information to make contact with a prospective respondent is a certificate and none exists in respect of the Second Respondent here. Furthermore, this is not a case where the Claimant has applied to amend to join the Second Respondent as a party to existing proceedings. I considered that to deem the Claimant to have made such an application would be artificial and would undermine the purpose of Rule 4 and the scheme in section 18A of the Employment Tribunals Act 1996 (see below).

16. The judgment dismissing the claim against Avon ("the dismissal judgement") was sent to the parties on 5 February 2020. It is important to note that **the claimant has not appealed against the dismissal judgment**.

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17. On 13 February 2020, the claimant applied for reconsideration of the dismissal judgement ("the reconsideration application"). The reconsideration application asserted that the letter dated 16 June 2018 was a forgery, that the claim against Avon had been accepted by the employment tribunal's letter of 11 April 2018 so it was a "respondent" not a "prospective respondent" and alleged that Employment Judge Foxwell had acted improperly in rejecting the claim against Avon. There was a reference in the lengthy reconsideration application to Rule 34 ET Rules that provides for "addition of parties". The claimant asserted that this had happened "automatically" so that there was "automatic jurisdiction" to hear the claim against Avon. There was no express application to join Avon as a party.

18. The power to reconsider a judgment is provided by Rule 70 ET Rules:

> 70. Principles
>
> 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.

19. The scope of the rule was considered by HHJ Eady QC in **Outasight VB Ltd v Brown** UKEAT/0253/14/LA:

> 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 interests 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.

20. By a judgment signed by the employment judge on 18 March 2019, and sent to the parties on 22 March 2019, Employment Judge Foxwell dismissed the application ("the reconsideration judgment"). **This appeal is only against the reconsideration judgment**.

21. The claimant submitted her Notice of Appeal on 8 April 2019. It was not contended in the Notice of Appeal that the employment judge should have treated the reconsideration application as amounting to an application to join Avon to the proceedings.

22. The appeal was initially rejected under the sift process by Lord Summers. The claimant

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applied under rule 3(10) for the matter to be considered at a hearing. The hearing took place before HHJ Auerbach on 1 October 2020. HHJ Auerbach noted:

> The Tribunal was not arguably wrong to decide that there was no jurisdiction in respect of the original claim against Avon, and its decision on the reconsideration was not, in this respect, arguably wrong.

23. HHJ Auerbach permitted one ground to proceed to a full hearing by an order sealed on 15 October 2020. In the attached reasons he stated:

> I consider it arguable that the Tribunal erred in failing to consider whether Avon should be added as a Second Respondent (applying the guidance in Drake and other cases). This is given that the Claimant was a litigant in person, the Tribunal accepted that, at the PH, she had not (or may not have) received the June letter notifying her that this issue would be considered at that hearing, and given the fact that she arguably, in any event, raised the possibly of adding Avon by amendment, in terms, in her letter seeking a reconsideration.

24. I consider that HHJ Auerbach adopted a generous interpretation to the claimant's grounds of appeal, perhaps implicitly having permitted an amendment to allow the point raised in his reasons to be advanced. The truth is that Employment Judge Foxwell, HHJ Auerbach and myself have had considerable sympathy for the claimant and the confusion that was caused by her receiving a letter that stated that her claim had been "accepted". But sympathy does not mean that we can ignore the relevant legal provisions. While I appreciate that the claimant cannot see it, there has been a conspicuous effort to treat her fairly so far as is consistent with the law and there is simply no basis for the invective and bile that the claimant has directed at the judges with whom she disagrees and, in particular, the employment tribunal and EAT staff who have just been doing their jobs.

25. The hearing of this appeal was not easy. The hearing was listed for half a day to include time to give judgment. The claimant sought to insist on reading out her skeleton argument and adding a few comments, which would have taken more time than available for her submissions and, possibly the whole hearing. I required her to finish her submissions by 12pm and allowed her about 15 minutes in reply after the respondent's very brief submissions. I sought to persuade the claimant to focus on the ground that HHJ Auerbach had permitted to proceed. She refused to do so, and used the majority

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of time to repeat her conspiracy theories in an irrational and, at times, offensive manner. The actions of the claimant were such that it would have been legitimate to consider striking out the appeal, but I decided to ignore the irrelevant material, appreciating that the claimant appears to have a genuine belief that she has been subject to a miscarriage of justice.

26. Two thing were crystal clear (1) the claimant considers that the letter of 11 April 2018 accepting her claim meant that Avon became a respondent and so the employment judge erred in law in dismissing them from the proceedings; and (2) the claimant is adamant that she has not, and never would, apply to add Avon as a party to the claim accepted against Echo.

27. These two points necessarily meant that the appeal must fail. An appeal against the rejection of the claim against Avon should have been brought against the dismissal judgment. The reconsideration application did not raise any new matters that could result in the employment judge revoking the rejection of the claim against Avon. HHJ Auerbach did not allow the appeal to proceed on the basis that the employment judge should have decided on reconsideration that Avon was a valid respondent to the proceedings. The only ground that HHJ Auerbach permitted to proceed was that the employment judge should have considered joining Avon as a party. This has been held to be permissible in cases such as **Drake International v Blue Arrow** [2016] ICR 445 and **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543. However, that ground necessarily fails as the claimant is adamant that she has not, and would not under any circumstances, apply for Avon to be added as a party.

28. Furthermore, I consider that even if the claimant did wish to pursue that argument, it would have failed because Employment Judge Foxwell specifically considered that possibility in the dismissal judgement and rejected it. According, that argument would have been for an appeal against the dismissal judgement, rather than the reconsideration judgment. The appeal is dismissed.

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