



EMPLOYMENT TRIBUNALS

Claimant

Mr Derek Allen

Respondent

Ringway Infrastructure Services
Limited

v

Heard at: Bury St Edmunds

On: 8 April 2022

Before: Employment Judge Boyes (Sitting Alone)

Appearances

For the Claimant: Dr G. Allen, lay representative and brother of the Claimant

For the Respondent: Mr J. Wynne of counsel

JUDGMENT

The Claimant's claim made on 20 July 2021 is rejected under rules 12(1)(c) and 12(1)(d) of The Employment Tribunals Rules of Procedure (Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). This is because the claim form does not contain an Early Conciliation certificate number and is made on a claim form which contains confirmation that one of the Early Conciliation exemptions applies, whereas an Early Conciliation exemption does not apply.

The Tribunal therefore has no jurisdiction to determine the Claimant's unfair dismissal claim.

REASONS

1. The Claimant lodged a claim for unfair dismissal with the Tribunal on the 20 July 2021. An open preliminary hearing was listed to determine whether the Tribunal had jurisdiction to deal with the claim. The issue of jurisdiction arose in respect of whether or not the Claimant had complied with the Early Conciliation requirements.
2. Judgment and summary oral reasons were given at the hearing on the 8 April 2021. These full written reasons are now provided at the Claimant's request.

The Hearing

3. I indicated that it would be helpful to hear evidence from the Claimant. This was because it was not clear to me, on the basis of the documentary evidence before me, of the provenance of the first of the two reference numbers included on the claim form (R150862/21). It was necessary for me to make findings of fact in this respect to enable me to consider the proper application of rule 12 of The Employment Tribunals Rules of Procedure (Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) (“the ET Rules of Procedure”).
4. I asked the Claimant questions in order to establish his evidence. He was then cross examined by the Respondent.
5. The Respondent and Claimant made closing submissions. I gave Dr Allen some latitude in closing submissions during which he, in effect, gave evidence regarding his involvement in completion of the claim form. In providing him with that latitude, I had regard to the overriding objective, the interests of justice and the fact that Dr Allen is not legally qualified and so could not be expected to appreciate the, sometimes subtle, distinction between submissions and evidence.
6. I reserved my decision.

Findings of Fact

7. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party’s account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.
8. Mr Allen worked as a road operative for the Respondent. His employment began on 1 October 2015. He continued in that employment until 22 April 2021 when he was dismissed.
9. The Claimant initially instructed solicitors to advise him. They told him he had to wait for an ACAS form. However, instead of paying the solicitors to submit the claim, he subsequently decided to deal with the claim himself with the help of Dr Allen, his brother. ACAS were contacted on 28 June 2021 in connection with early conciliation. The Claimant explained in live evidence that he could not recall who first contacted ACAS in this respect.
10. The first Early Conciliation certificate (“the first certificate”) was subsequently issued on 29 June 2021. The reference number on that certificate is R150862/21/42 [24].
11. The Claimant was asked if he received the first ACAS certificate at some point after the 29 June 2021 and he replied that it was possible but he could not state that as a fact.
12. ACAS were again contacted on 19 July 2021. An acknowledgement was issued by ACAS on the same date [4]. The reference number R156857/21 is included in that acknowledgment.
13. On 20 July 2021, the Claimant completed the claim form, with the assistance of Dr Allen and lodged it with the Tribunal.

14. The Claimant was asked in cross examination whether he had the first Early Conciliation certificate before he submitted his claim. He replied that he was unaware of the certificate when the ET1 was sent in. He and his brother were debating which reference number to use. He believed that he obtained the reference R150862/21 in an email from the solicitors he had previously instructed. He gave both references (R150862/21 and R156857/21) to his brother as he was not sure which one was relevant. They put both reference numbers on the claim form to provide clarity because it was a muddle.
15. Section 2.3 of the form the box is ticked to say that the Claimant does not have an Early Conciliation certificate [9]. The form then goes on to ask why no certificate number is provided. The Claimant ticked the box to indicate that his employer had already been in touch with ACAS [9]. This was incorrect. Later in the form, at section 8.2, two ACAS reference numbers are given [14]. The reference included were R150862/21 and R156857/21.
16. Dr Allen explained at the hearing that he had not, at the point that the claim form was completed, had sight of the early conciliation certificates, so he did not have the certificate numbers. As he had not seen the certificates, he did not know what the numbers were. In terms of the reference number R150862/21, he could not recall how he had obtained it, but he thought he may have obtained it over the telephone from the Claimant.
17. Having heard evidence from the Claimant, supplemented by what was said by Dr Allen in closing submissions, it was clear that neither of them had the first certificate in their possession at the point when the claim form was completed and submitted to the Tribunal.
18. I am fortified in this view by what is said in the e mail of the 18 October 2021 from Dr Allen to the Respondent's solicitors and the Tribunal [43]. It includes the following,
"(By means of background I contacted ACAS on 19th July (reference R156857/21) being unaware that ACAS had already been approached on the matter via solicitors and ACAS had already issued their certificate (R150862/21) on 29th June 2021. A note was added to form RT1 [sic] to this effect providing both ACAS numbers)."
19. It is clear from what is said in that email that Dr Allen was not aware just prior to when the claim was lodged that ACAS had issued a certificate on the 29 June 2021.
20. On the evidence before me, I find as a fact that neither the Claimant nor Dr Allen looked at the first certificate or obtained the reference number from it at the point that the claim form was completed and lodged. I find as a fact that the reference numbers contained at section 8.2, of the claim form were ACAS reference numbers. They were not ACAS Early Conciliation certificate numbers. The reference numbers included on the form differ from the Early Conciliation certificate reference numbers because the final two digits are missing. In the case of the first certificate, '/42' is missing.
21. They cannot have been the Early Conciliation certificate numbers because, on the facts as I find them, neither Dr Allen nor the Claimant had had looked

at the first Early Conciliation certificate at the time when the claim form was submitted.

22. The Claimant stated that he did not know why the exemption box had been ticked at section 2.3. On 14 March 2022, Dr Allen wrote to the Tribunal by email to explain why an exemption had been claimed at section 2.3. He stated:
- “If the form is submitted online (as in this case) on page 5 of 11 the question is asked whether you have an ACAS Certificate.
If you answer YES, then the certificate number MUST be added to progress to page 6.
If you answer NO, then one of the four options MUST be selected to progress to page 6.
The only option available to me to progress the form to page 6 therefore was to select NO and choose the option most relevant.
The alternative to online submission is to complete the PDF form and send by post to the appropriate centre (details can be found online). Post was not an option in this case due to time constraints.”*
23. It was apparent from the evidence that I heard, and from the manner in which the form was completed, that there was confusion on the part of the Claimant and Dr Allen as to what exactly was required in so far as early conciliation was concerned. Those difficulties were compounded by the way in which the fields have to be completed on the electronic claim form. I do not consider that there was any dishonesty or attempt to mislead the Tribunal by either the Claimant or Dr Allen when completing the form in the manner that they did.
24. On the 21 July 2021, ACAS issued the second Early Conciliation certificate with the number R156857/21/19 (“the second certificate”) [22 & 25]. In the email enclosing the certificate it states *“Your certificate is number is R156857/21/19. If you make a Tribunal claim you must use this number in full. If you do not use the full number above, including the last two digits, your claim may be rejected by the tribunal.”*
25. On 6 September 2021, the Tribunal wrote to the Claimant asking for clarification regarding the answers given in the claim form about any Early Conciliation certificate. It was pointed out that the reference numbers provided were not complete ACAS Early Conciliation certificate numbers. The Tribunal requested a copy of the ACAS Early Conciliation certificate(s). On the same date, Dr Allen provided the Tribunal with both certificates.
26. The Tribunal office acknowledged the claim on 22 September 2021.
27. The ET3 and Respondent’s response was filed on 18 October 2021. The Respondent stated that contrary to what was said in the claim form, the Claimant was not exempt from providing an Early Conciliation certificate. This was because the Respondent had not contacted ACAS in relation to the dispute. The Respondent submitted that proceedings were issued prematurely, that the Tribunal had no jurisdiction to determine the claim and therefore that the claim should be rejected.

28. There was then subsequent correspondence between the parties regarding the issues arising as to jurisdiction.
29. On 11 November 2021, the Tribunal wrote to the Claimant and confirmed that the ET3 had been received and the matter had been passed to an Employment Judge.
30. On 12 November 2021, an Employment Judge directed that the case be listed for a preliminary hearing to determine whether the Tribunal had jurisdiction.

The Relevant Law

31. The basis of the Early Conciliation scheme is set out at sections 18A and 18B of the Employment Tribunals Act 1996 (“ETA”), and in the Early Conciliation Rules of Procedure (‘the EC Rules’) contained in the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254 (as amended).
32. If either party does not wish to engage in conciliation, or if settlement is not reached within the applicable timeframe, then ACAS will issue an early conciliation as evidence that section 18A(1) of the ETA has been complied with.
33. Rules 10 and 12 of The Employment Tribunals Rules of Procedure (Schedule 1 to The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) (“the ET Rules of Procedure”) set out certain ‘technical’ and ‘substantive’ grounds on which a claim (or part of a claim) will be rejected. Rules 10 and 12 are as follows:

Rejection: form not used or failure to supply minimum information

10.-(1) The Tribunal shall reject a claim if-

[...]

(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.

[...]

Rejection: substantive defects

12.— (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) one which the Tribunal has no jurisdiction to consider;

(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) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;

(e) one which institutes relevant proceedings and the name of the Claimant on the claim form is not the same as the name of the prospective Claimant on the early conciliation certificate to which the early conciliation number relates; or

(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 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).

(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the Claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

(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.

(3) If the claim is rejected, the form shall be returned to the Claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

34. *'Early conciliation number' as referred to in rule 12 is, as per rule 1, to be interpreted as "the unique reference number which appears on an early conciliation certificate".*

35. Cases involving the failure to include an early conciliation certificate number in the ET1, in full or in part, have been considered by the Employment Appeal Tribunal on several occasions. However, many of these cases pre-date the amendment of the Employment Tribunal Procedure Rules on the 8 October 2020. On that date rules 12(da) and 12 (2ZA) were inserted by The Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020). I have borne that change in mind when applying the principles in those cases to the facts in this case.

36. In *Adams v British Telecommunications Plc* UKEAT/0342/15/LA, Mrs Justice Simler held that if the required minimum information is not provided within the form, the Tribunal has no option but to reject the claim unless that omission is capable of being excused by some other rule.
37. In *E. ON Control Solutions Limited v Caspall* [2020] ICR 552, HHJ Eady (as she was then) held that a failure to include an accurate Early Conciliation certificate number fell within the scope of Rule 12(1)(c) and that, in such circumstances, a Tribunal was required to reject claims where such an inaccurate number was included in the form. Further rule 6 of the ET Rules of Procedure does not provide confer discretion to an Employment Judge to disregard a mandatory rule.
38. In the case of *Ash v. ISS Facility Services Limited* UKEAT/0098/20/00, the claim was rejected by the Employment Judge because the Claimant did not include an Early Conciliation certificate number on his claim form. Instead, he ticked a box to indicate that an exemption to having a certificate applied in his case. The claimant had in fact obtained a certificate prior to issuing his claim but had sent it to the Respondent and a copy had not been retained on his form. The copy sent to the Respondent had gone into an email 'junk' folder. He then requested a copy of the certificate but he was instead issued with a second certificate. In dismissing the claimant's appeal, the EAT held that the Employment Judge had no option but to dismiss the claim and did not err in law. In doing so HHJ Tucker stated that:

"34. These provisions [rules 6, 10 and 12 of the ET Rules of Procedure] have been considered in a number of cases. Those authorities have established that the use of the word "shall" in Rule 12(1) and (2) denotes that the effect of the rule is mandatory and that there is no discretion in its application. See per Langstaff P in Cranwell F v Cullen UKEATPAS/0046/14/SM. In that case, the EAT held that there was no discretion to waive a failure to include an EC number or the erroneous claim that an exemption applies (i.e., the circumstances described in rule 12(1)(c) or (d)); that was the effect of the rule. In Adams v British Telecommunications Plc [2017] ICR 382, Simler P. considered the provisions of Rules 12. She noted that Rule 12(2)(a) provided an escape route for some minor errors in compliance within the EC rules relating to names and addresses of employers (as a Judge had a discretion not to reject the claim if it was not in the interests of justice to do so) but that a minor error in relation to the EC number itself is not capable of being corrected in the same way. She stated (paragraph 7) that, "It is difficult to see any justification for this distinction. None was advanced by either counsel and I cannot identify any. Both are minor errors but no escape route is provided for the certificate number errors."

Conclusions

39. The Claimant had contacted ACAS prior to issuing proceedings and an Early Conciliation certificate was issued by ACAS. Substantively, he had therefore done what was required of him under section 18A of the ETA, that is to undertake the early conciliation process.

40. Some confusion arose about how to complete the section of the claim form (ET1) that relates to early conciliation. I accept the explanation as to why the form was completed in the manner that it was.
41. However, I am required to have regard to rules 10 and 12 of the ET Rules of Procedure. They set out certain technical and substantive grounds on which a claim may be or must be rejected.
42. Two issues arise in this case in relation to those rules. The first is that whilst two reference numbers were provided in the claim form, these were not early conciliation certificate reference numbers. The second is that it is stated in the claim form that an exemption applied when in fact no exemption did apply.
43. Dr Allen submitted that the Tribunal had, by serving the ET1 upon the Respondent, in effect, accepted the claim and so had accepted that the requirements of the rules were met.
44. It is notable that rule 12 requires that the Tribunal office refer any potential application of rule 12 to an Employment Judge for consideration. Given that the actual position was far from clear on the face of the claim form in this case, it would have been wholly inappropriate for the Tribunal office to reject the claim form under rule 10 without first referring the matter to an Employment Judge for consideration.
45. The matter was referred to an Employment Judge on the 11 November 2021 for further consideration. On the 12 November 2021 an Employment Judge directed that the matter be listed for a preliminary hearing to determine the jurisdictional point in issue.
46. Further, whilst the claim form was not rejected at an earlier stage, and was served upon the Respondent, this does not and cannot confer jurisdiction where jurisdiction otherwise does not exist.
47. I turn now to the application of rule 12 on the facts of this case. I have found as a fact that the earlier reference number cited at section 8.2, that is R150862/21, was not an Early Conciliation certificate number. It could not have been because the evidence before me is that neither the Claimant nor Dr Allen had a copy of the first certificate before them when the claim form was completed.
48. Rule 12(2) requires that a claim shall be rejected if 12(1)(c) applies. 12(1)(c) applies, inter alia, if the form does not contain an early conciliation number. An 'early conciliation number' is defined as "*the unique reference number which appears on an early conciliation certificate*". The reference R150862/21 was not obtained from the Early Conciliation certificate. It is therefore not such a number. The reference R156857/21 also cannot have been obtained from an early conciliation certificate. This is because this second certificate was only issued until after the claim had been lodged with the Tribunal. Rule 12(1)(c) therefore applies in this case.
49. Rule 12(2ZA) confers some discretion in a case where rule 12(1)(da) applies, that is that the Early Conciliation number on the claim form is not the same as the Early Conciliation number on the Early Conciliation certificate. This does not apply in this case because an Early Conciliation

number (defined as the unique reference number which appears on an early conciliation certificate) was not included in the claim form. Rather rule 12(1)(c) applies. No discretion is given under the rules in relation to rule 12(1)(c).

50. Therefore, as rule 12(1)(c) applies, I am required to find that the claim form must be rejected. I have no discretion to decide otherwise.
51. In *Ash v. ISS Facility Services Limited*, HHJ Tucker observed that whilst the aim of the statutory regime, and the linked procedural rules, was to ensure that would be litigants conciliate certain disputes before issuing proceedings, an unfortunate consequence has been that it has created more litigation. At paragraph 27 she observed that:

“Not only is that precisely the opposite of what the legislation sought to do, but in some cases, if there is no judicial discretion to mitigate the effect of the rule in an appropriate case, there is a risk that mandatory procedural rules lead to harsh and, potentially, unjust results. It is difficult for rules to make provision for all the many, different factual circumstances which make their way before the Courts in disputes between litigants. Strict procedural rules, and adherence to them, have an important role to play in the administration of justice: they are part of a process through which litigation can be fairly managed, and managed in the interests of justice for all.

However, strict procedural rules which serve to limit access to a court or tribunal without determination of the underlying dispute, and where no judicial discretion exists for an exceptional circumstance, or a wholly unforeseen situation, are particularly susceptible to that risk, namely of leading to a harsh, and potentially, unjust result.”

52. Regrettably, in this case, the application of the ET Rules of Procedure leads to a harsh outcome. Despite this Tribunal is required to apply the law that it is bound by in this case.

Employment Judge Boyes

Date: 17 July 2022

Sent to the parties on: 19 July 2022

For the Tribunal Office