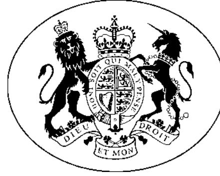
Case No: 2200378/2022



EMPLOYMENT TRIBUNALS

Claimant: **Mr M Diop**

Respondent: **1. Knightsbridge Residents Management Company Limited**
2. CN Security Limited
3. London Portman Hotels Ltd t/a NOBU Hotel

OPEN PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (Hybrid)

On: 8 August 2022

Before: Employment Judge Palca (sitting alone)

Appearances

For the claimant: In person
For the respondents: 1. Ms E Kurcheika (Head of HR at First Responent)
2. Mr R Cater (Consultant)
3. Mr D Brown (Counsel)

JUDGMENT

1. **The Claimant's claims for unfair dismissal against all the respondents are struck out on the basis that the tribunal does not have jurisdiction to hear them.**
2. **The second respondent's application for an order that the claims against it should be struck out because an incorrect application for early conciliation was made does not succeed.**
3. **The respondents' applications that the discrimination claims against them be struck out because they disclose no reasonable prospect of success do not succeed.**

Conduct of this hearing

(1) This has been a hybrid hearing conducted using Cloud Video Platform (CVP). The claimant attended in person. The respondents' representatives attended via CVP.

(2) In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net No members of the public attended.

(3) No requests were made by any members of the public to inspect any witness statements or any other written materials before the tribunal.

(4) The parties were able to contribute to the discussion and to hear all comments made and see and hear all those speaking.

(5) The participants were told that it is an offence to record the proceedings.

The claim

(6) The Claimant was employed by the second respondent, part of a group which supplies agency workers to clients, as a security officer starting in December 2021. He was placed as a security officer at the first respondent on 17 December 2021 and at the third respondent on 3 and 4 January 2022. By a claim form presented on 24 January 2022, following a period of early conciliation from 12-14 January 2022, the claimant brought complaints of unfair dismissal and discrimination on grounds of race and religion. No application for early conciliation was made to ACAS in the name of the second respondent. Instead, it was made against a related company of the second respondent. The claim is essentially about the claimant being withdrawn from the two posts, the first one over the state of his shoes and whether or not he should be clean-shaven; and the second following a dispute with a colleague. At present, there is no evidence that the claimant has been dismissed, or that he has resigned. The respondents defend the action and each argues that some or all of the claims should be struck out. At the hearing the claimant clarified that he is bringing claims that he has been discriminated against on the grounds of his race (Black African) against all respondents, but that his claim for discrimination on the grounds of religion/belief (Muslim) is only against the first respondent.

The issues

(7) The matters for the tribunal to consider at the present hearing are as follows:

(i) Should the claim against the Second Respondent be struck out on the basis that the claimant did not comply in full with the provisions of s 18A Employment Tribunals Act 1996 in that while he was employed by the second respondent he did not apply for an early conciliation certificate against that company, but against Armatus Risks Security Solutions;

(ii) Whether the claimant’s claim that he has been unfairly dismissed against any or all of the respondents should be struck out on the basis that:

a. He was never employed by the first or third respondents; and/or
b. None of the exemptions to the requirement that a person cannot complain that they have been unfairly dismissed unless they have been employed for two years, as set out in s108(3) Employment Rights Act 1996, applies; and/or

c. He had not been employed by his employer for two years or more, and therefore the tribunal does not have jurisdiction to hear his claim;

(iii) Whether the claimant's discrimination claims against any or all of the respondents should be struck out pursuant to Rule 37 (1) a of the Employment Tribunal Rules of Procedure ("ET Rules") on the basis that they have no reasonable prospect of success;

(iv) Whether deposit orders should be made pursuant to Rule 39 of the ET Rules in relation to any of the claims on the basis that they have little reasonable prospect of success;

(v) Whether the claimant's claims should be struck out pursuant to Rule 37 (1) (d) of the ET Rules on the basis that they are not being actively pursued;

(vi) Whether an unless order should be issued against the claimant in light of his failure to deliver further particulars of his calim by 27 July 2022;

(vii) The finalisation of the list of the outstanding issues to be determined by the tribunal at any full merits hearing;

(viii) The listing of any full merits hearing and any further case management directions that need to be made.

Failure to apply for early conciliation against the correct respondent

(8) The claimant was employed as a security guard by the Second Respondent, part of a group of companies which hires out staff to clients. That company is in the same group of companies as Armatus Risks Security Solutions;, the company which contracts with the clients, such as the first and third respondents. The claimant sought early conciliation against , and commenced proceedings against Armatus Risks Security Solutions. I changed the identity of the Second Respondent to CN Security Limited at the previous case management hearing, on the basis that this was the company which employed the claimant.

(9) S 18A of the Employment Tribunals Act 1996 sets out the requirement to contact ACAS before instituting proceedings as follows:

(*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.*

(10) The prescribed manner is by using an early conciliation form. The prescribed information is (a) the prospective claimant's name and address; and (b) the prospective respondent's name and address.

(11) Rule 12.1.f of the Employment Tribunal Rules provides that tribunal staff must refer to a judge a claim form where the name on the early conciliation certificate does not match the name of the respondent on the claim form. Rule 12 .2. A states that in those circumstances the judge should reject the claim "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."

(12) In the present case, the circumstances were slightly different. The early conciliation certificate and the claim form named the same second respondent, but that company was not the correct employer. It is not surprisiing that the claimant was confused: he has never been presented with a contract of employment or a payslip. He was not to know that, as I was told at the hearing, although the company which contracts with clients is Armatus, all staff are in fact employed by CN Security Limited.

(13) A number of appellate decisions have considered whether differences between the respondent's name on the EC certificate and the claim form mean that the claim should be rejected. Early cases favoured a rigid approach. For example the EAT in *Giny v SNATransport Ltd EAT 0317/16* G rejected G's argument that rule 12 should be given a purposive construction so that an error can be overlooked so long as Acas has been given sufficient information to enable it to make contact with the correct respondent. In the EAT's view, this was a finding of fact in each case.

(14) However, the emphasis changed with *Chard v Trowbridge Office Cleaning Services Ltd 2017 ICR D21, EAT*. In that case, while approving the principles set out **in** *Giny* (above) the EAT reached the opposite conclusion on essentially the same facts. In that case, the claimant incorrectly gave Acas the name of B, the controlling shareholder and managing director of TOCS Ltd, as the respondent, whereas the ET1 correctly named the limited company. An employment judge took the view that this could not be a 'minor error' within rule 12(2A) because it was more than just a typographical error. The EAT overturned that decision on appeal. It agreed with the EAT in *Giny* that the issue of 'minor error' is one of fact and judgement for the tribunal and that the EAT can interfere only if the decision is flawed by error of law or perversity. However, the EAT in *Chard* considered that considerable emphasis should be placed on the overriding objective when considering issues of this kind, avoiding elevating form over substance in procedural matters, especially where parties are unrepresented.

(15) The *Chard* judgment has been approved by Deputy High Court Judge Sheldon QC in Stiopu v Loughran EAT 0214/20. In his judgment, Kerr J in *Chard* made the following comments

> *62. …For my part, I would place considerable emphasis on the overriding objective when Tribunals have to consider issues of this kind. In this jurisdiction, the overriding objective includes dealing with cases "fairly and justly", but unlike in the Civil Procedure Rules ("CPR"), it also includes "avoiding unnecessary formality and seeking flexibility in the proceedings"; see Rule 2(c) of the Employment Tribunal Rules of Procedure.*
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> *63. 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.*

64. I accept that to a lawyer the identity of a company as distinct from its controlling shareholder is much more than a matter of form (see, e.g. Prest v Petrodel Resources Ltd [2013] 2 AC 415 SC on piercing the corporate veil in matrimonial proceedings). But to a nonlawyer, in a case such as this, the distinction 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…

67. I consider also the wording of Rule 12(2A) in the light of the overriding objective, with which it was presumably intended to operate harmoniously….

68. …I prefer to 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. The Judge here never got as far as the interests of justice. It appears that was because she did not think that the error was minor.

In that case, Kerr Jconcluded that the error was minor, no prejudice had been suffered by the respondent, and that the interests of justice require that the claim not be rejected. He said: *"An error will often, in my opinion, 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."*

(16) Thus in essence, the tribunal must consider, in cases where rule 12(1)(f) may apply, whether there is a 'minor error' in relation to a name or address and whether it would or would not 'be in the interests of justice to reject the claim'..

(17) While the facts in the present case are different from those cited above, in that the same name appeared on both the early conciliation certificate and the claim form, and the issue here is that the wrong company was named as employer, I propose to adopt the basis for the reasoning, and the purposive construction, set out by Kerr J. In my opinion, In the present case, the claimant, who was representing himself, included in both his application for early conciliation and his ET1, the name of the company which provided his services to clients. That company was a sister company of the company which, I am told, in fact employed the claimant. The error is perhaps understandable given that the claimant did not have legal representation, nor a contract of employment or payslip. The second respondent, at the previous hearing in this matter on 22 July 2022 applied to the tribunal to re-name the second respondent to the company which had actually employed the claimant. The addresses of the two companies are the same. The second respondent clearly had no difficulty in identifying the nature of the

claim, nor the relationship between the employer and the claimant. No prejudice has been suffered by the second respondent, whereas significant prejudice could in theory be suffered by the claimant should the claim not be allowed to proceed on this ground. Therefore, bearing in mind the overriding objective, to deal with cases fairly and justly, avoiding unnecessary formality and seeking flexibility in the proceedings and taking into account the guidance of Kerr J set out above, I conclude that the failure to name the correct employer in the ET1 was a minor error, and that therefore it should not, of itself, impede the claimant from continuing to bring his claim against the second respondent

(18) Therefore, I reject the second respondent's application that the claims against it should be struck out because the early conciliation certificate was obtained against the wrong company.

Unfair dismissal claims

(19) The claimant has brought unfair dismissal claims against all the respondents. He states that he must have been employed by the first and third respondents because they sent him away without asking anyone's permission. The second respondent admits that it employed the claimant, and claims, too, that his employment has never been terminated by either party. It is clear that the services of the claimant were provided by the second respondent, acting as a temporary employment agency, to the first and third respondents, for (in the case of the first respondent) one day, and (in the case of the third respondent) two days. This is not a relationship of employer and employee. Claims of unfair dismissal can only be brought against any entity or person actually employing a person. This is not the case here, so the claims of unfair dismissal against the first and third respondents should be struck out.

(20) Even if I am wrong on that, the claimant's employment with the second respondent began in December 2021. His engagement with the other respondents was for one or two days only. In general, a person can only claim that they have ben unfairly dismissed if they have been employed by the employer for at least two year. The claimant has advanced no reason why any of the exceptions to that rule may apply, and it is not obvious to me why any might. Therefore, all claims for unfair dismissal should be struck out on the basis that the tribunal does not have jurisdiction to hear them.

Discrimination Claims

(21) The respondents all argued that the discrimination claims against them should be struck out as disclosing no reasonable prospect of success.

(22) The first respondent relied on its grooming standards relating to the quality of shoes and clean shaven-ness to be adhered to by staff, as showing that their treatment of the claimant was based on a neutral policy, and not on his race or religion. There did however appear to be some dispute over whether the claimant had informed one of the first respondent's employees, Mr Elaffi, that he was Muslim (an exception to the clean-shaven policy is where beards are worn on religious grounds). The first respondent's representative informed the tribunal that Mr Elaffi was himself Muslim. She also said that the first respondent has a contemporary note disproving that the company had at any time told the

claimant that his shoes were satisfactory. I note in passing that at the hearing today the claimant said "Even if I wasn't Muslim, I'm not prepared to clean shave".

(23) The second respondent inferred that the acts of discrimination alleged against it were that they had not investigated his complaints against the other respondents, nor taken his side against them. But there was no indication that any action taken against him was thought to be on grounds of race.

(24) The third respondent argued that the ET1 appeared only to claim discrimination against the first respondent, and that there were no grounds to indicate that any act of discrimination had been performed by the third respondent. The third respondent's representative also noted the apparent inconsistency between the claimant's allegation that a senior member of its security team had admired his work and wanted to employ him permanently and his allegation that he had been discharged because of his race.

(25) All respondents relied on *Madarassy v Nomura International plc* 2007 ICR 867 CA in support of their argument that the claimant had shown no evidence that he could establish a prima facie case that he had been discriminated against.

(26) I declined to strike out any of the discrimination claims. I noted that discrimination cases should only be struck out in the most obvious of cases, because they tend to be fact sensitive. There was potentially an important dispute of fact in the claim against the first respondent, which would need to be dealt with at a full merits hearing. In relation to the other claims, it is possible to establish from the ET1 that the claimant has complained of unfavourable treatment. At this stage, and without evidence, it would not be fair to say that all the other claims had no reasonable prospect of success. I do note however that there are difficulties with all the claims, in particular that the claimant is unlikely to be able to prove to the tribunal sufficient facts to persuade it that he has a prima facie case of discrimination. However, at this stage one cannot say, as I believe would be the correct test, that it would be impossible for him to do so.

(27) I therefore reject the applications that the discrimination claims should be struck out.

Other applications

(28) No application was made to strike out the claimant's claims on the basis that they were not being actively pursued. The other matters are dealt with in separate documents.

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Employment Judge Palca

08/08/2022

Sent to the parties on:

08/08/2022

For the Tribunal:

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