EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was V – by Cloud Video Platform. A face to face hearing was not held because it was in accordance with the Presidential Road Map that this hearing should be conducted remotely and all issues could conveniently be considered in a video hearing."

Claimant		**Respondent**
Mr M Williamson	v	DHL Services Ltd

PRELIMINARY HEARING

Heard at: Watford (by CVP) **On:** 30 August 2022

Before: Employment Judge George

Appearances:

For the Claimant: In person
For the Respondents: Mr T Cook, Counsel

JUDGMENT

The claim is dismissed under rule 37(1)(a) of the Employment Tribunals Rules of Procedure (no reasonable prospects of success) because the Employment Tribunal has no jurisdiction to hear it.

REASONS

1. The claimant presented a claim form on 24 February 2021 complaining of disability discrimination arising out of his employment by the respondent as a warehouse colleague. That employment started on 29 November 2020 and is, so far as I understand it, continuing. There had been some correspondence between the claimant and the Tribunal which meant that the ET1 should be treated as having been accepted not on 24 February (when it was first submitted) but on 4 March 2021. I will set out some more detail of that

correspondence below. The respondent entered a response on 15 April 2021 which was in time.

2. In the claim form presented on 24 February 2021, in answer to the question in box 2.3 "Do you have an Acas Early Conciliation Certificate number?", the claimant had ticked the box for "no". He had also indicated that this was a claim in respect of which ACAS had no power to conciliate. As a matter of fact, I accept Mr Cook's submissions that this particular type of claim does not fall within s.18A(7) of the Employment Tribunals Act 1996 (hereafter referred to as the ETA) which exhaustively sets out the types of complaint that ACAS does not have the power to conciliate.

3. The hearing has been listed before me as a Preliminary Hearing in public by Employment Judge Wyeth following a case management hearing which took place by telephone on 3 December 2021. He listed it to consider three preliminary issues:

    a. whether the Tribunal had jurisdiction to hear the claim or whether it should have been rejected for being issued prematurely;

    b. the issue of disability and

    c. whether a Deposit Order should be made as a condition of the claimant being permitted to continue to advance any claim or particular allegation.

4. Between that hearing and the hearing before me, the claimant made an application to amend his claim and therefore there were four matters which were before me today. However, it was agreed between the parties that I should deal first with the arguments related to jurisdiction. That is a fundamental matter that, if raised, the Tribunal has no discretion but to decide. If the Tribunal does not have jurisdiction to hear a particular claim then the claim must be dismissed. Therefore, the consequence of the judgment that I have made today is that the claim is dismissed as it stands and the other matters that are listed for today's hearing will not be considered. In considering the issues today I had the benefit of a file of documents to which both parties had contributed which runs to 131 pages and contained the documents set out in the accompanying index. Page number in these reasons refer to that file. There were three relevant documents on the Tribunal file which were not in the joint hearing file and I caused those to be scanned and shared with the parties, who were attending remotely. Mr Cook had prepared a skeleton argument and, in these reasons, that is referred to as the RSA.

5. When I was delivering my judgment and reasons for dismissing the claim, the claimant (who had previously not experienced any connectivity issues of note), dropped out of the hearing. I caused the clerk to contact him by telephone to see whether he needed assistance and he told her that he did not intend to rejoin the hearing to hear the conclusion of my reasons for the decision. I

therefore have provided full written reasons rather than merely the written judgment.

6. The basis on which the respondent argues that the claim was issued prematurely is that the Early Conciliation Certificate relied on by the claimant in this matter shows that he contacted ACAS on 24 February 2021, the same date as that on which he originally presented the claim, and the certificate was issued to him two days later, on 26 February 2021. The chronology set out by Mr Cook in his skeleton argument is relevant and I have amplified it based on documents that I have found in the Tribunal file.

    a. The claimant notified the respondent on 17 February 2021 that he had obtained advice from ACAS and was proposing or considering to issue legal proceedings (see page 126).

    b. On 23 February 2021 the claimant emailed to the respondent stating that he had spoken to ACAS again and had received documentation to take the matter further.

    c. At 05:57 on 24 February 2021 (page 130) the claimant notified ACAS of his potential claim against the respondent and then a few minutes later at 06:10 on the same day the claimant issued his claim form by presenting the ET1.

    d. The Early Conciliation Certificate was issued on 26 February (page 1).

    e. When the claimant forwarded the certificate to the Tribunal on 4 March 2021 by email (additional document from the Tribunal file) it included the covering email from ACAS to the claimant at 10.38 on 26 February 2021 which was in standard form but which included additional information. The certificate was attached and the number of the certificate, including the final two digits, was referred to in the body of the email and the claimant was advised that if he makes a Tribunal claim he must use the number in full otherwise the claim may be rejected by the Tribunal. Of course, at this point he had already presented his claim.

    f. On 1 March the claimant was written to by the Tribunal to notify him that Employment Judge R Lewis had decided to reject his claim. The reasons were as follows, and I quote (additional document from the Tribunal file):

        > "1. You have not given an early conciliation number
        > 2. Although you have ticked the box to explain why you don't have an early conciliation number the explanation appears to be incorrect in that it is not a valid exemption."

    g. The claimant sent a copy of his early conciliation certificate to the Tribunal on 4 March 2021.

h. On 18 March 2021 the Tribunal wrote saying that this had been referred to Judge R Lewis again and the whole claim was accepted and the defect was to be treated as having been rectified on 4 March, the date on which the Early Conciliation Certificate was provided (additional document from Tribunal file).

7. The reasons given by Judge R Lewis for rejecting the claim on 1 March 2021 would appear to be a reference to the two reasons for rejection set out in Rule 12(1) of the Employment Tribunal Rules of Procedures 2013, which says that a claim should be referred to an employment judge for consideration of rejection if (see r.12(1)(c)), it is one which institutes relevant proceedings and is made on the claim form that does not contain an early conciliation number or (see r.12(1)(d)), one which confirms that an early conciliation exemption applies and an early conciliation exemption does not apply.

8. The letter rejecting the claim refers to some explanatory notes which I have not seen. However, there is no reason for me to think that those explanatory notes expressly directed the claimant to provide a new claim form including the certificate number. What he did, on 4 March, was to provide the Early Conciliation Certificate and it is clear from that, and indeed the claimant accepts, that that certificate was received by him after presentation of the claim.

9. In the circumstances that the claimant has chosen to absent himself from the balance of the hearing, I set section 18A ETA out in full.

> **[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 pre-scribed 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 be-tween the persons who would be parties to the proceedings.
>
> (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.

(5) The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.

(6) In subsections (3) to (5) “settlement” means a settlement that avoids proceedings being instituted.

(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

The cases that may be prescribed include (in particular)—

cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;

cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;

cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.

(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).

(9) Where a conciliation officer acts under this section in a case where the prospective claimant has ceased to be employed by the employer and the proposed proceedings are proceedings under section 111 of the Employment Rights Act 1996, the conciliation officer may in particular—

(a) seek to promote the reinstatement or re-engagement of the prospective claimant by the employer, or by a successor of the employer or by an associated employer, on terms appearing to the conciliation officer to be equitable, or

(b) where the prospective claimant does not wish to be reinstated or re-engaged, or where reinstatement or re-engagement is not practicable, seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the prospective claimant.

(10) In subsections (1) to (7) “prescribed” means prescribed in employment tribunal procedure regula-tions.

(11) The Secretary of State may by employment tribunal procedure regulations make such further provi-sion as appears to the Secretary of State to be necessary or expedient with respect to the conciliation pro-cess provided for by subsections (1) to (8).

(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 infor-mation to ACAS under subsection (1) or issuing a certificate under subsection (4);

(b) requiring ACAS to give a person any necessary assistance to comply with the require-ment in subsection (1);

(c) for the extension of the period prescribed for the purposes of subsection (3);

(d) treating the requirement in subsection (1) as complied with, for the purposes of any pro-vision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a).]

10. I took particular account of s.18A(8) which states that "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)."

11. I accept that the claimant was a person who was subject to the relevant requirement set out in s.18A(1) to provide relevant information to ACAS and that these proceedings are relevant proceedings (which are defined in s.18(1) ETA). This means that this claimant was prohibited by s.18A(8) from presenting a claim form without having first obtained an Early Conciliation Certificate.

12. Rules 10, 12 and 13 of the Employment Tribunals Rules of Procedure 2013 concern the Tribunal's obligations on first receipt of a claim. They were interpreted in Pryce v Baxter-Storey [2022] EAT 61. The claimant argues that the defect was accepted as having been rectified by Judge Lewis and it is understandable that he should regard it that way. As I say, there was no evidence that he was told that the only way to re-present the claim in these circumstances was to send another claim form on the prescribed form including at box 2.3, the correct number. As a litigant in person he may well not have realised that that was necessary. His Honour Judge Shanks considered that very point in Pryce. The two points under consideration by the learned judge in the EAT were whether the claimant could be treated as having re-presented the claim when they had sent in an early conciliation certificate received after presentation of the claim without submitting a fresh claim form and whether the requirement to represent been waived by the ET when they notified the claimant that the claim had been accepted.

13. For reasons that he sets out in, in particular, paragraphs 11 to 14 of his judgment, he reached the conclusion that the claimant could not be treated as having re-presented the claim and that the Tribunal has no power to waive the requirement for using the prescribed form on re-presentation.

14. In the same way as His Honour Judge Shanks expressed sympathy for Mrs Pryce, I have sympathy for the claimant in this situation. However, I am satisfied that his only option is to present a new claim which, if presented now, would be out of time and would have to be accompanied by an application to extend time setting out the reason why he had not presented the claim in time. It is likely that part of that reason would include an explanation of the facts and matters that I have set out in the above chronology and, no doubt, those would

be taken into account by an employment judge considering any application to extend time. However, the circumstances in which this claim has been dismissed would not be the only factor that an employment judge would have to consider when deciding whether or not to extend time for a disability discrimination claim based on the same facts as are contained in this claim form brought so long after the events in question. There would likely to be some investigation of the sources of advice available to the claimant, what information he obtained from ACAS or from his trade union. I am also mindful that the respondent argues that the claim is, in any event, unmeritorious. That, of course, is not something that I make any assessment or even comment on today, given the decision I have made that the Tribunal has no jurisdiction to consider the claim. Merits are something that would be likely to be taken weighed in the balance when considering the prejudice to the respective parties if the claimant takes the course of presenting a new claim at this late stage.

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Employment Judge George

15 October 2022

Sent to the parties on:

20/10/2022

For the Tribunal:

N Gotecha