



EMPLOYMENT TRIBUNALS

Claimant: Mr P Edwards

Respondent: Harman Technology Limited

Heard at: Manchester

On: 18 October 2022

Before: Employment Judge Porter

Representation

Claimant: In person

Respondent: Mr R. Powell of counsel

JUDGMENT having been sent to the parties and written reasons having been requested by the claimant on 28 October 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues to be determined

1. This was an application by the respondent that the entire claim should be struck out or rejected on the grounds that the tribunal has no jurisdiction to hear the claim as the wrong EC Certificate number had been included in the claim form on presentation to the tribunal on 2 July 2021.

Background

2. At private preliminary hearings on 7 December 2021 and 2 March 2022 the claims were identified as

2.1 General Unfair dismissal;

- 2.2 Disability discrimination under sections 13, 15 and 20/21 Equality Act 2010.
- 2.3 Automatically unfair dismissal under s103A Employment Rights Act;
- 2.4 Detrimental treatment under s 47B Employment Rights Act;
- 2.5 Direct race discrimination under s13 Equality Act 2010

3. The issues were identified and orders were made that the claimant provide additional information about his claims, including the preparation of Scott Schedules. An open preliminary hearing was listed to take place on 25 July 2022 to determine whether, at the relevant time, the claimant was a disabled person within the meaning of the Equality Act 2010, in relation to two stated mental impairments:

- 3.1 Anxiety and depressive disorder;
- 3.2 Agoraphobia and associated panic attacks

4. On 21 June 2022 the respondent made a written application that the following claims be either struck out or that the claimant be ordered to pay a deposit as a condition of being allowed to pursue those claims:

- 4.1 Automatically unfair dismissal under s103A Employment Rights Act;
- 4.2 Detrimental treatment under s 47B Employment Rights Act;
- 4.3 Direct race discrimination under s13 Equality Act 2010

5. That application was listed to take place at the preliminary hearing on 25 July 2022.

6. That open preliminary hearing took place before EJ Porter. The claimant required further time to consider his response to the respondent's applications. It was therefore ordered that the hearing be adjourned part-heard to 18 October 2022.

7. By email dated 3 October 2022 solicitors for the respondent raised a challenge to the tribunal's jurisdiction to hear the claim, stating:

7.1 Upon receipt of the Claimant's statement in preparation for the OPH, it became evident that the Claimant had obtained two early conciliation certificates, one in December 2020 and one in April 2021 (attached). Upon review of the Claimant's ET1, that form contains the second Early Conciliation number from the second "voluntary" April EC certificate, not the original "mandatory" December 2020 certificate. As such, it is the Respondent's position that the entirety of the Claimant's claim is outside of the Tribunal's jurisdiction. Further, a number of the Claimant's claims are out of time, including the section 47B and race discrimination claims, as the limitation date would be 1 May 2021 for those claims, based on the mandatory EC certificate. The Claimant's claim was not lodged until 9 July 2021. The Claimant appears to acknowledge this in his statement.

7.2 In the alternative, if the Tribunal is not minded to give permission for the matter to be raised at the OPH as per the above, the Respondent applies for the Tribunal's original decision to accept the ET1 to be reconsidered as the Claimant has failed to correctly state the mandatory EC number in section 2.3 of the ET1. The correct

EC Certificate number was R231887/20/66. The Claimant has failed to provide the correct EC Certificate number and accordingly the claim should be rejected (Rule 10).

8. That request was referred to EJ Porter who ordered that this application/jurisdictional issue be considered at the adjourned hearing on 18 October 2022.

Submissions

9. The claimant relied upon written and oral submissions which the tribunal has considered with care but does not repeat here. In essence, the claimant asserted that:

- 9.1 The correct EC certificate number was included in the claim form at presentation;
- 9.2 He contacted ACAS on the 21 December 2020 when he was still employed by the respondent and was seeking advice about the grievance which he had raised at work. He had a 5 minute telephone call simply about the grievance, nothing else;
- 9.3 He was then dismissed and he appealed against the decision. His mental health was not good and there was a delay. However on 29 March 2021 he contacted ACAS again for advice in relation to his dismissal. He understood that he had three months less one day from the effective date of termination - 6 April 2021 - to present his claim. ACAS told him that his first EC certificate had passed its time limit and he could not link his claim with that;
- 9.4 On presenting his claim therefore, on the basis of ACAS advice, he quoted the ACAS number from the second EC Certificate - 29 March 2021;
- 9.5 there is nothing on the ACAS website, nothing on any public website giving any clear indication as to which EC certificate numbers should be used, when any new matter becomes a new matter for the purpose of the tribunal proceedings, when a new certificates is required;
- 9.6 the telephone call to ACAS on 21 December 2020 had no relevance to the termination of the contract of employment;
- 9.7 The tribunal is obliged under its rules to use a common sense approach and simplify the procedure as much as possible for litigants in person;
- 9.8 It is against the interest of justice that the claimant be penalised for this simple error;
- 9.9 The cases relied upon by the respondent can be distinguished on the facts. It is clear that in this case the first and second EC certificates related to completely separate matters;
- 9.10 The tribunal must balance the prejudice between the parties when deciding on these matters. The prejudice to the claimant far outweighs the prejudice to the respondent if his claim is struck out.

10. Counsel for the respondent relied upon written and oral submissions which the tribunal has considered with care but does not repeat here. In essence it was asserted that:-

- 10.1 **HMRC v Serra Garau [2017] ICR 1121** does not allow for more than one certificate;
- 10.2 there is no dispute that the first certificate is dated the 21 December 2020 which related to the claimant's knowledge at the time;
- 10.3 a second certificate was issued giving day A as 29 March 2021 and day B as 14 April 2021;
- 10.4 **Science Warehouse Limited v Mills UKEAT/0224/15/DA** provides that there is no need for a claimant, once he/she has started conciliation, to repeat the process. This was endorsed by **Compass Group UK limited V Morgan (2017) ICR 73** in which Simler J stated that it did not matter that the EC certificate preceded some of the events
- 10.5 the second certificate is a nullity;
- 10.6 the ET1 contains an omission of the correct EC certificate number;
- 10.7 under rule 10 it is mandatory that the claim be rejected;
- 10.8 following **EON Control Solutions Limited v Caspall 2020 ICR 552** the tribunal must reject the claim and return it to the claimant, who may present a new claim or apply for reconsideration of this rejection;
- 10.9 the tribunal is unable to exercise any discretion. The overriding objective does not apply. The rejection of the claim form even at this late stage is mandatory;
- 10.10 everything that the claimant has said today can be taken into account in any application by him for reconsideration

Evidence

11. No evidence was heard. The tribunal referred to the documentary evidence prepared for the previous open preliminary hearing and the copy of the earlier EC certificate.

Determination of the application

12. Section 18A Employment Tribunals Act provides that before a person 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.
13. On presentation of the claim on 2 July 2021 the claimant listed on the claim form (ET1) EC certificate number R125658/21/92 in compliance with section 18A Employment Tribunals Act. That Certificate states Day A as 29 March 2021 and Day B as 14 April 2021. The claim was accepted on that basis.
14. There was, in fact, an earlier EC certificate - R231887/ 20/ 66 in which Day A was 21 December 2020 and Day B was 21 December 2020 ("the first certificate").

15. In **HMRC V Serra Garau [2017] ICR 1121** it was stated that a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period.
16. The question is whether the first certificate or EC certificate number R125658/21/92 (“the second certificate”) in this case was the correct certificate.
17. If the first certificate was the correct certificate then the claim form should be rejected because the claimant cited the second certificate - the wrong EC certificate and the second certificate is a nullity.
18. If the second certificate was the correct certificate then the claim form was presented correctly and the claim can proceed.
19. The claimant argues that the second certificate was the correct certificate because the first certificate related simply to the claimant wishing to take advice about a grievance and the second certificate related to different matters, in particular, dismissal. However, the tribunal notes the case of **Compass Group UK limited V Morgan (supra)** in which Simler J held that it did not matter that the EC certificates had preceded some of the events relied on in the case. The word “matter” in s18A is very broad and could embrace a range of events including events that had not yet happened when the EC process was completed.
20. The case law indicates that it does not matter if the events arising after the start of the first early conciliation are unconnected with the events to which the first early conciliation relates. However, I have considered with care the claimant’s assertion that this case can be distinguished on the facts, namely that the first EC certificate related to a wholly different matter and should be ignored. Having considered this, I note from the documentary evidence that:
 - 20.1 the claimant raised his grievances in August 2020. The grievance was not upheld on the 15 October 2020 and the appeal was unsuccessful and notified to the claimant on the 18 November 2020;
 - 20.2 The claimant raises complaints in the ET1 relating to his treatment by the respondent prior to him going off sick in September 2019. This pre dated the first EC certificate. Events prior to that date were the subject of the grievance, and are relevant to the issues before the tribunal now.

Therefore, the tribunal cannot accept that the first EC certificate relates to wholly different matters to the matters raised in the ET1 in this case.

21. Therefore, the first certificate is the correct certificate and the second certificate is a nullity.

22. Following the case of **EON Control Solutions v Caspell** (supra) the consequences of the failure to include the correct EC certificate number is that the claim must be rejected and returned to the claimant. This is mandatory. Where the claimant fails to include an accurate ACAS EC certificate number Rule 12(2) of the Employment Tribunal Rules of Procedure applies and an employment judge is required to reject the claim and return the claim form to the claimant. This is a mandatory requirement and is not a matter upon which the employment judge can exercise discretion.
23. In these circumstances the claim must be rejected, even at this late stage, and returned to the claimant with an explanation of the grounds on which he can apply for a reconsideration of the rejection.
24. I have every sympathy with the claimant's assertion that he is prejudiced by this decision. However, the case law is clear and I am unable to substitute my view or take into account the prejudice to the parties or make a decision in accordance with the interests of justice. Both parties are prejudiced by this decision, bearing in mind the number of hearings which have already taken place under this claim. However, the claimant will have the opportunity to present the claim form again, quoting the correct EC certificate number on this occasion, and applying for a reconsideration of the decision to reject it. Alternatively, the claimant can present a new claim again quoting the correct EC certificate number. The claimant is urged to obtain urgent legal advice on this point. However, whichever way the claimant chooses to proceed, the new claim will be presented out of time and the points raised today by the claimant in relation to the reason for the delay will be considered by the tribunal at a later date. It is unfortunate that the tribunal cannot deal with this matter now, cannot deal with the out of time point today, as requested by the claimant. However, the tribunal is bound by the decisions of the EAT and the rules of the tribunal which state that this claim must be rejected. The tribunal has no jurisdiction to deal with a claim which has been rejected and is returned to the claimant – following this rejection there is no claim before the tribunal, no claim in its jurisdiction, unless and until the claimant takes steps to re-present the claim and/or present a new claim quoting the correct EC certificate number, that is, the first certificate.
25. The judgment will include details of how the claimant may challenge this decision and/or apply for a reconsideration of the decision. The claimant is urged to act on this promptly and to take legal advice.

Employment Judge Porter
Date: 2 November 2022

REASONS SENT TO THE PARTIES ON
3 November 2022

ON BEHALF OF THE TRIBUNAL