



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss B Pawlicka

**Respondent:** Department for Work and Pensions

**Heard at:** Watford

**On:** 16 January 2023

**Before:** Employment Judge Edmonds

## Representation

Claimant: In person

Respondent: Mr T Kirk, counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was via CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

## JUDGMENT

1. The Tribunal does not have jurisdiction to consider the claimant's claims of disability discrimination, notice pay, arrears of pay and other payments. Those claims are dismissed.
2. This does not affect the claimant's claim for automatic unfair dismissal.

## REASONS

### Background and Issues

1. The claimant seeks to bring claims for automatic unfair dismissal, disability discrimination, notice pay, arrears of pay and other payments. The question before me today was whether the claimant's claims for disability discrimination, notice pay, arrears of pay and other payments could proceed because the claimant had not carried out ACAS early conciliation prior to submitting those claims.
2. It was accepted that the Tribunal does have jurisdiction to consider (i.e. is able to consider) the claimant's claim for automatic unfair dismissal, as the claimant had sought interim relief in relation to that claim within her original

claim for and therefore ACAS early conciliation was not required in respect of that claim.

3. The key facts were not in dispute and I summarise them below. In essence, the issues I had to decide in light of those facts were:
  - a. Whether the claimant was required to undertake ACAS early conciliation in respect of those claims which were not subject to her interim relief application, or whether the fact that part of her claim was subject to an interim relief application meant that ACAS early conciliation was not required for the entirety of her claim;
  - b. Whether, by undertaking ACAS early conciliation after submitting her claims, the claimant had rectified any previous defect caused by her not undertaking ACAS early conciliation prior to submitting her claims;
  - c. If I found that the claimant had been required to undertake ACAS early conciliation, and that the defect had not been rectified, whether the claimant's claims other than automatic unfair dismissal could proceed.
4. The claimant gave oral evidence and I had before me a file of documents amounting to 212 pages, along with five additional documents provided by the claimant on the day of the hearing. I heard oral submissions from both parties and written submissions on behalf of the respondent.
5. I gave my decision orally at the hearing, along with oral reasons, and the claimant requested that I provide my reasons in writing, which I now do. One point I do wish to clarify is that the claimant stated during the hearing, before I had heard evidence, that she felt that I had already made my decision on this matter and that she would be appealing. I reassured the claimant that I had not yet made my decision at the time, however for completeness I record here that I did not make my decision until listening to the evidence and considering the submissions made by both parties.

## **Facts**

6. The claimant was employed by the respondent as an Administrative Officer from 10 August 2020. On 25 January 2022 she was informed that her employment was to be terminated and that termination took effect on 18 March 2022.
7. The claimant said in her evidence that she spoke with ACAS in January 2022 and was told that she did not need to conciliate for an interim relief application. I have no reason to doubt what the claimant has said and I accept that this conversation happened. For the avoidance of doubt, the claimant does not allege that this was formal ACAS early conciliation and/or that she provided ACAS with the "prescribed information" for the purposes of early conciliation at this point.
8. The claimant submitted an Employment Tribunal claim on 1 February 2022, claiming unfair dismissal (relying on protected disclosures), disability

discrimination, notice pay, arrears of pay and “other payments”. At box 2.3 of that form, in response to the question “Do you have an ACAS early conciliation certificate number”, the claimant ticked “No”. Then, under the question “If No, why don’t you have this number?” the claimant ticked “ACAS doesn’t have the power to conciliate on some or all of my claims”. In box 8.2 of her claim form the claimant stated “This claim contains an application for Interim Relief due to my disclosure on Monday 24<sup>th</sup> January 2022”.

9. The claimant confirmed in evidence that, at the time of submitting her claim, she did not have an early conciliation certificate number and had not provided the prescribed information to ACAS, being her name/address and the respondent’s name/address. The claimant’s position is that she did not need to do so as she was applying for interim relief, and that what she needed to do was to make sure that she commenced early conciliation within three months (less a day) from the dismissal date. I address these points in my conclusions below.
10. The claimant’s interim relief application was dealt with at a hearing on 29 March 2022 and was not granted. The details around that application are not relevant for the purposes of the matter before me, save that I would note that the claimant was, and remains, very unhappy about that outcome and sought to refer to it on a number of occasions at this hearing. The claimant also takes issue with the fact that the respondent did not attend that hearing, however the respondent’s position is that it was unaware of it.
11. A Notice of Claim was sent out by the Tribunal on 20 May 2022, requiring the respondent to respond to the claim on or before 17 June 2022. The claimant takes issue with the fact that the respondent had until 17 June 2022, which she believes is in excess of the 28 days ordinarily permitted by the Tribunal. The issue here is that the Notice of Claim was not sent out until 20 May 2022 and therefore, whilst it is true that the claimant submitted her claim some time before that and more than 28 days had elapsed by that point, the 28 days would only start from the point at which the Notice of Claim is sent out, and therefore the timescales provided to the respondent were correct.
12. On 13 June 2022 the respondent’s representative wrote to the Tribunal, submitting that the claimant had failed to comply with the requirements for ACAS early conciliation and requesting a public preliminary hearing to consider the matter. The claimant replied on 14 June 2022, stating that she had contacted ACAS before submitting her claims but had not been offered early conciliation, and also asserting that exceptions apply for claims related to protected disclosures. The claimant wrote again on 20 June 2022, objecting to any preliminary hearing on various grounds which I need not address here, and attaching a document setting out why she believed she had complied with ACAS requirements. In essence, she argued that (a) the deadline for conciliation was 17 June 2022 (being three months less a day following the dismissal date) and (b) her claim was exempt from the requirement for early conciliation. She confirmed this position again by email dated 5 July 2022.

13. On 17 June 202 the claimant was issued with an ACAS certificate, confirming that conciliation had started and ended on 17 June, however it does not appear to have been provided to the Tribunal or to the respondent at that point.
14. On 26 August 2022 the claimant confirmed to the Tribunal and respondent that she now had a valid ACAS number obtained within the prescribed period (although did not provide the number or a copy of the certificate).
15. On 13 September 2022, following the issuing of the Notice of Preliminary Hearing by the Tribunal, the claimant emailed the Tribunal stating that such a hearing would be an abuse of process by the respondent, that it was against the Tribunal's Rules of Procedure to require an ACAS certificate upon initiating conciliation, and that it would only be justifiable to have a preliminary hearing if that also included a retrial of her interim relief application (along with some other points which I need not address here). She repeated similar assertions by further email on 14 September 2022.
16. Following specific requests from the respondent for information, the claimant provided the early conciliation certificate number to the respondent on 7 October 2022. Following further requests for the actual certificate itself, the claimant eventually provided that to the respondent on 21 October 2022. That certificate confirmed that conciliation had commenced on 17 June 2022 (and ended that same day). At this point I will address one point raised by the claimant in that she said that the certificate was confidential. Whilst the content of any without prejudice or settlement discussions are indeed confidential and not for sharing with the Tribunal, this certificate is needed to demonstrate on what date conciliation took place (with no details provided about whether or not either party actively tried to settle the case). It is therefore needed to work out whether the relevant time limits and requirements to carry out early conciliation have been complied with and it is commonplace for such documents to appear in the file at hearing.

## Law

17. Section 18A of the Employment Tribunals Act 1996 states that:

*“(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.”*
18. Section 18 sets out a list of "relevant proceedings". All of the claimant's claims save for her claim for automatic unfair dismissal in respect of which she sought interim relief fall within that list, namely claims under section 23 of the Employment Rights Act 1996 (wages), claims under section 111 of the Employment Rights Act 1996 (unfair dismissal), claims under section 120 of the Equality Act 2010 (discrimination) and claims for breach of

contract under Article 6 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

19. What is not included in that list is a claim for interim relief in respect of any automatic unfair dismissal under section 103A Employment Rights Act 1996: that is exempt from the requirement.

20. Section 18A(8) states:

*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).*

Subsection (4) refers to the ACAS early conciliation certificate provided by ACAS at the end of early conciliation.

21. Rule 1 of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 provides that:

*“To satisfy the requirement for early conciliation, a prospective claimant must -*

- (a) Present a completed early conciliation form to ACAS in accordance with rule 2; or*  
*(b) Telephone ACAS in accordance with rule 3”.*

Rules 2 and 3 then make clear that, whichever option is chosen (i.e. the form or telephone), the prospective claimant must provide their name / address, and the prospective respondent’s name/address.

22. The relevant extract from Rule 12(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the ET Rules”) states that:

*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 –*

- (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*

23. Rule 12(2) goes on to state:

*“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).*

24. Where a claim form has been presented without the required ACAS early conciliation number in circumstances where early conciliation was required, the requirements of section 18A of the Employment Tribunals Act 1996 are not met by the claimant subsequently providing an early conciliation certificate, even if the claimant’s claims would still at that point have been brought within the required time limits. In those circumstances the claimant

would need to issue a new claim after the ACAS early conciliation certificate was issued: *Pryce v Baxterstorey Limited* [2022] EAT 61.

25. Where an employment tribunal claim consists of some claims which are exempt from the requirements under section 18A of the Employment Tribunals Act 1996, and some claims which are not, the parts of the claim which is not exempt remains subject to the requirement to provide prescribed information to ACAS in advance of bringing proceedings: *Webster v Rotala plc T/A Diamond Bus North West* UKEAT/0015/20.
26. An incorrect address on an early conciliation certificate will not prevent that certificate from being valid: *Peacock v Murrayfield* UKEAT/0117/19/JOJ
27. It is worth noting separately (for reasons that will become apparent in my conclusions) that, under section 123 of the Equality Act and under sections 111, 48 and 23 of the Employment Rights Act, the applicable time limits for bringing the claims that the claimant sought to bring is 3 months plus early conciliation extension as applicable from the act complained of or termination date (as applicable).

## **Conclusions**

28. The question is whether, in failing to undertake ACAS conciliation prior to submitting her claim form, but then submitting a certificate dated 17 June 2022, the claimant had taken sufficient steps to comply with the requirements of s18A Employment Tribunals Act 1996.
29. The first point to note is that I do not believe that it matters whether or not the claimant spoke with ACAS in January 2022, as the claimant accepts that she did not provide the prescribed information and no certificate was issued. Her case is simply that she did not have to.
30. Turning therefore to whether the claimant was indeed required to provide the prescribed information to ACAS and obtain a certificate prior to submitting her claim, the wording of s18 and s18A of the Employment Tribunals Act 1996 is clear. Whilst interim relief applications under s103A ERA are exempt, none of the other claims which she brought were.
31. The claimant submits that, because part of her claim was exempt, the whole of her claim did not require a certificate. Unfortunately, that is not the case. The case of *Webster v Rotala plc T/A Diamond Bus North West* UKEAT/0015/20 makes this clear: that case specifically considered the scenario where part of the claim was exempt and part was not, and found that the exemption only relates to those exempt parts. This is supported by the wording of box 2.3 on the claim form which gives as one reason for not providing an ACAS certificate number that [bold added for emphasis] “*My claim consists **only** of a complaint of unfair dismissal which contains an application for interim relief.*” The claimant did not in fact tick that box in any case but instead ticked that ACAS does not have the power to conciliate on some or all of my claim.

32. I do have some sympathy for the claimant who I have no reason to believe deliberately disregarded the law: it is likely that she simply did not realise what she was required to do, as was the case for the claimant in the case of *Pryce v Baxterstorey Limited [2022] EAT 61*. Unfortunately for the claimant however, that case does make clear that this is a jurisdictional matter for the Tribunal and, however sympathetic the Tribunal is to the claimant's position, there is no ability for the Tribunal to exercise any discretion in this matter. The wording of s18A(8) of the Employment Tribunals Act 1996 is clear that a person may not submit a claim for a relevant matter without having gone through early conciliation.
33. The conciliation that the claimant did later go through did not remedy this: *Pryce v Baxterstorey Limited [2022] EAT 61* makes clear that, where a certificate is provided after the claim form is issued, that is insufficient. The early conciliation must be carried out before the claim is issued and, if it has not been, as the Judge indicated in that case, the only way forward is for the claimant to issue a new claim once the early conciliation has happened.
34. I also considered the case that the claimant referred to: *Peacock v Murrayfield UKEAT/0117/19/JOJ*. That case relates to the wrong address being provided on the form, not a situation where no form was provided. The claimant submitted that this showed that the prescribed information does not have to be accurate. I find that this does not assist the claimant as all that case shows is that an incorrect address still counts as an "address" for the purposes of prescribed information. The claimant here provided no address at all to ACAS prior to submitting her claim.
35. The claimant also submitted that the appropriate time limit would be 3 months less one day, and therefore her ACAS certificate number was obtained within the relevant time limits. That is correct in relation to the time limits for bringing claims, but the matter before me today is a separate issue about the requirement for ACAS early conciliation to take place prior to the claim form being issued. Regardless of whether the claim was brought within that 3 month period, it must also be brought after early conciliation takes place: in this case the claimant accepts that she issued her claim form first.
36. Having reviewed the precise wording of Rule 12 of the ET Rules, I accept that the correct course of action would have been for the Tribunal to reject the claim before any Notice of Claim was issued, in so far as it dealt with those matters other than the interim relief application. It is unfortunate that this did not happen. Nonetheless, a similar situation arose in *Pryce v Baxterstorey Limited [2022] EAT 61* and it was held there that this is a jurisdictional matter and the Tribunal therefore has no choice but to address the issue when it did come to light.
37. Therefore, I must find that, despite the claim not having been rejected under Rule 12(1) of the ET Rules, the Tribunal does not have jurisdiction to consider the claimant's claims other than for automatic unfair dismissal. Therefore, I dismiss the claimant's claims for disability discrimination, notice

pay, arrears of pay and other payments. For the avoidance of doubt, the claimant's claim for automatic unfair dismissal under section 103A of the Employment Rights Act 1996 is not affected by this Judgment and will proceed.

38. For the claimant to be able to proceed with claims for disability discrimination, notice pay, arrears of pay and other payments in the Employment Tribunal, she would have needed to submit a fresh claim following receipt of the ACAS certificate on 17 June. The claimant may now wish to consider whether she wishes to do so: the claim would of course now be outside of the required time limits and so would need to be accompanied by an application for the Tribunal to extend the relevant time limits. This is a matter for the claimant.

**Employment Judge Edmonds**

**Date 22 January 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON

24<sup>th</sup> January 2023

GDJ  
FOR THE TRIBUNAL OFFICE