EMPLOYMENT TRIBUNALS

Claimant: MS ROSEMARY NWOGU

Respondent: ROYAL BERKSHIRE NHS FOUNDATION TRUST

Heard at: Watford Employment Tribunal by video

On: 17 January 2023

Before: Employment Judge L Burge

Appearances
For the Claimant: Mr Ogbonmwan, Consultant
For the Respondent: Mr Boyd, Counsel

JUDGMENT having been delivered orally on 17 January 2023 and written reasons having been requested by the Claimant at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

REASONS

1. Today's preliminary hearing was listed to determine the Respondent's application that the Claimant's ET1 should have been rejected as it did not contain a correct ACAS conciliation number pursuant to Rules 10(1)(c) of the Employment (Constitution and Rules of Procedure) Regulations 2013 ('the Rules').

2. Both representatives provided written and oral submissions. At one point during the hearing Mr Ogbonmwan lost connection. Mr Boyd helpfully recounted what Mr Ogbonmwan had missed of his submissions.

3. A summary of the background is as follows.

    3.1 The Claimant was employed by the Respondent as a Senior Nurse.
    3.2 In April 2019 a training programme was withdrawn from the Claimant.
    3.3 On 26 April 2019 the first anonymous letter was received by the Respondent which led to a disciplinary process against the Claimant with the allegation that she was working two full time jobs.
    3.4 On 13 May 2019 a formal investigation was commenced.

3.5 The Claimant entered her first grievance on 20 May 2019 for "breach of confidentiality and malicious investigation".
3.6 On 29 June 2019 a second anonymous letter was received.
3.7 On 4 July 2019 a grievance meeting was held.
3.8 On 17 July 2019 a disciplinary investigation meeting took place with the Claimant.
3.9 On 29 July 2019 the first grievance outcome was provided, an apology was issued about the way the news of investigation had been shared with the Claimant.
3.10 On 23 August 2019 grievance 2 was raised for "breach of trust and falsification of investigation records with malicious intent".
3.11 On 20 September 2019 grievance 3 was issued.
3.12 On 12 November 2019 the Claimant was invited to a disciplinary hearing to take place on 28 November in relation to the allegation that the Claimant had been working two full time jobs.
3.13 On 14 November 2019 the Claimant contacted ACAS.
3.14 The disciplinary was then put on hold pending determination of the Claimant's grievances
3.15 The grievance hearing took place on 16 December 2019. The Claimant's grievances were discussed and summarised as:
(1) The minutes of 17 July were not accurate, her changes were not accepted, the notes were falsified: she is not happy with them and has not signed the document.
(2) The investigator behaved in a bullying manner towards her.
(3) The investigator racially discriminated against her.
(4) A formal investigation was not the appropriate course of action, as per the Disciplinary Policy. She added she received no advice, guidance or support but was told about the Employee Assistance Programme and did contact them and their response was 'Wow!' and to tell her to contact ACAS.
(5) She was unhappy with the amount of time taken to resolve these matters.

3.16 A meeting took place on 18 December 2019, there were no notes of this meeting but the Claimant's application to amend and response to the Respondent's Further particulars state:

> *"11. Mrs Suzanne Emerson sought settlement on or about 10/12/2021 in December 2019 and caused the Claimant to attend settlement meeting at her office accompanied by Mr Ogbonmwan. The internal settlement was not without prejudice. It was agreed that the Respondent will withdraw the disciplinary action and the Claimant withdraw the prospect of Employment Tribunal proceeding which was in practise ongoing with the pre-action protocol served."*

3.17 Mr Ogbonmwan submitted that in the meeting Mrs Emerson offered an apology to the Claimant to avoid any litigation. There were no records of any agreement or resolution.

3.18 On 23 December 2019 ACAS issued the first certificate.

3.19 On 23 January 2020 the outcome of grievance 2 and 3 was communicated, the grievance about redaction of her hand written comments of the meeting notes was upheld, other parts were not.

3.20 On 28 January 2020 the Claimant appealed against the grievance outcome.

3.21 On 29 January 2020 the Claimant contacted ACAS again.

3.22 On 4 February 2020 the Claimant entered a further grievance about Naomi Harrison of the Respondent contacting the other suspected employer of the Claimant.

3.23 The second ACAS certificate was issued on 29 February 2020.

3.24 The Claimant brought her claim on 13 March 2022.

3.25 At the end of the submissions Mr Ogbonmwan provided two further ACAS early conciliation certificates dated 28 March 2020 with the certificates being issued on 30 March 2020 with Naomi Harrison and Suzanne Emerson-Dan as the Respondents.

3.26 On 9 November 2020 a disciplinary hearing was held and the outcome dated 11 November 2020 concluded that at the time the anonymous letter was received by the Respondent the Claimant had not declared any additional employment which was not in line with the Trusts Working Time Regulations Policy and that the Respondent was disappointed that she had only at this later stage been honest in telling them that she did in fact have two jobs and that was the decision maker's main concern.

The Law

4. Section 18A of the Employment Tribunals Act 1996 ("ETA") provides:

> *"18ARequirement 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 prescribed 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 between 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.
…
(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).
…
(11)The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process 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 information to ACAS under subsection (1) or issuing a certificate under subsection (4);
…"

5. Rule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 (the "Rules") provides:

"A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it consider just, which may include all or any of the following –
(a) waiving or varying the requirement;
(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
(c) barring or restricting a party's participation in proceedings;
(d) awarding costs in accordance with rules 74 to 84."

6. Rule 8 provides: "(1). – A claim shall be started by presenting a completed claim form (using a prescribed form) …"

7. Rule 10 says that a claim will be rejected where certain requirements are not met:
"10. - … shall reject a claim if –
(a) it is not made on a prescribed form;
(b) …
(c) it does not contain all of the following information –
(i) an early conciliation number;
…"

8. Rule 12 is headed "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) …
(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) …
(e) …
(f) …
(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 prescribed in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).*
> *(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 a minor 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."*

9. The requirement in Rule 12(1)(c) of the Rules to provide an early conciliation number on the ET1 is for the correct number to be provided. In *Sterling v United Learning Trust* [2014] UKEAT/0439/14 the Employment Appeal Tribunal held that the Employment Tribunal was obliged to reject a claim where the EC Conciliation number that was missing two digits:

> *"The fault might not be great, but it was [the claimant's] responsibility, as the Tribunal thought, to make sure that the right conciliation number was used" (paragraph 24)*

10. In *E.ON Control Solutions Limited v Caspall* [2019] UKEAT/0003/19/JOJ per HHJ Eady QC :

> *"40. In Sterling v United Learning Trust UKEAT/0439/14 (Langstaff J presiding), it was held that where the rule requires an EC number to be set out, it is implicit that the number is an accurate number…*
> *…*
> *41. In Sterling, the EAT went on to note that, once the ET had found that the claim form did not include an accurate EC number, it was obliged to reject it. Again, although Sterling was concerned with Rule 10 ET Rules, the effect of Rule 12 is the same: although an Employment Judge might allow that a claim should not be rejected where there was a minor error of a kind described in Rule 12(l)(e) or (f), and it would not be in the interests of justice for it to be rejected (see Rule 12(2A)), that escape route does not apply to an error (whether minor or otherwise) in relation to the EC certificate number itself (see Adams v British Telecommunications Pic [2017] ICR 382 and North East London NHS Foundation Trust v Zhou UKEAT/0066/18)."*

11. In *HM Revenue and Customs v Serra Garau* [2017] ICR 1121, the EAT held that a second certificate is not a "certificate" falling within section 18A(4).

12. The case of *Romero v Nottingham City Council* [2018] UKEAT/0303/17/DM emphasises the point that the word "matter" is to be construed broadly and can include events that have not occurred by the time the EC process comes to an end.

13. The case of *Akhigbe v St Edward Homes Limited* UKEAT/0110/18/JOJ concerned whether the first and second claims were claims "relating to" the same "matter" for the purposes of the early conciliation requirement in section 18A(1) ETA, HHJ Kerr concluded:

> *"47. There is no express provision stating that a single "matter" within the meaning of section 18A(1) is necessarily limited to a single claim. It is clear from the authorities that a single matter may comprise a variety of assertions, allegations and causes of action…it is also clear that a fresh EC certificate is not required merely because events relied on as part of claim postdate the EC certificate: Simler J (P) in Compass Group at [21].*

48. The approach of Simler J in that case was that a "matter" is an ordinary English word and there is no reason why it should be given an artificially restricted meaning. I agree and do not regard the specific exemptions that may be prescribed as provided for by section 18A(7) of the ETA as altering that conclusion…

49. A number of commonplace examples may help to illustrate the point. Claimants quite often bring a discrimination claim followed a little later by a victimisation claim; the latter claim founded on the protected act of bringing proceedings in the former claim. Does the victimisation claim relate to the same matter as the original discrimination claim? It is a question of fact and degree but the probable answer is yes; the "matter" is the dispute arising out of the employment relationship and the alleged discrimination and subsequent alleged victimisation.

…
"51. Cases that fall the other side of the line would be those where the connection between the first and second claims is merely that the parties happen to be the same: such as, in Mr Akhigbe's example, a whistleblowing claim followed up with a claim for unpaid wages where the withholding of wages is put forward as a separate issue and not a connected issue such as a further detriment suffered as a result of the whistleblowing. In such a case, there is merit in a further conciliation opportunity that may help settle the unpaid wages claim.
…

"53. In my judgment, the true principle is that identified by Simler J (P) in Compass Group at [23]:

> *"… it will be a question of fact and degree in every case where there is a challenge … to be determined by the good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided the requisite information to Acas…."*

Conclusions

14. The Claimant had brought numerous grievances about being refused training and various aspects of the disciplinary process which related to the allegation that she was working full time elsewhere in addition to her full time job at the Respondent. She contacted ACAS on 14 November 2019. The grievance hearing took place on 16 December 2019 and then a meeting took place on 18 December 2019 with Suzanne Emerson and the Claimant who was accompanied by Mr Ogbonmwan. The Claimant's document says it was agreed that the Respondent would withdraw the disciplinary action and the Claimant withdraw the prospective of Employment Tribunal proceedings. Mr Ogbonmwan submitted that in the meeting Mrs Suzanne Emerson offered an apology to the Claimant to avoid any litigation. The Respondent disagrees with that characterisation. There are no contemporaneous documents shedding light on what was agreed. However, the Claimant had not yet put in a claim and so there was nothing to withdraw. ACAS issued the certificate on 23 December 2019 which is indicative that there had not been resolution. Both the grievance and the disciplinary proceedings continued. I therefore reject the Claimant's assertion that the matter had been "withdrawn".

15. The claims that were brought by the Claimant were claims of direct sex discrimination, direct race discrimination, harassment on the grounds of race, victimisation, detriment in breach of health and safety rights and a claim of breach of Article 8 of the European Convention on Human Rights (ECHR). They related to the withdrawal of training, removal of wording from hearing notes, the disciplinary process, the referral to the NMC during the disciplinary process, the

writing to her other employer and the grievance process. These were all matters that were ongoing grievance and disciplinary matters with her employer. The ACAS certificate was validly issued on 23 December 2019. The continuing grievance and disciplinary dispute is clearly the "relating to" the same "matter". *Romero* is clear that matters arising after the ACAS EC certificate are covered by the original certificate. The outcome of the grievance, the continuation of the disciplinary process and the contacting of the Claimant's other employer do not come close to the examples given in *Akhigbe* of what would constitute a different "matter".

16. My conclusion is that the first and second EC Certificates relate to the "same matter". This means that the first certificate is valid and the second is a nullity (*Serra Garau*). As the first EC notification was valid it was that ACAS certificate that should have been referenced in the Claimant's claim form. The Claimant did not need a second certificate, she should have acted on the first valid certificate. The second ACAS certificate was a nullity. The Claimant contacted ACAS again after she issued her claim on 13 March 2020 and two further certificates were issued on 30 March 2020 with Naomi Harrison and Suzanne Emerson-Dan listed as the Respondents at the Trust's address. These cannot have been valid ACAS certificates for the current claim given they were issued after the Claimant had commenced her claim but also because they arose out of the same matter as the first ACAS Conciliation Certificate.

17. I have sympathy with the Claimant, even though she was represented at the time that she obtained her second (and third and fourth) ACAS certificates, because this decision means that she cannot pursue her claims. However, I have no discretion to allow her claim to proceed. The Rules and the caselaw are clear - even where a Claimant has missed two digits off an ACAS reference they have not complied with the mandatory requirement. Inputting the second ACAS conciliation number instead of the first meant that an entirely incorrect ACAS conciliation number was provided (*Sterling*). The claim form therefore fails to comply with the mandatory requirement and so the claim must be rejected both under Rule 12(1)(c) and 10(1)(c).

18. The claim is therefore rejected, guidance has been sent with the Judgment on Claim Rejection – Early Conciliation: Your Questions Answered'. The hearing scheduled for 30 May 2023 – 8 June 2023 is vacated.

EJ L Burge

17 January 2023

Reasons sent to the parties on:17/2/203

NG - For the Tribunal Office: