Case Numbers: 1403818/2021
1403821/2021

EMPLOYMENT TRIBUNALS

Claimants		**Respondents**
1. Chloe Naylor	**v**	**1. Hugh Sims-Hilditch**
2. Megan Anderson		**2. Hildare Stud Farm Ltd**

Heard at: Southampton (by VHS) **On:** 7 December 2022

Before: **Employment Judge Hogarth**

Appearances:
For the Claimant: Mr Adrian Naylor
For the Respondent: Mr Allan Roberts Counsel

REASONS

Introduction

1. At the hearing on 7 December 2022, I gave oral judgment striking out the claims made by Chloe Naylor (case 1403818/2021) and Megan Anderson (case 1403821/2021) against both respondents, on applications made by them. Formal judgments were sent to the claimants on 15 December. Mr Naylor has requested written reasons on behalf of the claimants.

Procedural history

2. The claimants were dismissed from their employment with Hildare Stud Farm Limited ("HSFL") on 8 July 2021 and have presented claims for unfair dismissal, arrears of pay and holiday pay.

3. The claimants were employed by HFSL from a date in September 2020 when their contracts of employment were transferred (under the Transfer of Undertakings (Protection of Employment) Regulations 2006) to HSFL from Anna Sims-Hilditch, who was their original employer. The first claimant's employment with her started on 18 December 2018 and the second claimant's on 10 May 2019.

4. The first claimant's father, Mr Adrian Naylor, has acted for both claimants from the outset and has been the sole point of contact with the Tribunal. The claimants have left everything to him. Mr Naylor is not legally qualified or experienced in Tribunal proceedings. It follows from the role Mr Naylor has taken on that it is

mostly his actions in relation to the proceedings that fall to be considered in relation to the strike out applications.

5. Mr Naylor sent Early Conciliation (“EC”) notifications to ACAS on 7 August 2021 (for the first claimant) and 10 August 2021 (for the second claimant). An EC certificate was sent to the first claimant on 18 September 2021 and another to the second claimant on 21 September 2021. Both EC certificates name “Hildare Stud Ltd” as the prospective respondent. The parties agree this refers to HSFL. So the EC Certificates correctly identified the claimants’ employer.

6. ET1 forms were received by the Tribunal on 25 September 2021 (first claimant) and 26 September (second claimant), within 3 months of the dismissal. The forms both name Anna Sims-Hilditch and Hugh Sims-Hilditch as the respondents and refer to claims for unfair dismissal, arrears of pay and notice pay. Each was accompanied by a document setting out the grounds for the claim.

7. The first claimant’s ET1 also made a claim for “harassment/bullying/breach of confidentiality”. At a hearing before Employment Judge Cadney on 30 August 2022 Mr Naylor confirmed that this was not intended to be a separate claim, but was more a description of how the first claimant viewed what had happened.

8. Two notices from the Tribunal dated 17 March 2022 were sent to Hugh Sims-Hilditch (the first respondent), informing him of the claims made against him by each claimant and stating they had been “accepted”. The word “accepted” in this context merely means the claim form has not been rejected at the outset as procedurally defective.

9. Anna Sims-Hilditch was not notified of the claims made against her. It appears these were rejected by the Tribunal, presumably for lack of an EC Certificate naming her as a prospective respondent

10. Mr Sims-Hilditch (at the time the only respondent) filed responses to the claims made by each claimant. These were dated 30 March 2022. He asserted that the Tribunal had no jurisdiction over the claims because he was not named on the EC Certificate and also because he was not the claimants’ employer. The grounds of response asserted that the claimants were fully aware their employer was HSFL (the EC certificate having named HSFL as the prospective respondent).

11. Mr Naylor did not take any action as a result of receiving the response to the claims.

12. On 14 April 2022 Mr Sims-Hilditch's solicitors emailed the Tribunal asking for a preliminary hearing to determine whether the claims against him should be rejected for lack of jurisdiction.

13. Mr Naylor responded to this application in a letter emailed to the Tribunal on 19 April 2022. He referred to the point that the ACAS certificate referred to HSFL but did not answer it. He took issue with the assertion in the respondent's response that HSFL was the claimants' employer, saying that the claimants had always viewed Anna and Hugh Sims-Hilditch as their employers and that there was evidence to support Hugh Sims-Hilditch being their employer. He objected to the preliminary hearing applied for by the respondent.

14. On 18 July 2022 the Tribunal wrote to the claimants informing them that Mr Sims-Hilditch's response to the claims had been accepted and that Employment Judge Rayner had directed that the claimants' cases had been linked and were to be listed for a preliminary hearing to determine the identity of the employer and whether the mandatory Early Conciliation steps had been complied with.

15. Mr Naylor responded to this on 22 August. In addition to points made in his previous response to the first application described in paragraph 12 above, Mr Naylor listed a number of communications which, in his view, made the first respondent the claimants' employer. His letter continued to maintain the position that it was the respondent (Hugh Sims-Hilditch) not HSFL who was the claimants' employer. It also asserts that the ACAS process leading to the issue of the EC Certificate was conducted with Hugh Sims-Hilditch, referring to the fact that "at no time did he state that he was not the claimant's employer. If that had been the position, the case officer was duty bound to inform the claimants, which he did not deem necessary".

16. A telephone case management preliminary hearing was held on 30 August 2022 by Employment Judge Cadney. The Case Summary states that Mr Naylor accepted at the hearing that it was HSFL (and not Mr Sims-Hilditch) who was the claimants' employer. EJ Cadney recorded his view that the claim against the first respondent was bound to fail, but explained that he was being retained as a respondent to avoid technical difficulties so as to allow all issues as to the proper respondent to be determined at the next hearing.

17. EJ Cadney added HSFL as a respondent, by agreement, but stated that this was only for convenience's sake at that stage as HSFL had not had any opportunity to object. Finally, EJ Cadney ordered that that a Preliminary Hearing be listed on 7 December to determine (a) whether the first respondent should be dismissed as a respondent and (b) to hear any objections from the second respondent to being added.

18. The Tribunal notified the second respondent of the claims now made against it in a notice dated 9 September 2021. It submitted a response dated 7 October 2021 which denied the substantive claims and raised a procedural objection to being added: that the claims against the second respondent are all out of time and there is no basis for extending time, because the claimants were aware who their employer was and it was reasonably practicable for them to have made a claim

against HFSL in time. The second respondent’s response also refers to the 5-month delay between the first respondent's’ response on 30 March 2022 stating that HSFL (and not the first respondent) was the correct employer and the addition of HSFL as second respondent on 30 August 2022.

The hearing and the documents before the Tribunal

19. The hearing was held by video (VHS) and the parties did not object. There were some connection issues during the hearing, but this did not affect the overall quality or fairness of the hearing.

20. I was supplied in advance of the hearing with:
    (a) a 133-page bundle of documents which appeared to have been prepared by the respondents’ solicitors;
    (b) a skeleton argument from the second respondent;
    (c) an email from Mr Naylor objecting to some of the content of the Skeleton and the second respondent’s Response to the claims, accompanied by a copy of the Response with some comments in red from him.

21. Some time at the start of the hearing was taken up with ensuring the Tribunal and the parties all had the right documents. It emerged that Mr Naylor had submitted a short supplementary bundle to the Tribunal in advance of the hearing that, regrettably, had not found its way to me. This was then supplied to me and I adjourned the hearing briefly so that I could identify what the additional documents were. During the hearing, Mr Naylor took me through the documents in that bundle that he considered relevant to the issues.

22. Towards the end of the hearing, Mr Roberts referred in passing to the fact that Mr Naylor was a retired police officer, to which Mr Naylor objected forcefully. This was an unsatisfactory way for this fact to come out. But it was in my view a piece of information of potential relevance to the issues, given that Mr Naylor is relying on a lack of legal knowledge and understanding as part of his reasons for asserting that it was not practicable for him to make the claims against the second respondent in time. However, I do not regard this information about his previous employment as adding significantly to the picture already given by the documents in the bundle, which include a number of detailed communications from Mr Naylor which indicate an ability to articulate his position and arguments, despite any lack of specific legal or procedural knowledge.

The application to strike out the claims against the first respondent

(1) Issues

23. The issues in relation to the application to strike out the claims against the first respondent are--

    1. Were the Early Conciliation requirements met in relation to the first respondent?

    2. Was the first respondent the claimants' employer at any material time?

    3. In the circumstances of this case, should the claims against the first respondent be struck out as having no reasonable prospects of success?

(2) The applicable law

Strike out

24. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides that at any stage of proceedings the Tribunal may strike out a claim on a number of grounds, one of which is that the claim has no reasonable prospects of success. This is the ground the application in this case relies on.

25. The power to strike out a claim is discretionary and the case law relating to Rule 37 makes it clear that "no reasonable prospects of success" is a high threshold for an application to succeed. The applicant does not have to show that the claim is bound to fail, but if it is bound to fail then the threshold is met.

Who is potentially liable for the claims

26. The claims made in this case, of unfair dismissal and matters relating to pay arrears and notice pay, can only be made against the claimants' employer. It follows that claims made against anyone other than the employer at the time of dismissal are bound to fail.

Early Conciliation requirements for claims for unfair dismissal and pay claims

27. Section 18A of the Employment Tribunals Act 1996 requires a prospective claimant to contact ACAS and provide it with prescribed information before instituting proceedings in the Tribunal. This is to enable attempts at conciliation to be made. Under the Employment Tribunals Rules of Procedure 2013 (see in particular Rules 10 and 12), before making claims against a particular person a claimant must obtain an EC certificate from ACAS naming that person as the prospective respondent.

28. As a matter of law, the claims made in this case cannot succeed against a person who is not named in an EC certificate obtained before the claim is first made against that person. The case law on early conciliation clearly establishes that the Tribunal has no jurisdiction in those circumstances.

29. Rule 12 requires Tribunal staff to refer a claim form to an employment judge in various circumstances, one of which is where the name of the respondent on the form is not the same as the name of the person named on the EC Certificate

relied on in the form (see Rule 12(1)(f)). Under Rule 12(2A) the claim must be rejected unless the judge considers there was an error in the name or address of the person named in the certificate and it would not be in the interests of justice to reject the claim. In this case the EC Certificates identified the correct person as respondent, so the exception to that rule is not in issue. They did contain a minor error in the name of the prospective respondent (who was the claimants' employer), but the parties have agreed that they did effectively identify HSFL as the prospective respondent.

30. In this case the claims against Anna Sims-Hilditch were rejected at the outset but not those against Hugh Sims-Hilditch (the first respondent). It is not clear why the claims against Mr Sims-Hilditch were not rejected, for absence of an EC Certificate naming him as the prospective respondent. That was clearly a mistake under the terms of Rule 12, but the failure to reject at the outset does <u>not</u> give the Tribunal jurisdiction over a case where the Early Conciliation requirements were not met. It is a jurisdictional point that the Tribunal has to take, even if it is not spotted until later. That is why Issue 1 set out above is a live, and potentially decisive, issue in determining the strike out application.

(3) Conclusions on the first respondent's application

The parties' contentions

31. The first respondent's position is that the answers to Issues 1 and 2 are "no", so the claims are bound to fail and should be struck out. Mr Naylor was reluctant to accept that the claims against the first respondent should be struck out on technical grounds, because he and the claimants consider that Mr Sims-Hilditch acted as if he was their employer and was the person who dismissed them. But Mr Naylor did accept during the hearing (as he did before EJ Cadney on 30 August 2022) that Mr Sims Hilditch was never their "legal employer". He also accepted that the first respondent was not named on the EC certificates he obtained in September 2021, but he said that he was not aware at the time of the significance of that fact.

32. I understood Mr Naylor's position to be that I should make allowances for the fact he is not legally qualified and that he thought, when he initially presented the claims, that the correct respondents were Mr and Mrs Sims-Mr Hilditch as the claimants' employers. When the claims against Mrs Sims-Hilditch were rejected by the Tribunal, he decided to continue against Mr Sims-Hilditch. He said he had not realised the importance of the EC Certificate in fixing who was a proper respondent to a claim in the Tribunal.

33. The difficulty with Mr Naylor's position is that there is no room for judicial discretion in answering the issues set out above, which are the only issues

relevant to the first respondent's application. The matters raised by him are though relevant to the second respondent's application.

Issues 1 & 2

34. The EC Certificates obtained by Mr Naylor do not name Mr Sims-Hilditch as the prospective respondent. The Early Conciliation requirements were not met in relation to the first respondent.

35. The claimants' employer was at all material times HSFL (the second respondent). They were originally employed by Anna Sims-Hilditch as an individual before being transferred to HSFL under TUPE when the business was incorporated. The first respondent was never their employer.

36. Mr Naylor accepted that the first respondent was not the claimants' employer. That is borne out by uncontroverted documents in the bundle stating that the letter of dismissal was from HSFL and by information given to me orally at the hearing about the name of the employer as stated in the claimants' payslips (ie Anna Sims-Hilditch until October 2020 and HSFL thereafter). Mr Naylor did at one point tell me categorically that all the payslips up to the date of dismissal refer to Anna Sims-Hilditch. But I did not understand him to dispute the information I was later given by Mr Roberts - that all the payslips after the TUPE transfer were in fact in the name of HSFL.

Issue 3

37. On 30 August 2022 Employment Judge Cadney decided not strike out the claims for procedural reasons, preferring to leave the final decision to the hearing on 7 December so all matters relating to the position of the respondents could be resolved together. It is clear from his Case Summary that that was the only reason he did not strike out the claims. As the parties had the opportunity to present evidence and submissions at the hearing on 7 December, there was no reason to delay further. The answers to Issues 1 and 2 are both "no", so the claims against the first respondent are bound to fail. For that reason, they are struck out as having no reasonable prospects of success.

Application to strike out claims against the second respondent

(1) Issues

38. The question arising on the application by the second respondent turns on whether it should have been added to the proceedings on 30 August 2022. The issues that fall to be determined in answering that question are:
4: Were the claims made against the second respondent within the applicable time limit?

5: If not, was it was reasonably practicable for the claimants (acting through Mr Naylor) to make the claims against the second respondent within the applicable time limit?
6: If not, were the claims made within a reasonable time after the end of that time limit?
7 If the answer to Issue 5 is no, and the answer to Issue 6 is "yes", should the second respondent have been added as a respondent, taking account of all the circumstances including the balance between the hardship to the claimants in refusing to allow the second respondent to be added against the hardship to the second respondent if it is added?

39. The issues described in paragraph 23 above do not arise because HSFL was the claimants' employer and was identified as the prospective respondent by the EC Certificates.

(2) Applicable law

Strike out

40. The law on strike out is summarised in paragraphs 24 and 25 above.

Time limit for claims to the Tribunal

41. A claim for unfair dismissal is required by section 111 of the Employment Rights Act 1996 to be made within 3 months of the dismissal date, subject to an extension of time to allow for the time taken to liaise with ACAS and obtain an EC certificate. The same applies to claims for pay arrears and notice pay.

42. Unless the Tribunal decides to extend time, it has no jurisdiction over a claim that was not made within the applicable time limit. However, the Tribunal can extend time if the claimant can show that it was not reasonably practicable to make the claim before the end of the period allowed and that it was made within a reasonable period thereafter.

43. The case law on extending time has made clear that "reasonably practicable" means "feasible". If it was reasonably practicable (or feasible) to make the claims in time, an extension of time cannot be granted.

44. Ignorance or a genuine mistake about the law or procedure, in the case of claimants who are not legally represented, is capable of justifying a conclusion that either it was not reasonably practicable for them to bring their claims in time or that the claim was nonetheless brought within a reasonable time. But what did or did not happen must have been reasonable in all the circumstances of the case.

45. What is reasonable depends in part on the level of understanding of the claimant. In this case that means Mr Naylor in practice as he has taken on everything for the claimants. However, there is an expectation that a claimant will take reasonable steps to inform themselves about the relevant law and procedure and what needs to be done when making a claim to the Tribunal. There are sources of information and advice available online and a claimant who is able to access them is expected to take reasonable steps to do so.

Adding a person as a respondent

46. Rule 34 of the Employment Tribunals Rules of Procedure 2013 gives the Tribunal power, on its own motion or in response to an application, to add a person as a party to existing proceedings if "*it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings*".

47. That rule gives the Tribunal a wide power to determine whether or not to add a respondent, in a case where the Tribunal has jurisdiction over the claims in question.

48. Adding a party is an amendment of the claim and subject to the rules applicable to amending a claim. Before deciding to amend a claim, the Tribunal is required to take into account all the circumstances and to balance the potential injustice and hardship of allowing the amendment against the potential injustice and hardship of refusing it (*Cocking v. Sandhurst Stationers* [1974] IRC 650; *Selkent Bus Co v. Moore [1996] ICR 836).*

How do the different laws relevant to the case fit together?

49. The hard question in this case is how the various laws described above fit together, where the Tribunal has no jurisdiction over the original claims owing to a failure to comply with the Early Conciliation requirements in relation to the first respondent. What is the relationship between those requirements, the Tribunal's power to add or remove a respondent, the time limits for bringing claims and the power to strike out?

50. The extensive case law on these matters is confusing and it is not easy to reconcile all the potentially relevant cases. This is apparent from reading the account of the law in Harvey on Industrial Relations and Employment Law and the corresponding account in IDS Employment Law Handbook 6.

51. Most of the reported court decisions since *Selkent Bus Co v. Moore* [1996] ICR 836 have emphasised the discretionary aspect of an application to amend a claim (including by adding a new respondent), even when the new claim is "out of time": see for example *TGWU v. Safeway Stores Ltd UKEAT/0092/07, Vaughan v Modality Partnership UKEAT/0147/20*.

52. Those cases depend on factual situations very different from those in this case. The case of *Cocking v Sandhurst Stationers* is authority for the proposition that where the Tribunal has no jurisdiction over the original claims against one respondent, there is no power to amend the claim by adding another respondent, at least in circumstances where the claims against the new respondent are out of time and time is not extended. In that case the originating application (under the procedures in force at the time) was made in time but made against the wrong company in a group. The Employment Appeal Tribunal allowed the appeal against refusal to allow the application to be amended to substitute the "right" employer. But the EAT went on to say that if the originating application had not been compliant with the rules when made there was no power to amend it. That suggests that where the Employment Tribunal has no jurisdiction there is no power to add a new respondent. Subsequently, the Court of Appeal in *Abercrombie v Aga Rangemaster Limited [2014] ICR 209* decided that in a case where the proceedings were initially valid, the absence of jurisdiction (owing to a failure to comply with a statutory grievance procedure applicable at the time) was not fatal to an application to amend a claim. But the Court of Appeal drew a distinction between such cases and cases where the initial claim is a nullity, suggesting that that was the situation the EAT in *Cocking* had in mind. I note that IDS Employment Law Handbook 6, Chapter 8 suggests that such cases will be rare because of the effect (among other things) of Rule 12 described in paragraph 29 above.

53. I conclude that where a claim is a nullity for lack of an EC Certificate naming the respondent as a prospective respondent, the proposition in *Cocking* described in paragraph 52 above applies. That means in practice that a new respondent should not be added in circumstances where (judged when a new respondent is added or an application to add a respondent is considered) the claim is out of time and time for presentation of the claim is not extended.

54. That view of the law is the legal basis for Issues 4 to 6 as set out in paragraph 38 above, given that in this case the claim against the first respondent is and has always been a nullity, for lack of an EC Certificate naming him as a prospective respondent. It follows from my conclusion on the applicable law that if I conclude that time should not be extended in favour of the claimants (issues 5 and 6) I do not in practice have any residual discretion to allow the second respondent to remain as a party. The claims should then be struck out.

55. In my view that result makes practical sense in the circumstances of this case. It would be a surprising result for the existence on 30 August 2022 of proceedings relating to a fundamentally defective claim against one respondent, Mr Sims-Hilditch (a nullity that should have been rejected at the outset) to put the claimants

in a better position in terms of the law on time limits than they would be in if they had simply made fresh claims against HSFL on the same day.

56. I should note that even if (contrary to my view of the law) I did have any residual discretion as to whether to permit the claims against the second respondent to proceed, the question whether an extension of time can be made is still an important, and potentially decisive, factor in the exercise of that discretion (according to Underhill J in *TGWU v Safeway*).

(3) Conclusions on the second respondent's application

57. Employment Judge Cadney added the second respondent to the proceedings formally, on the understanding that it would be able to object to this at the hearing on 7 December. The second respondent did so at the hearing.

58. The second respondent's position is that the claims against it were not made in time, that it was practicable for the claimants (acting through Mr Naylor) to present the claims against it in time and (even if it was not practicable to do that) that the claims were not made within a reasonable period after the end of the time limit. Even if I conclude time should be extended, Mr Roberts submitted that I should nonetheless exercise my discretion under Rule 34 against the claimants.

59. Mr Naylor's position was, in effect, that it is unjust for the claimants to be denied the opportunity to have their claims heard, that it was not reasonably practicable for them to have brought their claims against the second respondent in time and that they were made (on 30 August) within a reasonable period. Mr Naylor urged me to exercise any discretion in favour of the claimants.

Issue 4

60. In this case the time limit for claiming was 3 months plus 41 days representing the time taken to liaise with ACAS and obtain EC certificates. The date of dismissal was 8 July 2021, so the last day for bringing the claims made in this case was 18 November 2021.

61. It is common ground that the claims were not made on or before that date. The claims against the second respondent were "made" when it was added as a respondent by EJ Cadney on 30 August 2022. This was not preceded by any application by the claimants.

Issue 5

62. The question is whether the claimants (through Mr Naylor) have shown that it was not reasonably practicable for the claims to have been made in time.

63. It is clear that within a month of the dismissal Mr Naylor had become aware of the need to contact ACAS for early conciliation, as he applied to them on 7 August 2021. At that time, he was aware that HSFL was the employer because it was the prospective respondent named in the EC Certificates. Doubtless this was because HSFL was named in the claimants' payslips as paying them from November 2020 and the dismissal letters came from HSFL. Those documents were not in the bundle, but the second respondent's factual assertions on those points have not been controverted by Mr Naylor in the correspondence between the parties.

64. In these circumstances, Mr Roberts submitted that it was reasonably practicable to have made the claims in time and that Mr Naylor had not shown otherwise.

65. During the hearing I invited Mr Naylor to explain why he did not bring the claims against the second respondent (rather than against Mr and Mrs Sims-Hilditch).

66. He explained that he thought they were the claimants' employer because of the things they did while the claimants were employed, culminating in Mr Sims-Hilditch's role in their dismissal. I found this explanation difficult to understand as the fact Mr and Mrs Sims-Hilditch as individuals had roles in HSFL, a limited company, did not make them employers and or affect its position as the claimants' employer. If he had thought otherwise, it would make no sense to commence the process of making claims by contacting ACAS on the basis that the respondent employer was to be HSFL. I was left with the impression that he had decided to pursue Mr and Mrs Sims-Hilditch, and not HSFL, for some reason that was not entirely clear. But in my judgement Mr Naylor failed to show that he had made a reasonable mistake in all the circumstances.

67. He referred to things he had been told by members of ACAS staff when he contacted ACAS to meet the early conciliation requirements. His account about that is set out in a letter to the tribunal dated 22 August 2022, as follows:
"6. The ACAS conciliation process was conducted with HSH in the role of respondent, in an e mail from ACAS to myself on 25th August, the case officer states, 'I have made contact with the Respondent and have a few questions around some points raised by him'.
On the 26th August 2021 the same case officer sent me an email which starts, 'The respondent has alleged'. The case officer spoke only to HSH during the conciliation process, at no time did he state that 130 he was not the claimant's employer. If that had been the position, the case officer was duty bound to inform the claimants, which he did not deem necessary.
7. The Acas certificate R162383/21/46 confirms that the prospective claimants have complied with the requirement under ETA1996 s18a to contact Acas before instituting proceedings in the Employment Tribunal."

68. Again, I do not understand how the things he refers to in the letter (assuming them to be an accurate record) could reasonably be interpreted as some sort of advice or assertion by ACAS that the employer was Mr Sims-Hilditch rather than HSFL. He had approached ACAS on the basis that HSFL was the employer and the prospective respondent and an ACAS officer had approached the respondent. As a company the second respondent can only act through individuals so it is not surprising that the officer spoke to Mr Sims-Hilditch. There was certainly no duty on the officer's part to inform Mr Naylor that Mr Sims-Hilditch was not the employer as nobody had ever suggested that he was. In my view there is nothing in the above extract to justify a decision to claim against Mr and Mrs Sims-Hilditch instead of HSFL. If that was a mistake (rather than a deliberate decision by Mr Naylor to pursue them instead) it was not in my view a reasonable one to make.

69. The EC Certificates Mr Naylor relies on both refer to HSFL as "prospective respondent", which makes it hard to understand why it was not also the respondent when the claims were presented (in time). Mr Naylor told me that he had not understood that the name in the certificates had to be the same name as the respondent. I consider, however, that even if that was the case, it does not justify a conclusion that it was not reasonably practicable to have proceeded against HSFL. He had discovered that it was necessary to contact ACAS before claiming in the Tribunal, and in my view it is reasonable to expect him to have found out or understood the importance of the name recorded in the EC certificates. He came across to me as an intelligent capable person who would, I am sure, have read the certificates and could have found this information out.

70. Mr Naylor also referred to a number of documents he said contributed to his confusion as to who the employer was, when the claims were first presented.

71. There are two documents in his supplementary bundle that referred to the first claimant as a key worker in a company called Urathon Europe Limited (23 March 2020) and as someone "employed by" Urathon (1 April 2020). Those documents related to her status as a key worker in the early days of lockdown. I did not understand why Mr Naylor thought this was significant as Urathon has not been suggested as a potential respondent in this case and the letters are dated more than a year before the dismissal. His supplementary bundle also included an email from Mr Sims-Hilditch asserting that she was never employed by Urathon and that her employment with Hildare started on 8 September 2020. This was in response to a question from Miss Naylor dated 17 September 2021 where she asked for confirmation of "my official employment dates from Hildare and also urathon". That email may suggest that Miss Naylor thought she had been employed by Urathon before Hildare, but it also shows that when she sent the message, she knew who her most recent employer was.

72. Mr Naylor referred me to a payslip in his supplementary bundle for the first claimant which was dated 28 October 2020 and names Anna Sims-Hilditch as the company paying her. He told me the same name was given in subsequent payslips. However, Mr Roberts told me a short while later that that was not so, and that all subsequent payslips were in the name of HSFL, although he was unable to produce them there and then. Mr Naylor did not dispute what Mr Roberts said, which was also consistent with the following statement by Mr Naylor in a letter to the Tribunal dated 14 April 2022: *"The claimants I represent were initially paid by Urathon Ltd and latterly, following its formation in August 2020, Hildare Stud Farm Ltd. The claimants' duties, place of work, terms and conditions were unchanged in the transition between the two companies."*

73. It is the case that the employer named on the 28 October 2021 payslip should have been HSFL (assuming the date it took over the claimants' employment was 8 September 2020 as stated by Mr Sims-Hilditch), but it is understandable that it took a few weeks for the change of employer to be reflected in their payslips. I fail to understand why Mr Naylor considered the name on the payslip in October 2021 to be relevant to the issues in the case, if all the later ones had the correct name on them.

74. My conclusion on issue 5 is that it <u>was</u> reasonably practicable for the claims to have been made against HSFL in time. Mr Naylor has not shown that it was not: nothing in the reasons Mr Naylor gave persuaded me that a reasonable mistake was made on his part that justifies a different conclusion. He did present claims against Mr and Mrs Sims-Hilditch in time and there was no good reason why he did not make those claims against HSFL, as he had proposed to do when he contacted ACAS.

75. I remain unsure why Mr Naylor was so determined to proceed against Mr Sims-Hilditch rather than HSFL, even after the first respondent correctly identified HSFL as the claimants' employer in his particulars of response dated 30 March 2022. Mr Naylor disagreed and maintained his position that the claims should be continued against the first respondent. In his letter to the Tribunal dated 19 April 2022 he stated "*It is the opinion of the claimants that the respondent should engage with the process and be called upon to justify and account for his actions that led to claimants' instant dismissal."* His letter concluded by stating that matters set out in his letter "*clearly illustrate HSH's active involvement as their employer, and therefore object to the request for a preliminary hearing.*" Mr Naylor maintained this position in his letter to the Tribunal of 22 August in advance of the hearing on 30 August, in which he states: *"I believe the evidence contained within this response clearly evidences an employer / employee relationship between the respondent and claimants. Therefore, I strongly object to a stay of proceedings as requested by the respondents' representing solicitors. I respectfully request that the tribunal proceeds as promulgated and the seventeen months the claimants have already waited, is not further extended."* Mr Naylor had clearly decided that he wanted to

continue the claim against the first respondent, despite what the first respondent had (correctly) told him.

Issues 6 and 7

76. Issue 6 does not arise because I have concluded that it was reasonably practicable for the claims against the second respondent to have been presented in time. I consider it inappropriate to speculate in any detail as to what I would or might have decided had I reached a different conclusion on Issue 5. That is because the reasons for determining Issue 5 in favour of the claimants (had I done so) would inevitably be a crucial part of the analysis required to determine whether the claims had, nonetheless, been brought within a reasonable time (Issue 6).

77. In carrying out that analysis, in addition to the parties' submissions on the merits of Issue 6 and the evidence I would have had to consider the significance of (a) the delay of about 5 months between the claimants' presentation of their claims in September 2021 and the notification of those claims by the Tribunal to the then respondents in March 2022 and (b) the reasons for the delay between March 2022 (when Mr Naylor was informed in the first respondent's grounds of resistance that the correct employer was HSFL) and the addition of the second respondent as a party on 30 August 2022.

78. Mr Naylor told me that he had been misled by the Tribunal informing him in March 2022 that the claim against Mr Sims-Hilditch was "accepted". While I have some sympathy with that point, I would note that the response to that claim made clear the respondent's view the claim against him was misconceived for the reasons described above. And while Mr Naylor's point is potentially relevant to Issue 6, it does not, in my view, help him in relation to Issue 5 (whether it was reasonably practicable to present the claim against the second respondent in time).

79. As I have concluded that the claims against the second respondent were made out of time and that the power to extend time is not available, Issue 7 does not arise and so does not need to be determined.

Decision

80. For all the above reasons I conclude that the second respondent should not have been added as a party. The claims against it are struck out as having no reasonable prospects of success.

Employment Judge Hogarth
Dated: 26 February 2023

Sent to the parties on
28 February 2023 by Miss J Hopes

For the Tribunal Office