EMPLOYMENT TRIBUNALS

Claimant: MS ROSEMARY NWOGU

Respondent: ROYAL BERKSHIRE NHS FOUNDATION TRUST

Heard at: Watford Employment Tribunal by video

On: 13 June 2023

Before: Employment Judge L Burge

Appearances
For the Claimant: Mr Ogbonmwan, Lay Representative
For the Respondent: Mr Boyd, Counsel

OPEN PRELIMINARY HEARING JUDGMENT

It is the Judgment of the Tribunal that:

1. the decision dated 17 January 2023 to reject the Claimant's claim pursuant to Rule 10(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is wrong.

2. The Claimant's claims therefore continue.

REASONS

JUDGMENT having been delivered orally on 13 June 2023 and written reasons having been requested by the Respondent at the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 ("ET Rules"), the following reasons are provided:

1. The Claimant made an application for reconsideration. I allowed the application to proceed to this hearing. Normally under a Rule 13 Reconsideration of Rejection hearing only the Claimant attends. However, as it had become apparent that

neither side referred the Tribunal to the correct version of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1, at the hearing on 17 January 2023, I decided that to ensure fairness in accordance with Rules 2 and 41 the Respondent may also participate in the hearing.

2. The parties were to provide an electronic agreed bundle to the Tribunal 10 days prior to the hearing and written submissions 4 days prior to the hearing. On 14 April the Tribunal wrote to the parties on my instruction drawing the parties attention to the recently decided case of *Sainsbury's Supermarkets Ltd v Clark & others* [2023] EWCA Civ 386. I requested that the submissions included consideration of this case. Only the Respondent submitted a bundle and no written submissions were received from either side. However, both representatives had read the decision and both gave oral submissions.

3. Mr Ogbonmwan is a lay representative and so I read the relevant parts of the Rules to him before I asked to hear the parties' submissions.

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. The Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014 provide:

"Satisfying the requirement for early conciliation
…
(2) An early conciliation form must contain—

(a)the prospective claimant's name and address; and
(b)the prospective respondent's name and address.

(3) ACAS may reject a form that does not contain the information specified in paragraph (2) or may contact the prospective claimant to obtain any missing information.

(4) If ACAS rejects a form under paragraph (3), it must return the form to the prospective claimant.
…

6. 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."

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

8. 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;
…"

9. 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) …

(da)one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate *(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).
(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.
(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."

10. 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).

11. 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.

12. 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…."*

13. *Sainsbury's Supermarkets Limited v Maria Clark and others* [2023] EWCA Civ 386 was handed down on 6 April 2023. It has overturned the *Sterling* and *E.ON Control Solutions* decisions. It primarily concerned the ACAS early conciliation requirements in relation to multiple claims but it also contained important principles about the requirements of providing an ACAS EC number contained in the Rules:

> *"Before plunging into the details of the relevant statutes and regulations I think it is worthwhile to stand back and look at the broad picture. Not even the considerable forensic skills of Julian Milford KC could disguise the fact that these are highly technical applications lacking any substantive merit. When industrial tribunals were established more than half a century ago the purpose of Parliament was to create a speedy and informal system free from technicalities. It has been repeatedly stated that employment tribunals should do their best not to place artificial barriers in the way of genuine claims. Nevertheless, if the Appellant is right, an artificial barrier has indeed been placed in the way of these claims. It should be emphasised that there is no suggestion that any of these Claimants failed to make the necessary reference to ACAS before the claim was issued, nor that any of them failed to obtain a certificate by ACAS demonstrating that such a reference had been made. The complaint is no more and no less than that the ET claim form did not give the appropriate certificate number."*

14. The Court of Appeal concludes:

> *"The legislative purpose of s 18A of the 1996 Act was to require claimants to go to ACAS and to have an EC certificate from ACAS (unless exempt from doing so) before presenting a claim to an ET in order to be able to prove, if the issue arises, that they have done so. I do not accept that it is part of the legislative purpose to require that the existence of the certificate should be checked before proceedings can be issued, still less to lay down that if the certificate number was incorrectly entered or omitted the claim is doomed from the start. If the claim is rejected in its earliest stages under Rule 10 or 12 then the claimant may seek rectification or reconsideration. If it is not, then the time for rejection of the claim has passed. The respondent may instead apply to have the claim dismissed under rule 27 or struck out under rule 37, with the tribunal having the power to waive errors such as the one relied on in the present case under Rule 6."*

Conclusions

15. A claimant must provide ACAS with prescribed information before starting proceedings. The prescribed information is the names and addresses of the prospective parties. The Claimant says the address in the first certificate was wrong. The Respondent says it was correct. Both addresses are for the Respondent on the London Road in Reading although the postcodes are different. The first address was where the Claimant worked and was opposite the second address. Even if the address was not the main address of the Respondent, this does not fall foul of the mandatory requirements set out in the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014 which states that the early conciliation form must contain "(b)the prospective respondent's name and address". ACAS could have rejected the form if it did not contain the information specified or could have contacted the prospective claimant to obtain any missing information. This did not happen in this case, ACAS did not reject the form and could in any event have corrected the address if it had been raised. The first ACAS certificate was valid.

16. The claim form was not rejected for any inconsistencies between the ACAS certificate and the claim form.

17. Mr Boyd submits that *Serra Garau* remains good law. I agree. In *Serra Garau* the EAT decided that only one mandatory EC process is enacted by the statutory provisions and the effect of that provision is to prevent the bringing of a claim without first obtaining an EC certificate. Once that has been done, the prohibition against bringing a claim enacted by the Employment Tribunals Act 1996 is lifted and time starts to run. It would not be right for a second certificate to be allowed in relation to the same matter so as to start the clock again. The Claimant's second EC Conciliation form must therefore be invalid.

18. *E.ON Control Solutions Limited v Caspall* and *Sterling v United Learning Trust* have been overturned by *Sainsbury's Supermarkets Ltd v Clark & Others.*

19. This is a claim where the early conciliation number of the claim form is not the same as the early conciliation number on the early conciliation certificate (Rule 12(da). Rule 12(2ZA) says that I shall reject it unless I consider that the Claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim. The Claimant did make an error in the number she wrote on the form. She already had a valid certificate and she should have put that number in. The introduction of Rule 12(2ZA) demonstrates a desire from the rule-makers to move away from technical points being taken in litigation. The Claimant had conciliated and obtained a certificate prior to entering her claim and that is the requirement. It was therefore not in the interests of justice to reject the claim. The decision to reject the claim was therefore wrong.

20. The power to vary a decision under Rule 70 is wide enough to allow a variation by substitution of the opposite result (*Stonehill Furniture Ltd v Phillippo [1983] ICR 556).* In accordance with Rule 70 it is also in the interests of Justice for the decision to be varied to provide that the decision to reject was wrong.

21. Further, if I am wrong that the first certificate is valid, the parties agree that the second certificate is valid. In that situation the claim would also proceed.

22. Further, this was an issue that was raised part way through proceedings. Had the Respondent made the application under Rule 27 and/or 37, I would have waived or varied the requirement for the first ACAS EC certificate to be entered onto the claim form under Rule 6 in these circumstances.

23. The final hearing will be re-listed.

Employment Judge Burge

13 June 2023

Sent to the parties on:

21 July 2023
For the Tribunal Office:

GDJ