



EMPLOYMENT TRIBUNALS

Claimant: Miss H. Oppong
Respondent: Cygnet Health Care Ltd

PUBLIC PRELIMINARY HEARING

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP)
On: 22 August 2023
Before: Employment H. Judge Mason

Appearances

For the Claimant: In person
For the Respondent: Miss Williams, solicitor

JUDGMENT

1. The Tribunal has no jurisdiction in respect of the claims of discrimination (age, sex, race and disability) as these claims are not exempt from the requirement to comply with ACAS early conciliation as they are not made under Part X of the Employment Rights Act 1996. These claims are therefore dismissed.
2. The Claimant's claim for a redundancy payment is dismissed on withdrawal.
3. The unfair dismissal claim will proceed to a final hearing.

Notes: Reasons for this judgment were given orally at the hearing. These written reasons have been provided at the request of the Claimant at the end of the hearing.

REASONS

Background and agreed facts

1. This hearing was listed by EJ Palmer who conducted a Case Management Preliminary Hearing on 22 June 2023. The purpose of this hearing was to consider and determine the following preliminary issue:
"Whether any or all of the Claimant's claims should be struck out on the basis that the Tribunal has no jurisdiction to hear them, in that the Claimant did not enter an Acas Early Conciliation Certificate number in box 2.3 of her claim form."

2. The Claimant was employed by the Respondent from October 2021 to 15 August 2022 as a Support Worker based at Cygnet Hospital, Gravely Road, Stevenage. The Respondent says the Claimant was dismissed because of her conduct and performance and *“the belief that the environment was not right for her”*.
3. On 15 August 2022 the Claimant lodged a first claim, number 3310713.2022 (“the First Claim”). In that First Claim, she brought complaints of “automatic” unfair dismissal (protected interest disclosure) and complaints of discrimination on grounds of race age sex and disability.
4. On 17 August 2022, the Claimant lodged a second claim, number 3310753.2022 (“the Second Claim”). In that Second Claim she repeated the complaints in the First Claim and added claims for a Redundancy Payment, notice pay and holiday pay.
5. It is not in dispute that the Claimant did not obtain an Acas Early Conciliation Certificate at any point.
6. In both the First and the Second Claim, the Claimant indicated that she was making an application for Interim Relief.
7. The Tribunal listed the Interim Relief application to be heard on 2 September 2022 but that hearing was postponed at the Claimant’s request because she was out of the country. It was relisted to be heard on 29 September 2022 but the day before that hearing, she withdrew her application for interim relief.
8. On 22 June 2023, EJ Palmer conducted a Case Management Preliminary Hearing by telephone which both parties attended. At that hearing:
 - 8.1 The Claimant withdrew her claims for notice pay and holiday pay.
 - 8.2 EJ Palmer
 - (i) consolidated the two claims;
 - (ii) listed this hearing today;
 - (iii) listed the final hearing for 5 days starting on 8 April 2024;
 - (iv) ordered the Claimant to provide further information about the alleged acts of discrimination.

Procedure at the hearing today

9. The Claimant attended; she was not represented. Ms. Williams, solicitor represented the Respondent.
10. The Respondent provided a bundle of document (94 pages) together with a Skeleton Argument and copies of two decisions of the Employment Appeal Tribunal, **Cranwell v Cullen** UKEATPAS/0046/15 and **Webster v Rotala PLC** UKEAT/0015/20/VP. The Claimant confirmed to me that she had copies of these documents and we adjourned to allow her time to read them.

11. It was not necessary to hear evidence from the Claimant as determination of this preliminary point is a question of law and the key facts relevant to this issue are not in dispute
12. The Claimant withdrew her application for a redundancy payment.
13. Ms. Williams made submissions based on her skeleton argument and, after a brief break, Ms. Oppong also made brief verbal submissions. After submissions, I adjourned for an hour to make my decision and then gave my decision to the parties verbally. These are my written reasons for that decision as requested by the Claimant.

Relevant Law

14. In summary a claimant may institute relevant proceedings without complying with the Acas Early Conciliation requirement where any one of five exemptions applies. The specific exemption relied on by the Claimant in this case is that she has made a claim for unfair dismissal which was accompanied by an application for interim relief. Set out below is the relevant legislation and case law.

15. **S18A Employment tribunals Act 1996 (“ETA”)**

“(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)

(6) ...

(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

The cases that may be prescribed include (in particular)—

- *cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;*
- *cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;*
- *cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are 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).”

16. **The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure Regulation 2014**

“Exemptions from early conciliation

3.—(1) A person (“A”) may institute relevant proceedings without complying with the requirement for early conciliation where—

(a) ...;

(b) ...

(c) ...;

(d) the proceedings are proceedings under Part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under section 128 of that Act or section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992;

”

17. **Part X Employment Rights Act 1996 (ERA)**

Part X of the Employment Rights Act 1996 provides employees with the right not to be unfairly dismissed and includes the right not to be “automatically” unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure (s103A ERA).

18. **s128 ERA: Interim relief pending determination of complaint.**

“(1)An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—

(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

...

may apply to the tribunal for interim relief.

(2)The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3)The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4)The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5)The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so”.

19. **In Webster v Rotala Plc t/a Diamond Bus North Ltd UKEAT/0015/20/UP, the EAT held that:**

“31. The whole of the claim form does not benefit from the exemption in regulation 3(1)(d). Rather the exemption relates to the parts of the claim under Part X ERA which accompanied by applications for interim relief.

“38. In summary, the Employment Tribunal was correct to regard itself as bound to dismiss the appellants’ claims in the claim form, which were other than those under Part X ERA... “

Submissions

Respondent

20. Ms. Williams submits as follows:

- 20.1 The Claimant's discrimination claims are not covered by an exemption from the requirement to provide an Acas Early Conciliation certificate as Regulation 3(1)(d) does not apply to discrimination claims. In accordance with the decision in **Webster**, the Tribunal does not have jurisdiction in respect of the discrimination claims and they should be dismissed.
- 20.2 The claim of automatic unfair dismissal should also be dismissed because the Claimant has withdrawn her application for interim relief:
- (i) When the Claimant withdrew her application for Interim Relief, she was on notice that there was an issue with the lack of an Acas Early Conciliation certificate as the Respondent had raised this in its responses (ET3s). She was still within time at this point to contact Acas and re-start the Tribunal process. She knew that presenting a further claim was an option as she had submitted a Second Claim to add the pay claims. Once she no longer wished to be reinstated, she should have contacted Acas, engaged in Early Conciliation and then issued a new claim.
 - (ii) The Claimant does not mention the claim for interim relief in her claim forms; there is no clear indication that the application for interim relief was intentional.
 - (iii) It is crucial that an application for interim relief is made swiftly and both the Tribunal and the Respondent must respond swiftly. The Respondent is put to great inconvenience – there is “an explosion of activity”. For these reasons, the exemption from the requirement for Early Conciliation only applies in in very specific circumstances.
 - (iv) Any application is just that until it is heard and it would be inconsistent with the overriding objective and illogical to allow rule 3(1)(d) to be considered as met at the point that a claim is received by the Tribunal regardless of what happens thereafter. The unfair dismissal proceeding should only be allowed to proceed without an Early Conciliation certificate if accompanied by a live application for interim relief. At the interim relief hearing, a judgment is given which decides the application and also gives an indication on the merits of the unfair dismissal claim. It is the hearing of that application and the judgment that follows that confers the continuing jurisdiction.

Claimant

21. Miss Oppong made brief submissions as follows:

- 21.1 The unfair dismissal claim is tied up with the discrimination claims.
- 21.2 Initially she wanted to return to work which is why she made the application for interim relief. She appealed to the Respondent but they did not want her to return. She asked herself if she really wanted to go back and decided that she did not want to and at that point withdrew her application for interim relief.
- 21.3 It was her understanding based on her conversations with Acas that she did not need an EC certificate

Conclusions

- 22. Applying the relevant law to the relevant facts to determine the issues, I have reached the following conclusions.
- 23. With regard to the discrimination claims, I must agree with Ms Williams that the Tribunal has no jurisdiction as these are not exempt from the requirement to comply with early conciliation as they are not claims which are made under Part X of the ERA. This is clear from the decision of the Employment Appeal Tribunal in **Webster v Rotala** and I am bound by that decision. I therefore have no alternative other than to dismiss the discrimination claims.
- 24. With regard to the Claimant’s unfair dismissal claim, it is not in dispute that this is a claim made under Part X of the ERA and was presented within 7 days of dismissal. It was accompanied by a claim for interim relief, which was accepted by the Tribunal and listed for a hearing. The merits of that application have never been determined as the hearing of that application was postponed and then vacated following the Claimant’s withdrawal of that application.
- 25. I do not agree with Ms. William’s submission that rule 3(1)(d) only provides an exemption from entering into the Early Conciliation process for as long as the interim relief application is live and that once the Claimant withdrew her interim relief application she lost the benefit of the exemption. However Ms. Williams was unable to take me to any case law on this point and I cannot accept this submission as, if this were the case, then logically every Claimant who failed in an interim relief application would automatically have their case for unfair dismissal dismissed for lack of jurisdiction thereafter.
- 26. I am satisfied that the requirements of s128 ERA were met at the time the claims were presented and the applicability of the exemption does not depend on the merits of the accompanying application for interim relief or whether that application proceeds or is withdrawn.
- 27. Accordingly the Claimant’s claims of discrimination are dismissed and the unfair dismissal claim will proceed. The claim of unfair dismissal is now the only claim going forward. I have listed a Case Management Hearing to be heard on 25th September 2023 and made case management orders which will be provided separately.

EJ H Mason
23 August 2023
Sent to the parties on:
29 August 2023
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For the Tribunal Office:
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