



EMPLOYMENT TRIBUNALS

Claimant: Miss M Gribbin

Respondent: Herefordshire Council

Heard at: Birmingham in private by CVP **On:** 29 November 2023

Before: Employment Judge Hindmarch

Appearances

For the claimant: In person

For the respondent: Mr F Mortin – Counsel

JUDGMENT ON A PUBLIC PRELIMINARY HEARING

The claim should have been rejected under Rule 12 (1) (d) and is now dismissed under Rule 27

REASONS

1. This open preliminary hearing came before me by CVP on 29 November 2023. The Claimant represented herself and the Respondent was represented by Counsel, Mr Mortin. I had a hearing bundle running to 73 pages. The Respondent had sent in an authorities bundle and written opening submissions. The Claimant had sent in written submissions and a number of other documents which I shall refer to as necessary below.
2. The Claimant had difficulty accessing the Cloud Video Platform but was dialled into the hearing by telephone by the clerk and was able to participate fully.
3. Both parties made oral submissions during the morning of the hearing. At the end of her submissions the Claimant indicated that if I find that the Tribunal did not have jurisdiction to hear her claim, she would appeal my decision as is entirely her right. After discussion with the parties, it was agreed I would reserve my decision and provide written reasons.

4. The hearing before me was listed by Employment Judge Fitzgerald at a case management preliminary hearing on 14 July 2023. Employment Judge Fitzgerald recorded the following: -

“Prior to lodging the claim form the Claimant undertook ACAS Early Conciliation from 25 November 2022 until 6 January 2022.”

It was clear that the second date above was mistakenly said to be 2022 when in fact, and as shown by the ACAS Early Conciliation Certificate, a copy of which was at page 1 of the bundle, the correct date was 6 January 2023.

5. Employment Judge Fitzgerald continued, “the claim form was lodged on 5 January 2023. The Claimant confirmed that as she lodged her claim a day before the ACAS Early Conciliation finished, she did not have the ACAS Early Conciliation number at that point. In the claim form at question 2.3 the Claimant ticked the box to say that she did not have an ACAS Early Conciliation number and then went on to tick the box indicating that her employer had already been in touch with ACAS. The Claimant explained today that she was doing her best to complete the form but wasn't sure which boxes to tick. The Respondent's position is that this is a situation which falls within the Employment Tribunals (Constitution and Rules of Procedure) Regulations, Rule 12 (1)(d) i.e., that the Claimant ticked to confirm that one of the exceptions to having an Early Conciliation number applied (employer had contacted ACAS) but in fact that exception did not apply and therefore the claim should have been referred to a Judge who should have rejected the claim under Rule 12 (2). The Respondent's position is that there is no discretion for the Tribunal in this instance and that the claim must be rejected.”

6. Employment Judge Fitzgerald listed the claim for the hearing before me to consider the following: -

“4.1 Did the Claimant incorrectly state an early conciliation exemption applied to her claim?

4.2 Has the Employment Tribunal considered the case as part of the further sift stage required by Rule 26 (1) of the Employment Tribunal Rules of Procedure 2013?

4.3 If not, should the Employment Tribunal reject the claim pursuant to Rules 12 (1) (d), 26 (1) and 27 (1) of the Employment Tribunal Rules of Procedure.”

7. As already noted, the ACAS Early Conciliation Certificate was issued to the Claimant on 6 January 2023 and confirms the period of ACAS Early Conciliation as being from 25 November 2022 to 6 January 2023.
8. The Claimant submitted her form ET1 on 5 January 2023. The ET1 on the first page and under the heading 'claim form' states 'You must complete all questions marked with an *'. At box 2.3 the claim form asks, 'Do you have an ACAS Early Conciliation certificate number' and, as narrative to this question,

states 'nearly everyone should have this number before they fill in a claim form. You can find it on your ACAS certificate. For help and advice, call ACAS on 0300 123 1100 or visit www.acas.org.uk.' The Claimant answered 'no' in relation to this question. The claim form continues, 'If no, why don't you have this number' and offers the opportunity to tick one of 4 boxes. The Claimant ticked the box that states, 'My employer has already been in touch with ACAS.'

9. The ET3 was filed on 24 March 2023. It was filed by the Respondent's in-house legal services team. In the form ET3 at box 3.1 the question is asked, 'Do you agree with the details given by the Claimant about Early Conciliation with ACAS?', to which the box was ticked as 'yes'. In the Grounds of Resistance the Respondent raised some jurisdictional points regarding the claim but did not raise any issue about early conciliation.
10. Mr Mortin was instructed in advance of the case management preliminary hearing before Employment Judge Fitzgerald in July 2023 and noted that there was a possible issue with the ACAS Early Conciliation point. He raised this with Employment Judge Fitzgerald who listed this open preliminary hearing. Employment Judge Fitzgerald ordered the Respondent to furnish the claimant with written submissions 'in clear and simple terms setting out the grounds for why it says the Claimant's claim should be rejected under the Tribunal Rules by 22 November 2023.' The Respondent complied with this Order.
11. Before this hearing commenced, I spoke with a Legal Officer at Midlands West Employment Tribunal regarding the acceptance of the claim and because I was sitting remotely and did not have the tribunal file. I was told that the Tribunal office had asked the Claimant on or around 18 January 2023 to either provide an early conciliation certificate or evidence that the Respondent had commenced early conciliation and that the Claimant had provided the early conciliation certificate dated 6 January 2023 to the Tribunal office and the claim was accepted on or around 6 March 2023. It appears the claim was not then referred back to a Legal Officer or a Judge at this stage or when the response was received for initial consideration.
12. I understand the document that the Claimant relied on as evidence that the Respondent had engaged with ACAS is an e-mail from ACAS to her dated 24 August 2023 which states, 'The respondent informed ACAS on 5 January 2023 that they did not wish to engage in early conciliation. As a courtesy, my colleague called you on 6 January 2023 and left a voice message advising you of this, and your ACAS certificate was issued.'

The Law

13. S18A Employment Tribunals Act 1996 is headed "Requirement to contact ACAS before instituting proceedings." The relevant sections are as follows: -

“(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 application.

This is subject to subsection (7).

(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.

(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 s18B 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)...

(10) In subsections (1) to (7) ‘prescribed’ means in employment tribunal procedure regulations”.

14. S18A Employment Tribunals Act 1996 is to be read in conjunction with the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. Regulation 3 (1) provides “A person (“A”) may institute relevant proceedings without complying with the requirement for early conciliation when –

(c) A is able to show that the Respondent has contacted ACAS in relation to a dispute, ACAS has not received information from A under section 18 (A) (1) of the Employment Tribunals Act in relation to that dispute, and the proceedings on the claim form relate to that dispute.”

15. Rules contained within Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are relevant as follows: -

“Rule 12

Rejection: substantive defects

(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-

- (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...
- (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 described in sub paragraph (d) of paragraph (1).
- (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."

Rule 26

"Initial consideration

- (1) As soon as possible after the acceptance of the response, the Employment Judge shall consider all of the documents held by the Tribunal in relation to the claim, to confirm whether there are arguable complaints and defences within the jurisdiction of the Tribunal..."

Rule 27

"Dismissal of claim (or part)

If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospects of success, the tribunal shall send a notice to the parties –

- a) setting out the Judge's view and the reasons for it; and
- b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.

(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The Respondent may, but need not, attend and participate in the hearing."

16. In the case of Pryce v Baxterstorey Ltd (2022) EAT 61, HHJ Shanks stated at paragraph 10 "...section 18A (8) (of the Employment Tribunals Act 1996) is in the nature of a jurisdiction requirement which is laid down by an Act of Parliament... it follows that when Ms Pryce presented her claim... with no certificate, there was indeed no jurisdiction to consider it and that what she sent to the tribunal was in effect a nullity and should have been rejected immediately."
17. In Cranwell v Cullen UKEATPAS/0046/14, Longstaff J determined that the claim form was defective because the Claimant in that case had indicated that she was exempt from early conciliation, however none of the exemptions applied.

18. In Sainsbury's Supermarkets Ltd v Clark and Ors (2023) EWCA Civ 386 the Court of Appeal agreed that Cranwell was correct and at paragraph 44 of the (Sainsbury's) Judgment stated, "In Cranwell v Cullen... the claimant had not provided the prescribed information to ACAS before bringing her ET claim, and was not exempt from providing such information. Longstaff P, though expressing sympathy for the claimant, upheld the decision of an ET striking out the claim. I consider that he was right to do so. Since s18A of the Employment Tribunals Act 1996 lays down that (unless an exemption applies) the claimant must provide the information before the claim is brought, the tribunal in Ms Cranwell's case had no jurisdiction."
19. In Sainbury's at paragraph 39, the Court of Appeal said, "If neither the claim nor the response has been rejected, the case moves on to the stage of "Initial consideration of the claim form and response under Rules 26 – 28. Rule 26 requires that as soon as possible after the acceptance of the response an employment judge shall consider all the documents held by the tribunal in relation to the claim, in order to confirm whether there are arguable complaints and offences within the jurisdiction of the tribunal. If the judge considers that the tribunal has no jurisdiction to consider the claim or part of it or that it has no reasonable prospects of success, the tribunal is to send a notice to the parties under rule 27."

Submissions

20. I had both written and oral submissions from both parties, and I summarise these below.
21. It was the Respondent's position that when the Claimant presented her claim, she did not have an early conciliation certificate, she did not enter an early conciliation certificate on her ET1 and instead she indicated that she had an exemption. In fact, no exemption actually applied, and the Tribunal should have rejected the claim under Rule 12 (1) (d). In the Respondent's submission, where no exemption applies, the Claimant must have an actual certificate at the point the claim is presented. The Claimant did not.
22. As the Tribunal failed to reject the claim the case then moves to Rules 26 - 28. If, as it appears no initial consideration had in fact taken place, that should occur now and the claim should be dismissed on the basis the Tribunal had no jurisdiction to accept the claim.
23. In the Claimant's submissions the cases referred to by Mr Mortin (Pryce and Cranwell) were based on a different factual matrix than her case and were not relevant. The Claimant argued that at the time she presented her claim she had started the ACAS early conciliation process. She believed that on 5 January 2023, when she discovered the Respondent was not interested in ACAS early conciliation, she was entitled to present her claim. Because ACAS had informed her of the Respondents' position she indicated on her ET1 that, 'my employer has already been in touch with ACAS.' She believed from discussions with ACAS and from viewing the ACAS website, that early conciliation ended at that point and that she could present her ET1. She

understood it could take up to 24 hours 'to electronically generate' the certificate but did not understand that she needed to wait for it. The Claimant said she had not realised there was any difficulty with her ET1 as she had complied with requests for information from the Tribunal, her claim had been accepted, and the Respondent had not raised any issue with early conciliation in the ET3. She accepts that by the case management preliminary hearing in July 2023, she knew this was an issue to be determined. The Claimant referred me to the case of Higgins v Home Office/Attorney General asserting that rejection of a claim form under Rule 12 should only be reserved for 'plain and obvious cases.'

Conclusions

24. It is the case that at the time the claim form was presented the Claimant did not have an ACAS early conciliation certificate. She had started the early conciliation process, but no certificate had been issued to her. She could not enter any early conciliation certificate number on the ET1 and instead indicated that an exemption applied. This was incorrect. No exemption applied. It was the Claimant who had started early conciliation, not the Respondent. The Respondent had simply informed Acas that it did not want to engage in early conciliation. The Tribunal should have rejected the claim but mistakenly in my view accepted it. I accept the Respondent did not pick up the early conciliation issue when the ET3 was filed however the ET1 was plainly defective.
25. It appears that there was no initial consideration of the documents on receipt of the response and as envisaged by Rule 26. Instead at the Case Management Preliminary Hearing when the Employment Judge noted the jurisdictional issues and listed this Public Preliminary Hearing to consider these matters. The Claimant was given advance notice of what I would need to decide, and this was recorded in the Case Management Preliminary Hearing. In my view this amounts to 'a notice' under Rule 27 (1). The parties have been afforded this hearing to consider these issues and to make full representations.
26. I do not have any discretion to permit the claim to proceed as the Tribunal has no jurisdiction to hear it. The legal framework I have set out above makes this clear. I understood that the Claimant believed ACAS early conciliation ended on 5 January 2023 but this was plainly a mistake on her part. I accept that she had commenced early conciliation at the time she presented her claim but it had not ended and she did not have the required certificate. She was mistaken in thinking any exemption applied. One of the arguments the Claimant put forward in her submissions was that she had understood from the ACAS website that early conciliation ended when ACAS informed her that the Respondent did not wish to conciliate and that she could then present her ET1. I have viewed the ACAS website which states 'Early conciliation – how the process works...if a respondent declines early conciliation we'll give you a certificate with a number on it. This is the number you will need for form ET1, which you use if you decide you still want to make a claim to an employment tribunal' and also 'if you do not reach an agreement...After early conciliation, we'll give you a certificate with a

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number on it. You need to put the number on the employment tribunal form ET1, which you use if you decide to make a claim,' This appears clear to me and, again, I believe the Claimant acted by way of her being mistaken as to what was required. For these reasons I must dismiss the claim.

Employment Judge Hindmarch

18 December 2023