EMPLOYMENT TRIBUNALS

Claimant: Ms M McLeod

Respondent: Royal Free London NHS Foundation Trust R1
CFES Limited R2
Mediplacement R3

Heard at: Watford Employment Tribunal (In public; In person)

On: **9 November 2023**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In Person
For R1: Mr J Jupp, counsel
For R2: Mr P Vallon, solicitor
For R3: Ms L Percival, CEO

JUDGMENT

(1) All and any claims against R2 and R3 are dismissed upon withdrawal. It is therefore not necessary to make a decision about whether any such claims had been validly presented in accordance with the relevant rules and legislation.

(2) The correct name for R1 is Royal Free London NHS Foundation Trust.

(3) R1's application to strike out case number 3302974/23 ("Claim 1") is refused.

(4) R1's application to strike out case number 3305400/23 ("Claim 2") is refused.

(5) Neither claim form presents any complaint of race discrimination or of harassment related to race. In the alternative, and for the avoidance of doubt, all and any such complaints are dismissed upon withdrawal.

(6) Case management orders for the claims against R1 have been made, and are contained in a separate document.

REASONS

Introduction

1. This was a public preliminary hearing which had been listed to consider both claim forms and the parties were on notice that strike out decisions might be made. Issues about how the correct identity of the respondents and about Early Conciliation requirements had been identified in the documents sent to the Tribunal and in the orders made by various judges prior to this hearing.

Procedural history

2. The Claimant obtained an ACAS certificate R110433/23/50. The date of receipt by ACAS was 21 January and the date of issue of the certificate was 4 March 2023.

3. The words under the heading "prospective respondent" were:

> CFES Ltd (Royal Free NHS sterile service department)
>
> Royal Free Hospital
>
> Crown Rd
>
> Enfield
>
> EN1 ITH

4. I was invited to decide that only the first of these lines refers to the name (or names) of the prospective respondent (or respondents) and that the remainder, including "Royal Free Hospital" is the address only, and not part of the name of any prospective respondent. The ACAS Early Conciliation Certificate itself, on its face, simply has the heading "prospective respondent"; on its face, there is no separate heading for "address".

<u>Claim 1</u>

5. On 29 March 2023, a claim form was received and given case reference number 3302974/23. I will call this "Claim 1".

6. The standard document known as "ET1" is the form which claimants are obliged to use when presenting a claim. Potentially they can supply additional documents too, which they wish to have treated as part of the claim, but it is mandatory to complete form ET1.

7. Form ET1 differs from the ACAS early conciliation certificate in that it does separately identify spaces where the name(s) of the respondent(s) can be written, and spaces where their respective addresses can be written.

8. Box 2.1 of the ET1 asks:

Give the name of your employer or the person or organisation you are claiming against (If you need to you can add more respondents at 2.5)

9. For Claim 1, the Claimant wrote “NHS Royal free decontamination unit” in Box 2.1.

10. The ACAS certificate number mentioned above was written in box 2.3 of the claim.

11. There were no other respondents mentioned in Box 2.5 or Box 2.7 etc. In other words, the sections where a claimant is invited to name “Respondent 2”, “Respondent 3” etc were left blank.

12. Thus, the respondent name in Box 2 used words which were fairly similar, though not identical, to the words that were in brackets on the first line of “prospective respondent” details on the ACAS certificate. However, the words which preceded the brackets (namely “CFES Ltd”) were not included in the ET1 for Claim 1.

13. In Box 2.2, the Claimant supplied a different address for respondent than that which appeared on the early conciliation certificate. However, the same postcode was used in both the early conciliation certificate and ET1.

14. Box 8 of the claim form ticked the boxes claims for unfair dismissal, race discrimination and disability discrimination. It also referred to whistleblowing about sexual harassment and hazardous behaviour from staff (drugtaking). It also referred to victimisation. There was reference to claimant's mental health. There is also a paragraph about the claimant being criticised for toilet breaks and telling the manager that it was connected to medical requirements.

15. In Claim 1, the dates of employment given in box 5 were from June 2021 until 10 January 2023.

16. Claim 1 was not rejected (at the time) under either Rule 10 or Rule 12. It was not referred to a judge. The Notice of Claim letter was sent out using the same details as per the early conciliation certificate. The precise details from Box 2.1 were not used in the covering letter (the notice of claim). However, the ET1 accompanied the letter and so the recipient could read for themselves how the Claimant had identified the respondent in the claim form. The choice of wording for the header on the Notice of Claim letter not the result of a decision made by a judge. No formal decision about the correct identity of the intended respondent (or respondents) had been made by this stage.

17. A response from CFES Ltd was received on 9 May. The grounds of resistance raised the point about the difference in name between what was written in the ET1 and what was stated in the notice of claim letter.

18. On 11 May, the claimant wrote to the tribunal (not copied to the respondent) stating that she wanted the information changed to Royal Free London NHS Foundation

Trust and gave two new addresses. The following day, 12 May, she wrote again, also not copied to the other side stating that she would like to put a hold on any changes.

19. In July, Claim 1 was reviewed in accordance with Rule 26. Coincidentally, that was by me, EJ Quill. I listed a public preliminary hearing and made various orders, which were sent to the parties on 9 August. I made some standard orders in relation to the disability issue. In addition, I also decided that the claim documents should be sent to Royal Free London NHS Foundation Trust with a view to potentially adding them as a respondent. I also ordered:

> By 23 August 2023 the claimant must write to the Tribunal and respondent to fully explain the differences between the names and addresses on ACAS certificate and claim form. At Preliminary Hearing the Judge might strike out the claim if it should have been rejected, or else might confirm the decision not to reject was correct. In any event the parties must be able to proceed to clarify the issues.

20. The tribunal forwarded the emails from the claimant to the respondent. The notice of hearing letter included two respondent names.

21. R1 submitted a response on 21 August. The grounds of resistance mentioned issues in relation to ACAS certificate and time limits. They also mentioned that a second claim (case number 3305400/2023) had been brought.

Claim 2

22. A claim form was submitted to Tribunal on 17 May 2023. It was given case number 3305400/2023. I will call this “Claim 2”.

23. The ET1 contains the identical ACAS certificate number mentioned above. The Claimant has, in fact, only obtained one early conciliation certificate in connection with these claims.

24. The information in Boxes 2.1, 2.2 and 2.3 of the claim form for Claim 2 is almost identical to that in those boxes for Claim 1. The only differences being a phone number is added and there is also a tick mark to say that an exemption applies (“ACAS does not have the power to conciliate on some or all of my claim”).

25. At boxes 2.5 and 2.7 respectively, CFES Ltd and Mediplacements are named. There is no ACAS certificate number stated for either of them.

26. Box 5 gives a different end of employment date. A similar start date is used, but the end of employment is stated to be 9 February 2023. (In passing, and while not directly relevant to the issues which I have to decide, there appears to be agreement that the Claimant was never actually an employee of R1, but she may have been an agency worker who was supplied to work for R1, and there appears

to be agreement that 9 February 2023 is the correct date for the end of the arrangement).

27. In Box 8, unfair dismissal and disability discrimination are ticked, but the box for "race" is not. (The Claimant informs me, and I accept, that she had not intended to bring a race discrimination claim and that ticking "race" in the ET1 for Claim 1 must have been an accidental error.)

28. Box 8.2 is different in format to the corresponding box in Claim 1. Some of the same information is included and but it is not worded identically. There is also information in box 15 ("additional information"). Furthermore, unlike Claim 1, there is a separate attachment. That refers to whistleblowing, disability discrimination, unfair dismissal and victimisation.

29. The claimant sent an email of 24 of May 2023 which asked for update.

30. Claim 2 was not rejected under Rule 10 or Rule 12. By notice of claim dated 15 June 2023. It was sent to all three prospective respondents.

31. R1 submitted a response on 13 July and this was accepted. In other words, R1 had submitted a response to Claim 2 before Claim 1 had been sent to it by the Tribunal.

32. The responses were reviewed, and a hearing listed. The orders made, and sent to parties on 15 August 2023 included:

> Employment Judge Hyams has directed me to write as follows:
>
> The file in case number 3305400/2023 has been put before Employment Judge Hyams for consideration under rule 26 of the Employment Tribunals Rules of Procedure 2013. He has seen that the identity of the respondent(s) is in issue and that the claimant has made another claim about the same matter, namely the one in case number 3302974/2023. The respondents to those claims have, the judge sees, made several assertions in relation to the appropriateness of the claims having been made against them (as opposed to any other potential respondent).
>
> Employment Judge Hyams is of the view that if and to the extent that there has been any mistake made by the claimant about the name and/or address of any particular respondent to either claim, then it is not in the interests of justice to reject the claim, that is to say either of the claims, so that rule 12(2A) of the Employment Tribunals Rules of Procedure 2013 applies to both claims.
>
> It is the judge's view that the cases should be consolidated. He has accordingly directed that there be a preliminary hearing (a) to determine (1) whether the claims should be consolidated and (2) what are the issues in the consolidated claims, and (b) to list the substantive hearing of the claims and make appropriate case management orders.

Both Claims

33. R1 had sent a letter dated 4 July 2023. It also sent letters on 21 August 2023, one of which referred to Claim 1 only and one of which referred to both claims.

34. REJ Foxwell made a decision that vacated the hearing which had been listed for Claim 1 only, and ordered that the hearing on 9 November would be a public preliminary hearing dealing with both claims. The notice of hearing letter was sent on 5 September 2023.

35. In the meantime, the Claimant had sent a letter to the Tribunal around 17 June 2023. It is unclear when it was added to the file, but probably it was after EJ Quill, EJ Hyams and REJ Foxwell had made the orders mentioned above. The letter included statements that the Claimant did not wish to pursue a claim against respondent CFES Ltd and wanted Mediplacements Ltd to be removed.

The Hearing

36. This public preliminary hearing took place entirely in person. R2 and R3 each attended. That might not have been strictly necessary given that they had each received, from the Claimant, her 17 June letter, and each regarded it as an unequivocal withdrawal. However, no dismissal judgment had been issued, and it was understandable, therefore, that they made the decision to attend.

37. There had been an unsuccessful attempt by the Respondents to supply an electronic copy of the hearing bundle. A hard copy bundle was supplied to me, and the Claimant also had a copy. A copy for the witness table was available, but no witness evidence was taken.

38. I had received a copy of R1's skeleton argument, and the Claimant had a copy. Having read that skeleton during my pre-reading, I had arranged for an email to be sent to the parties to draw the parties' attention to the court of appeal decision in Sainsbury's Supermarkets Limited v Marcia Clark & Ors [2023] EWCA Civ 386 and to supply a hyperlink.

39. After some preliminary discussions to check we all had the same documents, and to check we all had the same understanding of which claim forms had been submitted on which dates, and about what the notices of hearings had said about the issues of respondents' identity, I discussed the Claimant's 17 June letter with her. The Respondents had all made clear that each of them regarded this as an unequivocal withdrawal of the claims against R2 and R3. The Claimant confirmed to me that it had been her intention to withdraw the claims against R2 and R3 and that she was content for me to issue a judgment dismissing those claims.

40. I did so and confirmed that Mr Vallon and Ms Percival were each free to leave the hearing. They each opted to remain throughout the remainder of the hearing.

41. The Claimant also confirmed that she had not intended that either claim form should present any complaint of race discrimination or of harassment related to race. It was a clerical error that the box was ticked in Claim 1. She confirmed that she had no objection to my issuing a judgment that dismissed any such claim for the avoidance of doubt.

42. I then proceeded to hear R1's strike out applications. After each of them was refused, for the reasons mentioned below, the final hearing was listed and orders were made.

The findings of fact

43. No formal evidence on oath was taken.

44. There does not seem to be much of a dispute between the parties as to what the arrangements were, but I have made no formal findings or decisions. Neither the Claimant nor R1 necessarily has a complete overview of the situation. However:

44.1 The Claimant's point of view is that she had an arrangement with R3, by which R3 supplied her to work for R1. She believes she was actually paid by a company called Sapphire. The Claimant regards Sapphire as, in her words, an umbrella company. She does not own any shares in Sapphire, and the arrangements were (on her case) all made by R3. [As I say, I have not made formal findings of fact. I did not hear formal submissions from R3 either. However, there does not seem to be a dispute about any of this.]

44.2 R1's point of view is that it does not necessarily know the exact arrangements which the Claimant had. When R1 requires agency staff, R2 handles the arrangements on its behalf. R1 does not dispute that the Claimant was supplied to provide her services to R1.

45. The Claimant informed me, and I accept, that when she contacted ACAS, she had intended to bring a claim against the NHS trust to which she had been supplied, and sought to supply ACAS with the relevant information to enable that to happen.

46. When the Claimant contacted ACAS to commence early conciliation, she did so by phone. She did not know the exact formal legal title of the NHS trust to which she had been supplied. She knew the location at which she worked and, in particular, she knew the post code. She did her best to describe the prospective respondent to the ACAS officer who took the phone call. That person looked up the postcode (whether using generally publicly available information, or whether using ACAS's own proprietary software does not matter) and read out Crown Road Enfield and asked the Claimant if that sounded correct, and she said it did.

47. My finding is that R2 is named in the early conciliation certificate. Not only that, ACAS could only have been aware of R2's name (CFES Limited) if the Claimant

had supplied it to them. Thus I needed to decide if R1 was also named, which I discuss in the analysis below.

Law

48. In so far as is relevant, section 18A of the Employment Tribunals Act 1996 ("ETA") reads:

> **18A Requirement 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.
>
> ..
>
> (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) …
>
> (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 prescribed in employment tribunal procedure regulations.
>
> (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);

(b) requiring ACAS to give a person any necessary assistance to comply with the requirement in subsection (1);

(c) for the extension of the period prescribed for the purposes of subsection (3);

(d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a).

49. None of the exemptions in Section 18A(7) are relevant here. Therefore, the effect of section 18A(8) is that the Claimant cannot submit a claim to the Tribunal unless she has complied with section 18A(1) and received the certificate.

50. Complying with the requirements of section 18A(1) for one respondent permit a claim to be presented against that respondent only. If a claimant wishes to name two or more respondents in a claim form, then for each such respondent, the claimant must comply with section 18A(1) (assuming no relevant exemption in section 18(7) applies).[1]

51. The requirement to obtain the certificate referred to in section 18A(4) must be met for each such respondent. However, in De Mota v ADR Networks (1) and The Co-Operative Group Ltd (2) UKEAT/0305/16, the Employment Appeal Tribunal confirmed that a separate certificate for each respondent was not necessarily required. Provided the claimant had complied with section 18A(1) for each respondent, and obtained a certificate for each respondent, then it was possible to rely on a single certificate (and therefore single early conciliation certificate number) for more than one respondent.

52. The Employment Tribunals Rules of Procedure include:

10.— Rejection: form not used or failure to supply minimum information

(1) The Tribunal shall reject a claim if—

(a) it is not made on a prescribed form;

(b) it does not contain all of the following information—

(i) each claimant's name;

(ii) each claimant's address;

(iii) each respondent's name;

(iv) each respondent's address; or

(c) it does not contain one of the following—

[1] Once a claim form has been validly presented, the claimant is able to make an application for other respondents to be added to the proceedings without needing to go through early conciliation for the additional respondents. Such an application might be granted, or might be refused, depending on the circumstances.

(i) an early conciliation number;

(ii) confirmation that the claim does not institute any relevant proceedings; or

(iii) confirmation that one of the early conciliation exemptions applies.

And

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—

(a) one which the Tribunal has no jurisdiction to consider;

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;

(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) 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;

(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) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(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-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 an error in relation to a name or address and it would not be in the interests of justice to reject the claim.

53. Neither rule requires a claim form to be rejected if the Respondent's address is (allegedly) incorrect. Neither rule requires a claim form to be rejected if there is mismatch in relation the Respondent's address on the early conciliation certificate compared to claim form. Furthermore, Rule 12(2A) would have to be considered if the cause of such a mismatch seemed to be an error by the claimant.

54. In Sainsbury's Supermarkets Limited v Marcia Clark & Ors [2023] EWCA Civ 386, the court of appeal reviewed the requirements of section 18A ETA, and of the Tribunal rules, and of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

55. Amongst other things, E.ON Control Solutions Ltd v Caspall [2020] ICR 552 was over-ruled. The effect of the court of appeal's decision is that once the claim form has been sent to the respondent, there is no ongoing ability (or obligation) to reject the claim form under Rule 12 (or Rule 10). If a failure to comply with the relevant requirements comes to light (whether spotted by a judge, or raised by a respondent) then that might lead to dismissal under Rule 27 or strike out under Rule 37. If the defect is purely in relation to the requirements of the Tribunal's rules, then the Tribunal should consider Rule 6 prior to making either such decision. However, Rule 6 cannot be used where the Claimant has failed to comply with Section 18A(1) ETA and cannot show that 18A(7) applied.

56. As summarised in Virgin Atlantic v Zodiac Seats [2013] UKSC 46, res judicata is a term which is used to describe a number of different legal principles with different origins, one of which is: "*the principle first formulated in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but which could and should have been, raised in the earlier proceedings*". In terms of that type of (alleged) abuse of process, Johnson v Gore Wood [2000] UKHL 65 had explained:

> "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not …
>
> While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."

Analysis and conclusions

57. R1's primary position was that neither Claim 1 nor Claim 2 should continue because of failure to carry out early conciliation (as required by Rule 18A(1) ETA) and failure to obtain the early conciliation certificate (as required by Rule 18A(4) ETA). In other words, its position was that the only entity named in the early conciliation certificate was R2.

58. In the alternative, if Claim 1 did not stand rejected, dismissed or struck out, then Claim 2 should be struck out as an abuse of process, being a duplicate of Claim 1 (and/or containing matters which could and should have been raised in Claim 1).

59. Given that the Claimant confirmed that her June 2023 letter was a withdrawal of her claims against R2 and R3, and that she had no objection to a dismissal judgment, it was not necessary or proportionate for me to consider whether claims against R2 or R3 had been validly presented. It was necessary, however, to consider whether Claim 1 was a claim which the Claimant had brought (and/or had intended to bring) against R2 as part and parcel of analysing R1's contention that the early conciliation certificate named (only) R2.

60. The headings used on the Notice of Claim letters are not binding on me. Those headings do not represent decisions of a judge.

61. EJ Hyams made the decisions set out above. Those are case management orders and they are not judgments. In its written skeleton, R1's position was that the claims should be rejected and that any prior decision not to do so should be "reconsidered". In the hearing, I was invited to strike out the claims.

62. If (but for EJ Hyams's decisions), R1 persuaded me that there is merit in its position then it would be necessary for me to consider whether or not, in light of those earlier decisions, a strike out would be impermissibly varying a prior case management order. However, if I decide that R1's position does not have merit, then the point is academic.

63. I was invited to decide that, unlike the claimant in De Mota, Ms McLeod had not obtained an early conciliation certificate which named two prospective respondents.

64. The relevant facts in De Mota included, at paragraph 6:

> His friend typed "ADR Network and The Co-operative Group". He then typed the West Thurrock address which is both the depot of the Co-op and a business address of ADR.

65. In other words, there was no express indication on the face of the document that "ADR Network" and "The Co-operative Group" were actually two separate entities either (a) in the claimant's opinion or (b) as a matter of actual legal and factual status. The word "and" is consistent with a reference to two separate entities, but is also consistent with a reference to a single entity which happens to use the word "and" in its name (as many very well known businesses and organisations do).

66. The ET (and EAT) had not decided that (for example) the (allegedly) separate respondents had been identified by "1" and "2" or "a" and "b" etc. Furthermore, it was not necessary for there to be two separate addresses (or the same address

written out twice) in order for there to be a decision that two separate respondents had been identified.

67. In my judgment, it is necessary and appropriate to consider the certificate as a whole. Amongst other things, I think there is no basis to confine myself to the first line under the heading of "prospective respondent". The first two lines read:

> C F E S Ltd (Royal free NHS sterile service department)
>
> Royal Free Hospital

68. I do note that in that in this case there is no word "and" used, just brackets. That is relevant but not conclusive. It is also relevant that the ACAS officer drafted the document, not the Claimant. The words in brackets in the first line are not part of CFES Ltd's actual name.

69. R1's actual legal name is "Royal Free London NHS Foundation Trust" and the contents of Box 2.1 of Claim 1 (and also of Claim 2) read: "NHS Royal free decontamination unit". I am satisfied that something close to that name is mentioned even just in line one of the certificate. However, I can also see line 2 and there is no reason for me to ignore line 2; line 2 provides additional clarification (if any were needed) that R1 is being named (albeit without precision) in the certificate. The inclusion of the word "hospital" and the absence of the words "London", "Foundation" and "Trust" do not cause me to think that either (a) a different entity was being mentioned (in addition to CFES Ltd) or (b) that no entity was being mentioned (in addition to CFES Ltd).

70. I am satisfied that if the Claimant had intended to claim against R2 only, she would have included "CFES Ltd" within the ET1 for Claim 1. Not only did she not reference the name of that company in Box 2.1, she did not mention it elsewhere in Box 2, or anywhere else in the form. In contrast, she did refer to "Royal Free" elsewhere.

71. R2's legal name does not include any of "Royal free NHS sterile service department" or "Royal Free Hospital" or "NHS Royal free decontamination unit". None of those things exactly replicate R1's name either. However, it has never been a requirement of ACAS early conciliation, or the Tribunal rules, that a respondent's correct legal name be used at the point of presentation of the claim. Similarly, the early conciliation rules do not require the precisely correct legal name be used. Furthermore, the tribunal rules expressly state that rejection of a claim form is not the inevitable result of a mismatch between the respondent name in the early conciliation certificate and the respondent name used in ET1.

72. I am entirely satisfied that the Claimant contacted ACAS with the intention of fulfilling the early conciliation requirements against R1. As I said above, the name of CFES Ltd must have been supplied by her to ACAS, or else those two words

("CFES" and "Ltd") would not have appeared in the early conciliation certificate. However, I am equally satisfied that she also attempted to identity the NHS Trust to which she was supplying her services as accurately as she could. Had she not done so, the words in brackets in Line 1 (and probably the words in Line 2) would not have been used in the certificate.

73. As per De Mota, I do not have to decide whether the Claimant was at fault for not being clear enough to the ACAS officer that CFES Ltd and the NHS Trust were separate entities, or whether the ACAS officer should have realised that and produced two separate certificates. I am satisfied that the Claimant did supply the details of the NHS Trust (as well as those of CFES Ltd) to ACAS and that the single certificate names both of them.

74. The Claimant has therefore complied with the requirements of both section 18A(1) and section 18A(4) ETA in relation to R1.

75. The mismatch between the name on the early conciliation certificate and ET1 was not considered by a judge before the claim was sent out. In the hypothetical scenario that the claim had been rejected under Rule 12, and the Claimant had sought reconsideration, supplying the same explanation that she presented to me in this hearing, I think the most likely outcome is that the explanation would have been accepted and a decision under Rule 13 that the claim would have been deemed to have been correctly presented on the original date. Alternatively, a referral to a judge might not have led to a rejection in any event. In either case, the rationale would have been that the names "Royal free NHS sterile service department" / "Royal free NHS sterile service department, Royal Free hospital" (in the early conciliation certificate) and the name "NHS Royal free decontamination unit" (in Form ET1) are mistakes, but sufficiently identify R1. The purpose of the legislation and the rules is not to act as a barrier to access to justice.

76. Thus, there is no reason to strike out Claim 1 based on alleged failure to comply with the statutory requirements, or based on the contents of Rule 12.

77. In terms of Claim 2, the ET1 is similar, but not identical to Claim 1.

78. To the extent that anything in Claim 2 is an exact duplicate of Claim 1, then the Respondent will not be "twice vexed" (in the language of Henderson v Henderson) because Claim 1 has not yet been dealt with.

79. To the extent that anything in Claim 2 is new or different to Claim 1, taking a broad merit based approach, that would not be a reason to treat Claim 2 as an abuse of process. Again, Claim 1 is not concluded (far from it). The facts are that this was a second claim presented fairly soon after the first one, and, in fact, before R1 had been served with a copy of Claim 1 by the Tribunal Service.

80. Once a claim has been presented, one option a claimant has is to seek the Tribunal's permission to amend that claim. The application may or may not succeed. However, it is not, in itself, an abuse of process to present a new claim form either instead of making an application to amend, or else, as a back-up plan, in case the application to amend is refused.

81. I do not have to comment on whether it might be an abuse of process to seek to present a new claim form after an application to amend had been refused. I do not have to comment on whether it might be an abuse of process to seek to present a new claim form which exactly duplicates an earlier claim form. Neither of those scenarios represent the facts of this case.

82. It is far from uncommon for claimants in tribunal proceedings to present more than one claim form and then seek to have the cases heard together.

83. The Claimant is a litigant in person. I find that she has not attempted anything underhand, or made any attempt to get around any rules or obligations. Her reason(s) for presenting the second claim form is that she became concerned that the first claim form might not contain information that was sufficiently detailed or sufficiently accurate. Her emails to the Tribunal in the days before Claim 2 was presented show that she had some concerns.

84. On a broad merits based approach, there is no abuse of process here. It is simply a claimant attempting to comply with requirements with which she was unfamiliar.

85. Even if, contrary to my decision in the previous paragraph, there had been an abuse of process, then strike out is a discretionary remedy, not an automatic one.

86. If there are any time limit issues with Claim 2, they can be addressed in due course. I am not making any binding decisions about time limit issues. On the face of it, taking the early conciliation into account, Claim 2 appears to have been presented within the time limit that would apply for any claims based on termination of the assignment. It might include complaints for which limitation periods began to run earlier than 9 February. However, in my judgment, Claim 2 has been submitted sufficiently early in this litigation that the interests of justice are such that, rather than strike it out, I should take its contents into account and that I should formally order that Claims 1 and 2 will be heard together.

Employment Judge Quill

Date 24 November 2023

JUDGMENT & REASONS SENT TO
THE PARTIES ON 4 January 2024

L TAYLOR-HIBBERD
FOR EMPLOYMENT TRIBUNALS