



EMPLOYMENT TRIBUNALS

Claimant: Mrs G Rothery

Respondents: (1) Dolce Limited
(2) Sarah Curtis

Heard at: Liverpool (by CVP)

On: 21 May 2024

Before: Employment Judge Ainscough

REPRESENTATION:

Claimant: in person

Respondents: (1) Mr Wyeth – Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for a detriment because of a protected disclosure in accordance with Part 5 of the Employment Rights Act 1996 is struck out.
2. The claim for disability discrimination in accordance with section 120 of the Equality Act 2010 is struck out.

REASONS

Introduction

1. This was an application that was made by the first respondent for strike out or a deposit order of/for the protected disclosure detriment claim and the disability discrimination claim that has been pursued by the claimant in the claim form.
2. The second respondent was not required to attend this hearing.
3. I heard submissions from both parties.

The claim form

4. The claim form was issued on 2 October 2023 after the claimant was dismissed on 2 October 2023. Within the claim form, the claimant ticked the box to say that she did not have an Early Conciliation number because she was applying for interim relief as part of the unfair dismissal claim. The claim form also included a claim for disability discrimination and a protected disclosure detriment claim.

The first respondent's application

5. The first respondent contended that the disability discrimination claim and the protected disclosure detriment claim should have been rejected by the Tribunal at the outset because the claimant had not been through the Early Conciliation process for either claim. It was the first respondent's position that the claimant had failed to comply with section 18A of the Employment Tribunals Act 1996.

6. However, the first respondent's application was for a strike out of both claims or in the alternative, deposit orders for both claims on the same basis.

7. The first respondent submitted that it would be inappropriate for the Tribunal to exercise the discretion under rule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to waive the requirement for Early Conciliation.

The claimant's response

8. The claimant accepted that she had not been through the Early Conciliation process for the disability discrimination claim or the protected disclosure detriment claim. It was the claimant's position that she didn't know that she needed to do so because it was her understanding that she was exempt from doing so because she had made an application for interim relief.

9. In addition, the claimant contended that she did not know she needed to go through the process to continue with these claims as the matter was not discussed during the interim relief application hearing.

10. The claimant acknowledged that she did understand the requirements to start the Early Conciliation process prior to issuing a claim with the Employment Tribunal.

11. The claimant submitted that the Tribunal should exercise the discretion under rule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and waive the requirement for Early Conciliation.

Relevant Legal Principles

12. Section 18 of the Employment Tribunals Act 1996 provides that "relevant proceedings" include those under Part 5 of the Employment Rights Act 1996 and section 120 of the Equality Act 2010.

13. Part 5 of the Employment Rights Act 1996 provides protection from suffering detriment in employment. Section 120 of the Equality Act 2010 provides for enforcement of unlawful discrimination in the Employment Tribunals.

14. Section 18A(1) of the Employment Tribunals Act 1996 provides:

“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).”

15. Subsection (7) provides that a prospective claimant may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

16. The Employment Tribunals (Early Conciliation Exemption and Rules of Procedure) Regulations 2014 prescribes that there is no need to comply with the requirement to contact ACAS if:

“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.”

17. Section 128 of the Employment Rights Act 1996 provides for a claimant to make an application for interim relief when making a complaint about unfair dismissal.

18. Rule 6 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 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 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 considers just, which may include all or any of the following:

(a) Waiving or varying the requirement.”

19. Rule 10(1)(c) requires the Tribunal to reject a claim if:

“it does not contain all of the following information:

(i) An early conciliation number;

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

(iii) Confirmation that one or the early conciliation exemptions applies.”

20. Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

“at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:

(c) for non-compliance with any of these Rules or with an order of the Tribunal.”

21. Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides the Tribunal with a discretion if, at a Preliminary Hearing, it considers an argument in a claim has little reasonable prospect of success, to make an order that a party pay a deposit to continue with the argument.

Discussion and conclusions

22. I agree that the detriment claim and the disability discrimination claim should have been rejected in accordance with rule 10 when the claim form was submitted because there is a requirement to begin the Early Conciliation process for both claims because they are relevant proceedings in accordance with section 18(1)(b) and (e) of the Employment Tribunals Act 1996.

23. The law requires parties to go through Early Conciliation for a good reason - to try and resolve their issues before they enter into costly proceedings. If a claimant pursues an unfair dismissal claim and makes an application for interim relief there is no requirement to enter into Early Conciliation for the purposes of the unfair dismissal claim. In such circumstances, there is insufficient time to complete Early Conciliation before the requirement to submit that claim. However, an application for interim relief does not exempt a claimant from the Early Conciliation requirement for any other claims that are included on the claim form.

24. In the case of **Clark and others v Sainsbury's Supermarkets Ltd 2023 ICR 1169 CA**, the Court of Appeal set out the correct procedure for dealing with claims that are erroneously accepted. Such claims cannot be retrospectively rejected. Instead, a respondent should apply to strike out the claims erroneously accepted.

25. The Court of Appeal also stated that rule 6 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 might be relevant in dealing with such applications. Rule 6 provides a discretion to waive or vary requirements of the rules of procedure if just to do so.

26. Rule 10 requires the claim form to contain an Early Conciliation number, confirmation that the claim does not institute relevant proceedings or that an exemption applies. Rule 6 allows the waiving of this requirement if I consider it just to do so.

27. The first respondent's position is that this is not a case where the claimant has complied with Early Conciliation and, for example, forgotten to put the number in the claim form or put an incorrect number in the claim form. It is the first respondent's position that the claimant has not complied with the statutory requirement to start Early Conciliation for the detriment or the disability discrimination claim at all.

28. In this matter, the claimant should have lodged the unfair dismissal claim with the application for interim relief and started Early Conciliation on the detriment and the disability discrimination claim at the same time. The claimant could then have issued a second claim form for the detriment and disability discrimination claim once the Early Conciliation process had been completed.

29. The claimant was aware of the requirement to enter into Early Conciliation before she started the proceedings because she had lodged another claim after she had completed an Early Conciliation process.

30. The claimant is a litigant in person. However, it is clear that the claimant is capable of undertaking research to understand how to submit Employment Tribunal claims, and also to make an application for interim relief. I have therefore determined that the claimant was capable of understanding that she would need to start the Early Conciliation process before lodging the claims for detriment and the disability discrimination.

31. I have determined that it would not be just to waive the requirement for Early Conciliation for both the detriment claim and the disability claim and both claims are struck out.

Employment Judge Ainscough

Date: 1 July 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: 1 July 2024

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