EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms E Scott	**v**	**Ladbrokes Plc**

Heard at: **Watford** **On: 6 September 2017**

Before: **Employment Judge Bloch QC**

Appearances:

For the Claimant: **Mr J Feeny, Counsel**
For the Respondent: **Mr S Hills, Solicitor**

JUDGMENT

RESERVED REASONS FOR DECISION

1. In the course of a preliminary hearing on 6 September 2017, I gave permission to the claimant to amend the claim form by deleting the name "Ladbrokes Plc" as the name of the respondent and substituting "Ladbrokes Betting and Gaming Ltd".

2. My reasons for this decision are set out below.

Brief History

3. By her claim form received by the tribunal on 25 May 2017, the claimant bought a complaint of unfair dismissal against "Ladbrokes Plc". Her dismissal had allegedly arisen out of a remark which she had made to another employee which the respondent said it regarded as amounting to gross misconduct. Following a disciplinary procedure, the respondent dismissed the claimant from her employment. She had been employed for some 19 years.

4. The claim form had been preceded by the usual mandatory ACAS early conciliation procedure pursuant to section 18A of the Employment Tribunals Act 1996 ("ETA") . An early conciliation certificate from ACAS recorded the date of receipt by ACAS of the early conciliation notification as 7 April 2017 and the date of issue by ACAS of the certificate as 21 May 2017. That

certificate confirmed in the usual way that the prospective claimant had complied with the requirement under section 18A to contact ACAS, before instituting proceedings in the Employment Tribunal.

5. It was common ground between the parties that Ladbrokes Betting and Gaming Ltd was the actual employer of the claimant and not "Ladbrokes Plc". In fact as at 2017, no entity existed by the name of Ladbrokes Plc (there had been a change of name in 2016 from Ladbrokes Plc to Ladbrokes Coral Group Plc).

6. It is common ground that (as indicated by the dates referred to above contained within the ACAS certificate) there had been an agreed extension of time of some two weeks as permitted by the ETA.

7. On 2 June 2017 the tribunal accepted the claim and notified the parties that the full merits hearing had been listed for 6 September 2017.

8. An ET3 with grounds of resistance was received from Ladbrokes Betting and Gaming Ltd by the tribunal on 29 June 2017 and in the details of the respondent" (paragraph 2 of the response form), the name of the respondent was correctly given as Ladbrokes Betting and Gaming Ltd.

9. Further, paragraph 1 of the grounds of resistance stated that the correct name of the respondent was Ladbrokes Betting and Gaming Ltd.

10. On 7 July 2017 the solicitors for the respondent requested a re-listing of the hearing with an extended time estimated 2 days, to which the claimant did not object. The matter was duly re-listed for the same date, namely 6 September 2017, but with a two day estimate. In the meantime, a hearing bundle was prepared and agreed by the parties (with exchange of witness statements taking place on or about 17 August 2017).

11. However, on 14 August 2017 Gateley Plc on behalf of the respondent, wrote to the tribunal saying that they wished to apply to strike out the claimant's claim and/or to apply for the hearing listed for 6 September 2017 to be postponed and re-listed as a preliminary hearing. The reason for the application was said to be that during the course of preparing the matter for hearing, it had been noted that the claimant had in fact issued the claim against Ladbrokes Plc giving an address of 1 Stratford Place, London. Similarly, according to the ACAS certificate issued on 21 May 2017, the claimant had commenced the early conciliation process against Ladbrokes Plc of 1 Stratford Place, London. However, the claimant had never been employed by Ladbrokes Plc. She was, at all times an employee of Ladbrokes Betting and Gaming Ltd whose head office is Rayners Lane, Harrow Middlesex.

12. The letter went on to say that accordingly "…and in light of the Employment Appeals Tribunal's recent decision in the case of Giny v SNA Transport Ltd (UKEAT/0317/16/RN) it is Respondent's position that the Claimant has instituted relevant proceedings against the wrong Respondent and that the difference between the names given and the name of the Claimant's actual former employer is more than

a minor error. The letter added: "It is the Respondent's submission that it is not open to the Employment Tribunal to remedy the matter simply by amending the name of the Respondent on the claim form given that there is a strict requirement set out in Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Regulations) requiring that the correct respective Respondent be named during the ACAS Early Conciliation process and on the Certificate. The Respondent further submits that there is no provision within the Regulations that allows the Employment Tribunal to amend the ACAS Certificate. The fact that early conciliation did take place makes no difference to the mandatory requirements that the certificate must contain the name and address of the prospective Respondent. The prospective Respondent could never have been Ladbrokes Plc of 1 Stratford Place, London as the Claimant was never employed by Ladbrokes Plc. This acts as a complete bar on the Claimant being able to pursue this matter in the Employment Tribunal". The letter added: " For these reasons the Respondent contends that the Employment Tribunal does not have jurisdiction to hear the Claimant's claim and that in these circumstances the claim should be struck out. In the event that the Tribunal is not minded to simply strike out the Claimant's claim then we should be grateful if the Tribunal would please accept this correspondence as the Respondent's application to have the hearing currently listed for 6 September 2017 to be converted to a Preliminary Hearing to determine whether in fact the Tribunal does have jurisdiction to hear the Claimant's claims and/or whether the Claimant's claims should be struck out. It is worth noting that the Claimant has been represented throughout these proceedings by Grant Williams LLM a Legal Officer at Community Union. If the Tribunal is minded to grant this application we are of the view that it will further the Tribunal's overriding objective to deal with matters fairly and in the most cost efficient way possible. Given there is already a current listing on 6 September 2017 the matter can be converted to a Preliminary Hearing without inconvenience being caused to either party".

13. The matter accordingly came before me on 6 September 2017 as a preliminary hearing.

14. Mr Steven Hills, solicitor, on behalf of the respondent, (realistically) conceded that the error in relation to the name(and address) of the respondent on the ACAS certificate and in the claim form, was a genuine error on behalf of the claimant. He did, however, ontend that the error was careless or negligent.

15. He also (realistically) conceded that the ACAS procedure had in no way been disrupted or negatively affected by the misnomer. The employer of the claimant had engaged in the conciliation process, which had run its course in the usual way and no confusion had arisen either by virtue of the misnomer or the incorrect address of the employer being provided on the ACAS certificate. He also accepted that the respondent's application was based on a change of view on behalf of the respondent, at a stage when the case was all but ready for trial.

16. The application contained in the letter of 14 August was (as Mr Hills realistically accepted) a change of tack and this was no doubt brought about as a result of the Giny decision coming to the attention of Ladbrokes or their solicitors.

17. Evidence was given by Mr Grant Edward Williams of Community Union on behalf of the claimant and he was cross-examined by Mr Hills. This did not add anything, especially given the concession realistically made by Mr Hills that the error in the name of the respondent was a genuine one.

18. After discussion with the representatives for the claimant and the respondent, a clearer picture emerged as to the nature of the decision which I had to make. The cases of Giny and one thereafter in the Employment Appeal Tribunal namely Miss J Chard v Trowbridge Office Cleaning Services Ltd UKEAT/0254/16/DM, a decision of Kerr J (sitting alone) given on 4 July 2017, were cases where the employment tribunal had (on its own initiative) rejected the claim because of a discrepancy between the name of the respondent on the ACAS conciliation certificate and the claim form. The relevant rule of the Employment Tribunal Rules of Procedure in those cases was Rule 12 [Rejection: substantive defects] and in particular Rule 12 (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".

19. Paragraph (1) (f) of rule 12 refers to a case where the staff of the tribunal office considers that a claim, or part of it is …"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".

20. To the contrary, the relevant Rules for the purposes of the application and upon which the claimant relied were rule 30 (case management orders) and rule 34 (addition, substitution and removal of parties).

21. There was some discussion about which of the two rules (rule 30 or 34) applied.

22. On the face of it, rule 30 applied if (as Mr Feeny on behalf of the claimant submitted) there was a simple correction of the name of the respondent by deletion of "Plc" and adding instead "Betting and Gaming Ltd". In the alternative Mr Feeny relied upon rule 34 which states: "A tribunal may…….on the application of a party…….. add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal, which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included".

23. On balance, as a matter of impression, it would seem that rule 30 was the appropriate rule, since in this case there was no existing party to be substituted, because there was no entity with the name Ladbrokes Plc in existence at the relevant time and because this was a case where there could only be one true respondent namely the employer of the claimant. (Unsurprisingly, at paragraph 2 of the Particulars of Claim she stated: "At all

material times the Claimant was employed by the Respondent as an area manager…….".)

24. That said, it was not necessary for me to decide the matter finally because both parties accepted that the tests were broadly the same under either rule.

25. In relation to an amendment application, the approach to be followed was, of course, that laid down by the Court of Appeal in Selkent Bus Co. Ltd v Moore [1996] ICR 836. The key principle laid down in that decision is that the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

26. The parties accepted that the test in relation to the substitution of a new party was not very different. I was referred to the well known case of Cocking v Sandhurst (Stationers) Ltd and another [1974] ICR 650 and in particular the passage at page 657: "In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against". The passage continues: "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular, they should consider any injustice or hardship which may be caused to the any of the parties, including those proposed to be added if the proposed amendment were allowed, or, as the case may be, refused".

27. Given the concession by the respondent as to the genuine nature of the mistake and the absence of any reasonable doubt as to the identity of the person intended to be claimed against, there seems to be little or no practical difference for the purposes of this case between the two tests.

28. Mr Feeny's made essentially two submissions on behalf of the claimant. The first was that the case of Giny (and the case of Chard) had no particular relevance given that they involved automatic strike out under Rule 12. (In passing he accepted that rule 27 (referred to in the Chard case) was also irrelevant, being a rule relating to action taken by the employment judge on his own initiative where he considered that the tribunal has no jurisdiction to consider the claim or that it or part of it had no reasonable prospect of success). He relied on the case of Mrs J Mist v Derby Community Health Services NHS Trust (Honour Judge Eady QC (sitting alone)) in which judgment was handed down on 22 January 2016. In that case the claimant sought to amend the claim form by adding a new party (in the context of a TUPE transfer). The amendment was allowed applying Selkent principles. In that case HJ Eady (at paragraphs 59 to 61) pointed out that in her view the claimant was not required to undertake early conciliation in respect of her application to amend to include a claim against a second respondent. In respect of the relevant proceedings, the claimant was no longer a "prospective claimant". She had already presented her claim form. She was

now asking the tribunal for leave to amend it. The question was thus in entirely for the tribunal. She added that this approach had the attraction of being consistent with rule 34, which specifically addresses the additional substitution of parties in ET proceedings without reference to any further early conciliation requirements. It also gave effect to the overriding objective by allowing the tribunal to deal with the case before it in a proportionate manner, avoiding unnecessary formality, seeking flexibility in the proceedings and avoiding delay and expense. At paragraph 62 she stated that the employment tribunal would not itself be bound to reject the claim against the second respondent, because the name given on the amended claim form was not the same as on the early conciliation certificate and the tribunal had plainly not done so.

29. Mr Feeny's second (and principal) point, however, was that in this case the misdescription of the respondent had had no effect whatsoever on the ACAS early conciliation procedure followed. The respondent was fully aware that there had been a misdescription (stating so in the grounds of resistance); neither did the incorrect address have any effect. The true respondent knew exactly whom they were dealing with (she was an employee of 19 years' service) and there was therefore no prejudice whatsoever that would be suffered by the respondent as a result of the amendment being allowed. On the other hand, the prejudice to the claimant as a result of being denied the amendment was that she would lose her claim.

30. Mr Hills on behalf of the claimant accepted that (as indicated by HHJ Judge Eady QC) there were no possibility of applying for a further early conciliation certificate or of amending it. He accepted that this application was made under rules 30 or 34. However, his key point was that the very act of amendment created the discrepancy referred to in rule 12 between the name of the respondent as appearing on the early conciliation certificate and as appearing in the claim form. This was an important factor in the exercise of my discretion whether to allow or disallow the proposed amendment. He also relied upon the incorrect address which appeared on the ACAS certificate, but accepted that this had caused no confusion or other prejudice to the respondent.

Conclusion,

31. I allowed the amendment principally for the reasons put forward by Mr Feeny on behalf of the claimant. I concluded that rule 12 had limited relevance to this application various reasons:

    31.1 Rue 12 does not concern an application to amend or an application to substitute a party under rules 30 or 34;

    31.2 In Trustees of the William Jones' Schools Foundation v Parry [2016] ICR 1140 Laing J decided that the procedure whereby compliance with Rule 12(1) of the **Rules of Procedure** is policed by means of a written paper exercise involving the Claimant only, without an oral hearing, was *ultra vires* and not authorised by the relevant provisions in the enabling legislation. That conclusion was tentatively supported by Kerr

J in the Chard case; it does not fall to me to decide what the ramifications of that decision are in the current case but it does tend to undermine its force in the current context, underlining the significant differences between an automatic striking out provision such as rule 12 and cases under rules 30 and 34 (and 27); it is inappropriate to "read across" (almost as a knock-out point) from rule 12 into rules 30 and 34 (as Mr Hill came close to suggesting in his submissions)

31.3 Rule 12 was, in any event, inapplicable to the current case, given that this was not a case where there was a discrepancy between the description of the respondent in the early conciliation certificate and the claim form. There was here in fact a "double error" in that the misdescription occurred in both. Accordingly, the Employment Judge could not have rejected the claim under rule 12.

31.4 In any event even if the respondent was dissatisfied with the failure by the Employment Judge to have struck out the case that would have to have been the subject of an appeal, which was never made and would now be out of time.

32. That said, it is relevant to the exercise of my discretion that granting the proposed amendment would create the discrepancy referred to in rule 12.

33. However, it cannot be that the creation of the discrepancy is a decisive or even overpowering or very strong factor in the exercise of my discretion without regard to the underlying substance of the point.

34. In this case, the key points in favour of allowing the amendment are that the mistake was a genuine one and caused no confusion and no prejudice to the respondent. On the other hand, to deny the amendment on this basis is to give the respondent an unmerited windfall in relation to a case which is all but ready to be heard.

35. The same is true in relation to the wrong address. It had no effect whatsoever and therefore has no particular weight in the exercise of my discretion. That is true too in relation to the fact that the mistake was made in the claim form by the legal officer for the Community Union, Mr Williams (a point on which Mr Hills did not specifically rely albeit that it was referred to in the 14 August letter), who simply followed what was said in the early conciliation certificate in relation to the name of the respondent.

36. I am fortified in my conclusion by the approach of the Employment Appeal Tribunal in the Chard case, where (at paragraph 39) Kerr J adverted to the difference between a hypothetical application under rule 34 in relation to an application to amend to substitute the correct employer and the approach under rule 12(2A). Under rule 34 the claimant might find herself "unconfined by the straight jacket of rule 12(2A)". She might argue at such a hearing that the interests of justice require the claim to proceed, because if it had proceeded against the wrong party instead of the correct party, the claim would not have been out of time at all and an application under rule 34 to

amend, so as to substitute the correct employer for the incorrect one would have easily succeeded.

37. I also respectfully agree with the thrust of paragraphs 62 to 74 that decision:

    37.1 regarding the need to give considerable emphasis to the overriding objective to deal "fairly and justly" with cases and "avoiding unnecessary formality and seeking flexibility in the proceedings":

    37.2 that rule 12(2A) should be read in the light of the overriding objective and that he preferred to read 12(2A) as indicating that the "interests of justice" part of the rule is a useful pointer as to what sort of errors ought to be considered minor. To put it another way, minor errors are ones that are likely to be such that it will not be in the interest of justice to reject the claim on the strength on them

    37.3 Kerr J's conclusion (at paragraph 72) that the error there was entirely minor - there were no factors pointing in the other direction such as for example an additional substantial shareholder in the respondent over and above the director incorrectly named in ACAS early conciliation certificate or a different place of business from the address given on the certificate;

    37.4 as to the wrong address, paragraph 73 is relevant: the respondent in that case knew from the letter from the claimant's solicitors that it was against the respondent that the claimant intended to proceed, not the director personally, there was therefore no prejudice to the respondent;

    37.5 (at paragraph 74) that an error will often be minor if it causes no prejudice to the other side beyond the defeat of what would otherwise be a limitation defence.

38. These passages emphasise the importance of looking at fairness and substance rather than form.

39. Accordingly, even if the discrepancy now created by the amendment were to be regarded as a matter of greater moment than I have regarded it, in my judgment the absence of any confusion and any prejudice as a result of the error is indicative of it being a minor error within the meaning of rule 12, which therefore cannot stand in the way of the overriding prejudice which would be suffered by the claimant were the amendment application to be refused.

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Employment Judge Bloch QC

Date: …14 September 2017……..

Sent to the parties on: .....

For the Tribunal Office