EMPLOYMENT TRIBUNALS

Claimant: Ms D Syme

Respondents: 1. Future Home Care Limited (R1)

2. Lifeways Community Care Limited (R2)

HELD AT: Liverpool **ON:** 19 December 2017

BEFORE: Employment Judge T Vincent Ryan

REPRESENTATION:

Claimant: Mr D Patel, Counsel

Respondents: Mr D Reade, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The decision of Regional Employment Judge Swann sent to the parties, on 24th July 2017 to accept the claimant's claim against the first respondent is confirmed.

2. The second respondent's application that it be dismissed from these proceedings fails and is dismissed.

3. This claim is stayed to 1st May 2018, subject to any application to lift or extend the stay made before that date, and the parties shall write jointly to the tribunal regarding any further application by 24th April 2018.

4. No later than 24th April 2018, and otherwise no later than the date of any earlier application to lift the stay, the claimant shall provide the tribunal and the respondents with written justification for naming the second respondent as a respondent to her claims or shall confirm withdrawal of her claims against it (whereupon those claims shall be dismissed against the second respondent).

REASONS

1. **The First Respondent's application for reconsideration of the decision of Regional Employment Judge Swann to accept the claimant's claim against R1**

1.1 **The Issue**: At the time that the claimant presented her claim to the tribunal the only early conciliation (EC) certificate that had been issued by ACAS in this matter was in the sole name of the second respondent (R2). Initially the tribunal rejected the claim against the first respondent (R1) but it was subsequently accepted by Regional Employment Judge Swann. The issue to be determined is whether, in the interests of justice, the latter decision ought to be confirmed, varied or revoked because R1 was not named in the said EC Certificate and this, it is argued by R1, denies the tribunal any jurisdiction; R1 argues that the claim ought to have been rejected and the decision to accept ought now to be revoked. R1 seeks its dismissal from this litigation.

1.2 **The Law**: The purpose of the early conciliation procedure is to explore the possibility of, and if possible to reach, a conciliated settlement of potential claims that would otherwise lead to litigation before a Tribunal. It is envisaged that through the good offices of ACAS a settlement may be reached within a prescribed time and before proceedings are commenced.

1.2.1 The principal statutory authorities are the Employment Tribunal Act 1996 (s18A) (ETA), Employment Tribunals Early Conciliation Exemption and Rules of Procedure Regulations 2014 (with schedule) (the EC Regulations), and the Tribunal's own Constitution and Rules of Procedure Regulations 2013 (ET Rules). I draw attention to Rule 2 of the ET Rules, which is the overriding objective of the Tribunal, and Rule 12 which deals with the rejection of claims with a substantive defect.

1.2.2 s18A ETA requires that a prospective claimant, one wishing to institute proceedings in the tribunal, provides to ACAS certain prescribed information in the prescribed manner before presenting the claim to the tribunal. That is the requirement placed upon the prospective litigant. Having stated that requirement the section continues to detail what the ACAS Conciliation Officer (CO) must do within a prescribed time. It also provides for what a CO may do after the expiry of the prescribed time. S.18A (7) provides for an exceptional circumstance that is irrelevant to us in this case. S.18 A (8) requires the prospective litigant to obtain a certificate as described in s.18A (4), namely a certificate issued by the CO to the effect that a settlement has not been reached where that is the case.

1.2.3 The procedures are laid down to ensure that the requirement of early conciliation is satisfied, that is that the parties to the potential claims have had the opportunity that I have described.

1.2.4 Regulation 1 of the EC Regulations confirms that the claimant can satisfy the requirement for early conciliation by presenting a completed EC form to ACAS, or indeed they can telephone ACAS. All else is by way of proving that the claimant has satisfied the said requirement before a claim is presented by the litigant to the tribunal, accepted by the tribunal and served on a respondent. The matter of substance is satisfying the requirement of attempted conciliation itself.

1.2.5 Rule 2 of the ET Rules states the tribunal's overriding objective to deal with cases fairly and justly; in doing so tribunals shall, amongst other things, ensure that matters are dealt with in ways which are proportionate to the issues, avoiding unnecessary formality, and seeking flexibility in the proceedings.

1.2.6 I was referred to the following authorities which I considered in reaching my judgment, whilst it was submitted by Mr Reade, amongst other things, that none of the authorities "re-write the procedure" or allow for that:

1.2.6.1 Mist v Derby Community Health Services NHS Trust [2016] ICR 543.

1.2.6.2 Drake International Systems Ltd v Blue Arrow Ltd [2016] ICR 445.

1.2.6.3 Chard v Trowbridge Office Cleaning Services Ltd UKEAT/0254/16/DM.

1.2.6.4 These authorities provide that in situations where minor procedural errors are made the tribunal ought not to elevate form over substance; the interests of justice prevail. What is "minor" is to be decided in accordance with usual usage of the term and is a matter of judgment by the tribunal.

1.3 **The Facts**:

1.3.1 In this case the claimant gave her details to her trade union representative who then completed the online ACAS EC form, as opposed to telephoning ACAS, thus providing the prescribed information. There is no suggestion by R1, or indeed evidence, that the claimant or her representative failed to provide to ACAS all the prescribed information. The online form that was submitted to ACAS on behalf of the claimant complied with the requirements for early conciliation in respect of R1 as laid down above.

1.3.2 The ACAS CO confirmed to the claimant's representative that by agreement R2 was dealing with all claims of the kind being advanced by the claimant, R1 and R2 being sibling companies in the Lifeways Group. R2 had dealt with the claimant's grievance on the same matters as she raised in her prospective

claim. Whoever the person who dealt with it within the Group, the correspondence, as evidenced by the fax correspondence to which I was referred is from R2. There is clearly a close relationship between R1 and R2, and a relationship that leant itself to the arrangement that the respondents had with ACAS that such claims would be dealt with exclusively and directly with R2. Neither the claimant nor her representative had any reason to demur when the CO confirmed dealings with R2 in respect of possible settlement by conciliation with R1 through R2's good offices. The claimant's representative had after all satisfied the EC requirement. There is no suggestion by either respondent that attempted conciliation by the claimant was in bad faith or lacked due and proper application and effort.

1.3.3 All the correspondence on behalf of the claimant with ACAS and ACAS back to the claimant's representative was under the subject heading of litigation against R1; that is how the claimant and her representative understood it, albeit the actual conciliation was, at the behest of ACAS, R1 and R2, directly with R2. Conciliation failed; the parties generally did not reach a settlement.

1.3.4 When it came to the issuing of the EC certificate ACAS issued a certificate only in the name of R2, with whom it had been conciliating on behalf of the prospective respondent R1; this was a patent error, and I find that it was a minor error because in fact the claimant had already satisfied the requirements of early conciliation in respect of claims against R1. No-one relevant, that is nobody with any interest of the matter, was in ignorance of the claim, deprived of an opportunity to conciliate or prejudiced in respect of any subsequent litigation. The error was a matter of form not substance.

1.3.5 The claimant's trade union representative did not spot the error in the EC. That was a mere oversight for the same reasons as I have just described; that was a minor error for the reasons I have already found.

1.3.6 The claimant's solicitor completed the claimant's ET1 form naming both first and second respondents as parties to the claims being made. By that time the claimant had, as I have said, satisfied the early conciliation requirements in respect of R1 and there had been conciliation through ACAS with both respondents based on that same prescribed information submitted in the prescribed manner to ACAS. There is no evidence before me as to whether the solicitor had committed an oversight, had assumed everything was in order or in fact knew it was not in order and covered up: I do not know which accurately describes what he/she did, but in any event the ET1 was erroneous in that it said that there was an early conciliation certificate that named not only R2 but also R1; it did not. The completed ET1 included the applicable EC number, the number

that was applicable to the satisfaction of requirements placed on the claimant regarding R1. The claimant satisfied the EC requirement, in respect of which a numbered EC Certificate was issued, and that number was entered on the ET1. There was still no prejudice to either respondent. These were matters of form and not defects of substance.

1.4 **Application of the law to the facts**:

1.4.1 In all the circumstances, and bearing in mind the overriding objective of the tribunal, acting always in the interests of justice, the claimant ought to be able to litigate her claims and R1 ought to be able to defend itself against them. The balance of prejudice against the claimant is too great to allow for a technical knock-out at this stage. The situation giving rise to the alleged technical defect, one of form, was caused in part or contributed to innocently by a convenient administrative arrangement entered into by ACAS with both respondents, namely for R2 to manage early conciliation and claims that followed its unsuccessful attempts at conciliation where the respondent was R1. It appears that R2 put itself in R1's place both as regards dealing with the claimant's grievance and the conciliation of potential claims; it agreed this with R1 and it agreed the management of conciliation with ACAS.

1.4.2 In circumstances where the claimant has satisfied the requirement placed on her, conciliation was undertaken apparently in good faith and properly, no party has been confused, misled or prejudiced and a fair trial is still possible (conciliation having been unsuccessfully exhausted by or on behalf of both the respondents) I am not prepared to effectively strike out the claim against R1 by revoking the decision of Regional Employment Judge Swann when he latterly accepted the claimant's claim. No injustice has been done to R1 or to R2. It would be an injustice to the claimant to be so unfairly deprived of the opportunity to litigate her claims, claims that both respondents can and will still defend without let or hindrance because of my decision.

1.4.3 In the context, I have described above I conclude that the erroneous reference in the ET1 to the EC certificate and the erroneous approach adopted by the claimant's representative to notification to the tribunal of compliance with the EC procedure was minor. In substance, the claimant and her representative had done what was required regarding pre-litigation attempted conciliation. The substantial steps that were taken satisfied the requirements of the applicable rules but the formalities on the ET 1 were in error; that did not affect the substance materially. The interests of justice prevail over such minor errors and the claimant should not be prejudiced by rejection of the claim on these grounds. The respondents are still able to contest claims of which they are aware and in respect of which they have been

involved from the earliest stage of all relevant procedures (including internal grievance procedures).

1.4.4 The alternative, if I had felt obliged to dismiss the claimant's claim on the technical and bureaucratic point being argued, would have been to then consider adding R1 as a party under rule 34 of the Tribunal's Rules in the interests of justice, and I would have done so at this stage and before considering the respondent's application to also strike out the claim against R2 thus seeking an end to proceedings. It seems appropriate and in line with the interests of justice to confirm Regional Employment Judge Swann's decision.

1.4.5 One further point of procedure regarding reconsideration ought to be confirmed. Normally an application for reconsideration will be made to the Judge who made the initial decision or judgment and that judge will grant or refuse the application in respect of their own decision or judgment. I have been delegated to case manage these claims. None of the parties, nor their representatives today, has objected to that or taken issue; I have noted that by implication my own Regional Employment Judge appointed me to consider this application when he refused an application to stay these proceedings and postpone today's hearing on other unrelated grounds than my involvement. I do not think there is a technical problem with me confirming the decision of Regional Employment Judge Swann, but as I say in the alternative and on any application to me or of my own initiative I would have joined R1 as a party.

2. **Application to strike out the claimant's claims against R2:**

2.1 **The Issue**: The claimant has presented claims to the tribunal to which her employer is the correct respondent. R2 says it was not her employer at the material time and cannot be liable for the claims presented. In those circumstances, the issue is whether the claimant's claims against R2 ought to b struck out as having no reasonable prospect of success and in the interests of justice.

2.2 **The Law**: The claimant has presented claims in respect of the payment of her wages and holiday pay under the Employment Rights Act 1996, Working Time Regulations 1998 and the National Minimum Wage Regulations 1999. Each of those claims is a claim in respect of wages due to a worker or employee from an employer, which term I use in the widest sense and to apply to one who engages a worker. The respondent to such claims must be a party liable to pay the sums claimed during employment/engagement and against whom a liability judgment can be made and who could be ordered to pay an award.

2.3 **The Facts**:

2.3.1 The claimant was employed by FCH (R1).

2.3.2 LCC (R2) is, as I have described it, a “sibling” of R1 as opposed to being wholly unrelated or the parent company; they are both Group members. Their interests in this litigation and involvement with this claimant are very closely linked, perhaps inextricably but further evidence would be required to establish that.

2.3.3 LCC dealt with the claimant's grievance which she raised against FCH.

2.3.4 LCC handled the early conciliation process for and on behalf of FCH as described above, taking it over for FCH. LCC was dealing with claimants raising similar claims against it at the tribunal and was in direct contact with ACAS in respect of all such claims against Group companies. Both respondents have retained the same solicitors and counsel to advise and represent in respect of this litigation. There is no apparent conflict between R1 and R2, whose interests appear to be inseparable with regard to this litigation and its defence.

2.4 **Application of the law to the facts**:

2.4.1 The claimant's principal issue must be with her employer i.e. FCH (R1). There are however potential issues with LCC (R2) over its handling of the claimant’s grievance. which potentially implicate LCC in respect of matters that might affect any award made if the claimant succeeds with her claim.

2.4.2 It is more likely that LCC would only be a witness as to how it handled the grievance on behalf of FCH but that is not yet clear.

2.4.3 . Mr. Patel quite frankly accepted that he did not know for certain at this stage whether there was real merit in retaining LCC as a party up to and including the final determination of the claims, however this litigation is complicated and it is possible, through the tortuous paths of incorporation of this Group, that there may well be a valid reason for LCC remaining as a second respondent.

2.4.4 I would not ordinarily consider it fair to name a potential witness, or a party against whom there is only a speculative chance of a claim being pursued that is as yet unformulated, as a party to litigation. It would be unfair for several reasons including because it is expensive, it is time consuming and requires emotional, amongst other, investments; it risks reputational damage. In this case however we know there is to be a stay by mutual consent in any event. LCC is heavily involved in this litigation on these issues and the effect of one additional claim, nominally only at this stage, will have minimal, if any, effect on it as to cost and as to reputation.

2.4.5 In the light of the above and in the interests of justice I refuse the application to strike out the claim against LCC, at least for the time.

2.4.6 I require however that prior to the lifting of the stay in respect of this claim the claimant identifies the potential claims, issues and liability of LCC before LCC must take any positive step with regard to defending this claim. I consider this to be fair to all parties. If the claimant cannot satisfy the tribunal that LCC has a real interest in this litigation (other than as a witness or by being involved in similar cases and thus potentially affected by any legal precedent set by this litigation) then clearly LCC ought to be dismissed as a party and without being put to the trouble and expense of defending the claims; that is unless of course LCC has a change of heart and consents to remaining a party without being provided with such justification. If LCC (R2) agrees with me that such justification is required then it must be provided by the claimant in writing to the tribunal and to R2 before any application to lift the stay is considered.

Employment Judge T Vincent Ryan

14.02.18