



EMPLOYMENT TRIBUNALS

Claimant: Mr N Schofield

Respondents: Bolton Textiles (Group) Limited
Joshua Dawson
Philip Andrew Dawson

HELD AT: Manchester

ON: 22 February 2019

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Mr M Ferron, Advocate
Respondent: Mr R Morton, Solicitor

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The correct identity of the first respondent is Bolton Textiles (Group) Limited, company registered number 10717887.
2. Joshua Dawson shall be added as the second respondent but only for the purposes of the claimant's claims under the Equality Act 2010.
3. Philip Andrew Dawson shall be added as the third respondent but only for the purposes of the claimant's claims under the Equality Act 2010.
4. The company is permitted to serve an amended response and the individual respondents shall serve their responses to the claimant's claims by 22 March 2019.

REASONS

1. At a preliminary hearing the claimant has applied to add two individuals as parties in the form of respondents to his claim against a limited company. The Employment Tribunals Rules of Procedure 2013 at rule 34 provide that the Tribunal may, on its own initiative or 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 also remove any party apparently wrongly included.

2. As to the issues between the parties, the claims are brought under the Equality Act 2010 as well as the Employment Rights Act 1996. The Equality Act at section 109 provides that:

“Anything done by a person (A) in the course of A’s employment must be treated as also done by the employer.”

By this section the Equality Act makes provision for claims to be brought against individuals as well as employers.

3. The claimant applies to add as parties the sole director of the respondent company and one employee, alleging that the employee in particular was responsible for a grievance and possibly dismissing the claimant and that the director was also responsible for those acts.

4. It is apparent from papers put before me in the bundle that the claimant started work in 2007 working for J H Cunliffe & Co Limited, and after working for an intermediate company he came to be employed by this respondent with the two earlier companies having become insolvent. The company most recently employing the claimant was incorporated on 10 April 2017, and from a look at Companies House as at today’s date its accounts are overdue. The claimant is concerned that if the company respondent goes into insolvency then his claims will be worthless.

5. Both the potential new respondents are named in the narrative particulars attached to the ET1 but they were not named on Early Conciliation certificates and they were not made parties when the case was commenced.

6. The respondent argues that it would be unfair on the two individuals to be made respondents as it goes behind the corporate veil; it would give the claimant an advantage over other creditors if the respondent did become insolvent. It is submitted that the claims against the individuals are out of time and that there was no blameworthy conduct on their part. It would be disproportionate to add them; there has not been compliance with the early conciliation procedure and there would be prejudice to the two people who should be protected by the limited company corporate structure which employs the claimant.

7. The President of the Employment Tribunals in England and Wales has issued Presidential Guidance on General Case Management (2018), and there is a section on adding or removing parties. At 16.2 one of the circumstances that might give rise to parties being added is where individual respondents other than the employer are named in discrimination cases on the grounds that they have discriminated against the client and an award is sought against them.

8. Paragraph 17 states that asking to add a party is an application to amend the claim. The Tribunal will have to consider the type of amendment sought. The amendment may deal with a clerical error, add factual details to existing allegations or add new labels to facts already set out in the claim. The amendment may, if allowed, make new factual allegations which change or add to an existing claim. The consideration set out above in relation to amendments generally apply to these applications. The provisions for amendments generally relate to adding different claims or making amendments to the form in which the claim is made.

9. Looking at the application before me, the two parties now sought to be added are named in the ET1 and the claimant does not seek to add anything further by way of allegations against them than is made in the ET1.

10. As to time limits, the claimant when he went through the early conciliation procedure was, I am told, acting alone; at the time the ET1 was put in it was professionally drafted; the two potential additional respondents were named but there was no early conciliation certificate and they were not included as parties.

11. The claimant's effective date of termination of employment was 29 March 2018. EC notification to ACAS was on 27 June and the Certificate was issued on 27 July. The ET1 was received on 25 August and the application to amend to add the further respondents was made by email on 27 August 2018. The application was therefore made one day after the expiry of the limitation period allowing for Early Conciliation.

12. Early Conciliation certificates are not required where a party is added by way of amendment. The application was made without significant delay and certainly before the prospective respondents could argue that the delay has prejudiced them due to documentary evidence or witnesses no longer being available.

13. The two further respondents could have been made respondents from the outset had Early Conciliation certificates been obtained for them and had they been entered as respondents on the ET1.

14. In dealing with this application the Tribunal has to consider the balance of prejudice between the parties.

15. From the perspective of the claimant if the corporate respondent falls into insolvency then the claimant will have no remedy in respect of his Equality Act claims. If the two individuals are added as respondents and the respondent company goes into insolvency the claimant will have the possibility of a remedy against them.

If the company remains solvent the two individuals will no doubt be indemnified by the company against any award that the Tribunal may make against them.

16. As to the two prospective respondents they will be prejudiced if the claimant's Equality Act claims succeed as against them and if there is no corporate respondent to indemnify them. Whether they have committed any blameworthy conduct is a matter of evidence but it would appear that they were responsible for the claimant's dismissal which he alleges was discriminatory.

17. Given the insolvency history of the two companies previously employing the claimant and the relatively recent incorporation of the respondent company, it seems to me that the balance of prejudice favours protecting the claimant rather than a director and an employee of the respondent company, thus potentially allowing the claimant more possibility of obtaining a remedy if his Equality Act claim succeeds. I therefore add the two named individuals as the second and third respondents.

18. The claim is the same therefore it does not seem to me that there is a need to serve specifically the second and third respondents, but the first respondent must be allowed to amend its response and the second and third respondents must be allowed to put in their own individual responses to the claimant's claims. As 28 days are allowed for that it seems to me that that takes us to 22 March 2019, which will be the date for the respondents to provide their responses.

Employment Judge Sherratt

28 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

4 March 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.