EMPLOYMENT TRIBUNALS

Claimant: Miss M Speakman

Respondent: Goodsir Commercial Limited (1)
Mr P Goodsir (2)

Heard at: London Central (via CVP) **On:** 6th December 2021

Before: Employment Judge Nicklin (sitting alone)

Representation

Claimant: Mr Wareing (Solicitor's agent)

Respondent: Ms Singer (Advocate from Avonsure Ltd)

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT ON A PRELIMINARY HEARING

It is the judgment of the tribunal that:

1. The Claimant made an error in relation to the ACAS Early Conciliation reference numbers on the ET1 claim form and it is not in the interests of justice to reject the claim. The claim form was therefore validly accepted.

2. The tribunal has jurisdiction to hear the Claimant's discrimination complaint and the application to strike out the claim is therefore dismissed.

REASONS

Introduction

1. This is the reserved judgment on the Respondent's application to strike out the Claimant's claim of indirect sex discrimination. The application is dated 22nd October 2021 and is concerned with whether the claim form should have been

rejected under Rule 12 of the tribunal's Rules of Procedure for want of valid ACAS Early Conciliation reference numbers.

Appearance at this hearing

2. At the beginning of the hearing, I clarified the capacity of the representatives attending because the Respondents' advocate had informed the tribunal that the Claimant's representative was suspended from practice as a barrister. Mr Wareing confirmed that he appeared in the capacity of a lay representative and later clarified this was as a solicitor's agent. The Claimant's solicitor wrote to the tribunal confirming that Mr Wareing was an agent of the firm. I queried whether the regulatory provisions set out in the Financial Services and Markets Act 2000 (as amended) apply if the Claimant's representative was acting in a paid capacity. However, both representatives assured me that these provisions did not apply because the Claimant had solicitors acting on the record and these are an exempt group for the purposes of claims management services under the Act.

Procedural history

3. By a claim form presented on 13th May 2019, the Claimant brought a claim of indirect sex discrimination against the Respondents. She was employed by the First Respondent, a Property Management company, from 28th August 2017 to 3rd March 2019 as Office Manager/Team Secretary. Her employment terminated at the end of her maternity leave after the Claimant had requested to return to work part time. The Respondents' case is that the Claimant's position was redundant at this point and they could not find an alternative part time role in the company.

4. The claim was case managed by Employment Judge Norris on 28th July 2021. On 25th October 2021, this preliminary hearing was listed in the following terms:

   to consider whether the Claimant has complied with her obligations in relation to Rule 12(1)(c) (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) and section 18A(4) Employment Tribunals Act 1996 and if she has not, whether the claim should be struck out because the Tribunal does not have jurisdiction to hear it.

5. The issue arising for determination at this hearing and in this reserved judgment is the legal effect of errors made by the Claimant in the provision of the ACAS Early Conciliation ("EC") certificate numbers on the claim form. Whilst the notice of hearing refers to Rule 12(1)(c), the issue actually engages Rule 12(1)(da) because there are two EC numbers provided for the two Respondents on the claim form[1]. However, these do not match the EC certificates supplied. The tribunal therefore has to determine the facts about that error and decide whether the claim should have been rejected. Where the tribunal considers that the Claimant made an error and it would not be in the interests of justice to reject the claim, the claim may, nevertheless be accepted. These matters must be considered in order to determine whether the claim should be struck out.

[1] This provision was inserted into the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on 8th October 2020 and applies to all proceedings to which the provisions relate (see Reg 22(1) of the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 (SI 2020/1003).

6. It is agreed between the parties that, if this claim continues and is not struck out and/or rejected, the Claimant's complaint is in time and the tribunal has jurisdiction to hear the claim. That would not be the case if the claim had to be amended or a rejection of the claim had to be reconsidered.

7. Neither party sought to call any oral evidence or rely on any witness statement in this application. I had the written and oral submissions of the parties along with a small bundle of documents running to 68 pages which consists of two ACAS EC certificates, the pleadings, tribunal orders and correspondence. I have therefore considered all of this material in order to make my decision.

8. During the course of the hearing, it became apparent that the parties were anticipating a variety of outcomes and seeking to offer submissions on these variables. For example, the Respondents sought to anticipate any application for reconsideration of rejection as well as any application for an amendment to the claim, engaging arguments as to time limits. It was confirmed, and not challenged by either party, that the correct course was to determine whether the claim should be rejected under Rule 12. If it should be rejected, it must then be struck out and the claim is at an end. That judgment may be subject to an application for reconsideration under the usual principles if a party chooses to take that course. Alternatively, if the claim is not rejected owing to the discretion found in Rule 12(2ZA) (discussed below) or the claim is not rejected for any other reason, it will therefore proceed and I will make separate case management orders for the progression of the claim.

9. Accordingly, this decision does not consider amendments, extensions of time arising from an amendment or principles of reconsideration. No such matters or applications are properly before the tribunal at this juncture.

Findings of fact

10. There are two EC certificates provided in the hearing bundle. The first was issued on 9th May 2019 and names the First Respondent as the Prospective Respondent. It bears the reference number R144284/19/80 ("the First EC Certificate"). The second was issued on the same date and names the Second Respondent as the Prospective Respondent, care of the company address. It bears the reference number R144290/19/26 ("the Second EC Certificate").

11. The claim form sets out two completely different EC reference numbers. They bear no relation at all to the certificates initially obtained by the Claimant for the preparation of this claim. However, I am told that the numbers provided on the claim form refer to two later EC certificates which were issued on 13th May 2019, the date that the claim form was presented. These are R155578/19/90 (First Respondent) and R155579/19/81 (Second Respondent). Given the numbering, these certificates appear to have been produced one after the other on 13th May 2019 and the Claimant's solicitor has then proceeded to issue the claim using those numbers. I have not seen the EC certificates in relation to those reference numbers.

12. The Claimant did not intend to cite the earlier EC certificate numbers. That is confirmed in the Claimant's written submissions for this hearing which contend that the certificate number given on the ET1 was correct and the wrong certificates have been disclosed in the course of the proceedings (i.e. the certificates referred to at paragraph 10, above). Further, an email sent to the

tribunal by the Claimant's solicitor (on 18th October 2021 at 12.11 [63]), says that a former paralegal was handling the matter and the Claimant's solicitor was looking into the issue. For reasons unknown, but likely, on the balance of probabilities, to be because they did not have the original certificates at the time, the Claimant's solicitors proceeded to obtain a second set of certificates in order to issue the claim. This is because there would be no reason to go through the process again if the solicitors had the first set.

13. The Claimant has been professionally represented by solicitors throughout the claim and, as above, they had conduct of the presentation of the claim.

Law

<u>*Rules concerning claim forms and jurisdiction*</u>

Rule 10:

(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—

(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.]

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.

Rule 12:

(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)](**c**) 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.]

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

Substantive legislation

14. Section 18A of the Employment Tribunals Act 1996, as amended, provides, so far as is material:

(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.

(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.

(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).

Authorities

15. The Respondents rely on the EAT decision in *Revenue and Customs Commissioners v Serra Garau* [2017] ICR 1121. In that case, the Claimant obtained an EC certificate following his dismissal. The day before the expiry of the time limit on his claim, the Claimant contacted ACAS for a second time and was issued with a second certificate. He then presented his claim one month later relying on the second certificate and claimed that the effect of the second EC process was to 'stop the clock' on his time limit. The tribunal found that the second process 'stopped the clock', but the appeal on this approach was allowed by Kerr J in the EAT. Kerr J held (insofar as relevant to the issues in this claim):

    15.1. Only one mandatory process is enacted by the statutory provisions. The quid pro quo for the prohibition against issuing a claim until a certificate is obtained is that the limitation regime is modified so that the certification process does not prejudice the Claimant [18 and 19];

15.2. The scheme of the legislation is that only one certificate is required for 'proceedings relating to any matter'. A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted [20];

15.3. A second certificate is not a 'certificate' falling within section 18A(4). The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of Procedure scheduled to the 2014 Regulations [21];

15.4. A purely voluntary second notification is not a notification falling within section 18A(1) [24]. On that basis, Kerr J held that the limitation regime was only modified by the first EC notification and certificate.

16. I was also referred to *Sterling v United Learning Trust* UKEAT/0439/14/DM, unreported, 18th February 2015, per Langstaff J (P). In this case, the tribunal held that it had no jurisdiction to hear the Claimant's complaints of unfair dismissal, discrimination and other claims. The judge had inferred that the Claimant had not included a correct EC certificate number and her claim was rejected (under Rule 10(1)(c)) and sent back to her. When the claim was re-submitted, it was out of time. The tribunal was upheld by Langstaff J (P). The following principles are relevant:

    16.1. Where the rule [i.e. Rule 10] requires an EC number to be set out, it is implicit that that number is an accurate number. In that case, the tribunal found it was not accurate. The tribunal was then obliged to reject it, subject to any application for reconsideration.

17. The Claimant referred to *Adams v British Telecommunications Plc* [2017] ICR 382. In this case, the Claimant's claims of unfair dismissal and discrimination were rejected by the tribunal on the ground that the EC certificate number was incomplete. New claims were presented but this was after the time limit had expired. The tribunal held that it did not have jurisdiction as the thresholds for extending time were not met. Simler J (P) held, in line with the judgment in *Sterling*, that the first claim was correctly rejected for want of a complete EC certificate number. The focus of the appeal was therefore on whether the tribunal had erred in its approach to the consideration of the extension of time provisions and principles governing the second presented claim. Ultimately, this case concerns the approach to extension of time, which is not relevant to the issues I must consider in this case.

18. Of relevance under a different, but similar, rule is *Chard v Trowbridge Office Cleaning Services Limited* (unreported, 4th July 2017, UKEAT/0254/16). Here the tribunal rejected a claim under Rule 12(2A) because the name of the Prospective Respondent on the certificate was given as an individual but the claim form named the company. The judge held the error was not minor. Kerr J concluded that it was wrong to say that a Respondent as an individual rather than a company could never be a minor error. Kerr J concluded that the error was minor (the individual was the managing director) and the interest of justice did not require the claim to be rejected. Kerr J referred to the 'considerable emphasis' to be placed on the overriding objective and avoiding unnecessary formality and seeking flexibility in the proceedings (as per Rule 2). In particular, this includes (at para 63 of the judgment): "*the need to avoid elevating form over substance in procedural matters, especially where parties are unrepresented*".

19. It is to be noted that the above decisions predate the amendment to Rule 12 by the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020, which came into force on 8th October 2020. The effect of the amendment is to insert Rule 12(1)(da) and 12(2ZA) (and to modify Rule 12(2A) to remove the word 'minor' from 'minor error'). These apply to all proceedings to which they relate[2]. Rule 12(2ZA) provides the tribunal with a discretion where it may otherwise reject a claim form bearing an incorrect EC certificate number which does not match the certificate. That discretion (in respect of incorrect EC certificate numbers) did not exist at the time of the above mentioned cases.

Submissions from the parties

20. I do not set out all of the parties' submissions in these written reasons. However, I have considered the written and oral submissions of both parties in detail, including all of the authorities cited and provided.

21. The Respondents made the following primary submissions (in writing and orally):

    21.1. In line with *Serra Garau*, the tribunal should only treat the first set of EC certificates as valid and compliant with the Claimant's obligations under section 18A. The second set of certificates were therefore voluntary and are of no legal effect. The Respondents therefore contend that the claim form is liable for rejection under Rule 12(1)(da) because the numbers on the claim form do not match the valid, original certificates;

    21.2. The Respondents rely on the principles in *Sterling* in support of that position;

    21.3. The Respondents say the claim form should therefore have been rejected. They contest any relief which could be offered to the Claimant under Rule 12(2ZA) on the basis that it should not be considered an error by the Claimant because she, or her solicitors, positively intended to cite the later, voluntary certificate numbers. The Respondents say this is not a minor error. They point to the facts in *Adams* to say this is not a case where the number has been written down incorrectly or by accident.

    21.4. Whilst some written submissions were deployed on the issue of time limits in the event that the claim was amended, the other relevant submissions made by the Respondents about the interests of justice were:

        21.4.1. The Claimant has been professionally represented throughout the proceedings;

        21.4.2. The Claimant's solicitors were on notice to this jurisdictional issue at the 28th July 2021 hearing and have not addressed the issues. The Respondents say they have only responded to their application to strike out and, in any event, were made the subject of an unless order as to compliance with orders concerning this issue;

        21.4.3. The Respondents contend that the Claimant's solicitors have not engaged with the issue of the validity of the certificates in correspondence prior to the hearing;

        21.4.4. The Claimant has made no application to amend her claim in light of the defect. There has been non-compliance with tribunal orders

[2] See transitional provisions referenced at footnote 1

and the approach to the litigation has caused delay during the proceedings, including in dealing with this matter;

21.4.5. The Claimant will have a route of redress against her professional representatives if the claim is struck out;

21.4.6. The Respondents contend that the claim is not a serious and credible claim of discrimination.

22. The Claimant made the following primary submissions (in writing and orally):

22.1. The Claimant's position is that the EC reference numbers provided are correct on the basis that they refer to the subsequent two EC certificates;

22.2. Emphasis was placed on the *Adams* case, although the principles relied upon concern the question of extension of the time limits;

22.3. The tribunal should consider the balance of prejudice as between the parties. The Claimant says that this caused the Respondents no great prejudice as compared with the effect on the Claimant if the claim is struck out;

22.4. Insofar as there is an error in the numbers used by the Claimant, the Claimant says it is a simple, minor error and the Respondents are seeking to profit from a technical issue when there is, on the Claimant's case, a serious discrimination case to be tried. The Claimant says it would not, therefore, be in the interest of justice to strike out the claim in those circumstances.

Discussion and conclusions

The EC certificate numbers on the ET1 claim form

23. In my judgment, Rule 12(1)(da) of the tribunal's Rules of Procedure is plainly engaged. It was an error for the Claimant, or those advising her, to put the later EC certificate numbers on her ET1 claim form. The Claimant cannot rely on those later certificates because, in accordance with the principles established in *Serra Garau*, those certificates were the product of a second, voluntary EC process. The Claimant complied with her obligations to complete early conciliation with ACAS (pursuant to section 18A) when she went through the process the first time round. That process completed on 9th May 2019 and the two certificates in the bundle (as set out at paragraph 10, above) constitute her valid, completed, early conciliation.

24. Whilst *Serra Garau* considered the issue of EC certificates in the context of when time ran (or when the 'clock stopped'), the principle that the first EC certificate is the mandatory certificate (proving compliance with the section 18A obligations) is clearly applicable. To conclude otherwise would be to say that a Claimant can initiate more than one conciliation process and choose any certificate but can only rely on the first for the correct calculation of time limits. That must be wrong since a Claimant could otherwise rely on a later certificate which a.) does not prove compliance with section 18A (since this can only be the first certificate); and, b.) is a nullity for the purposes of calculating a time limit.

25. Accordingly, the Claimant has used incorrect certificate numbers on the ET1 claim form which do not match the valid certificates which comply with section 18A. On that basis, Rule 12(2ZA) is engaged. An Employment Judge must then reject the claim 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.

Rule 12(2ZA)

26. There are two parts to the discretion in Rule 12(2ZA). I must first consider whether the Claimant made an error in relation to the EC numbers. Whilst the parties adopted the term 'minor error' during submissions (which existed in the similar test in Rule 12(2A) until the Rules of Procedure were amended on 8th October 2020) the new Rule 12(2ZA) does not include the word 'minor'. I have not been referred to any recent authority on the construction of this new wording. The omission of the word 'minor' must be deliberate given it has been deleted from Rule 12(2A). Much of the previous case law on the term 'minor error' has been concerned with errors in the name of the Respondent.

27. Whilst the Respondents contend that this was an intentional act by the Claimant or her advisers to state the later EC certificate numbers, it does not follow, in my judgment, that the use of those numbers was not an error. It was an error to use the later certificates and cite the corresponding numbers. The Claimant's representative suggested in submissions that this occurred because the Claimant initiated the first process herself and then instructed her solicitors who, not being aware of the previous process, initiated the second process on her behalf. No evidence was called (in any form) to establish this and I have not been able to make findings about exactly how the error occurred. Whether the later certificate numbers were used because of those alleged events or, alternatively, were used through an administrative error of the solicitors, it is plain that the numbers used were as a result of an error because a mistake was made by using the wrong set of certificates (even if the Claimant or her advisors thought that was the correct set to use at the time). The fact the Claimant obtained valid EC certificates in compliance with section 18A but failed to use these when presenting her claim supports this conclusion. The Claimant clearly intended to start her claim following a process of early conciliation but did not use the correct certificates.

28. I must then consider whether it is not in the interests of justice to reject the claim under Rule 12(2ZA). In my judgment, it is not in the interests of justice to reject the claim for the following reasons:

    28.1. The Claimant embarked on a valid process of early conciliation and obtained EC certificates which are not challenged as being compliant with section 18A. But for the error (i.e. using the numbers on the later set of certificates), the claim would have proceeded. The Claimant having complied with her early conciliation obligations, it would not now be in accordance with the overriding objective (in dealing with the case fairly and justly and avoiding unnecessary formality and seeking flexibility in the proceedings) to deprive her of the opportunity to pursue that claim on the basis that she used the second set of certificate reference numbers.

    28.2. In would, in my judgment, be an exercise of elevating form over substance if the claim were now rejected in these circumstances. It is right that the Claimant has been represented throughout. That is a stronger point in the Respondents submissions but, on balance, however the error occurred, the fact that the Claimant completed a valid process of early conciliation which, necessarily, enabled the Respondents to engage in the process of attempting to resolve any dispute before the claim began, militates in favour of relief under Rule

12(2ZA).

28.3. In the context of a technical error as to the reference numbers used, there is far greater prejudice to the Claimant in rejecting her claim (and therefore striking it out) than to the Respondents. Both Respondents were named as prospective respondents in the original early conciliation process. The primary prejudice to the Respondents in these proceedings is the delay in the resolution of this matter since the case management hearing in July 2021 (including delays in the provision of information about the EC certificates from the Claimant's solicitors) and other non-compliance with orders. The tribunal can deal with those matters separately and do justice to the parties under its case management powers, exercised in accordance with the overriding objective. Those issues carry lesser weight, in my judgment, as to the interests of justice in the rejection of the claim for the EC certificate reference numbers.

28.4. Finally, there is a live dispute between the parties in respect of the Claimant's complaint of discrimination and the termination of her employment. There has been no application to strike it out on its merits, the claim is defended and it is otherwise brought in time. These factors also support a conclusion that it is not in the interests of justice to reject the claim in all the circumstances of this case.

Outcome

29. It follows that the claim will not therefore be rejected under Rule 12(2ZA) and, accordingly, the application to strike out the claim on that basis is dismissed. The tribunal has jurisdiction to hear the discrimination complaint. Case management orders will be made separately to deal with the progression of the claim to final hearing.

Employment Judge Nicklin

Date: 22nd December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22/12/2021.

FOR THE TRIBUNAL OFFICE