



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100253/2021

10

Preliminary Hearing Held by Cloud Video Platform (CVP) on 27 May 2021

Employment Judge: R King

15

Miss Julie Donohoe

**Claimant
Represented by
Miss Rebecca Tait and
Rory Crombie
University of Strathclyde
Law Clinic**

20

Scotspeed

**First Respondent
Represented by
Mr D James,
Solicitor**

25

Alistair McGhee

**Second Respondent
Represented by
Mr D James,
Solicitor**

30

35

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application for reconsideration of the rejection of her claim against Scotspeed is successful on the ground that the notified defect can be rectified.

40

REASONS

Introduction

1. On 13 January 2021 the claimant presented claims for unfair dismissal,
5 discrimination on the grounds of disability, sex and sexual orientation and for
notice pay, holiday pay, arrears of pay and for other payments. All claims
were made against both her former employer Scotspeed and its owner Alistair
McGhee.
2. Although her ET1 set out her complaints against both parties, her claim
10 against Scotspeed was rejected by letter dated 20 January 2021 because her
ET1 did not contain an ACAS early conciliation certificate number for that
respondent.
3. By letter dated 18 February 2021 the claimant's representatives made an
application for reconsideration of that decision and this preliminary hearing
15 has been fixed for that purpose.
4. The Tribunal heard the evidence from the claimant only.

Findings in fact

5. Having heard the claimant's evidence, the Tribunal finds the following facts to
be admitted or proved.
- 20 6. The claimant was formerly employed by Scotspeed at certain times between
22 August 2018 and 3 September 2020, although intermittently and she did
not have continuous service.
7. Following the claimant's dismissal on 3 September 2020 she contacted Acas
25 with a view to obtaining advice about her rights to bring a claim. Having done
so, she subsequently contacted the University of Strathclyde Law Clinic's
initial advice service in October 2020. She was advised by Ben Brown, an
adviser at the Law Clinic, that she had grounds to make a claim and that she

would need to engage with Acas early conciliation as the first part of that process.

8. At this time the Law Clinic was providing the claimant with general advice but it was not formally representing her in relation to her potential claim. The claimant therefore contacted Acas personally with a view to engaging with early conciliation. She found the process of early conciliation stressful and the advice from Acas unhelpful. Her stress while going through the early conciliation process was compounded by having to deal with underlying health conditions, including thyroid issues, stress, anxiety and PTSD, which affect her concentration and are debilitating.
9. In due course Acas issued two separate early conciliation certificates; the first in respect of Alistair McGhee dated 12 December 2020 (R218309/20/48) and the second in respect of Scotspeed dated 18 December 2020 (R220513/20/00).
10. Having completed early conciliation the claimant submitted her claim to the Employment Tribunal on 18 January 2021. Although she was not represented by the Law Clinic at that time and had not even taken its advice before completing her ET1 she nevertheless completed Ben Brown's details in section 11 of the ET1, indicating that he was her representative.
11. Although she had received separate early conciliation certificates for Mr McGhee and Scotspeed, she inserted the early conciliation certificate number for Mr McGhee (R218309/20/48) twice; correctly in the section of the ET1 for the claim against Mr McGhee and incorrectly in the section in which she should have inserted the early conciliation certificate number she had obtained for Scotspeed. She did so because she understood that one Acas early conciliation certificate number applied to her complaints against both respondents.

12. On 21 January 2021 the claimant formally instructed the University of Strathclyde Law Clinic to represent her. When the Law Clinic representatives informed the Judge at the preliminary hearing on 18 March 2021 that the claimant wished to proceed only with her claim against Mr McGhee that was an error on their part that did not reflect the instruction they had been given.

Submissions

Submissions for the claimant

13. On behalf of the claimant Miss Tait submitted that the claimant had made an administrative mistake when completing her ET1. She had inserted the same EC number for her claim against Mr McGhee and Scotspeed in circumstances where she had in fact gone through early conciliation in respect of both proposed respondents and had an early conciliation certificate number in respect of both, which was evidenced by those certificates.
14. She invited the Tribunal to accept that the claimant's mistake had been an understandable one in the circumstances because at the time of the submission of her ET1 on 18 January 2021 she was not formally represented by the University Law Clinic and she had therefore submitted the application on her own.
15. In the circumstances the claimant had lacked proper legal advice to complete the form and the absence of legal advice was exacerbated by factors such as the Acas advice which she had found confusing. However, this had been her *only* source of advice and she had relied on it.
16. While the Tribunal had rejected her ET1 against Scotspeed for lack of an early conciliation certificate number the claimant *had* complied with early conciliation in respect of both proposed respondents but had inserted the wrong certificate number for Scotspeed in the ET1 by mistake.
17. Miss Tait also submitted that the Tribunal's letter of 20 January 2021 rejecting the claim against Scotspeed was not compliant with Rule 12(3) because it had not set out details of how to apply for a reconsideration of that decision.

To compound matters for the claimant that letter had been sent only in hard copy to the offices of Strathclyde University Law Clinic at a time when due to Covid restrictions there was nobody in attendance at the office until 4 February 2021 when it was discovered by chance.

5 18. Having discovered this letter on 4 February the claimant's representatives had made an application for reconsideration on 18 February 2021. That was within fourteen days from the date of having received notice of the decision, albeit it was not within fourteen days of the date of the decision.

10 19. Miss Tait invited the Tribunal to accept that the claimant's evidence had been credible and reliable. She had been suffering from acute stress and financial pressure at the time when she submitted her claim. She had been suffering from panic attacks that had affected her mental health and wellbeing. She had taken advice from Acas and she understandably relied on that.

15 20. Prior to this preliminary hearing, Miss Tait's understanding was that Acas had merely advised the claimant but it appeared from her evidence that Acas had submitted her ET1 on her behalf.

20 21. In all the circumstances it would be in the interests of justice to allow the claim against Scotspeed to proceed. That would not be prejudicial to the respondent whereas the claimant would suffer an unjust loss if her claim against Scotspeed was not allowed to proceed.

Submissions for the respondent

25 22. On behalf of the respondent Mr James invited the Tribunal to reject the claimant's application for reconsideration. He noted that it was accepted that an early conciliation certificate had been issued in respect of Scotspeed on 18 December 2020. It must have been provided to the claimant. It could safely be said that at the time when she lodged her claim on 18 January 2021 she was in receipt of the early conciliation certificate.

23. Mr James referred to the case of *Fforde -v- Black UK EAT/68/80*. He submitted that the interests of justice ground could only be successful if something had gone wrong with the tribunal's procedure so that a party was denied natural justice. He submitted that was not the case in respect of the circumstances of this case.
24. In the first place there was no administrative error on the Tribunal's part. It had acted correctly when it had identified a substantial defect in the ET1 having regard to the EC certificate number against Scotspeed being identical to that in respect of the claim against Mr McGhee. A unique EC certificate number was a prerequisite for the claim and its absence was a substantive error. The Tribunal was correct in rejecting the claim against Scotspeed for that reason, in circumstances where, based on the timeline in her evidence, the claimant could have included the correct reference number.
25. Mr James submitted that while the claimant had given evidence that she suffered from a number of health conditions she had not relied on those as the reason she could not identify the correct EC number. Her health had therefore had no impact on her ability to complete the claim form.
26. Despite what the claimant's representative had asserted, the claimant did have legal representation from the Law Clinic in or around September/October 2020 and 21 January 2021 was not the first occasion when she had obtained representation. The claimant did have access to legal advice when she submitted her claim but had simply chosen not to take that advice because she believed that it was a simple process. She had made an informed decision not to take advice at the time.
27. In respect of the evidence that the claimant had given that Acas had completed the form on her behalf, he submitted that this was peculiar standing their neutral position and that her evidence in that regard was simply not plausible.

28. Mr James also referred to the fact that at the preliminary hearing the claimant's representative had said that she did not want to add an additional respondent to the claim against Mr McGhee. It was significant that this point had been specifically discussed and a discussion had been recorded in the Judge's note to the effect that a claim would not be proceeding against Scotspeed. The note of the preliminary hearing had expressly recorded that the claimant's representative had confirmed the claim had correctly been brought only against Mr McGhee. There had been no confusion.

29. Mr James submitted that there would be no prejudice to the claimant if the claim against Scotspeed was not allowed to proceed. All of the allegations she had made in her ET1 were against Mr McGhee and there were no further distinct allegations against Scotspeed distinct from those against him. She still had the right to pursue all of her claims against Mr McGhee. In all those circumstances he invited the Tribunal to reject the application.

The Law

30. So far as relevant Rules 12 and 13 of the Employment Tribunals (Constitutions and Rules of Procedure) 2013 provide as follows:-

12.— Rejection: substantive defects

(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—

...

(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;

(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) of paragraph (1).

...

- 5
- (2) 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.

13.— Reconsideration of rejection

- 10
- (1) A claimant whose claim has been rejected (in whole or in part) under [rule 10](#) or [12](#) may apply for a reconsideration on the basis that either—
 - (a) the decision to reject was wrong; or
 - (b) the notified defect can be rectified.
 - (2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.
 - (3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.
 - (4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.
- 15
- 20

25

Discussion and Decision

31. In the first place the Tribunal finds that the claimant's application for reconsideration should be considered although presented late. In reaching that decision it takes into account that only a hard copy of the Tribunal's 20 January 2021 rejection of the claim against Scotspeed was sent to the Law Clinic's offices and because of Covid restrictions was not collected until the original 14 day limit had expired. It also takes into account that this letter was deficient because it did not set out details of how to apply for a reconsideration of the decision. In those circumstances, the claimant's delay in making her application was reasonable. Applying Rule 5, it therefore finds that the time for making the application should be extended to 18 February 2021 when that application was made.
32. The principal question for the Tribunal in terms of Rule 13(1) is whether the defect identified can be rectified. It was not in dispute that the claimant had, despite the difficulties she had described, completed the Acas early conciliation process in respect of both Alistair McGhee and Scotspeed and had obtained early conciliation certificates in respect of both potential respondents, albeit they were not issued on the same date. The claimant was therefore in receipt of both early conciliation certificates by 18 January 2021 when she submitted her claim form.
33. However, when she submitted her claim form, because of confusion, ill health or having received advice from Acas that she did not properly understand, she inserted the same early conciliation certificate number for both respondents. In those circumstances the Judge correctly rejected the claim against Scotspeed under Rule 12(2).
34. However, the Tribunal concludes that in circumstances where the claimant has subsequently, in her application for reconsideration dated 18 February 2021, produced an early conciliation number in respect of Scotspeed (R220513/20/00), obtained prior to the presentation of her rejected claim, that the defect has been rectified.
35. In reaching this decision the Tribunal takes into account the interests of justice and the overriding objective to deal with cases fairly and justly. It has had

5 regard to the fact that the claimant had engaged with early conciliation and obtained early conciliation certificates for both respondents. In that regard she had done everything required of her before presenting her claim. When she presented her claim she did not take advice about its completion and she was also suffering from stress and anxiety.

36. Under the previous ET rules a decision was capable of being reviewed if it could be argued that an administrative error had resulted in a wrong decision. In ***Sodexho Ltd v Gibbons* UKEAT/0318/05, UKEAT/0319/05 & UKEAT/0320/05**, the EAT held that administrative error included errors by the parties, as well as by the tribunal staff. However, it was necessary for the party seeking a review to show that the administrative error had led to the wrong decision being made. Although that decision was made under a different set of rules, the Tribunal considers that it should be taken into account. It is clear that the claimant's error was an administrative one and that it resulted in a wrong decision in circumstances where the claimant had complied with the early conciliation requirement in relation to both respondents.

10

15

37. The Tribunal also accepts that the claimant's representatives' failure to oppose the rejection of the claim against Scotspeed during the preliminary hearing on 18 March 2021 was a mistake on their part and did not reflect the claimant's position. In that regard the Tribunal takes into account that the claimant's representatives are university students and not professional representatives. In any event the defect is now deemed to have been rectified by the date of the preliminary hearing.

20

38. The Tribunal did not accept the claimant's evidence that Acas completed and submitted her claim form on her behalf. Her evidence about that was confused and, as Mr James submitted, entirely implausible in light of its neutral role. Had Acas submitted her claim form they would not have completed the same early conciliation number for both respondents.

25

30

39. In all the circumstances the Tribunal concludes that as the claimant has produced an early conciliation certificate (R220513/20/00) in respect of Scotspeed, dated prior to the presentation of her rejected claim, that the defect has been rectified. Her claim against Scotspeed is therefore treated as having been presented on 18 February 2021 when her representative provided the Tribunal with confirmation of the relevant early conciliation certificate number.

Time bar

40. There remains a live preliminary point in respect of time bar and therefore a further open preliminary hearing to deal with that issue in respect of the claims against both respondents should now be fixed.

Employment Judge: Robert King
Date of Judgment: 22 June 2021
Entered in register: 22 June 2021
and copied to parties