



EMPLOYMENT TRIBUNALS

Claimant: Mr A Soares
Respondent: Serco Limited
Heard on: 13 October 2021
Before: Employment Judge Pritchard

Representation

Claimant: In person
Respondent: Mr D Hogg, solicitor

RESERVED JUDGMENT UPON A PRELIMINARY HEARING

The Claimant's claim shall proceed. The claims of the other individuals listed on the annex to the ACAS Early Conciliation Certificate are rejected under Rule 10(2) because the failure to comply with the requirements of Rule 10(1)(b)(i) and (ii).

REASONS

Issues

1. This preliminary hearing was listed for consideration of the Respondent's application in its ET3 and grounds of resistance dated 16 November 2020, the Claimant's email of 7 January 2021, the Respondent's emails of 11 January 2021 and 15 February 2021 and any other case management issues.
2. The Respondent accepts that the Claimant's claims for unfair dismissal, unpaid wages and breach of contract were validly instituted within the applicable time limit. However, in short, the Respondent submits that, in its ET3 and its various items of correspondence and before me at this preliminary hearing, the Tribunal does not have jurisdiction to consider the claims of others because such claims have not been validly instituted.
3. The Respondent puts forward the following issues for consideration:
 - 3.1. Has the Claimant lodged a single claim on behalf of himself or a multiple claim on behalf of others?

- 3.2. If the Claimant has lodged a single claim, is it just and equitable for the Tribunal to accept that claim as a claim on behalf of others?
- 3.3. If the Claimant has brought a claim on behalf of others, who are the other Claimants?
- 3.4. If the Claimant has brought a claim on behalf of others, have those claims been brought in time?
- 3.5. If the claims are out of time, what is the reason for them being lodged out of time?
- 3.6. In the circumstances, is it just and equitable for the Tribunal to consider claims on behalf of others out of time?

Findings of fact

4. The Claimant's employment with the London Borough of Hounslow commenced in November 2011. In August 2013 his employment transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Following a period of consultation with the Respondent, the Claimant alleges that with effect from 13 April 2020 he and others were required to work under a contract with less favourable terms and conditions.
5. On 11 June 2020, the Claimant and 12 other individuals notified ACAS for the purposes of Early Conciliation. ACAS closed conciliation and issued a certificate on 11 July 2020. The annex to the certificate sets out the names and addresses of all 13 individuals said to be prospective claimants (each of whom was allocated an EC reference number).
6. The Claimant, who is neither a legally qualified person nor a trade union representative, presented an online claim to the Employment Tribunal on 7 August 2020. He included the ACAS certificate number on the ET1. He included his own name as the Claimant in the case together with his address.
7. Section 3.1 of the ET1 asks the following question:

Are you aware that your claim is one of a number of claims against the same employer arising from the same, or similar, circumstances?

The Claimant ticked the box marked "No" in answer to that question.
8. The Claimant told me that he must have ticked this box by mistake.
9. At section 5.2 the Claimant states that he had been employed as a Civil Enforcement Officer and that:

- *Employment start dates of claimants vary*
10. At section 8.1 the Claimant ticked the boxes to indicate that he was making claims for unfair dismissal, arrears of pay and other payments. He also ticked the box to confirm that he was making another type of claim which the

Employment Tribunal can deal with. He set out the nature of this claim as follows:

Breach of contract, unfair changes to our contracts T & Cs and pay

11. The Claimant set out the details of claim in section 8.2 in which, throughout, the Claimant refers to “we” and “our”. Similarly, the Claimant refers to “we” in section 15 setting out further information.
12. In section 11, the Claimant inserted his own name and address as the representative.
13. The Claimant told me that he manually entered the names and address of all the prospective claimants onto the online ET1 but, when he was provided with the PDF version of the document, those details were missing. The Claimant also told me that he raised a query with the Tribunal about the missing details but was assured by an administrative clerk that it was considered a multiple claim. The Tribunal file shows that the claim was indeed vetted as a multiple claim. I assume this was because the Tribunal had obtained a copy of the ACAS certificate with the annex which identified the additional prospective claimants.
14. On 22 September 2020, Employment Judge Hyams-Parish gave instructions for a letter to be sent to the Claimant asking him to confirm the claim he was making, the legal basis for it, and what remedy was being sought. The subject description in the email to which this letter was attached is “Soares & Others v Serco Limited”. The title of the Claimant on the letter is shown as “Mr A Soares & Others”.
15. The Claimant promptly replied by email dated 24 September 2020, enclosing a copy of the ACAS certificate and its annex. He states as follows:

The claim we are making is “unlawful deduction wages” including our contractual benefits and “constructive dismissal” as some of us have resigned due to the changes implemented against our permission and agreement.

Those of us that are still employed with the new T and Cs are working under duress until we find suitable new employment but due to the pandemic this has proven to be difficult. The legal grounds are that an employer cannot implement changes on the grounds of harmonisation as we were told from our consultation meetings. When an employer wants to change the terms and conditions of transferred employees, he or she has to have an economic, technical organisational (ETO) reason for the change, entailing changes in the workforce. This means that there must be changes in the actual numbers of staff employed or in the functions performed by the staff. Simple harmonisation of terms will not meet this requirement: there is no change in the numbers and functions of the workforce. They reduced our wage per hour and removed all our contractual benefits to match with their “Serco contract” staff.

The remedy we seek is financial compensation in the loss of wages since the changes were made and our former contracts reinstated.

16. Although the Notice of Claim served on the Respondent shows the Claimant as Mr A Soares, and states that “Mr A Soares has made a claim”, a copy of the multiple schedule was served on the Respondent together with the Claimant’s ET1 on 19 October 2020.
17. The Tribunal did not however expressly reject claims of the others listed on the annex to the ACAS certificate.
18. On 30 December 2020, upon instructions issued by Employment Judge Corrigan, the Tribunal wrote to the Claimant asking if he was bringing the claim in his name only or also those on the ACAS certificate. If it was a multiple claim, the Claimant was asked to provide the names and addresses of all claimants.
19. The Claimant replied to state that he was a Claimant and representing all the individuals mentioned on the ACAS certificate. He provided their names and the EC reference number for each. He confirmed that they claimed unfair dismissal from their original contracts (which therefore appear to be claims in accordance with the ruling of the Employment Appeal Tribunal in Hogg v Dover College 1990 ICR 39). The Claimant also confirmed that they were bringing claims for unauthorised deductions from wages (which he explained to me was in respect of the shortfall of wages under the new contract) and breach of contract being claims for notice pay upon dismissal from the old contract.

Applicable law

20. Rule 9 of the Employment Tribunals Rules of Procedure 2013 states:

Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6.

21. Rule 10 states:

(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) ...*

(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.

22. Rule 12(1) sets out circumstances in which a claim form shall be referred to an Employment Judge and the circumstances in which the claim must be rejected.

23. Rule 34 states:

The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become 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.

24. Rule 6 states

A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following

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- (a) waiving or varying the requirement;*
- (b) ...*

25. Rule 2 states:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues;*
and
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

26. Mr Hogg referred me to a significant number of legal authorities in support of his submissions. I refer to those authorities below insofar as they are relevant to my determination of the preliminary issues.

Conclusion

27. I unhesitatingly conclude that it was always the Claimant's intention to bring claims for unfair dismissal, breach of contract and unpaid wages on behalf of himself and all the other individuals listed on the annex to the ACAS Certificate. I accept that he ticked the box in section 3.1 in error.

28. However, notwithstanding the Claimant's submission that complied with the requirements of Rule 10 by typing the names and addresses of each prospective claimant onto the ET1 form, that is not the format of the document ultimately presented to the Tribunal.

29. Mr Hogg points to the mandatory requirements of Rule 10; Sterling v United Learning Trust UKEAT/0439/14. In that case Mr Langstaff J observed (at paragraph 26) that it may be open to argument that Rule 6 might have some applicability and I consider it as follows.
30. In relation to Rule 6, Mr Hogg drew my attention to:
- 30.1. Cranwell v Cullen UKEAT/0046/14 in which Langstaff J held that where a claim was rejected because of non-compliance with Rule 12, Rule 6 could not be used to relieve the Tribunal's own obligation to reject a claim where the ACAS EC procedures had not been complied with;
 - 30.2. Baisley v South Lanarkshire Council [2017] ICR 365, in which it was said that Rule 6 could not be invoked to allow the Tribunal to waive the mandatory requirement to pay the relevant fee (under the regime applicable at the time); and
 - 30.3. E.ON Control Solutions Ltd v Caspall [2019] 7 WLUK 319 in which Her Honour Judge Eady QC stated that she was unable to accept that Rule 6 imports a discretion for the Employment Tribunal when considering failures to comply with rules 10 and 12 where no such discretion exists and the mandatory terms of those Rules. The overriding objective in Rule 2 does not change the position. She noted that the obligation arising under Rule 12(2) to reject the claim had not ceased to apply and that the Employment Judge ought properly to have rejected the claims in that case.
31. In accordance with these rulings, I am bound to reject the claims of the other prospective claimants under Rule 10(2). The Tribunal may not use Rule 6 so as to disapply the mandatory obligation upon claimants to comply with the requirements of Rule 10(1) or the Tribunal's obligations under Rule 10(2).
32. The ET1 claim form shall therefore be returned to the Claimant (who is the representative of the additional prospective claimants) with a notice of rejection explaining why it has been rejected as a claim on behalf of those additional prospective claimants. The reason for rejection is the failure to comply with Rule 10(1)(b)(i) and (ii) in that the prescribed form did not contain each additional claimant's name and each additional claimant's address. The notice shall contain information about how to apply for a reconsideration of the rejection.
33. I have given consideration as to whether the Tribunal may join the additional claimants on its own initiative and concluded that it cannot. The wording of Rule 34 is in discretionary terms. The reasoning set out in the appeal cases referred to above are largely based on the principle that a discretion in the Rules cannot override a mandatory requirement of the Rules. The Claimant's position is that he has made claims on behalf of himself and others. There was no application before me to amend the claim and I have no need to determine it nor consider the Respondent's submissions in relation to amendments and time limits.
34. For completeness, I do not accept the Respondent's argument, in reliance of Hamilton & Others v NHS Grampian UKEATS/0067/10/B, that the additional claimants have not presented "their claims". It is clear from the ET1 that the

claims of the Claimant and the additional claimants are based on the same set of facts and, had all the claims been validly instituted, would have proceeded as a valid multiple claim. This case is to be distinguished from Grampian which concerned an application for an amendment to a claim by one claimant within a multiple based on a different factual basis.

35. Nor do I accept the Respondent's contention that the Claimant has failed to comply on behalf of the additional claimants to use a prescribed form by using an ET1 form instead of an ET1A form. The ET1 form used is "a prescribed form". Mr Hogg was unable to refer me any authority for the proposition that only an ET1A form could be used as a prescribed form in which to present a multiple claim.

36. Nor do I accept that the application of Rule 9 is limited to claims such as those in Brierley v Asda Stores Ltd [2019] EWCA Civ 8. The test is that set out in Rule 9, namely whether their claims arise out of the same set of facts. The details set out in the ET1 suggest they do.

37. My conclusions in relation to the specific issues put forward for consideration are as follows:

Has the Claimant lodged a single claim on behalf of himself or a multiple claim on behalf of others?

37.1. The Claimant intended to present a claim on behalf of himself as a multiple claim including others but the claim in respect of the others was not validly instituted for the reasons given above.

If the Claimant has lodged a single claim, is it just and equitable for the Tribunal to accept that claim as a claim on behalf of others?

37.2. The Tribunal may not exercise its discretion under Rule 6 to waive or vary the mandatory requirements of Rule 10.

If the Claimant has brought a claim on behalf of others, who are the other Claimants?

37.3. As it stands, the Claimant is the only Claimant in these proceedings.

If the Claimant has brought a claim on behalf of others, have those claims been brought in time?

If the claims are out of time, what is the reason for them being lodged out of time?

In the circumstances, is it just and equitable for the Tribunal to consider claims on behalf of others out of time?

38. In light of my conclusions above, these issues do not fall for consideration.

Note

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Employment Judge Pritchard

Date: 15 October 2021