



EMPLOYMENT TRIBUNALS

Claimant
The Practice Services Ltd

Respondent
Complete Care Holding Ltd

v

Heard at: Watford
Before: Employment Judge Heal

On: 14 March 2018

Appearances

For the Claimant: Mr. M. Islam-Choudhury, counsel

For the Respondent: Mr. J. Boyd, counsel

PRELIMINARY HEARING RESERVED JUDGMENT

The claim in relation to contract 12 is not struck out.

REASONS

1. By a claim form presented on 20 July 2017, the claimant complained that the respondent failed to provide employer's liability information in relation to a series of 12 TUPE transfers.
2. The claimant made contact with ACAS for the purposes of early conciliation on 9 May 2017 (day A) and an early conciliation certificate was issued on 23 June 2017 (day B). That is the only early conciliation certificate issued in these proceedings.
3. I have before me today as a preliminary issue two questions that relate to 'contract 12'.
4. This hearing had also been listed to deal with the issue of whether the proceedings relating to contracts 1 to 7 were presented out of time. Those proceedings have now been withdrawn so that issue does not arise before me. There is no jurisdictional point taken in relation to contracts 8 to 11 inclusive.
5. The transfer relating to contract 12 took place either on 12 or 16 June 2017. I do not have to decide today which is the correct date.

6. It is common ground that day A fell before the dispute in contract 12 had crystallised, although disputes in other contracts relevant to these proceedings (contracts 8 to 11) had crystallised.

7. Two issues arise before me:

7.1 Does a claimant to proceedings brought under regulation 12 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 need an early conciliation certificate at all?

7.2 If the claimant does need a certificate, did all matters relevant to contract 12 relate to those disputes which had crystallised (i.e. disputes about contracts 8 to 11), so that it was not necessary for the claimant to re-contact ACAS and get a new early conciliation certificate for contract 12?

8. In their submissions, both parties addressed those issues in the opposite order to that set out above, however it seems to me logical to address the first point first. I have not been able to resolve issue 1 finally however, for the reasons I set out. This is academic, since I have resolved issue 2 in favour of the claimant. In the event that issue 1 becomes relevant, because the respondent appeals, I set out a mechanism by which issue 1 may be dealt with.

The statutory framework

9. Regulation 11 of the 2006 TUPE Regulations provides that, not less than 28 days before the relevant transfer, the transferor to a transfer shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of the relevant transfer.

10. Regulation 12 provides that on or after the relevant transfer, the transferee may present a complaint to an employment tribunal that the transferor has failed to comply with any provision of regulation 11.

11. Section 18A(1) of the Employment Tribunals Act 1996 provides that before a 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.

12. Section 18A sets out the procedure for early conciliation including the issue of a certificate by ACAS (section 18A(4)).

13. Section 18A(8) provides that 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).

14. Section 18(1) of the 1996 Act sets out the list of 'relevant proceedings'. The 2006 TUPE regulations do not appear in that list.

15. Section 18(8) of the 1996 Act provides that the Secretary of State [and the Lord Chancellor, acting jointly,] may by order [amend the definition of 'relevant proceedings' in subsection (1) by adding to or removing from the list in that subsection particular types of employment tribunal proceedings].
16. On the face of it, proceedings brought under the TUPE regulations 2006 are not subject to the requirement to contact ACAS and procure a certificate under section 18A.
17. However, the Enterprise and Regulatory Reform Act 2013 (consequential amendments) (Employment) Order 2014, SI 2014/386 added these words as regulation 12 (7) to the 2006 regulations:

'Sections 18 A to 18 C of the 1996 Tribunals Act (conciliation) shall apply to the rights conferred by this regulation and to proceedings under this regulation as it applies to the rights conferred by that Act and the employment tribunal proceedings mentioned in that Act.'

18. Section 99 (1) of the Enterprise and Regulatory Reform Act 2013 provides that *'the Secretary of State may by order made by statutory instrument make such provision as the Secretary of State considers appropriate in consequence of this Act.'*
19. Section 99(2) provides that this includes the power to amend, repeal, revoke or otherwise modify any provision made by or under an enactment (including any enactment passed or made in the same Session as this Act). It appears that SI 2014/386 was made under this power.
20. Section 99(5) provides that a statutory instrument containing (whether alone or with other provision) an order under this section which amends, repeals or revokes any provision of primary legislation is not to be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament. SI 2014/386 appears to have been laid before Parliament on 25 February 2014.

Issue 1

21. After discussion, Mr Islam-Choudhary accepted that the intention of the drafter of regulation 12(7) of the 2006 regulations was clear. That amendment was plainly intended to add proceedings under the 2006 regulations to those proceedings for which an early conciliation certificate was necessary before the proceedings could be commenced. It is not ambiguous.
22. Mr Islam-Choudhury says, however, that section 18(8) of the 1996 Act provides the mechanism by which the list of relevant proceedings may be amended. He points out that section 18(8) is primary legislation. It enables the Secretary of State to make secondary legislation to add new proceedings to the list but it only enables this to be done by adding to (or removing from) the list particular types of employment tribunal proceedings.

23. Mr Islam-Choudhury says that SI 2014/386 does not add or remove proceedings to or from the list, indeed it makes no mention of the list. It takes the different approach of simply asserting that sections 18A to 18C shall apply to proceedings under the 2006 regulations. Therefore, he says, that it has no effect because it was made outside the power permitted by the 1996 Act.
24. Mr Islam-Choudhary says that secondary legislation can only amend primary legislation within the mechanism provided for by primary legislation. He lacked authority for this assertion but Mr Boyd did not demur from it and without the benefit of any authority, it seems to me that it must be right. If the matter stopped there, I would resolve this point in the claimant's favour.
25. Neither representative referred me to the Enterprise and Regulatory Reform Act 2013 however, which is the primary legislation which enabled the amendments to the 2006 regulations to be made. Without the benefit of submissions from either party, it seems to me, *provisionally*, that section 99(1) and (2) does provide the necessary mechanism in primary legislation to put into effect the amendment contained in regulation 12(7). If that is correct then it seems to me that there was power to add regulation 12(7) and that unambiguously applies the provisions of section 18A of the 1996 Act to these TUPE proceedings.
26. The power under section 99 is qualified however by section 99(5). On the face of the statutory instrument as published, there is a statement that it was laid before Parliament on 25 February 2014. The parties have not however had any opportunity to make submissions about this. It may be, in any event, that this is academic, given my findings on issue 2 below.
27. Therefore, I leave this situation like this. I do not wish to cause the parties to incur unnecessary additional costs by making further submissions about section 99 and in particular, section 99(5) when the problem may never matter in practical terms. It seems to me additionally that it will be a matter of public record whether the requirements of section 99(5) have in fact been fulfilled.
28. Therefore, if the respondent decides to take issue 2 further upon appeal so that the result of issue 1 becomes significant, then, within 42 days of the date when this judgment is sent to the parties, the respondent may send to me its written submissions on the effect of section 99. The claimant may send its written submissions in reply within 14 days thereafter and unless either party invites me to conduct a hearing on the subject I will deal with the matter on paper.

Issue 2

29. I have been referred to the following authorities:

Science Warehouse Limited v Mills [2016] IRLR 96;
Mist v Derby Community Health Services NHS Trust [2016] ICR 543;
Drake International Systems Ltd and others v Blue Arrow Ltd [2016] ICR 445;
Compass Group UK & Ireland Ltd v Morgan [2016] IRLR 924.

30. Mr Boyd accepts that the word 'matter' in section 18 should be interpreted broadly. He accepts that an early conciliation certificate can cover a subsequent tribunal claim without requiring a claimant to go through early conciliation again although he says that will not invariably be the case. He accepts that the early conciliation process was never intended to and should not give rise to overly technical arguments and satellite litigation. He accepts the essential principle set out by Mr Islam-Choudhury in paragraph 22 of his skeleton. That is, so long as the matters are related, the fact that a dispute post-dates an early conciliation certificate does not preclude that certificate from applying to the dispute.

31. I am grateful to Mr Boyd for those sensible and helpful concessions.

32. I note that at page 452, paragraph 17 of *Drake*, Langstaff J says this:

'the word 'matter' is deliberately chosen. It is not 'claim' as it might be. A 'matter' may involve an event or events, different times and dates, and different people. All may be sufficiently linked to come within the scope of 'that matter'.

33. Subsequently, in *Compass Group*, Simler J (P) said:

'Against that background, the question of construction raised by Mr Milsom is whether there is any temporal or other limit on the applicability of the EC certificate in the context of 'relevant proceedings relating to any matter' that are commenced in relation to a cause of action that only crystallises after the EC process is complete. The question, accordingly, is: what is meant by 'relating to any matter'? In our judgment, these are ordinary English words that have their ordinary meaning. Parliament has deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and the matter and by reference to the word 'matter' itself. We do not consider it useful to provide synonyms for the words used by Parliament. Provided that there are or were matters between the parties whose names and addresses were notified in the prescribed manner and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of s18A(1).'

Analysis

34. The disputes about contracts 8-11, which undoubtedly are covered by the EC certificate, and this dispute have certain factors in common. They arise between the same two parties, all involve a common dispute about whether employer's liability information was provided under regulation 11, and they were all subject to a single negotiation between the parties. Each contract involves a different service user and separate staff, however and the contracts transferred at different precise times between 22 February and 12 or 16 June 2017.

35. I have heard no oral evidence about the 'matters' and little detail in the submissions, which have mainly focussed on the law. On the claim form and response, and on what I have been told however, I find that the dispute in contract 12 and the disputes in contracts 8 to 11 inclusive, are related matters. I take into account that the wording used in the legislation is indeed broad and

I take into account the limited nature of the obligation to notify ACAS. There is no obligation to identify the matter in dispute or the nature of the dispute, still less to provide any factual details. The index disputes are related by common parties, common legal subject matter, facts in common about the background negotiation, and a pattern of complaint about information not provided or provided late. That being the case, no additional early conciliation certificate is needed. They are related matters. The tribunal has jurisdiction to hear the contract 12 because the claimant had procured certificate number R137047/17/35.

36. Having heard submissions and reserved judgment, I then conducted case management as follows.

CASE MANAGEMENT SUMMARY

Listing the hearing

37. After all the matters set out below had been discussed, we agreed that the hearing in this claim *on liability only* would be completed within 3 days. It has been listed at Watford Employment Tribunal, to start at 10am or so soon thereafter as possible on **5 – 7 November 2018**. The parties are to attend by 9.30am. The hearing may go short, but this allocation is based on the claimant's intention to call 3 witnesses and the respondent's to call 2 witnesses.

38. I made the following case management orders by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disclosure of documents

- 1.1 The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **11 April 2018** (lists) and **25 April 2018** (copies requested).
- 1.2 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they help the party who produces them, the other party or appear neutral.
- 1.3 The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

2. Bundle of documents

- 2.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the Hearing.

- 2.2 The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **16 May 2018**.
- 2.3 The respondent is ordered to bring sufficient copies (at least three) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

3. Witness statements

- 3.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements.
- 3.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues. They must not include generalisations, argument, hypothesis or irrelevant material.
- 3.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 3.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 3.5 It is ordered that witness statements are exchanged so as to arrive on or before **20 June 2018**.

CONSEQUENCES OF NON-COMPLIANCE

- 1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- 2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- 3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Heal

Date: 14.3.18

Sent to the parties on:

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For the Tribunal Office.