# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Potter

**Respondent:** St Helens Borough Council

**HELD AT:** Manchester (by CVP) **ON:** 25 June 2021

**BEFORE:** Employment Judge Peck (sitting alone)

**REPRESENTATION:**
**Claimant:** Miss J Connolly (Counsel)
**Respondent:** Mr S Gorton QC (Counsel)

# JUDGMENT

1. The claimant's claim shall not be dismissed for want of jurisdiction under section 18A(8) Employment Tribunals Act 1996.

2. The correctly named respondent to this claim is St Helens Borough Council and it is substituted for The Governors of Holy Spirit Catholic Primary School under rule 34 of the Employment Tribunals (Constitution and Rules of Procedures) Regulations 2013.

3. The claim is hereby stayed until 31 December 2021 and the parties are to provide an update to the Tribunal on or before 31 December 2021.

# REASONS

**Introduction and Background**

1. This was a public preliminary hearing conducted as a remote hearing by CVP on 25 June 2021. The parties did not object to the case being heard remotely, with both parties being professionally represented.

2. By a claim form presented on 19 December 2020 the claimant, who is employed on a term-time contract to work at the Holy Spirit Catholic Primary School (the **School**), seeks recovery of what she claims is a shortfall in her holiday and pension payments under the Working Time Regulations 1998. The claimant relies on the decision made by the Court of Appeal in Harpur Trust v Brazel [2019] EWCA Civ 1402, which is the subject of an appeal to the Supreme Court due to be heard on 9 November 2021.

3. Prior to presenting her claim, on 27 November 2020, the claimant commenced and concluded the Acas early conciliation process. The claimant identified "The Governors of Holy Spirit Catholic Primary School" as the prospective respondent to her claim.

4. The Governors of Holy Spirit Catholic Primary School (the **Respondent**) instructed the in-house legal department of St Helens Borough Council (the **Council**) to act on its behalf and by a response form of 8 February 2021, the Respondent contended that it did not employ the claimant. It did not specify whom it alleged employed the claimant.

5. A preliminary hearing for case management purposes took place before Employment Judge Shotter on 5 March 2021, at which this preliminary hearing was listed to determine the correct employer of the claimant and/or dismiss the claim.

6. On 6 April 2021, in accordance with a Tribunal order, the Respondent clarified its position, being that the claimant was employed by the Council not the Respondent. In support of this the Respondent provided a statement of particulars for the claimant dated June 1997 and July 1998 and evidence that the claimant's wages are paid by the Council in the form of a payslip dated March 2021. The Respondent confirmed the basis upon which it was applying for the claimant's claim to be dismissed, namely that "*this claim has not been issued against the correct employer and as a consequence, there has been a complete failure to comply with the mandatory early conciliation procedure against the claimant's employer, St Helens Borough Council…This cannot be cured and the respondent submits that the Tribunal cannot substitute the Council as a party pursuant to Rule 34…as there are no validly issued proceedings*".

7. On 26 April 2021, an application was submitted on behalf of the claimant for the Council to be joined as a second respondent to the claim under rule 34 of the Employment Tribunals (Constitution and Rules of Procedure) 2013,

requesting that the Tribunal then determine whether the Council should remain as a respondent either jointly with or in substitution for the Respondent. The Respondent objected to this application.

**Issues and Information Considered**

8. Written submissions were provided by Mr Gorton on behalf of the Respondent (and the Council, as a prospective respondent) and by Miss Connolly on behalf of the claimant. Accompanying authorities were also provided. Both Mr Gorton and Miss Connolly made oral submissions during this hearing.

9. No witness evidence was presented or considered.

10. Documentary evidence in the hearing bundle included the claimant's statement of particulars and payslip only.

11. At the outset of this hearing, the issues to be determined were identified, which included a discussion about whether the correct employer was still in dispute. Miss Connolly raised concern about the reference to section 36(2) of the Education Act 2002 in the Respondent's application dated 6 April 2021 (at para 4), which appeared to suggest that the Council was asserting that, as the School was a voluntary aided school, the Respondent was the employer pursuant to statute.

12. Mr Gorton confirmed that the Respondent was not seeking to assert (and nor would it later seek to assert) that section 36 of the Education Act 2002 operated such as to prevent the Council from being the claimant's employer. Its position in this regard is formally noted for future reference. On this basis, it was agreed that the correct employer of the claimant was the Council. The claimant's application was no longer for the Council to be *added* as a respondent, but for the Council to be *substituted for* the Respondent.

13. It is also noted that, at no stage prior to or during this hearing has either party sought to assert that the Respondent should be treated as the claimant's employer under the Education (Modification of Enactments Relating to Employment) (England) Order 2003 or that Article 6 of that Order is being relied upon.

14. Both Mr Gorton and Miss Connolly referred the Tribunal to the decision in Drake International Systems Ltd v Blue Arrow Ltd [2016] ICR 445, EAT. In this case, the claimant obtained an early conciliation certificate from Acas in accordance with section 18A of the Employment Tribunals Act 1996, which named the parent company as the prospective respondent to their claim. The EAT upheld the Tribunal's decision to grant an amendment under rule 34, naming the subsidiary companies as respondents by way of substitution.

15. Miss Connolly submitted that Drake provides authority for the rule 34 discretion to be exercised notwithstanding that the Council was not identified as a prospective respondent for the purpose of early conciliation. Mr Gorton submitted that the Drake decision is not binding upon this Tribunal (a) on the

basis that it can be easily distinguished on its applicable facts; or (b) because it is wrong.

16. The issues to be identified at this hearing were therefore: -

**Issue 1**: Does the EAT authority of Drake apply, such that the claimant's failure to identify the correct respondent is not fatal to the Tribunal's jurisdiction under section 18A(8) of the Employment Tribunals Act 1996?

**Issue 2**: If the Tribunal has jurisdiction, should it exercise its discretion under rule 34 and substitute the Council for the Respondent, considering the principles set out in Selkent Bus Company Ltd t/a Stagecoach Selkent v Moore [1996] ICR 836 EAT and the rule 2 overriding objective?

17. It is noted that if Drake is found to apply, the Respondent reserves its position to argue on appeal that Drake is erroneous and not binding, but it was agreed that this was not a matter for this Tribunal.

**The Law**

18. Miss Connolly helpfully referred the Tribunal to the summary of the law relevant to Issue 1, as set out at para 9-12 of Drake:-

"*9 The Enterprise and Regulatory Reform Act 2013 inserted section 18A into the Employment Tribunals Act 1996. So far as material, it provides:*

*(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.*

*This is subject to subsection (7). Subsection (7) provides that the requirement does not have to be complied with in prescribed cases and gives three instances of cases which might be prescribed…*

*10 Section 18A provides:*

*(2) On receiving the prescribed information in the prescribed manner, Acas shall send a copy of it to the conciliation officer.*

*(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.*

*(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.*

*(6) The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.*

*(7) In subsections (3) to (5) "settlement" means a settlement that avoids proceedings being instituted…*

*(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).*

*11 "Relevant proceedings" are defined by section 18…*

*12 Section 18A does not sit on its own, but together with sections 18B and 18C.*"

19. As to Issue 2, rule 34 provides that: -

"*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.*"

20. In exercising the discretion conferred by rule 34 and in determining whether to grant the claimant's application, the Tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment (Selkent).

**Decision and Reasons**

Issue 1: Does the EAT authority of Drake apply, such that the claimant's failure to identify the correct respondent is not fatal to the Tribunal's jurisdiction under section 18A(8) of the Employment Tribunals Act 1996?

21. On behalf of the Respondent, Mr Gorton submitted that Drake is "*eminently and safely distinguishable*" on the basis that "*there was no doubt who the employer was as the claimant knew that all along*" and that there is no reason to give "matter" a wide meaning under section 18A in contrast to Drake.

22. Miss Connolly, on behalf of the claimant, disagreed submitting that Drake is not limited to its particular facts, nor limited to situations where there is uncertainty over the identity of a respondent.

23. I accept Mr Gorton's submission that, in the absence of relevant evidence from the claimant, I cannot make findings as to why the claimant did not name the Council as the prospective respondent to her claim. She may well not have retained her statement of particulars as was indicated by Miss Connolly, but I cannot make a finding to that effect. Nor can I reach the conclusion that

this was merely a mistake on the claimant's part when initiating early conciliation.

24. However, I do not believe that this case can be distinguished from Drake on the basis that "*there was no doubt who the employer was as the claimant knew that all along: her payslip told her every pay cycle and her contract of employment could not be clearer*" and I conclude that it is likely that there was uncertainty, or mistaken certainty. There was a mixed employment picture at the School. The claimant (along with other domiciliary staff) was employed by the Council whereas other staff (teachers, teaching assistants and administrative employees) were employed by the Respondent. The claimant was paid by the Council, but the paying entity of an employee is not conclusive evidence as to their employer. Identifying the correctly named respondent in claims involving education establishments is often not straightforward. If the claimant knew with certainty that her employer was the Council, there would be no reason for her to name the Respondent as the prospective respondent to her claim.

25. In any event, I accept the submission that the decision in Drake is not only applicable where there is uncertainty as to the correctly named respondent and note that a "matter" (as opposed to a "claim") 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'*" (Drake, para 22).

26. Adopting a broad interpretation of "matter", I am satisfied that the claimant always wanted to bring the "matter" before the Tribunal and that the claim lodged against the Respondent is sufficiently linked to the intended claim against the Council to come within the scope of "that matter".

27. I am also satisfied that the link between the Respondent and the Council is a close one. Whilst the Respondent and the Council are separate legal entities, it is not in dispute that both the Respondent and the Council have some responsibility and control over the School. It cannot be said that the Council is an "*entirely different party*" (Drake, para 30) to the Respondent. As highlighted by Miss Connolly, in Drake Langstaff J found (at para 23) that "*the link…between the parent company and the present respondents which the judge permitted to be substituted is close, as indicated by the fact that the same legal team represents them. The claimant had an opportunity to seek conciliation in respect of "the matter" in regard to which it ultimately brought a claim…The purpose of the…[early conciliation rules]…were thus honoured in respect of that matter*". In this case, not only are the Council and the Respondent represented by the same legal team, but they are also represented by the Council's in-house legal team and have been throughout.

28. It is therefore my conclusion that the EAT authority of Drake does apply and that the claimant's failure to identify the Council as the prospective respondent to her claim at the early conciliation stage is not fatal to the Tribunal's jurisdiction.

Issue 2: If the Tribunal has jurisdiction, should it exercise its discretion under rule 34 and substitute the Council for the Respondent, taking into account the Selkent principles and the overriding objective?

29. Several factors relevant to Issue 1 are also applicable to and have been in my mind when determining Issue 2.

30. In addition, on behalf of the Respondent, Mr Gorton submitted that there is no reason why the claimant could not have taken corrective measures and sought formal conciliation and that account should be taken of the fact that she could still issue proceedings now. He also submitted that it would be an abuse of process to allow conciliation to be "*side-stepped completely*" referring in particular to paragraph 30 of the EAT decision in Drake:

"*As to the fourth, the get-out clause does not create absurdity once one remembers that rule 34 confers a discretion which is to be exercised judicially.* ***If a claimant were to issue against one party in order to proceed later against an entirely different party, it is not difficult to see that a judge might well refuse the amendment to substitute that different party****.*"

31. I acknowledge that care needs to be taken and that parties should not be allowed to simply side-step the early conciliation process. However, in my view, that is what the discretion conferred by rule 34 ensures does not happen. It enables a judge to refuse an amendment to substitute a different party as Langstaff J envisaged. It also enables a judge to allow an amendment where to do so would be in accordance with the rule 2 overriding objective and the Selkent principles.

32. In this case, allowing the amendment will not cause the Council undue hardship and the substance of the claim against it, about which it has been aware since proceedings were issued at the latest, is the same as that initiated against the Respondent.

33. There will be no delay as a result of the amendment, since proceedings against the Council will be stayed alongside other claims being brought on the same or similar basis (ie by term time employees pursuing holiday pay claims under the Working Time Regulations 1998).

34. There will be no evidential prejudice to the Council by substituting it for the Respondent. The facts of the claimant's case are likely to be substantially agreed and her claim is one that will turn on statutory interpretation.

35. By contrast, rejecting the application and requiring the claimant to initiate early conciliation against the Council would not be in accordance with the overriding objective and would potentially create, not save, expense. As per Langstaff J at para 25 of Drake:

"*Fairness and justice which the overriding objective seeks to promote include in rule 2:*

*"(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."*

*As I have pointed out elsewhere, the saving of expense may not simply be restricted to the expense of the parties directly concerned: the expense here is that also of Acas whose time and trouble would in a case such as the present be quite likely to be employed considering conciliation again in respect of the substance of a matter which had been raised with it beforehand.*"

36. In this case, the claimant initiated the early conciliation process. To the extent that the Respondent was notified of and given the opportunity to engage in the early conciliation process, such notification and opportunity extended to the Council at the relevant time. Requiring the claimant to proceed against the Council by re-starting early conciliation would, I believe, do no service to justice.

37. The claimant's application to amend is therefore permitted under rule 34, and the Council shall be substituted for the Respondent. The correctly named respondent to this claim is St Helens Borough Council.

Employment Judge Peck
6 July 2021

JUDGMENT SENT TO THE PARTIES ON
12 July 2021

FOR THE TRIBUNAL OFFICE

Notes

1. 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.