EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100018/2021 and others

Final Hearing Held by Cloud Video Platform on 8 October 2021

Employment Judge A Kemp

Mr Tadas Kucinskas	**First claimant** **In person**
Miss Ellen Kidd	**Second claimant** **In person**
Miss Rachel Schulberg	**Third claimant** **In person**
Miss Tory Henry	**Fourth claimant** **In person**
Miss Alexandra Sleigh	**Fifth claimant** **In person**
Miss Sophie Scott	**Sixth claimant** **In person**
Miss Florence James	**Seventh claimant** **In person**
Miss Lucy Vandone	**Eighth claimant** **In person**
Miss Helin Opan	**Ninth claimant** **No appearance**
Mr Paul Hutton	**Respondent** **No appearance or representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimants' claims of unlawful deduction from wages are not within the jurisdiction of the Employment Tribunal and are dismissed.

2. Separately, the respondent was not the employer of the claimants and the claim against him must be dismissed for that reason.

REASONS

Introduction

1. This Final Hearing was arranged to address issues of jurisdiction as well as whether the correct respondent had been called, whether there were unlawful deductions from wages for failing to pay furlough pay under the Coronavirus Job Retention Scheme, and if so what remedies were appropriate.

2. The respondent has not entered appearance, and did not appear at the Final Hearing.

3. There has been no Preliminary Hearing but there was a case management order issued on 11 May 2021, which included arrangements for a remote Final Hearing and Schedules of Loss after which various documents were tendered by some of the claimants. There has also been correspondence with the claimants. On 11 January 2021 the Tribunal wrote to all claimants to state that the claims appeared out of time but that they could present arguments on that issue. On 6 October 2021 the Tribunal wrote to Mr Kucinskas to ask who his employer was, and he replied that day to say that it was Mr Hutton. The claim by Ms McGrath was withdrawn by email dated 11 October 2021 and was separately dismissed under Rule 52.

4. All of the claimants save Ms Opan attended at the hearing and gave evidence. They did so in the order set out above. At the commencement

of the hearing I decided that it was in accordance with the overriding objective to combine all of the claims, which had been presented on the same Claim Form, and all related to the same general circumstances at the same premises, albeit some details were different. That was agreed to by all present.

5. Also at the commencement of the hearing I explained the issues that arose for determination and how evidence would be given.

Evidence

6. The claimants gave evidence, principally the first claimant for issues related to jurisdiction as well as his own circumstances, and the witnesses spoke to documentation that had been provided to the Tribunal albeit not collated into a single Inventory. Not all of the evidence that could have been provided was, for example not all claimants provided payslips, contracts of employment, P45s or similar documentation, but the first claimant was permitted to send further documents after the evidence was heard, which he did and were considered.

Issues

7. The hearing considered the following issues:

(i) whether the claim was commenced in time, or if not whether it was not reasonably practicable to have done so within the primary time limit in section 23 of the Employment Rights Act 1996, having regard to the provisions on early conciliation, and if was not reasonably practicable to have done so whether the claim was presented within a reasonable period of time thereafter, also under that section.

(ii) If the Tribunal did have jurisdiction, (a) who or which company was the employer, and if not Mr Hutton should there be any substitution of the respondent under Rule 34 (b) whether there had been deductions from the wages of the claimants which were unlawful

under section 13 of the said Act and (c) what remedy the claimants were entitled to.

The facts

8. The first claimant is Mr Tadas Kucinskas

9. The respondent is Mr Paul Hutton.

10. The respondent is the person who owned at the material time the majority or all of the shares of Coro Chocolate Limited (CCL). CCL is a company incorporated under the Companies Acts. It operates a café in Frederick Street, Edinburgh.

11. The first claimant was employed by CCL as a supervisor at the café. His employment commenced on 29 September 2019.

12. The remaining claimants were also employed by CCL at the café. Their commencement dates are as follows –

    (i) Ellen Kidd – October 2017
    (ii) Rachel Schulberg – 16 January 2016
    (iii) Tory Henry – September 2017
    (iv) Alexandra Sleigh – August 2019
    (v) Sophie Scott – October 2018
    (vi) Florence James – 9 October 2019
    (vii) Lucy Vandome – February 2020

13. The claimants' employment with CCL was confirmed on contracts of employment issued to two of them, and on payslips issued to all of them (although payslips for all claimants were not before the Tribunal). The contracts were on the basis of pay for hours worked, with no guaranteed number of hours of work. Pay was therefore variable.

14. On 27 March 2020 the claimants agreed to commence "furlough" arrangements in light of the Covid-19 pandemic under the Coronavirus Job Retention Scheme which had resulted in the closure of the café from 23 March 2020.

15. The respondent did not make any payment of furlough payments to the claimants. When the claimants queried why that was so they were told that HRMC had refused an application from the CCL. The reason for that refusal was failure by the CCL to provide accurate information.

16. During May 2020 CCL indicated that the café was potentially to reopen. The claimants were asked when they would be available for work. Many sent replies.

17. On 19 June 2020 the first claimant commenced new full-time employment.

18. On or around 26 June 2020 CCL indicated by email to the claimants that no further shifts would be offered to the claimants.

19. On or around that date forms P45 stating that employment had terminated that day were sent to the following two claimants- the first and sixth. The P45 stated that the employer was CCL.

20. In or around July 2020 the claimants agreed that they would present their claims together and that the first claimant would act as the co-ordinator of them. The claimants passed details to the first claimant thereafter.

21. In July 2020 the first claimant contacted ACAS, who advised him about a three month time limit to commence early conciliation. He also made internet searches about making claims to the Employment Tribunal. The first claimant attempted to make an application for early conciliation with CCL named as respondent but made mistakes in doing so, and the application was rejected because of that (it was not before the Tribunal).

22. On 16 August 2020 the first claimant wrote to David Grieve of CCL intimating that he was tendering his resignation.

23. On 2 September 2020 the first claimant wrote to the respondent asking him to contact ACAS giving him the details to do so. The respondent replied to the effect that he had not got in touch with them.

24. The claimants are all students. The second to eighth claimants sent him their details separately (documentation for which was not before the

Tribunal). The first claimant has no legal qualifications or experience, and is studying geography and geosciences at University. He sought to contact solicitors for advice but they required payment which the claimants could not afford. He contacted the Citizens Advice Bureau. The claimants were as a group unclear as to when their right to make a claim arose, and the date from which any timebar provisions were applicable. They had not all received P45s, and none of them had received a letter or similar communication from CCL terminating their employment.

25. On or about 1 November 2020 the first claimant made a second attempt at early conciliation again naming CCL as respondent. It was also rejected for the same general reason of there being errors (it was also not before the Tribunal).

26. He made a third application on 15 November 2020 not in relation to CCL but the respondent. He did so as he understood that the ownership of shares of CCL had by then changed from Mr Hutton to third parties. The application was accepted, and related to all of the claimants.

27. An Early Conciliation Certificate was issued by ACAS in relation to the respondent on 15 December 2020.

28. At that stage of early to mid December 2020 the first claimant was undergoing examinations. It took him time to prepare the completed Claim Form.

29. The Claim Form prepared by the claimant was presented to the Tribunal on 4 January 2021.

The claimants' submission

30. The claimants did not make a submission other than to refer to the respondent having an obligation as owner of CCL, that there had been a loss of income with serious consequences including the inability to pay rent, and that what had happened was not acceptable.

The law

(i) Time-bar

31. Section 23 of the 1996 Act provides as follows, so far as relevant to this Claim:

> "**23 Complaints to employment tribunals**
>
> (1) A worker may present a complaint to an employment tribunal—
>
> (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
>
> (b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),
>
> (c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or
>
> (d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20 on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).
>
> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
>
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
>
> (3) Where a complaint is brought under this section in respect of—
>
> (a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(*d*) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).]

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

32. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the date by which the last of a series of deductions from wages was made, at the very latest, EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal. If not, then a Tribunal cannot consider a claim unless it was not reasonably practicable to have done so in time, and then if EC starts, and a Certificate issued, the Claim is presented within a reasonable period of time.

33. The question of what is reasonably practicable is explained in a number of authorities in the field of unfair dismissal law, in which the test is

materially the same, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal in England. The following guidance is given:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

34. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

35. In ***Marks and Spencer plc v Williams-Ryan [2005] IRLR*** 562 the Court of Appeal set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (iii) whether he was legally represented.

36. In ***Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490***, the Court of Appeal stated that the test of reasonable practicability should be given a liberal interpretation in favour of the employee, citing ***Williams-Ryan***. In ***Brophy*** the claimant did not have professional advice, which was held to be a factor in his favour.

37. Ignorance of a time limit has been an issue addressed in a number of cases. In ***Wall's Meat Co Ltd v Khan [1979] ICR 52*****,** the test which Lord Denning had earlier put forward in another case was re-iterated as -

> "It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences'.'

38. The editors of Harvey on ***Industrial Relations and Employment Law*** make the following comments at paragraph P1.207(2):

> "As the courts have pointed out, with the widespread public knowledge of unfair dismissal rights, it is all the time becoming more difficult for

an employee to successfully plead ignorance: see, for example, ***Riley v Tesco Stores Ltd [1980] ICR 323*** at 328, 329, 335, ***Wall's Meat Co Ltd v Khan***, above. If this was the case in the 1980s, it applies with significantly more force now: with increasing discussion, advertisement and coverage of employment rights and litigation in the media, coupled with the ease of searching for information online, the cases of justifiable ignorance will be fewer and fewer."

39. Whilst those comments are made in the context of unfair dismissal claims, they are I consider also apt in the context of claims of unlawful deductions from wages.

40. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.***

(ii) Unlawful deductions from wages

41. The basic position is set out in section 13 of the Act, which provides

"**13 Right not to suffer unauthorised deductions**

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction……."

42. Wages are defined in section 27 which provides

"**Meaning of 'wages' etc**

(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,……."

43. The Coronavirus Job Retention Scheme provided that payments would be made to employers to allow them to pay what has become known as furlough pay to the employees in light of the measures taken because of the pandemic which closed much of commerce, including cafes, for lengthy periods. It was subject to conditions and processes requiring action by employers.

(iii) Substitution of respondent

44. If it is held that the employer is not Mr Hutton the current respondent, an issue arises as to whether to substitute CCL for him. Rule 34 of the Rules of Procedure in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013 provides:

> "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."

45. That Rule falls to be considered in light of the overriding objective set out in Rule 2 which provides as follows:

> **"2 Overriding objective**
>
> 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."

Discussion

46. I considered that the claimants were credible and reliable witnesses. There was a palpable sense of injustice shared by all of them. They were however moderate in what they said and did not exaggerate the position.

47. Not all of the documents that might have been before the Tribunal were produced, such as contracts of employment for those who had received them, payslips for all claimants, or forms P45 for those who had received them, nor the documents for the first claimant's new employment which commenced on 19 June 2020. I was however satisfied that I had sufficient information before me to form views on the issues I had to address.

48. The first issue I shall address is in relation to jurisdiction for the claim. The last possible date argued for in the evidence in respect of any deduction from wages for any of the claimants bar the first claimant was 26 June 2020. Although the first claimant referred to an email he sent the respondent about wishing to resign on 16 August 2020 that is not the key date, which is when a series of deductions, or the last deduction in a series, was. He started a new role in June 2020. Under the Scheme referred to payment of furlough is made in effect to replace lost income from the job held at the start of the pandemic. One cannot both have furlough and a second, replacement, job. For the first claimant therefore his entitlement to furlough ended on his starting the new role, and the date by which his claim required to be taken was earlier than 26 June 2020. That earlier date did not however make a material difference. What may have made a difference was the first claimant's belief that the claims could be commenced by early conciliation within three months of when he sought to resign. As explained however that date of 16 August 2020 is not the correct one.

49. Many of the other claimants referred in their evidence to an email on 26 June 2020 informing them that no more shifts would be provided. It was clear at that stage that, if that be the position, any series was then coming to an end. For some of the claimants the date may be earlier than that.

50. Early conciliation on that basis ought to have been commenced by 26 September 2020. It was not commenced until 15 November 2020, 50 days late. That is a substantial period of time. Even if one stretches matters further by saying that the entitlement to payment may have been in July 2020 it is still materially outwith the primary period of time.

51. The question that follows from that is firstly whether the claimants have established that it was not reasonably practicable to have commenced that Claim, by commencing early conciliation, timeously.

52. It is a matter of fact and degree in each case. I noted that the first claimant was co-ordInating the claims and that there were a number of them. I took into account the circumstances, that he was not legally qualified or experienced, and that there may have been some confusion, as it was put in evidence, in their own minds as to when the date for timebar periods to be calculated from was. I took into account that he did search the internet, did have some advice from ACAS such that he was aware of the three month period in general terms, and had, as one witness said in evidence, spoken to the CAB. The claimants are also students, this occurred at the start of the pandemic when they were in general away from family. I appreciate that that can cause difficulties for those in such a situation. The first claimant does not have English as his first language although his command of it is reasonably good.

53. In my judgment the claimants ought reasonably to have known of, or taken steps to find out, the time bar provisions that affected their claims. The first claimant made his first attempt at early conciliation within the primary time-limit. That is I consider a significant matter. It is hard to argue from that that it was not reasonably practicable to have commenced early conciliation, when he tried then to do so. The difficulty was that he did not do so sufficiently, and it was rejected. But that was not an issue of

reasonable practicability, and I did not have the detail of what the errors were. The onus of proof falls on the claimants. The second was not attempted until 1 November 2020, and that long delay was not really explained. It too was rejected because of errors, but the detail of them and related documentation was not provided in evidence. If there was some confusion as to what the time period was, or when it started, as was spoken to in evidence, that is all the more reason to find out, or to commence early conciliation reasonably quickly, and not to leave it until it may be too late. There was no practical reason not to commence Early Conciliation timeously within the jurisdiction provisions in my judgment. The third application was made, and did not have errors such that it was accepted, but for reasons I shall come to was made against the wrong party. It started on 15 November 2020. That is the date which I require to use as the start of early conciliation. I take into account that there were earlier attempts, but the fact of them rather supports the view that doing so was reasonably practicable.

54. The test which I require to apply is quite a high one, set in statute and explained in case law. It is of reasonable practicability. I cannot let my sympathy for the claimants and their position mean that I apply a different, and looser, test. I do not have a discretion to do what I think fair, or just.

55. Taking all the circumstances into account, I consider that the claimants have not proved that it was not reasonably practicable to have commenced Early Conciliation timeously, and on that basis the Tribunal does not have jurisdiction on the first “limb” of the statutory test.

56. The next issue does not strictly arise, but if it had been relevant was whether the Claim Form was presented within a reasonable period of time after it did become reasonably practicable to have done so. In this case the Early Conciliation Certificate was issued on 15 December 2020. By that time, at the very latest, it ought to have been clear that the Claim was at that stage late, and therefore needed to be submitted very quickly, essentially within a day, or at least a short matter of days, unless there was good reason that that could not be done. Examination pressure is understandable, but does not I consider prevent action on such a matter.

Examinations come to an end. Even if it was reasonable not to work on the Claim Form during those that the first claimant sat, and the detail of that was not available, as soon as that ends there is an opportunity to do so. The detail of that was not provided in evidence.

57. I considered that the claimants had not demonstrated that the Claim Form was presented within a reasonable period of time in such circumstances.

58. I must therefore conclude that the claims are not within the jurisdiction of the Tribunal. They must be dismissed as a result.

59. I do so with very considerable regret. It is a conclusion which I consider I am driven to by the law that applies, rather than the equities of the situation. The first claimant was seeking to co-ordinate all the claims, but did not seem fully to appreciate what claims were made, against which party, and when they had to be commenced. The circumstances which applied to him did not necessarily apply to others, and there was a misunderstanding by him about his continued seeking of furlough when also employed in an alternative role. Mistakes were made in early conciliation which, if not made, may have led to a claim in time. It may be that as he thought that the important date was his email of resignation of 16 August 2020 he was in time but for reasons set out above I consider that wrong for him, and it is also not the relevant date for the other claimants. That is all unfortunate for the claimants as a whole, but as stated I must apply the law.

60. From the material presented to me CCL did not handle the matter competently or with consideration. There was evidence from some claimants that they had protested the lack of furlough pay, and that they thought that that was why they later received the email stating that they would not receive further shifts. It is possible that if that be factually correct there was a claim for asserting a statutory right under section 104 of the Employment Rights Act 1996. That claim has not however been made before me, and my role is not to act as the advocate or adviser of the claimants. Even if such a claim were now to be attempted, it is very materially out of time.

61. I am conscious however that CCL were never a party to the claim before me, and I may not have all of the information that may be relevant in light of that. It is possible that the claimants may have a different remedy in another forum, but that is not a matter for me and not one that it is appropriate for me to comment on further.

62. I have required to set out the facts, the law, and my analysis to explain why I make the findings that I do. It may read rather harshly, particularly in respect of the first claimant. I appreciate that he was seeking to do his best, against not an easy set of circumstances, and where some of the legal issues were far from straightforward for someone not legally qualified or experienced. In matters of jurisdiction, which is whether or not the Tribunal can competently hear a case, there are occasions where trying one's best is not sufficient.

(i) Identity of employer

63. This issue does not now arise, but lest it is relevant I consider it appropriate to comment briefly on it. It appears to me from the evidence as a whole that the employer was CCL. It is a question to be decided from that evidence. That evidence includes two of the contracts of employment which were before me stating that entity as the employer, the inference I draw from that that the same terms applied to all the claimants, the various payslips before me stating that entity as employer and again an inference of that applying to all claimants, and other items of correspondence that refer to that entity as employer which included two forms P45, one for the first claimant himself stating CCL as his employer. This is I consider compelling evidence that CCL not the respondent was the employer.

64. Paul Hutton, the respondent, was described in evidence as the "owner" of CCL, and that is in reality the only evidence put forward for the contention that he was the employer. That argument was made by the first claimant in evidence, but the other claimants in theirs accepted that it was CCL. That evidence from the first claimant does not however make Mr Hutton the employer in law. The first claimant explained that he changed the identity of the respondent in his early conciliation application from CCL to

the first respondent, an individual, as he heard that the company shares had been sold, but that is not a basis in law to change who the employing entity is, or had been. It was, and remained, CCL.

65. It is I consider overwhelmingly clear that the wrong respondent was the subject of early conciliation, and the wrong party was convened as the respondent. In both cases it should have been CCL. I can understand in a sense why the first claimant as someone with no legal training or experience did as he did, but again I must consider the evidence before me and make a decision according to the law. That is a further and separate basis which means that I must dismiss the claim, as the respondent was not the employer and only the employer is liable for deductions from wages.

(ii) Substitution

66. In light of the findings above I do not require to address the issue under Rule 34, but again comment briefly on it. I would have held that it was not in accordance with the terms of the Rules to have allowed CCL to be substituted for Mr Hutton as employer on the basis that there had been no formal and effective Early Conciliation in relation to them, and that is a pre-requisite for a claim of this kind. There is in law a very significant difference indeed between an individual, and a limited company. It is not the case of correcting the mis-spelling of a name, or substituting one entity in a group for another which is the correct employer. In simple terms, as I have said, the wrong party was convened.

(iii) Remedy

67. I have also not set out what awards I would have made had there been jurisdiction, lest this matter is litigated elsewhere, as a different claim in law and potentially against a different party, where the evidence heard may therefore be different if that claim is defended. It is open to the claimants to write to CCL setting out what sums they seek and why before considering commencing any such litigation. It is then open to CCL to consider their position carefully, and take legal advice on the same if they

wish to. These matters are not however ones that can be before this Tribunal.

Conclusion

68. The claimants' claims are not within the jurisdiction of the Employment Tribunal, the claimants were not employed by the respondent, and the claims must therefore be dismissed.

Employment Judge: Sandy Kemp
Date of Judgment: 19 October 2021
Entered in register: 19 October 2021
and copied to parties