



EMPLOYMENT TRIBUNALS

Claimant: Mr Cem Cam

Respondent: The London Fire Commissioner

RECORD OF A PRELIMINARY HEARING

Heard at: In private (by CVP)

On: 12 November 2021

Before: Employment Judge Braganza

Appearances

For the Claimant: In person

For the Respondent: Mr Ben Amunwa, Counsel, attended by Ms Legore, solicitor
(both attended for only the start of the hearing)

CASE MANAGEMENT ORDER

1. The Claimant's application for reconsideration of the Tribunal's rejection of his claim on 30 May 2020 is refused.

CASE MANAGEMENT SUMMARY

2. This hearing concerned the Claimant's application for reconsideration of the Tribunal's rejection of his claim under rule 13 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The Claimant's claim was rejected on 30 May 2020 for its failure to provide an ACAS Early Conciliation number in the ET1 form. The decision of 30 May 2020 was explained in reasons set out within the Case Management Summary of Employment Judge Sage on 28 May 2020.
3. I apologise to the parties for the delay in sending out my decision. I gave my decision and explained my reasons in summary to the Claimant at the end of the

hearing on 12 November 2021 but at that stage the Respondent was not a part of the hearing. The Respondent was notified by the Tribunal of the outcome of the hearing and that it was no longer needed directly afterwards.

4. The reason the Respondent did not attend the hearing, other than at the very outset, was in accordance with rule 13(3). This provides that where the Tribunal considers an application by the claimant for reconsideration of the rejection of his claim at a hearing, the application shall be considered at a hearing attended only by the claimant.

Background

5. The background to this hearing is as follows. The Claimant presented his ET1 to the Tribunal on 16 May 2019. He brought claims for constructive unfair dismissal and discrimination because of age, race and/or religion or belief. The Respondent in its Grounds of Resistance dated 4 September 2019 denied the claims in their entirety and raised a number of issues going to the jurisdiction of the Tribunal to hear the claim.
6. The claim form had a substantive defect: it did not include an ACAS Early Conciliation (EC) number. Rule 10 (1) states that a Tribunal “shall reject a claim if - (c) it does not contain all of the following information - (i) an early conciliation number; ... or (iii) confirmation that one of the early conciliation exemptions applies”.
7. Although the Claimant ticked the box to state that an exemption applied, (that the Respondent had already contacted ACAS), this was incorrect. No exemption applied therefore the claim form should have included a valid EC Certificate number.

Hearing on 28 May 2020

8. On 28 May 2020 at a Preliminary Hearing held in private before Employment Judge Sage, the Claimant explained that he had an EC Certificate at the time he presented his claim and that he had made an error in not putting the number on the claim form. He said that this was sent to the Tribunal at a later date and that he had been badly advised by those he spoke to and that he was not represented at the time.
9. There is an EC certificate which shows that on 9 May 2019 the Claimant gave notice to ACAS of Early Conciliation and that the EC certificate was issued on the same day. This is at page [81] of the bundle provided by the Respondent for the hearing on 12 November 2021.
10. In the Case Management Summary dated 28 May 2020 [53-54] Employment Judge Sage concluded that although this did not appear to have been referred to a Judge to deal with at the time the claim form was presented, the obligation to consider whether a claim form contains substantive defects applies at whatever stage of the proceedings it is raised and must be dealt with by the Tribunal.

11. The Respondent relied on the case of *E.On Control Solutions Limited v Caspall* UKEAT/0003/19 which confirmed that claim forms containing substantive errors should be rejected and that this is a mandatory rule which cannot be remedied by amendment.
12. The Tribunal therefore decided that because of the substantive defect, the claim form must be rejected. The claim form was returned to the Claimant accompanied by a letter dated 30 May 2020 [55] explaining the reason for the rejection and the process that should be followed to challenge this decision by way of reconsideration and/or appeal (under rule 12(3)).
13. On the same date the Claimant responded to the Tribunal and applied for reconsideration. The Respondent was not copied into that correspondence.
14. On 19 April 2021 the Tribunal considered the Claimant's application for reconsideration and requested written submissions from the Respondent within 21 days [62]. On 17 June 2021 the Tribunal directed that the case should be listed for a 3 hour hearing to deal with the Claimant's application for reconsideration of the decision to reject the claim under rule 70 [74]. This was listed for 12 November 2021.

Hearing on 12 November 2021

15. At the hearing on 12 November 2021, in addition to Mr Amunwa and Ms Legore of the Respondent, there was also an observer of the Respondent, Ms Gibbs, to which there was no objection. In any event, the Respondent agreed at the outset that the Claimant's application for a reconsideration of the rejection of his claim fell to be considered under rule 13. As it was being dealt with at a hearing, rule 13(3) required that it was attended only by the Claimant. Those attending on behalf of the Respondent were required to leave after I assured them that they would be informed of the outcome and whether they would be needed later in the hearing. The Respondent then left.
16. Mr Cem told the Tribunal that he had spoken to a staff member of ACAS, while completing his claim form and had discussed it since. He said he was told to leave the section blank and so was misinformed. He then realised this was wrong. He applied for the certificate 1 or 2 days later and did not understand how these matters worked or how important the error would be. He confirmed that he did apply for EC and did complete the process but did not tick the box with the EC number. He said that the consequences on him were very harsh for what he described as a 'minor error' in how he completed the form. He accepted that he had not put the EC number in. He also explained that this had caused him serious stress that "something like this" has "thrown out" his case. The Tribunal clarified with Mr Cem that he had sent his EC form to the Tribunal by email dated 12 July 2019. This was at page [65] in the bundle.
17. Mr Cem also explained that at the previous hearing before Employment Judge Sage he had been cut off part way and had been unable to reconnect to the hearing. That is also explained by him in his email of 30 May 2020 to the Tribunal [59].

Legal Framework

18. Section 18A of the Employment Tribunals Act 1996 provides:-

18A Requirement to contact ACAS before instituting proceedings

(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.

...

(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).

19. The relevant Tribunal Rules 2013 provide as follows:-

Rule 10 - Rejection: form not used or failure to supply minimum information

(1) The Tribunal shall reject a claim if—

...

(c) it does not contain one of the following—

(i) an early conciliation number;

...

(iii) confirmation that one of the early conciliation exemptions applies.

(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.

Rule 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;

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

(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).

(3) 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

(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.

20. In *E.On Control Solutions Ltd v Caspall* UKEAT/0003/19 (19 July 2019, unreported) HHJ Eady QC, as she then was, held that rule 12(2) created a mandatory rule requiring the Tribunal to reject a claim with a substantive defect. This could not be cured by amendment of the claim since there were no proceedings capable of amendment, and that the correct procedure for reconsideration was found in rule 13 of the Tribunal Rules 2013, see paragraphs 45, 54, 56-59. She set out at paragraph 45 of her judgment:

“The Claimant would have needed to rectify the error by providing a claim form containing an accurate EC number – that of the first certificate. Had he done so, the claim would have been treated as presented on the date he submitted the rectified claim form.”

Conclusion

21. Although the hearing listed for 12 November 2021 was listed under rule 70, it is clear that this application is not a reconsideration of a judgment under rule 70 but a request for a reconsideration of a rejection of the Claimant’s claim for the failure to include the EC number under rule 13.

22. Rules 10 and 12 required the Tribunal to reject the claim as there was a substantive defect on the claim form in it failing to provide the EC number. The Claimant has failed to rectify the substantive defect in his ET1 as he has not filed a rectified ET1 with the correct ACAS EC certificate number, applying *E.On*

Control Solutions Ltd v Caspall. His email to the Tribunal of 12 July 2019 including his EC form does not rectify the substantive defect in his ET1 form. Employment Judge Sage considered this history at the hearing on 28 May 2020 and there is no change to the circumstances before her since that time.

23. Whilst I do have considerable sympathy with the Claimant, there is no basis on which I can override Employment Judge Sage's previous conclusion and reasons dated 28 May and sent on 30 May 2020 that the claim form was rejected.
24. Applying rule 13, the decision to reject the claim was not wrong and the defect has not been rectified. The Claimant has not submitted a claim form containing the correct EC number. The Claimant's application for reconsideration is therefore refused.

Employment Judge Braganza
31 January 2022