



EMPLOYMENT TRIBUNALS

Claimant: Ms J. Bostic

Respondents: (1) Mitie Ltd
(2) Mr G. Molloy
(3) Mr M. Chestney

London Central

Employment Judge Goodman 3 March 2023

RULE 13- RECONSIDERATION OF REJECTION

Having reconsidered the rejection of claim, the claim presented against Mitie Ltd is accepted as presented on 20 February 2023.

REASONS

1. The claimant is a store detective at B&Q in Leyton. She presented a claim of disability discrimination to the tribunal on 15th December 2022, naming four respondents. The first was her employer, Mite Limited. The other three are individual co-workers.
2. Her claims against the second and third respondents, Molloy and Chestney were accepted. Her claim against Mitie and another co-worker, Moheed Hussein, were rejected because there was no relevant early conciliation certificate number. The ET1 form shows claimant had inserted an Early Conciliation certificate number against Mitie limited, but it was a duplicate of the certificate number of one of the other respondents, certificate number R257906/22/47.
3. Rule 12 of the Employment Tribunal Rules of Procedure 2013, as amended, requires a claim that lacks an early conciliation certificate number for any respondent to be rejected. It looked as if there was no certificate for the respondent Mitie. Accordingly, the claimant was informed on the 25th January 2023 that her claims against respondents Molloy and Chestney were accepted, and her claim against Mitie Limited and Hussein were rejected. She was told to get an early conciliation certificate and re-present her claim The letter contained a link to details of how to apply for reconsideration or re-present a claim.

4. The claimant wrote to the tribunal on 20th February 2023 saying:

Please accept my apologies in respect of this matter as I only became aware that I had sent the wrong conciliation certificate in respect of the third respondent. Please find the correct certificate attached in this email.

She attached a copy of an early conciliation certificate naming Mitie Limited, dated 16th of November 2022, number R238938/22/39.

5. Rule 13 of the Employment Tribunal Rules of Procedure provides:

(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.

6. Rule 12 (2ZA) provides:

The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

7. The defect in 12(1 (da) is where:

..the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate.

8. Now that the claimant has sent in her certificate naming Mitie, it is clear that she had complied with the early conciliation provisions at the time of presenting the claim in respect of Mitie, but the number she inserted on the claim form was not the same as the number on the certificate, that is, a defect under 12(1)(da). This means I have discretion under rule 12 (2ZA) not to reject the claim if the claimant made an error in respect to the number, and it would not be in the interests of justice to reject it.

9. Plainly the claimant did make an error. She had three certificates and wrote in the numbers of only two of them.

10. Is it in the interests of justice not to reject the claim? Firstly, the claimant had complied with the early conciliation provisions, her only fault is a clerical error. Secondly, there is an ongoing claim against her two colleagues, and it will be in the interest of justice as against *them* for the employer to be a respondent to this claim, as was always intended. It will ensure that if they are found at fault and

acted in the course of employment the employer is liable as principal. This is also in the interests of the claimant, as if she obtains judgement for any substantial sum she is more likely to be paid by the first respondent than by co-workers who may lack the ability to pay.

11. I bear in mind that the additional delay in notifying the claim to Mitie means that they may have difficulty investigating, but I also take into account that the individual respondents will probably have consulted their employer about this claim in any event, as the response that has been entered has been filed by employment law specialist solicitors, suggesting that Mitie are aware of the claim.

12. I also take into account whether involving Mitie at this stage, when one of the individual respondents has responded, and the other has not, because he had left the business and his home address has only recently come to the tribunal's attention, will hold up progress in bringing the claim for final hearing. The first case management hearing is already listed for 18th of May 2023. There is therefore time for Mitie and the individual respondent to file responses in time for a case management hearing. The claimant herself has also just been asked by the tribunal to supply further information to clarify her claim. Involving Mitie as respondent at this stage will not import delay or extra expense.

13. On whether reconsideration should be on the basis that the original decision was wrong, or on the basis that the defect can be rectified, I bear in mind the words of the Employment Appeal Tribunal in **Clark and others v Sainsbury's Supermarkets Limited 2002 IRLR 996**:

Nonetheless, if unambiguous mandatory provisions of the procedural scheme require rejection of the claim that outcome cannot be avoided, even if the application of the provisions may bring to an end a claim brought by a person who has complied with the substantive requirements of EC. However, in other cases, where the wording of the provisions permit, the courts will seek an interpretation that advances the purpose of the substantive EC scheme and does not place unnecessary obstacles in the way of prospective claimants obtaining access to justice.

and

..it is significant that these are gatekeeping provisions. The fundamental purpose of the underlying scheme is to ensure that those who are required to do so comply with EC.

14. The effective difference in which basis I choose is in the limitation period. If the decision not to accept was wrong, the claim against Mitie is treated as having been presented on 15th December 2022 and is in time. If it was right, but the defect has been rectified, it is to be treated as presented on 20th February 2023, which may mean that the claim is out of time, although it is clear that the narrative on the claim form is incomplete and the whole story may or may not indicate a continuing course of conduct.

15. While bearing in mind that the purpose of the scheme is to get claimants to approach ACAS for early conciliation before presenting claims to an employment tribunal, and that the claimant had approached ACAS for early conciliation with regard to Mitie and had a valid certificate when she presented the claim, the purpose of the tightly defined rules is to ensure that the employment tribunal has a way to check that there has been compliance with the early conciliation requirement, as discussed in the **Clark** judgment, and it cannot do that if there is

no certificate number, or the wrong certificate number. I consider that the decision was right (she had not given a valid certificate number), but that this is a defect that has been rectified by the claimant's supply, on 20 February 2023, of the missing certificate. That means the claim is accepted as presented on that date.

16.If that means that the claim is out of time, the employment tribunal that decides the claim at a hearing where the respondent is represented can consider whether it is just and equitable to extend time given the balance of prejudice between the parties.

17.Finally, an application for reconsideration must be filed within 14 days. It took the claimant 31 days to reply, so her application was out of time. She does not explain the delay. I have a power under rule 5 to extend time for most purposes under these rules, including rules 12 and 13. I consider it to be in furtherance of the overriding objective to deal with cases justly and fairly to extend time for the claimants application to reconsider the rejection decision. This is because she presented the claim in time, she already had an early conciliation certificate at that time, it is in the interests of justice that the intended respondent come out the employer, is included, and it was done before the responses were filed, and the delay will not put back the case management hearing or impede preparation. Despite the delay, there is time to get the claim properly afoot by the time of the case management hearing.

Employment Judge EJ Goodman

Date 03/03/2023

JUDGMENT SENT TO THE PARTIES ON

06/03/2023

FOR THE TRIBUNAL OFFICE