Neutral Citation Number: [2022] EAT 61

Case No: EA-2020-000323-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 December 2021

Before :

HIS HONOUR JUDGE SHANKS
- -

Between :

MISS J PRYCE	**Appellant**
- and -	
BAXTERSTOREY LIMITED	**Respondent**

- -
- -

Miss J Pryce the **Appellant** in person

Mr C Kelly (instructed by Lewis Silkin LLP) for the **Respondent**

Hearing date: 9 December 2021
- -

TRANSCRIPT OF JUDGMENT

SUMMARY

TOPICS:

8 PRACTICE AND PROCEDURE

30 JURISDICTIONAL/TIME POINTS

The claimant issued sex and race discrimination claims before she had obtained an early conciliation certificate from ACAS. By virtue of section 18A(8) of the ETA 1996 the ET plainly had no jurisdiction to consider the claims at that stage.

A few days later she emailed the ET enclosing a copy of a certificate she had obtained in the meantime and inviting the tribunal to add the reference number to the form.

The claims were then allowed to proceed but some time later they were dismissed by the ET for lack of jurisdiction.

On appeal against that decision, the EAT rejected the appeal:

(1) The claimant's email enclosing the certificate could not be considered as a "re-presentation" of the claim form since rule 8 of the ET procedure rules requires a claim to be presented by sending a completed ET1 to the tribunal, a requirement that cannot be waived; and

(2) There was no jurisdiction to waive the requirement to re-present the claim since, if there was, it would undermine the express statutory provision in section 18A(8) of the ETA 1996.

HIS HONOUR JUDGE SHANKS:

1. This, I regret to say, is the kind of case that gives the law a bad name. Ms Pryce's claim was dismissed by Employment Judge Self in a decision sent out on 18 February 2020 on the basis that the employment tribunal had no jurisdiction to consider it by virtue of section 18A(8) of the **Employment Tribunals Act 1996**, because she did not have an ACAS early conciliation certificate when she started her claim. She appealed against that decision. HHJ Auerbach allowed the appeal through on two grounds which I will come to in due course.

2. The claimant started work with the respondent as a vending operative or (as it says otherwise in the papers) operator on 23 October 2018. On 23 August 2019, following an incident which led to her dismissal on that day, she brought employment tribunal proceedings claiming race and sex discrimination. In the part of the ET1 form asking about the ACAS early conciliation certificate number, she ticked "no". She also ticked the box stating that ACAS did not have power to conciliate on the claim; that regrettably was plainly wrong. I have asked Ms Pryce about this and I accept that as a lay person bringing a claim in a tribunal, when she ticked that box she did not fully understand what was being required or what she was saying, and I accept that she cannot be criticised for what she did.

3. The same day, namely 23 August 2019, she did in fact notify ACAS of the dispute, and after she had presented the claim she was told by ACAS that she would need a certificate and a number, and on 27 August 2019 ACAS duly issued a certificate to confirm she had complied with section 18A of the **Employment Tribunals Act 1996**. On that day, just four days after she had presented her claim, she wrote to the employment tribunal an email which said as follows:

> **On 23 August 2019 I applied for an Employment Tribunal case to be heard, but at the time I missed the ACAS certificate off the form, and I would really appreciate this reference number being added to the form in order for my case to proceed. Please find attached the certificate number in question.**

Attached was the certificate with the appropriate number.

4. The file was referred to an employment judge on 12 September 2019 but without that communication, which had no doubt got lost somewhere in the system, and the tribunal staff stated, "No EC certificate, shall we reject?", and there is according to the judgment a clear indication that the judge wanted it rejected. However, for whatever reason that did not happen and the matter was referred back to a judge on 19 September with a new note saying, "We now have ECC. Shall we accept and serve?", to which the answer given was “yes”.

5. The claim was therefore formally accepted. The respondents responded with an ET3 form, which challenged the claimant's claim on the merits but did not say anything about jurisdiction or conciliation, and the case was duly listed for a preliminary hearing on 3 February 2020 "to identify the issues and make case management orders".

6. At the hearing on 3 February 2020 Employment Judge Self spotted the point that the claim had been presented at a time when there was no certificate in existence and adjourned the preliminary hearing for written representations to be made on the issue. The claimant wrote an email to the tribunal dated 6 February 2020 saying as follows:

> '**I would like to admit that I am at fault for not going to ACAS before my claim form was submitted to the tribunal. I have never been to the employment tribunal before. …**
>
> **I would like to make you aware that had I known that I was to see ACAS prior to a form being submitted, if the form had been returned to me**

> **within the jurisdiction period and I had been advised accordingly, I would have been through the necessary channels to submit my claim according to employment tribunal legal procedures.**

7. I can say today that I have no doubt that that was correct. However, the employment judge, having considered the matter, decided that the claim must be dismissed. He said at paragraph 14 of his judgment:

> **This is a jurisdictional matter and I do not have any discretion under it. This Claim was lodged prior to an EC Certificate being issued in circumstances where having one is a mandatory prerequisite to bringing a Claim … Accordingly, these claims must be dismissed. It is a matter for the Claimant as to whether she brings these claims again. If she does so then consideration will be given as to whether the Tribunal has jurisdiction to consider them taking into account time limits and the relevant statutory provisions for extending the same.**

8. I asked the claimant about that last section of the paragraph as well, and she said (and I accept) that it did not really register with her what the judge was suggesting, and she can be forgiven, I think, for not appreciating that there were different reasons why there might not be jurisdiction, on the one hand the absence of a certificate, on the other the lateness issue.

9. In any event, this appeal was brought and it was allowed to proceed by HH Judge Auerbach following a Rule 3(10) hearing on 14 July 2021. He allowed it to proceed on two grounds, which I will now read into the record:

> **(1) The Tribunal erred in confining its future consideration of the issue identified to whether the claim should be dismissed on the basis that (a) it had been presented on 23 August 2019 when the claimant had not yet obtained an ACAS EC certificate and (b) no exemption from that requirement applied, and in not considering or allowing for the alternative possibility that the claimant should have been treated by her letter of 27 August 2019 enclosing a copy of the certificate of that date, as having re-presented her claim in a compliant manner.**

> **(2) Alternatively, the Tribunal erred by not considering the possibility that the requirement to re-present her claim once she had obtained the certificate should have been treated as having been waived by the Tribunal and/or the Respondent.**

10. Mr Colm Kelly has represented the respondent on this appeal and has made helpful submissions on both those grounds for appeal. He is clearly right to submit that section 18A(8) is in the nature of a jurisdictional requirement which is laid down by an Act of Parliament. It specifically says:

> **(8) A person who is subject to the requirement in subsection (1) [to make contact with ACAS and provide them with information] may not present an application to institute relevant proceedings without a certificate under subsection (4) [the kind of certificate that was obtained by Ms Pryce on 27 August 2019].**

It follows that when Ms Pryce presented her claim on 23 August 2019 without a certificate, there was indeed no jurisdiction to consider it and that what she sent to the tribunal was in effect a nullity and should have been rejected immediately.

11. On 27 August 2019, as I have said, she wrote an email asking the employment tribunal to add the number to her form. Can that be regarded as a re-presentation of the claim as suggested in ground (1)? The problem with this suggestion is that the rules clearly specify how a claim is to be brought. Rule 8(1) of the Tribunal Rules says, "A claim shall be started by presenting a completed claim form (using a prescribed form) [the ET1 form] in accordance with any practice direction made under regulation 11 which supplements this rule". There was indeed a relevant practice direction, which is made in fact under Rule 85 of the tribunal **Rules of Procedure**. Rule 85(2) says, "A claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8". I have been shown the **Practice Direction** (page 35 in the bundle of authorities) made by Judge Doyle, the

President, and that says that a completed claim form could be presented to the tribunal in one of three ways: online, by post or by being presented in person.

12. So, what the claimant sent in on 27 August 2019 was first of all not a claim form in the prescribed ET1 form, and it was not as it happens submitted in the right way (it was sent in by email), although that is perhaps a detail, the real point being that it was not in the prescribed form. What happened on 27 August 2019 was therefore clearly not the presentation of a claim, and it seems to me that it cannot therefore be described as a "re-presentation" of the claim. Furthermore, the employment tribunal has no power to waive the requirements of Rule 8, namely that a claim form should be presented in that particular way; Rule 6 provides for the waiver of irregularities, and it expressly excludes Rule 8(1), which is the relevant rule about how a claim is presented.

13. That brings us to ground (2) of the grounds that HH Judge Auerbach allowed to proceed, which is whether the employment tribunal should have considered the possibility that the requirement to re-present should itself be treated as having been waived by the employment tribunal or by the respondent. Of course, that possibility can only happen if there was some power on the part of the tribunal to waive the requirement to re-present. It seems to me that if there was such a power, it would directly conflict with the express statutory requirement that the certificate must be obtained before a claim can be started. That is a statutory requirement, and it is not open to a tribunal, still less a respondent, to waive it.

14. There is provision in Rules 12 and 13 of the **Employment Tribunal Rules** for rejection of claim forms if they do not comply with the requirements about providing an early conciliation certificate number and for reconsideration and rectification, and it is clear that that Rule 12 was not complied with in this case because of an error by the employment tribunal. But the

important point for these purposes is that the only way to rectify the error that was made here, namely starting proceedings before there was even a certificate in existence, was to start them again after the certificate had been obtained using the standard claim form. It is noticeable that even under the new Rule12, there is no reference to the error of putting in a claim without a certificate having been obtained at all; there are provisions to deal with getting the number wrong and getting the names of the parties wrong, but there is no suggestion that that is one of the specific errors that would be subject to the procedure under Rule 13.

15. So, the result of that is that it was not open to the tribunal and still less the respondent to waive the requirement of re-presentation. The result is that with great regret I must reject the appeal.

16. I will say again that I have a great deal of sympathy with the claimant. All she wants to do is to bring a complaint against her former employers and have it heard on its merits. She did everything that she understood she was meant to do. She issued her ET1 on the very day of her dismissal. She obtained the certificate very quickly when she realised that that was the requirement. She sent it straight to the employment tribunal the same day. Because of an error by the tribunal, she was given the impression that her claim would proceed. She was not told, as she should have been, that the matter needed rectifying; nor was she told, as she may well have been, that the way to rectify it was to re-present a completed ET1 form, until, that is, Employment Judge Self's decision in February 2020 (paragraph 14, which I have already read out). As I have said, she can probably be forgiven for not understanding the hint given at paragraph 14. When she appealed, her appeal was allowed to proceed on the points that I have identified, and the delay in the Employment Appeal Tribunal must I think inevitably be down to the state of the lists in this tribunal and the Covid pandemic.

17. I therefore very much hope that if she now issues a new claim promptly with all the right boxes filled in and applies for an extension of time, the employment tribunal will look on such an application sympathetically, notwithstanding the further time that has passed. Having said that, I must emphasise that whether to extend time would of course be entirely a matter for the employment tribunal and the tribunal will have to take account of all the relevant circumstances, and there may be relevant circumstances that I do not have in mind.