



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Din

**Respondents:** (1) BMW (UK) Manufacturing Ltd  
(2) Gi Group Recruitment Ltd

**Heard at:** Reading (by CVP)

**On:** 12 May 2023

**Before:** Employment Judge Reindorf KC (sitting alone)

## **Representation:**

Claimant: In person

First Respondent: Ms N Gyane (counsel)

Second Respondent: Miss H Platt (counsel)

## RESERVED JUDGMENT

1. The claim against the Second Respondent is struck out as having no reasonable prospects of success, under Rule 37(1)(a) of the Employment Tribunal (Constitutions and rules of Procedure) Regulations 2013.

## REASONS

### **Introduction**

2. The Claimant was employed by the Second Respondent, an employment agency, under a contract dated 8 August 2014. On 2 January 2018 the Second Respondent placed him in a job with the First Respondent as an Assembly Operator. At a later date he became a Production Operative. His placement was brought to an end by

the First Respondent with effect from 29 May 2020 after it determined that it did not have work that was suitable for him in light of physical restrictions arising from his back condition. His contract with the Second Respondent was terminated with effect from 15 September 2020.

3. The Claimant entered into ACAS Early Consideration 7 October 2020 and was issued a certificate on 26 October 2020. The certificate was numbered R202347/20/49 and named only "BMW Mini" as the prospective Respondent.
4. The Claimant lodged his ET1 on 23 December 2020, complaining of unfair dismissal and disability discrimination. On the ET1 he inserted the ACAS EC number correctly in box 2.6. He named "BMW" as the First Respondent and "GI Group" as the Second Respondent. He entered the name of a Unite the Union representative in section 11. Originally no Grounds of Claim were attached to the ET1. These were provided by the Claimant following a strike out warning issued by the Tribunal on 8 May 2022. The date on which he supplied them is not clear.
5. At a preliminary hearing on 28 January 2023 the Claimant's disability discrimination claims were clarified as a complaint of failure to make reasonable adjustments contrary to s.20 of the Equality Act 2010 (EqA) and discrimination arising from disability contrary to s.15 EqA. The Respondents were ordered to set out their positions as to whether the claims were brought in time on or before 28 February 2023. An order was made for the Claimant to provide further information about his discrimination claims on or before 14 February 2023. He did not comply with this order.
6. On 28 February 2023 the Respondents set out their positions on whether the claims were brought in time. Both Respondents sought strike outs of the claim on the basis that it was out of time. The Second Respondent also applied for a strike out on the basis that the claim had no reasonable prospect of success, was scandalous or vexatious, or because it was no longer possible to have a fair hearing due to the passage of time. In the alternative the Second Respondent applied for a deposit order.
7. The Respondents subsequently lodged amended Grounds of Resistance.

### **The issues, the hearing and the evidence**

8. The hearing was listed to determine whether all or any of the Claimant's claims were brought within the usual time limit and, if they were not, whether that time limit should be extended ("the preliminary issue").
9. The hearing was held by video (CVP). The Respondents provided a bundle containing 137 pages and two witness statements. The Claimant did not join the hearing until 10:11am. He had no copy of the bundle or witness statements, although they had been sent to him by email both on 28 March 2023 and again on the morning of the hearing. He said that he had been out of the country for the past week without access to email. He had not sent any emails to the Respondents about the hearing prior to his trip abroad and had taken no steps to prepare himself for the hearing. He managed to locate the email attaching the papers in his emails, but had only his mobile phone on which to conduct the hearing and look at papers.
10. At the outset of the hearing Miss Platt for the Second Respondent submitted that the Claimant had not informed ACAS of the claim against the Second Respondent and

that therefore there was no ACAS number or certificate relating to the Second Respondent. She argued that on that basis the claim should have been rejected by the Tribunal under Rule 12 of the Employment Tribunal Rules of Procedure.. She said that she did not know why the point had never been raised previously, but that she had identified it when instructed shortly before the hearing. She said that she wished to apply for a strike out of the claim against the Second Respondent on this basis under Rule 12(1)(f) and Rule 12(2A). Ms Gyane, counsel for the First Respondent, helpfully raised a relevant recent decision of the Court of Appeal, *Sainsburys v Maria Clarke and others* CA 2023 EWCA Civ 386, in light of which Miss Platt pursued her application as one for a strike out under either Rule 27 or Rule 37.

11. The Claimant applied for a postponement of the hearing on the basis that he was not prepared. He said that he was able to deal with the point raised by counsel for the Second Respondent (“the ACAS point”) as this did not require him to look at any documents. The Respondents opposed the application for a postponement and the First Respondent made an application for costs in the event that the Claimant’s application for a postponement was granted.
12. I decided to deal with the ACAS point first, and then consider whether to consider the time point after that. In the event, there was insufficient time to deal with the time point and it was postponed for that reason. I did not deal with the First Respondent’s costs application, which may be pursued at the next hearing.
13. I heard evidence under oath from the Claimant and from Ms Sally Charlton from the Second Respondent. Miss Hallett and the Claimant made oral submissions.

### **Findings of fact**

14. When the Claimant lodged his claim form with the Employment Tribunal on 23 December 2020, it was not rejected by reason of any failure to comply with the requirement to provide an ACAS Early Conciliation Certificate number. That is no doubt because it contained a number, albeit that the number related to a Certificate which bore then name of the First Respondent only.
15. Unsurprisingly in light of the passage of time, the Claimant had a poor recollection of the process by which his ACAS Early Conciliation notification came about. He recalled that he had notified ACAS by telephone, and that the representative he spoke to filled out the relevant form for him during the call. He said that he had mentioned to the representative that he had worked at the First Respondent but had been placed there through the Second Respondent. He said that he was “pretty sure” that he had been told that both Respondents were named and that he was under the impression that it was a joint claim. However, he later said that he was under the impression that the First and Second Respondents were “the same thing”, since the Second Respondent is an “internal agency” of the First Respondent, and he didn’t know that he was supposed to have an ACAS EC reference number for each of them. He confirmed that he had consulted his Trade Union representative at the time.
16. I find that the Claimant’s recollection was unreliable on this point. I consider it more likely than not that the Claimant did not give clear instructions to ACAS that the Second Respondent should be notified of Early Conciliation. In any event, the Claimant did not notice that the Second Respondent was not named on the ACAS EC Certificate and took no steps to check the position with ACAS.

17. I was satisfied on the basis of Ms Charlton's evidence that the Second Respondent did not receive any notification of the Claimant's prospective claim from ACAS.
18. Taking the evidence as a whole, I find that the Claimant did not provide the prescribed information to ACAS in respect of the Second Respondent, that he did not obtain an ACAS EC Certificate in respect of the Second Respondent and that he did not enter an ACAS EC Certificate number on to his claim form in respect of the Second Respondent.

### **The law**

19. Before instituting proceedings in the Employment Tribunals, a prospective Claimant (unless exempt) must provide prescribed information to ACAS (s.18A(1) of the Employment Tribunal Act 1996 ("ETA")) and must obtain an Early Conciliation Certificate from ACAS (s.18A (8) ETA).
20. Rule 8(1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("ETR") requires a claim form to be presented on a prescribed form. By Rule 10(1)(c)(i) "an early conciliation number" is part of the minimum information which must be contained on the form; if it does not, it will be returned to the Claimant.
21. By Rule 12(1)(f) ETR, the Tribunal staff must refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be:  
*one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.*
22. Thereafter, by Rule 12(2A):  
*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-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made [an] error in relation to a name or address and it would not be in the interests of justice to reject the claim.*
23. Rules 10 and 12 relate to the earliest stage of proceedings, which is "in the nature of a preliminary filter" (*Sainsburys v Maria Clarke and others* 2023 EWCA Civ 386 CA at para 41 per Bean LJ). If the Tribunal makes a mistake at this preliminary filter stage, it is not open to a Respondent to later argue that the claim should have been rejected. Its remedy is to seek the dismissal of the claim under Rule 27 or a strike out under Rule 37 (*Sainsbury's* at para 42; see also para 51).
24. Rule 27 ETR provides that a claim may be dismissed if the Employment Judge considers that the Tribunal does not have jurisdiction to determine it or that it has no reasonable prospects of success. The Rule requires written notice to be sent to the parties and the Claimant to be given the opportunity to make written representations in advance of any hearing to determine the point.
25. Rule 37 ETR provides that  
*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

*(a) that it is scandalous or vexatious or has no reasonable prospect of success;...*

*(c) for non-compliance with any of these Rules or with an order of the Tribunal.*

26. Rule 37(2) ETR requires that the party in question have a reasonable opportunity to make representations, either in writing or at a hearing.
27. Rules 27 and 37 ETR are subject to the “very wide” waiver provision in Rule 6 (*Sainsbury’s* at para 43). Rule 6 ETR provides in relevant part that:
- A failure to comply with any provision of these Rules ... does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—*
- (a) waiving or varying the requirement;*
- (b) striking out the claim or the response, in whole or in part, in accordance with rule 37.*
28. In *Sainsbury’s* (at para 44) Bean LJ said that the decision of Langstaff P in *Cranwell v Cullen* UKEATPAS/0046/14/SM (20 March 2015, unreported) was correct. In that case, the Claimant had not complied with the mandatory requirement to provide prescribed information to ACAS and the Tribunal therefore had no jurisdiction to determine her case.

## Conclusions

29. It follows from my findings of fact that the Claimant did not comply with the mandatory requirements laid down by ss.18A(1) and (8) ETA, and that the Tribunal therefore does not have jurisdiction to determine his claim against the Second Respondent.
30. I do not consider that it is open to me to dismiss the claim under Rule 27 ETR, since no written notice has been sent to the Claimant and he has not had an opportunity to make written representations on the point. If I am wrong that written notice and the opportunity for written representations are mandatory, I would have dismissed the claim against the Second Respondent under Rule 27 ETR.
31. I turn to Rule 37 ETR, which permits me to strike out the claim at any stage in the proceedings provided that the party in question has had a reasonable opportunity to make representations.
32. I see no basis upon which I could strike out the claim against the Second Respondent under Rule 37(1)(c) ETR, since the Claimant has not failed to comply with a Rule. He complied with Rule 8(1) ETR, since his claim form contained “an early conciliation number”, albeit not one relating to the Second Respondent. The obligation to provide prescribed information to ACAS and to obtain an EC Certificate arise under the ETA, not the ETR. I therefore dismiss the Second Respondent’s application for the claim to be struck under Rule 37(1)(c).
33. I find that the claim against the Second Respondent falls to be struck out under Rule 37(1)(a) ETR on the basis that it has no reasonable prospects of success. Where, as here, the Tribunal has no jurisdiction to determine a case, it cannot have any prospects of success at all. If it were not to be struck out now on this basis, it is inevitable that it would be struck out under Rule 27 ETR in due course after further expenditure of time and money by the parties.

34. Despite the indication at para 43 of *Sainsbury's* that the waiver power in Rule 6 applies to the determination under Rules 27 and 37, I am doubtful that this can be correct where the defect goes to the jurisdiction of the Tribunal. My view is supported by the clear statement in paragraph 44 of *Sainsbury's* that *Cranwell* was correctly decided because the Claimant in that case had failed to comply with mandatory rules and the Tribunal therefore had no jurisdiction to determine her case. In any event Rule 6 does not permit me to waive requirements imposed by different legislation; in this case, the ETA. I therefore do not exercise my discretion to waive or vary any requirement of the ETR.
35. I am satisfied that the Claimant has had a reasonable opportunity to make oral representations as required by Rule 37(2).
36. In summary, I find that the claim against the Second Respondent has no reasonable prospects of success because the Tribunal does not have jurisdiction to determine it as a result of the Claimant's failure to comply with the requirements in s.18A ETA. I therefore strike it out under Rule 37(1)(a) ETR.

---

**Employment Judge Reindorf KC**

Date 12 June 2023

**Sent to the parties on:**

**13 June 2023**

**For the Tribunal:**

**GDJ**

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.