EMPLOYMENT TRIBUNALS

Claimant: **Ms W Prescott**

Respondent: **Cornwall Partnership NHS Foundation Trust**

Heard at: **Bodmin** **On:** **20 October 2017**

Before: **EJ Housego**

Representation
Claimant: Mr P Sayers (Solicitor)
Respondent: Miss R Chahal (Solicitor)

PRELIMINARY HEARING JUDGMENT

1. This is a preliminary hearing to decide the following issues: –

    1.1. Is the unfair dismissal claim in time?

    1.2. If not was it reasonably practicable for the claim to be presented in time and if not was presented within such further time as I consider reasonable?

    1.3. It is conceded that the discrimination claims are not in time and the claimant asserts that it is just and equitable to allow them to proceed, which application is opposed by the respondent.

    1.4. Is there a jurisdictional bar to the entire claim? The respondent is named as Cornwall Partnership NHS Foundation Trust ("Cornwall"), and the number of the early conciliation certificate set out in that claim relates to Peninsular Community Health ("Peninsular").

    1.5. The claimant applied the day before the hearing to add a further claim under section 15 of the Equality Rights Act 2010, based on the same facts.

Facts

2. The facts are, for the most part, not contentious:

    2.1. The claimant is a nurse who was employed by Peninsular. She had mental health problems that caused her attendance to work to be such that the absence management policy was implemented. The timeline is as follows:

2.2. On 29 January 2016 Peninsular gave to the claimant 12 weeks notice of dismissal by reason of ill-health;

2.3. on 24 May 2016 the claimant's employment ended on the expiry of that notice;

2.4. on 23 August 2016 the claimant approached ACAS under the early conciliation procedure against both Peninsular and Cornwall (no time point for unfair dismissal);

2.5. on 07 October 2016 two early conciliation certificates were issued, one in respect of each (no time point for unfair dismissal - conciliation was extended);

2.6. on 14 November 2016 the claimant submitted her ET1 online (respondent accepts in time for unfair dismissal);

2.7. on 23 November 2016 the Tribunal emailed the claimant, attaching a letter stating that Regional Employment Judge Parkin had considered her claim (which had been referred to him by the administration) and he rejected it. This was because the early conciliation certificate number in the claim form related to Peninsular, and the claim form named Cornwall as the respondent;

2.8. the claimant says that she did not receive that email:

2.9. on 12 January 2017 the claimant emailed the Tribunal to ask as to the progress of her claim;

2.10. on the same date the Tribunal replied enclosing a copy of the email of 23 November 2016, with attachments;

2.11. on the same date the claimant asked that the matter be reconsidered;

2.12. on 16 January 2017 the Tribunal wrote to the claimant and to Cornwall stating that the claim had been issued and that the preliminary issue of some or all of the claim being out of time needed to be addressed;

2.13. on 10 February 2017 the respondent received the claim form, dated 04 November 2016;

2.14. the respondent filed a response and there was a detailed case management order on 26 April 2017, which identified the matters asserted by the claimant as disability: these were Section 26 harassment claim related to disability following return to work on 06 October 2015, an alleged failure to make reasonable adjustments contrary to Sections 20 and 21, namely giving the claimant an office based return to work, and on a phased basis and by redeploying her.

Order of issues

3. It was agreed that these issues should be approached in the order set out above, and that I should hear evidence as to the out of time point, and then make decisions on all the issues. Both representatives stated that the early conciliation certificate point involved a point of law that was not clear. Accordingly it was agreed that I would decide all the applications so that if either side appeal whatever decision I made the remaining matters should be would be clear. I emailed this decision to the parties representatives in draft form by 3:30 pm on the day if the hearing.

The Early Conciliation point

4. The essential issue in the early conciliation certificate point is whether this is a *"minor"* mistake which can be rectified, or a fundamental difficulty for the appellant. The appellant has to show both that it is a minor issue and that the interests of justice must be considered. This is in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

   "Rejection: substantive defects

   12.—(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—
   (a) one which the Tribunal has no jurisdiction to consider; or
   (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process.

   (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) or (b) of paragraph (1).

   (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 a minor error in relation to a name*** *or address* ***and it would not be in the interests of justice to reject the claim****.* (Note: added by The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2014))

   (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.

   Reconsideration of rejection

   13.—(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."

5. The relevant cases are as follows: –

   Sterling v United Learning Trust UKAEA T0439/14, 18 February 2015

   Mist v Derby Community Health Services NHS Trust UKAEA T/0170/15, 22 January 2016

   Giny v SNA Transport Ltd UKEAT/0317/16/RN May 2017

Chard v Trowbridge Office Cleaning Services Ltd (Practice and Procedure) [2017] UKEAT 0254_16_0407 (04 July 2017)

6. *Sterling* is a case where the appellant had obtained an EC certificate but left out a couple of digits, and the claim was rejected as the number given did not correlate with the name of the respondent at the ACAS database. At paragraph 22 the Longstaff J said that the Tribunal was for that reason *"obliged"* to reject the claim. There had been no application for reconsideration under Rule 10(2). Rule 12 (2A) was not referred to in that decision.

7. In *Mist* J Eady QC J referred to the EC provisions in a case where she was discussing minor errors in ECs and thought it should not be a situation…

> *"53. … giving rise to the kind of technical legal arguments that beset the abandoned statutory discipline and grievance pre-action requirements under the Employment Act 2002. …*
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> *54. … is not for the precise or full legal title; it seems safe to assume (for example) that a trading name would be sufficient.* ***The requirement is designed to ensure Acas is provided with sufficient information to be able to make contact with the prospective respondent if the claimant agrees such an attempt to conciliate should be made (Early Conciliation Rules, rule 5(2)). I do not read it as setting any higher bar."*** (My emphasis.)
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> *55. … Early conciliation builds in an opportunity for pre-claim conciliation, but, other than the acknowledgement of that opportunity by means of the notification requirements, it does not oblige a prospective claimant to engage with the process in any substantive sense, still less does it give any rights to the prospective respondent (notably, any contact with the prospective respondent is conditional upon the claimant's consent; the respondent has no "right" to early conciliation as such). The minimal notification requirements, as I read them, are thus consistent with the general aims of early conciliation. There is no suggestion that the process was intended to set any greater threshold for a claimant before she can lodge tribunal proceedings. Indeed, the absence of the relevant information does not even result in an immediate rejection of the prospective claimant's notification: Acas may reject such a notification (Early Conciliation Rules, rule 2(3)), or it may contact the prospective claimant to obtain any missing information. That would suggest that, if Acas considers it has sufficient to permit it to make contact with the prospective respondent (should the claimant be amenable to that), it may equally choose not to reject the notification simply because there is a non-material error in providing the prospective respondent's name and address."*

8. In *Giny*, the director was named, and not his company. Soole J said:

> *"Conclusions*
>
> *32. I have considerable sympathy for the Claimant's position. He made a mistake in identifying Mr Ahmed as his employer and did so at a time when he was unrepresented. However, I am not persuaded by Mr Watson's able submissions that there was any error of law in the Employment Judge's decision to reject his claim under Rule 12(2A).*
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> *33. First, even if it were legitimate to import the purposive interpretation, that is capable of producing anomalous results when applied to errors in the address of the prospective respondent. Thus, if the Claimant had given the correct name of his employer but had mistakenly given an address with the wrong number in Kingston Road, an Employment Judge might well (depending on the particular facts and circumstances) have concluded that this was a minor error and that it*

would not be in the interests of justice to reject the claim. By contrast, the erroneous address would be likely to fail the suggested test of sufficiency for ACAS to contact the Respondent. As Mr Watson acknowledged in argument, the prospect of doing so would be dependent on fortuity, e.g. local knowledge of a postman or someone at the given address. Indeed, the suggested hypothetical question does not engage with the possibility of a wrong address.

34. Secondly, whilst readily acknowledging the purpose of the EC procedure as outlined by HHJ Eady QC, I do not consider that any gloss on the simple and straightforward language of Rules 12(1)(f) and 12(2A) is warranted. Furthermore, its likely effect would be to foster further legal technical arguments of the type which have been deprecated.

35. In my judgment, this is a classic issue for Employment Judges to determine, by application of their good sense and great experience to the evidence before them and the language of Rule 12(2A). The first stage involves a judgment as to whether or not the difference in name or address is a "minor error". If not, the claim must be rejected. If it is a minor error, there is a further judgment to be made as to whether it would not be in the interests of justice to reject the claim. Circumstances in which it would be in the interests of justice to reject a claim where a minor error has been made are not easy to envisage, but the second stage allows for that possibility."

9. In *Chard,* the most recent case (July 2017), Kerr J stated:

"67. I consider also the wording of Rule 12(2A) in the light of the overriding objective, with which it was presumably intended to operate harmoniously. It has been pointed out that it appears to enact a two stage test. On a literal reading, the first stage is to consider whether the error is minor without regard to the interests of justice. The second stage then arises only if the Judge has already concluded, ignoring the interests of justice, that the error is minor. If, but only if, she has reached that conclusion she must go on to consider whether it would not be in the interests of justice to reject the claim.

68. In my judgment, that literal reading is too purist. It is inconsistent with the overriding objective and risks causing injustice. I prefer to read Rule 12(2A) as indicating that the "interests of justice" part of the Rule is a useful pointer to what sort of errors ought to be considered minor. To put the point another way, minor errors are ones that are likely to be such that it will not be in the interests of justice to reject the claim on the strength of them. The Judge here never got as far as the interests of justice. It appears that was because she did not think that the error was minor.

69. I do not propose to attempt the perilous exercise of an exposition of what errors are and are not minor; it is always a question of fact and degree, but I am satisfied that the decision and reasoning of the Employment Judge were flawed, including on the third and final occasion when she addressed her mind to the issue. Having decided it adversely to the Claimant twice on the papers, and owing, as she did, a duty under Rule 12(3) to give reasons for her decision, she did not adequately address the argument that an error in relation to name (or address) can be minor, even though it is more than just a spelling error or typographical error.

70. She did not address the proposition of Soole J, which Ms Romney impressed upon me, that an error which fails to differentiate between an individual and a company can be a minor one. She appears to have thought that it could not be unless it were a mere spelling or typographical error, or an incomplete form of the company name, but that is not correct in law.

71. The Employment Judge had erred in law when considering whether an error as to the correct name of the Respondent in an early conciliation certificate was a "minor error" and whether it was not in the interests of justice to reject the claim."

Decision on EC point

10. I decide this jurisdictional point in favour of the claimant. There are judicial authorities pointing both ways. I decide to follow the most recent, *Chard*. The reasoning, that Rule 12(2A) has two tests that must be looked at together is incontrovertible. It cannot be that the question of whether an error is minor or not is a gateway to consider whether the interests of justice require the claim to be admitted. If it were so, one would have the absurd result that it would be possible to have a minor error which led to the draconian removal of the possibility of claiming. How, it may be asked rhetorically, could it ever *not* be in the interests of justice to allow a case with a minor error to proceed? The Rule only makes sense in the way Kerr J set out in *Chard*. Therefore the question of whether an error is minor or not is influenced by the interests of justice. I note that in Sterling rule 12(2A) was not considered.

11. I have carefully considered the argument of Miss Chahal that giving the number of the completely wrong EC certificate cannot be considered minor. It is, she says, a complete failure to give the correct number, precisely because it is the wrong certificate that has been given. That is not a minor error, she asserts, but a very major one.

12. The claimant says that her particulars of claim assert that *"I wish to bring a case against Peninsular Community Health (now CMHT)"*, and that is precisely what it does say. However the respondent box clearly states only Cornwall, and I do not accept this justification.

13. The appellant sought ECs against both Peninsula and Cornwall and then pursued only one respondent, Cornwall. This was correct, as it is accepted that the appellant was transferred during her notice period to Cornwall. She then simply picked up the wrong document to input the number, perhaps understandably as she had never worked for Cornwall - she was on sick leave for her entire notice period.

14. The aim of the EC requirement is to try to get matters resolved by agreement. It is common ground that there was ACAS involvement and that was why the conciliation period was extended. Accordingly Cornwall had full notice of the claim the claimant intended to bring, and was engaged with her fully, though ACAS, to try to resolve the issue. So that statutory aim was fully met.

15. It is not possible to see how this is other than a clerical error by the claimant. Bearing in mind the overbidding objective, the helpful guidance of Eady J in *Mist* and the approach taken in *Chard*, I decide this clerical error was minor. It is not in the interests of justice (and inconsistent with the overriding objective) for a claimant who has done all that she should do in terms of the EC process (notifying and then using ACAS conciliation services), and whose opponent is not disadvantaged in any way, and who fully knew that the appellant had complied with the EC regime, should have a knock out blow though a *"silly me"* type error by the claimant.

16. For these reasons I decide that this is within Rule 12(2A) and decline to strike out the claim for this reason.

Time - unfair dismissal

17. The respondent says that the unfair dismissal claim is in time if the date is taken as 04 November 2016, but out of time when it was actually issued, on 10 February 2017.

18. I decide this issue for the claimant. The relevant date is not the date when the Tribunal issues a claim to the claimant and sends it to the respondent, but the date when it was received from the claimant. It was received in time. The rejection of the claim by REJ Parkin was the subject of an application by the claimant on 12 January 2017 for reconsideration. It was reconsidered and issued, I have decided correctly. (As this appears to have been a decision taken without considering the point means this is a retrospective justification, but having heard argument on the point the decision to issue the claim was correct, even if made accidentally.) Accordingly the relevant date is 04 November 2016 and the unfair dismissal claim is in time.

Time - disability discrimination claim

19. This is accepted as out of time for the simple reason that the appellant had 3 months notice, for all of which she was at home, and nothing happened in those 3 months. The last possible date for lodging a claim is therefore the end of her employment (plus any EC extension).

20. I heard evidence from the appellant who was cross examined. She had taken advice. She was not in any fit state to do anything at the beginning of the period. Though she was able to work this was the therapeutic effect of *"autopilot"* in utilising a professional skill that was second nature to her now. It was through reflection and on beginning her recovery that she wanted to claim. She knew nothing about the process and while she had advice and knew about the 3 months period generally, she had not given thought to it in connection with any date other than the date her notice ended.

21. The claimant tendered a letter from her GP making it clear that there was a serious mental health problem which I accept as accurate (and the respondent accepts this, as they agreed that the claimant could have ill health early retirement for that reason).

22. The claimant says that her disability is mental health, depression, and so it is understandable that she was not swift. She is not a lawyer. She took advice and followed it. She thought she had lodged her claim in time. The matters would be document heavy and so the memory of witnesses was not as important as in other cases. There was more about the interpretation of what happened rather than dispute about what actually occurred. The factual matrix for the unfair dismissal case was much the same so it was hard to see any prejudice to the respondent. Her sense of grievance had grown with time as she reflected on what had happened and began her recovery from her mental health problems, and so she had not simply sat on her hands for months. There had been a TUPE transfer and all the same people are still available as witnesses.

23. The respondent says there are time limits for a very good reason. This delay is long, as the last event complained of is in October 2015, so a year before the claim was actually made, and now 2 years ago. The appellant had advice from the RCN and from solicitors, that during this period the claimant was able to work, and had resumed as a bank nurse for Cornwall, so that there was no health reason why she could not bring her claim. The matters complained about went back beyond the dismissal date, and were not the same, although admittedly similar, and dimming of recollection was an issue, it now being 2 years ago. The appellant had known all that time all the facts that she now complained were discrimination.

Decision on time point in disability claim

24. While sympathetic to the claimant, I conclude that it is not just and equitable to extend time for the disability claim. The claimant was in receipt of advice. She was not (fortunately) so badly affected that she was sectioned under the Mental Health Act. The medical evidence put before me is not such that the argument that the claimant was incapable of putting in a claim (or that it is just and equitable to give

more time) can succeed. A claim could have been put in while she was in her notice period, which is well over six months before she did put in her claim.

25. I do not take account of any period after 04 November 2016 as though the mistake that caused the problem was hers it was reasonable of her to wait a while before chasing her claim with the Tribunal. She knew they had received it as she had an on line acknowledgement. Nevertheless it is over a year from the last act complained of to the issue of the claim. That is 4 times the limitation period. The dismissal itself was not asserted to be discriminatory.

26. While there is an overlap of fact with the unfair dismissal claim, they are different matters. There is force in the argument that the starting point is that time limits are there to be observed and there has to be good reason to go beyond them. That usually means both good reason for the delay and little prejudice to the respondent.

27. Accordingly I strike out the claims under the Equality Act.

28. I declined to hear applications by the respondent that the claims and no reasonable prospect of success, and by the claimant to add dismissal as another head of claim, both of which were raised during the hearing, for the very reason that they were raised during the hearing, and not beforehand.

29. In the light of my decision they are not now relevant, unless the respondent seeks such an order in respect of the unfair dismissal claim.

30. However if I had not struck out the claims under the Equality Act I would have permitted amendment to add the claim under S15, to the existing claims, as this would only be to add a new label (and so alter the test required to be met). It would not have disadvantaged the respondent as the factual matters are the same, and it would be potentially to deprive a claimant of remedy for a detriment suffered for a protected reason by reason of a pleading technicality. S15 was brought in to fill a legislative gap, and it would not have been in the interests of justice to restrict the way the claim is pleaded.

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Employment Judge Housego

JUDGMENT SENT TO THE PARTIES ON

22nd November 2017

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FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.