EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Blakey	v	(1) Estio Training Limited (2) BPP Holdings

Heard at: Leeds (in person) **On**: Thursday 21 December 2023

Before: Employment Judge James

Representation

For the Claimant: Represented himself

For the Respondent: Mr J Naylor, solicitor

JUDGMENT

(1) The claimant's claim is dismissed under Rule 27 Employment Tribunal Rules of Procedure 2013 because the tribunal does not have jurisdiction to hear it; further, since for that reason it has no reasonable prospects of success, it should be struck out under Rule 37 Employment Tribunal Rules of Procedure 2013.

REASONS

The issues

1. The agreed issues which the tribunal had to determine are (1) whether the claimant was obliged to comments Acas early conciliation before submitting the employment tribunal claim; (2) if so, whether the tribunal has jurisdiction to hear the claim; (3) if not, should it be struck out because it has no reasonable prospects of success?

2. The claim has two case numbers because, since issue, it has been classed as a reform case (with the 6001532/2023 case number). For the avoidance of doubt, there is only one claim. This judgment applies in any event to both case numbers.

The hearing

3. The hearing took place in person at the Leeds Employment Tribunal on the afternoon of 21 December 2023. Submissions were heard first from Mr Naylor for the respondent and then from the claimant. A short bundle was provided to assist the tribunal. One previously decided legal case was relied on, which is referred to below. Following a short adjournment, a verbal judgment was delivered. The claimant has asked for written reasons.

Background facts

4. The claimant was previously employed by the first respondent from September 2015 until his employment ended in August 2022. He subsequently raised employment-related legal claims. Those were compromised in a COT3 agreement in mid-November 2022.

5. It is not in dispute that Acas Early Conciliation did not take place in relation to the issues in the current claim, prior to the claim form being issued on 14 August 2023. The claimant has made claims for sexual orientation discrimination and breach of contract. (It is noted the claimant asserted at the hearing that his claim also includes claims for whistleblowing. Were the claims to be ongoing, the tribunal would have had to determine whether that was the case. Given the decision on jurisdiction however, it was not necessary to resolve that question.)

6. In its response form, the respondent states:

> *The Claimant has not given any Early Conciliation Certificate Number on the Claim Form. The Respondent is unaware of any attempt by the Claimant to undertake early conciliation (for example, it has had no contact from ACAS in relation to this matter). The Claimant appears to suggest that the Respondent initiated conciliation with ACAS. This is not correct. The Respondent's view is therefore that the Claim Form is not exempt from the usual requirement to conduct early conciliation and therefore the Claim should be rejected.*

7. A preliminary hearing for case management purposes took place on 10 November 2023. Since there was insufficient time to convert that to a public hearing, today's hearing was arranged, in order to consider the respondent's application to strike out the claim. The breach of contract claim, which relates to an alleged breach of the mid-November 2022 COT3 agreement, was withdrawn at that hearing, the claimant having accepted that the tribunal did not have jurisdiction to hear that claim.

8. The claimant accepts that he did not comply with the provisions of s.18A Employment Tribunals Act 1996 (see below), prior to issuing the claim form. He accepts that he did not go through the Acas Early Conciliation process before 14 August 2023, about the matter complained about in this claim form. He says that he assumed, when completing the ET1, that he could rely on an exemption; namely, that Acas had been contacted by the respondent in relation to the previous dispute that led to the COT3 agreement being signed in mid-November 2022.

Discussion

9. The provisions of section 18A Employment Tribunals Act 1996 are mandatory. Section 18A(1) provides:

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.

10. This is subject to (7) which provides for prescribed exemptions. Section 18A obliged the claimant to provide the prescribed information in the prescribed manner about the matters complained about in the claim form before this tribunal, unless one of the exemptions applied. It is not in dispute that the claimant did not comply; nor is it in dispute that an exemption did not in fact apply.

11. I am happy to accept at face value the claimant's explanation for not doing so. The explanation is that the claimant understood from speaking to Acas that it was not mandatory to go through Acas Early Conciliation. From what has been said today, it appears that what Acas was actually saying was that they could simply issue an Early Conciliation Certificate, without the claimant having to enter into any negotiations with the respondents; not that commencing Acas Early Conciliation (EC) and obtaining an Acas Early Conciliation Certificate was not mandatory before submitting a claim. I am however content to assume, for the purpose of this hearing, that the claimant misunderstood what he had been told.

12. Further, I accept that when the claimant completed the claim form at paragraph 2.3, he thought an exemption applied - since his employer had already been in touch with Acas, in relation to the COT3 agreement entered into in mid-November 2022.

13. Taking the claimant's explanations at face value, I am content to accept for the purpose of the issues before me today, that he genuinely misunderstood what he was required to do in relation to Acas EC prior to this claim being submitted.

14. In reaching my conclusion, I have also noted that it has taken four months to get to this point; and that the claimant says his life has been turned 'upside down' by the events leading to his claim. I also duly note that the claimant has, since submitting the claim, been through the Acas EC process.

15. Yet further, the claimant says that the alleged discrimination stopped in August 2023 when the claim was commenced. He fears that it will start again if this claim is struck out. He is also concerned about time limits, if he re-submits the claim after today's hearing. The claimant argues that he has a valid claim, which the respondent is trying to get struck out on a technicality.

16. The claimant urges me to allow the claim to proceed, to save the time, expense and rigmarole of having to submit a further claim. The claimant has also told me that he fears that the rejection of his claim could have a serious impact on his mental health. He says that for all of these reasons, allowing the continuation of this claim 'makes common sense'.

17. In response, Mr Naylor points out that the provisions of s.18A are mandatory. They do not give the Employment Tribunal any discretion; that therefore none of the matters raised by the claimant, as set out above, are relevant to the issue before me.

18. I have carefully considered all of the arguments made by the claimant. If the tribunal did have discretion whether or not to accept the claim form, despite

the provisions of section 18A Employment Tribunals Act 1996 not being complied with, most if not all would be valid matters to consider, in deciding whether or not to exercise a judicial discretion to allow the claim to proceed. I have concluded however that the clear words of section 18A do not give me any such discretion.

19. Consistent with that position, Rule 6 of the Employment Tribunal Rules of Procedure 2013 does not give the tribunal any discretion to ignore the failure by a claimant to comply with the mandatory provisions of section 18A. Where a claim has been accepted, but a respondent disputes that it should have been, it is open to the respondent to argue, amongst things, that the claim should be struck out because it is no reasonable prospect of success. See paragraph 42 of *Clark and others v Sainsbury's Supermarkets Ltd [2023] IRLR 562*, per LJ Bean, which states:

> *42. If the tribunal staff reject a claim under r 10 or an employment judge rejects it under r 12, the claimant may seek reconsideration on the basis that either the decision to reject was wrong or the notified defect can be rectified: see r 13(1). But if no such rejection occurs it is not in my view open to a respondent to argue at a later stage that the claim should have been rejected. The respondent's remedy is to raise any points about non-compliance with the Rules in their form ET3, or in appropriate cases at a later stage, and to seek dismissal of the claim under r 27 or apply for it to be struck out under r 37.*

Conclusions

20. In the circumstances of this case, there has been a failure to comply with the mandatory provisions of s.18A(1). This tribunal therefore has no real choice but to strike out the claimant's claim, because it does not have jurisdiction to deal with it. The making of a deposit order, or unless order, were not considered to be reasonable alternatives, because neither of those could rectify the failure by the claimant to comply with a relevant, mandatory statutory provision.

21. Were I to allow the claim to proceed out of empathy towards Mr Blakey, as he urged me to do, that would clearly be an error of law. The respondent would be entitled to appeal the decision and the end result would be inevitable - a successful appeal to the EAT.

22. Further, as I explained to the claimant, once a jurisdictional point has been raised, as it has been, quite validly, in this case, the tribunal has to consider it. There have been previous Employment Tribunal claims where the jurisdictional point has not been spotted until the final hearing. The tribunal at that stage, having considered the jurisdictional point, and after the parties had prepared the case for a full hearing, has struck the claim out. Were I to fail to deal properly with the jurisdictional point at this stage, it would only be a matter of time before it was properly dealt with – in this case by an appeal to the EAT. I would simply be kicking the can down the road and failing to properly carry out my role, by reaching a correct conclusion, following the application of the correct legal principles to the facts of the case. In those circumstances, I conclude that it would not help either party to allow this claim to continue and that there is only one possible outcome available to me.

23. For all of the above reasons I conclude that the provisions of section 18A are mandatory. It is not in dispute that they were not complied with prior to the claim being issued. I therefore conclude that the claim should be dismissed because the Employment Tribunal has no jurisdiction to deal with it; and further, for that reason, it has no reasonable prospect of success and should in any event be struck out.

Employment Judge James
North East Region

Dated 15th January 2024

Sent to the parties on:

Date: 17th January 2024
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For the Tribunals Office

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