Employment

Early conciliation: a relaxed approach or not?

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A recent series of cases before the EAT have highlighted the complexities faced by respondents when determining whether to challenge the ET's jurisdiction where a claimant has failed to comply with the *EC requirements*.

Introduction

Since 6 April 2014, a prospective claimant must provide *Acas* with certain prescribed information before they can present an application to the ET to institute relevant proceedings relating to any matter (*section 18A(1), Employment Tribunals Act 1996* (ETA)). The prescribed information is limited to the name and address of the prospective claimant and respondent. A claim will be rejected by an ET if the name or address of a party on the claim form is not the same as specified in the relevant EC certificate, unless the ET "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." (*Rule 12(2A), ET Rules*.)

The EAT's initial approach

The EAT indicated that a technical construction of the EC requirements was to be discouraged. In *Mist v Derby Community Health Services NHS Trust [2016] ICR 543*, HHJ Eady QC rejected an argument that the difference between the name of the prospective respondent on an EC certificate ("Royal Derby Hospital") and respondent on the claim form ("Derby Hospitals NHS Foundation Trust") was more than minor. She stated: "The requirement is not for a 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 … I do not read it as setting any higher bar." (*Paragraph 54*.)

The purpose of EC influenced the EAT's approach to section 18A(1) of the ETA. HHJ Eady QC commented: "[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" (*paragraph 55*). A similar approach to the interpretation of the statutory provisions was taken by Langstaff J in *Drake International Systems Ltd v Blue Arrow Ltd [2016] ICR 445* and Simler P in *Compass Group UL & Ireland Ltd v Morgan [2016] IRLR 924*, cases which considered the meaning of "any matter" under section 18A(1) of the ETA. However, recent cases have suggested that the EAT's approach is not as settled as it initially appeared.

Giny

In *Giny v SNA Transport Ltd UKEAT/0317/16*, a very different approach was taken by the EAT. In this case, a claimant had incorrectly named the prospective respondent as a sole director of a company, but named the company as the respondent in the claim form. The ET rejected the claim. In the EAT, Soole J found the ET was entitled to find that the difference was not a minor error. He rejected a submission by the claimant that it was sufficient compliance with the EC requirements if the information provided allowed Acas to contact the true employer. He held that any gloss on the

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language of the ET Rules was not warranted.

Soole J held that it was a classic issue for ET judges to determine "by application of their good sense and great experience to the evidence before them and the language of rule 12(2A)." (*Paragraph 35*.) The rule called for a two-stage test:

- Was the difference in name or address a minor error?
- If so, would it be in the interests of justice to reject the claim?

No doubt with the ET's discretion in mind, he rejected an argument by the respondent that the difference between the names of a natural and legal person could never, as a matter of law, be a minor error.

Chard

By contrast, in *Chard v Trowbridge Office Cleaning Services Ltd UKEAT/0254/16*, a differently constituted EAT reached the opposite conclusion on very similar facts. The claimant had incorrectly named the controlling shareholder of the company as the prospective respondent, instead of the company itself. Kerr J agreed that the issue of determining whether an error is minor is one of fact and judgment for an ET. Nevertheless, he found that it would not have been in the interests of justice to reject the claim. ETs should "avoid elevating form over substance in procedural matters, especially where parties are unrepresented." (*Paragraph 63*.) Rather than applying a two-stage test, Kerr J suggested that minor errors are likely to be ones where it will not be in the interests of justice to reject the claim because of them.

De Mota

In *De Mota v ADR Network and another UKEAT/0305/16*, the EAT commented further on rule 12(2A), albeit in a different context. In this case, Acas had issued a single EC certificate which named two respondents ("ADR Network and the Co-operate Group"), against whom the claimant brought claims. HHJ Richardson found the claimant was entitled to rely on a single EC certificate to issue proceedings against both respondents. He considered whether the claim could have proceeded had the EC certificate identified only one of the respondents but the claim form named both. He commented that the difference between the EC certificate and claim form might not have led to a rejection, noting that Kerr J's analysis in *Chard* was a "valuable guide to the correct approach to rule 12(2A)." (*Paragraph 40*.)

A relaxed approach or not?

While the EAT has attempted to discourage satellite litigation on this issue, further guidance is likely to be required. There are conflicting EAT authorities as to the manner in which rule 12(2A) should be interpreted. While in *De Mota* HHJ Richardson appeared to prefer the analysis in *Chard*, he did not appear to have been taken to *Giny*. The analysis of *Giny* is arguably to be preferred, on the basis that the language of rule 12(2A) suggests a conjunctive test. Therefore, the issues of "minor error" and "interests of justice" should be considered separately.

The overall direction of recent cases suggests that parties should still think carefully before taking technical arguments. However, claimants do not necessarily have a free pass; *Giny* demonstrates how harsh the application of the rules may be for claimants who are mistaken about the identity of their employer.

Where there are complex company structures, ETs may find that any difference between names or addresses is a minor error. In having regard to the interests of justice, ETs may consider:

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- Whether a claimant is represented.
- The extent of their resources.
- If a new claim were to be brought, whether it would be out of time.

Ultimately, ETs have a broad discretion in deciding whether to reject a claim and it may be difficult to show an error of law in a fact-sensitive decision.

A previous version of this blog was published on 29 November 2017 by Practical Law Company. This can be viewed here.

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