3PB Employment Breakfast Briefing Notes

By Oliver Isaacs

Barrister

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Early Conciliation – *De Mota v ADR Network UKEAT/0305/16/DA*

1. The EAT has held that an employment judge erred in rejecting a claim on the basis that the early conciliation (EC) certificate named two respondents. Although rule 4 of the Schedule to the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014 SI 2014/254 (the EC Rules) requires a prospective claimant to present a separate EC form in respect of each respondent when contacting ACAS, it does not apply to the EC certificate itself, and there is no rule that renders unlawful a certificate that names two respondents.

2. C worked as an HGV driver for the Co-Op between 2012 and 2015. He sought to claim unfair dismissal, breach of contract, unlawful deduction from wages, holiday pay and notice pay. His case was that he was employed by, or contracted to work for, ADR, and that ADR assigned him to work for the Co-Op. ADR and the Co-Op disputed this, saying that C had set up his own company providing his services to ADR, and that ADR provided his services to the Co-Op. C completed an EC form online. The information provided to online applicants states, in accordance with rule 4 of the EC Rules, that in order to make a claim against more than one respondent the claimant must complete a separate form for each one. However, DM completed just one form, putting 'ADR Network and The Co-operative Group' in the box for the respondent's name. He gave an address which is both the depot of the Co-op and a business address of ADR. Despite the error, ACAS issued an EC certificate, which identified the 'prospective respondent' as 'ADR Network and The Co-operative Group'. DM went on to present his claim to an employment tribunal, naming ADR and the Co-Op as two separate respondents.

3. An employment judge rejected C's claim for non-compliance with the EC Rules. He ruled that the form that C had submitted to ACAS named neither of the respondents but rather a non-existent entity whose name was the conjunction of the names of both respondents. He noted that rule 4 renders it necessary to submit separate forms in respect of separate respondents. He therefore concluded that C had failed to provide the required information in the prescribed manner and so the tribunal was deprived of jurisdiction by S.18A of the Employment Tribunals Act 1996. C appealed to the EAT.

4. The EAT allowed the appeal. HHJ David Richardson noted that it is clear that the purpose of the EC provisions is limited – it is not to require or enforce conciliation, it is simply to build in a structured opportunity for conciliation to be considered. Furthermore, it is no part of the provisions to encourage satellite litigation. HHJ David Richardson pointed out that S.18A ETA, which sets out how the tribunal's jurisdiction depends on compliance with the EC provisions, focuses upon the existence of an EC certificate. In his view, Parliament did not intend that the process leading up to the certificate should be subject to criticism and examination by the parties or the employment tribunal. For one thing, if the prospective claimant does not provide the prescribed information in the prescribed manner, the EC Rules make it plain that ACAS is not bound to reject the claim. For another, if it were open to the parties or the tribunal to go behind the certificate, it would also be open them to challenge ACAS's conduct of the conciliation procedure. Thus, the employment judge erred in law in going behind the certificate and finding that C failed to provide the prescribed information in the prescribed form to ACAS.

5. HHJ David Richardson went on to hold that the employment judge was wrong to rule that ACAS had issued an unlawful certificate. Rule 4 (which requires individual respondents to be named on separate forms) does not apply to the EC certificate, and there is no similar mandatory requirement elsewhere in the EC Rules. Nor should such a requirement be implied, especially where the effect would be to bar access to the legal system for a litigant based on a technicality. It may be that the issuing of a single certificate was an error on ACAS's part but that is not the same as saying that it was an unlawful certificate. The appeal was therefore allowed and the claim remitted to the employment tribunal for proceedings to continue.

6. Practice Note:- This case is also relevant in that endorses the approach set out in **Chard v Trowbridge Office Cleaning Services Ltd (2016) 02546/16** which suggested that errors can be "minor" even though they can be more than just typographical, and that the focus must be on the overriding objective - avoiding form over substance in procedural matters. To my mind this is yet further emphasis that one should not take too procedural approach to purported deficiencies within the EC Certificate process. However, note **Giny v SNA Transport UKEAT/0317/16** in which the facts were almost identical to **Chard,** and yet the EJ rejected the claim stating that the error (putting the director of the company rather than the Respondent) was more than minor. The EAT upheld the decision.

Practice and Procedure - *Jhuti v Royal Mail UKEAT/0061/17/RN*

7. C appealed against an employment judge's refusal to appoint a litigation friend. C had successfully brought claims against R in the employment tribunal. However, an appeal was pending and at stake was an award of damages and the vindication of the C's rights. Before the appeal was heard, C's solicitor raised concerns about her capacity to litigate and applied for the appointment of a litigation friend. The employment judge refused that application, holding that he was bound by **Johnson v Edwardian International Hotels Ltd** to conclude that the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Sch.1 did not empower him to appoint a litigation friend.

8. The EAT overturned the decision holding that the words of the s7(1) ETA 1996 conferred the power to appoint a litigation friend. Schedule 1 para.29 of the Regulations conferred a broad power to make case management orders and was to be interpreted in accordance with the overriding objective to deal with cases fairly and justly, ensuring that the parties were on an equal footing. It stated that to continue a hearing with an unrepresented litigant who lacked capacity to litigate would fly in the face of that objective. It went on that access to justice was a right of the highest constitutional importance, and legislation removing that right was, prima facie, contrary to the rule of law. It overturned **Johnson** on the basis that it was decided under the 2004 rules which were more prescriptive and should in any event be doubted.

9. Practice Note:- The following guidance was given:-

    a. Employment tribunals should tread carefully if invited to investigate a party's

mental capacity, and should only accede where there was clear evidence to support an investigation.

b. An investigation into capacity was not to be embarked upon where the respondent had concluded that the claimant was mentally ill simply on the basis of the claim or the allegations being made. There was ample power in the 2013 Rules to strike out misconceived, unreasonable or vexatious claims without resorting to an investigation into capacity.

c. Until the Tribunals Procedure Committee drafted rules defining and regulating the way in which issues of capacity were to be dealt with, the special provisions in CPR Pt 21 provided guidance that was relevant by analogy. First, a person was assumed to have capacity unless it was established that they lacked it. The burden of proof rested on the person asserting that capacity was lacking and, if there was any doubt, the matter was to be decided on the balance of probabilities. Second, a person should not be permitted to act as a litigation friend unless they could fairly and competently conduct proceedings on behalf of the protected party, and had no personal interest in the litigation and no interest adverse to that of the protected party. Third, an application for the appointment of a litigation friend had to be supported by evidence demonstrating that the proposed appointee was suitable and consented to act.

Burden of Proof - *Efobi v Royal Mail Group Ltd*

10. The EAT has held that S.136 of the Equality Act 2010 - which deals with the burden of proof in discrimination cases - does not impose any initial burden on claimants to establish a 'prima facie' case of discrimination. Rather, it requires the tribunal to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not there are facts from which it can infer discrimination. If there are such facts, and no explanation from A, the tribunal must uphold the complaint. It may therefore be misleading to refer to a 'shifting' of the burden of proof, as this implies, contrary to the language of S.136, that Parliament has required a claimant to prove something.

11. C worked as a postman for RMG Ltd. On more than 30 occasions, C applied unsuccessfully for an IT job with the company. He subsequently complained to an employment tribunal that his applications were rejected because he was a black African, born in Nigeria. The tribunal dismissed his race discrimination claims, holding that he had not proved facts from which it could conclude that there was discrimination. For

instance, there was no evidence to show that the successful applicants were appropriate comparators (no evidence having been adduced as to their race and national origins). In contrast, RMG Ltd had adduced ample evidence to establish that it had good reasons, untainted by discrimination, to reject C's applications - notably that while C was highly technically qualified, his CV did not set out the required skills for the various jobs.

12. Upon appeal to the EAT, C argued that the tribunal had erred in law in its application of the burden of proof, having failed to analyse properly what inferences it could (or should) have drawn from the evidence. The EAT (Mrs Justice Laing sitting alone) observed that S.136(2) of the EqA provides *'if there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred'*. (which was different from the old wording which suggested "Where C proves acts from which the tribunal could conclude") S.136(2) 'does not apply if A shows that A did not contravene the provision' - S.136(3).

13. In the EAT's view, S.136(2) does not put any initial burden on a claimant (although if the claim is 'manifestly frivolous', a respondent can apply to have it struck out). Rather, it requires the tribunal to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not there are facts from which it can infer discrimination. If there are such facts, and no explanation from A, the tribunal must find the contravention proved. If a respondent chooses, without explanation, not to adduce evidence about matters that are within its knowledge (such as, in this case, the race and national origins of the successful applicants), it runs the risk that a tribunal will draw adverse inferences in deciding whether or not S.136(2) has been satisfied.

14. The EAT acknowledged that this is not the way in which S.136 is interpreted in the Explanatory Notes to the EqA (which state that 'the burden of proving his or her case starts with the claimant'). However, while such notes may be an admissible aid to the construction of a statute in order to establish contextual factors, they cannot be treated as reflecting the will of Parliament, which is to be deduced from the language of the statute itself. The EAT further acknowledged that this is not the way in which the burden of proof has been understood thus far in discrimination cases- e.g. **Igen v Wong**.

15. It was clear to the EAT that the tribunal did not understand the effect of S.136, since it had stated on several occasions that C had the initial burden of proving a prima facie case of discrimination. In light of this misdirection, the EAT could not be confident that

the tribunal had not required C 'to prove things that he was neither required, nor able, to prove', such as the race and national origins of the successful candidates. In addition, the EAT could not be confident that the tribunal had imposed a sufficiently rigorous standard of proof on RMG Ltd. Had the tribunal appreciated that C did not have to get 'to first base' (as it put it), but that it had to consider all the evidence in the round, it might have concluded that S.136(2) was satisfied, and then have subjected RMG Ltd's explanation to more rigorous scrutiny than it did.

16. The EAT therefore remitted the case to a differently constituted employment tribunal to decide whether or not C's race discrimination claims were made out.

17. Practice Note:- Unsurprisingly, permission to appeal has been sought from the CA. No decision has yet been taken on whether permission will be granted. Whilst this case may not make a material difference to the way in which the practitioner analyses a case, it potentially makes it even more difficult to strike out a claim having regard to the guidance set out in **Anwanyu**. It also means that Respondents can not sit back and wait for a Claimant to "prove" the case of discrimination. Respondents will need to ensure that they address allegations of discrimination fully and provide appropriate evidence to support their contentions.

Causation and Apportionment – *BAE Systems (Operations) Ltd v Konczak (2017) EWCA Civ 1188*

18. R appealed against an award of damages to the respondent employee in respect of sex discrimination, disability discrimination and unfair dismissal.

19. C had made allegations of sexual harassment against colleagues and had been moved to a new role at a different site. She was unhappy there and her line manager suggested that she should return to her previous team. She rejected that proposal because it would involve working with the same colleagues. Her manager made a comment to the effect that women took things more emotionally then men, who tended to forget things and move on. Following that conversation, the employee was diagnosed with work-related stress and certified by her GP as unfit to work. The employer dismissed her in July 2007, claiming that it was inappropriate for her to return to her old job and there were no other positions for her. The tribunal dismissed nearly all of the employee's sex discrimination claims, but found that the line manager's comment amounted to sex discrimination. It also found that the employee had been unfairly dismissed and subjected to disability

discrimination. There involved numerous hearings and appeals. Suffice, that a Tribunal at first instance eventually found that the injury was triggered by the final comment.

20. The tribunal found that it was inappropriate to apportion damages because the psychiatric injury was indivisible and had been triggered by the comment. R appealed asserting that there had been 15 other matters referred to in evidence which had occurred in C's life which would have been stressors and which should have led the ET to apportion the injury.

21. The Court of Appeal reviewed the authorities. It rejected the contention that psychiatric injury is always indivisible (which had been suggested in obiter comments in **Dickens v O2 (2008) EWCA Civ 1144**). It endorsed the approach set out in propositions 15 and 16, (see **Sutherland v Hatton (2002) EWCA Civ 76**)

    a. Proposition 15 stated that where psychiatric harm had more than one cause, the employer should only pay for that proportion attributable to his wrongdoing, unless the harm was truly indivisible.

    b. Proposition 16 stated that assessment of damages would take account of any pre-existing disorder or vulnerability, and of the chance that the claimant would have succumbed to a stress-related disorder in any event

22. It suggested that a "sensible attempt" should be made to apportion the harm. It recognised that there might be cases where the harm was truly indivisible and that in such cases apportionment might be wrong. It sated as follows:-

    What is therefore required in any case of this character is that the tribunal should try to identify a rational basis on which the harm suffered can be apportioned between a part caused by the employer's wrong and a part which is not so caused. I would emphasise, because the distinction is easily overlooked, that the exercise is concerned not with the divisibility of the causative contribution but with the divisibility of the harm.

    …In Rahman the exercise was made easier by the fact….that the medical evidence distinguished between different elements in the claimant's overall condition….In many, I suspect most, cases the tribunal will not have that degree of assistance…The most difficult type of case…is where the claimant will have cracked up quite suddenly, tipped over from being under stress into being ill." On my understanding…even in that case the tribunal should seek to find a rational basis for distinguishing between a part of the

illness which is due to the employer's wrong and a part which is due to other causes; but whether that is possible will depend on the facts and the evidence.

23. In this case, the CA accepted that there was medical evidence supporting the tribunal's conclusion that the employee had only developed a diagnosable illness after the manager's comment. The tribunal's finding had not been perverse. It was not an affront to justice to ignore the employee's history of stress and problems at work, for which the employer bore no responsibility. The basic rule was that a wrongdoer had to take his victim as he found him. The effects of that rule were mitigated by propositions 15 and 16. In relation to proposition 15 the tribunal had been unable to find that the injury was divisible. In relation to proposition 16, the grounds of appeal did not raise the issue of whether the employee would have suffered a similar breakdown triggered by something else. It was not appropriate to determine that issue.

24. Practice Note:- To my mind this is a very significant case and I am surprised it has not had a broader circulation. In any case involving personal injury it is now clear that:-
    a. Careful consideration should be made as to whether to have separate remedy hearings and whether, when and how to call expert evidence.
    b. One must consider the totality of any medical history when dealing with mental conditions and consider when stress becomes a medical condition. This is relevant to causation.
    c. One will need to ask questions as to whether any particular part of the illness is caused by the wrong committed.
    d. Even if other factors have caused a mental condition, one will need to consider exacerbation and ask appropriate questions as to the extent of any exacerbation.
    e. If the injury is not divisible, one must ask the expert to opine on whether any condition would have arisen in due course in any event.

25. This case underlines the dangers of focusing on liability. It is a classic case of ignoring the complex problems of remedy until it is too late!!

Permanent Health Insurance - *ICTS (UK) Ltd v Visram (2017) All ER D 229*

26. V had a contractual right to the benefits of a long-term disability plan (LTDB), funded by an insurance policy. Under the terms of the plan, V would receive benefits after 26 weeks sickness absence. V went off on long term sick. Whilst absent, (and before the 26 weeks) V's employment transferred under TUPE. He brought a grievance which

resulted in benefits being reinstated (unbeknownst to him in the short term). V was subsequently dismissed for capability reasons.

27. The ET found that the dismissal was unfair and discriminatory. It found that there was an obligation on the employer to pay the LTDB and that the effect of dismissal was to deny him that benefit. It also found that there had been a failure to properly investigate the contractual position and therefore both the investigation and the dismissal was outside the range of reasonable responses. The ET further found that the dismissal was disability discrimination.

28. The EAT upheld these findings.

29. Practice Note:- The facts of this case need to be considered carefully. Not every case involving long term disability benefits/GIPS can be fitted into the facts of this case. The contractual position must be considered carefully. This is also a classic case in which the justification argument was not appropriately considered by the Respondent and it failed to properly consider the legitimate aim (and certainly failed to consider proportionality).

Whistleblowing - *International Petroleum Ltd v Osipov & Others (2017) UKEAT/0058/17/DA*

30. The employer appealed against an employment tribunal's decision that it had subjected C to detriments for making protected disclosures. The second and third non-executive directors of the employer appealed against a decision that they were jointly and severally liable for the award of damages made. C cross-appealed against a decision that the second and third respondents were not the employer's workers or agents. The employer was an oil and gas exploration company. The second respondent provided advisory services to it through his company, and the third respondent provided consultancy services. Four months after his appointment as CEO, C had been summarily dismissed. The tribunal held that C had made four protected disclosures and as a result the second appellant had instructed the third appellant to dismiss him. It held that the dismissal instruction amounted to a detriment actionable pursuant to the Employment Rights Act 1996 s.47B. It awarded compensation for unfair dismissal, injury to feelings, unpaid salary and a 12.5% uplift for failure to comply with the Acas code of practice, and held that the first, second and third appellants were jointly and severally liable.

31. The second and third appellants argued that it was wrong in law to hold them jointly and severally liable for the award because an award could only be made against them under s.49, and the decision to dismiss could not be an independent detriment by reason of s.47B(2), which provided that the protection for workers against detrimental treatment in s.47B(1) did not apply where "the detriment in question amounts to dismissal (within the meaning of Part X)".

32. The EAT held that the whistleblowing provisions in the Employment Rights Act 1996 s.47B(2)(b) did not exclude fellow workers or an employer's agents from liability for detriments amounting to dismissal. Workers and agents were not relieved of liability for detriments amounting to dismissal not within Part X, simply because a Part X claim based on dismissal was pursued against the employer. The starting point was to construe all the words in s.47B(2)(b), including those in brackets, in the light of that intended purpose. It did not seek to exclude all claims for detriment amounting to dismissal. Rather, Parliament had chosen to limit the disapplication to those detriments amounting to dismissal within Part X, namely unfair dismissal claims necessarily against an employer. There was nothing in the express words of s.47B(2) that relieved a fellow worker or agent of their liability for a detriment amounting to dismissal not within the meaning of Part X.

33. The EAT stated that it was likely to be unusual for an employee to pursue a claim against a fellow worker rather than the employer, but there was no principled reason against it. Nor was there any principled reason for making fellow workers personally liable for losses caused by detriments short of dismissal, but relieving them from individual liability for the consequences of what were likely to be the most serious detriments, such as an instruction or recommendation for termination, which had the potential to cause the most substantial losses. Therefore:-

    a. Claims for detriment amounting to unfair dismissal against an employer could only be brought under Part X.

    b. Claims for detriment amounting to dismissal not within Part X continued to be capable of being brought under Part V.

    c. Workers and agents were not relieved of liability for detriments amounting to dismissal not within Part X, simply because a Part X claim based on dismissal was pursued against the employer.

d. Although the basic award was payable under s119 ERA 1996 and only by the employer, the remainder of the compensation related to losses flowing directly from C's dismissal and the detriment to which he was subjected by the second and third appellants.

e. There was no statutory basis on which to regard them as being outside the scope of any award being uplifted for breach of the Acas code of practice.

34. Practice Note:- This decision could be important in considering "time limits." If time runs from the last "detriment," it may be possible to bring claims "within time" by utilizing dismissal as an act of detriment.

OTHER NEWS

- *Pensions:-* At last!!! Judge Doyle has published 'Presidential Guidance: Employment tribunals: Principles for Compensating Pension Loss' (the Guidance) and 'Employment tribunals: Principles for Compensating Pension Loss, Fourth Edition' (the Principles). The Principles cover matters such as the calculation of a claimant's retirement date, and how to approach loss of the new state pension. It is, however, the compensation of occupational pension loss which takes up the bulk of the Principles' 153 pages. Cases are split into two categories: 'simple' and 'complex'. In the former, tribunals should aggregate the contributions that, but for the dismissal, the employer would have made to the claimant's pension scheme during the period of loss that has been identified. This 'contributions method' is appropriate where the occupational pension is a defined contribution scheme (the more common arrangement in the private sector) and in cases concerning defined benefit schemes where the period of loss is short or there are other reasons which would render a complex assessment unnecessary, such as the claimant's total loss far exceeding the cap on the compensatory award for unfair dismissal. In the 'complex' category of cases, the claimant's lost pension rights derive from a defined benefit scheme and the loss relates to a longer period. Calculating pension loss in such a case will involve choosing one of two approaches set down in the Principles (or, sometimes, a blend of these two approaches). The first involves use of the Ogden Tables applied in personal injury cases. The second, generally more expensive option, involves expert evidence, typically from an actuary. The Principles emphasise the important role that case management has in complex cases: tribunals will seek to identify at an early stage those cases with a realistic prospect of a significant award for pension loss. In such cases, tribunals will be more likely to list a hearing on liability first, and park

the issue of remedy until the extent of liability has been established.

- *Vento:-* The Presidents of the Employment Tribunals in England and Wales and in Scotland have published their response to the consultation launched in July 2017 on uprating the bands of compensation for injury to feelings in discrimination cases. The Presidents have decided that the appropriate bands are now: a lower band of £800 to £8,400 for less serious cases; a middle band of £8,400 to £25,200 for cases that do not merit an award in the upper band; and an upper band of £25,200 to £42,000 for the most serious cases, with only the most exceptional cases capable of exceeding £42,000. The band takes into account the **Simmons** uplift.

- The new bands will be set out in formal Presidential Guidance and will apply to claims presented on or after 11 September 2017. For claims presented before that date, it will be open to the tribunal to adjust the bands to reflect inflation, and the Presidential Guidance will provide the methodology for doing so.

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Oliver Isaacs

Barrister
3PB Barrister

020 7583 8055
oliver.isaacs@3pb.co.uk

3pb.co.uk