Appeal No. UKEAT/0134/19/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 15 January 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

APPELLANT

PAYCO SERVICES LIMITED

MR T SINKA (DEBARRED) RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KAUSHIK CHAUDHURI (Representative) Instructed by: Chartergate Legal Service Limited 5-6 Rankin House Mudoch Court Roeback Way Knowhill Milton KEYNES MK5 8GB
For the Respondent	MR TAMAS SINKA (Debarred)

SUMMARY

PRACTICE AND PROCEDURE

At a case management Preliminary Hearing it was determined that three substantive issues, and strike-out and deposit order applications, should be considered at a public Preliminary Hearing. That further hearing duly took place, evidence was presented and submissions made. The Judge then reserved her decision. In that decision she set out her analysis of aspects of the evidence, and made certain findings of fact, but came to the conclusion that she could not determine the preliminary issues without two other Respondents being first joined to the proceedings.

The Judge erred in law in so deciding, principally because (a) the substantive issue having been set down for a Preliminary Hearing, and heard at that Hearing, the Judge was obliged to make findings of fact, on the basis of the evidence presented, and determine them, as best she could. She had not identified any material change in circumstances or other exceptional reason to justify a change of course; and (b) she had taken her decision without the parties being made aware that she was considering doing so, and they had not had a fair opportunity to make submissions on that proposed course.

HIS HONOUR JUDGE AUERBACH

Introduction, Background and the Employment Tribunal's Decision

1. The Claimant in the Employment Tribunal ("ET"), Mr T Sinka, presented claims to which one of the proposed Respondents was Payco Services Limited. To avoid confusion, I will refer to them respectively as the Claimant and Payco.

2. Payco have appealed against a decision of the Employment Tribunal arising from a Preliminary Hearing held on 9 October 2018 before Employment Judge ("EJ") Morton sitting alone. The written Judgment and Reasons were sent to the parties on 11 December 2018. I need to start with the procedural history of this matter in the ET leading up to that Preliminary Hearing and events just after.

3. The claim form was presented on 18 April 2018. In Section Two, for the Respondent's details, the Claimant identified the Respondent as "Payco" and gave an ACAS early conciliation certificate number. He also indicated that the address at which he had worked was that of a company called Day Aggregates. In box 2.5 and 2.6, which allow for details of a second Respondent, he identified "247 Staff, Granby Chambers" and gave the same ACAS early conciliation certificate number. Boxes 2.7 and 2.8 allow for particulars to be entered of a third Respondent, if any, but the Claimant left those boxes blank.

4. The Claimant identified further on that his employment had begun on 17 August 2017 and ended on 31 January 2018. Further on, in box eight, he ticked that he was claiming for race discrimination, a redundancy payment, notice pay, holiday pay and other payments. The narrative in box 8.2 read as follows:

"I worked For Day Aggregates from the l7th August, 2017 till the 31st January, 2018-as an agency worker through 247staff and Payco.

On the 31st January, without any reasonable explanation amidst a heavy bully and assault, I had to leave all my personal belongings behind to leave the premises. My supervisor, Eric, assaulted me in front of my colleagues with a false accusation of a moving conveyor belt, where I used to work, which has been locked by a lock.

A week later, I asked for an appointment from the companies HR to clarify the situation, but there was no explanation neither for my other queries, like wage deductions, which I also raised earlier too. I also contacted Natalia Jozefiak at 247staff for explanation, who said sorry and she would provide further hours for me, which she did not due, still unexplained. I was also not offered for neither verbal or written complaint opportunity about the incident on the 31st January, nor my complaints (on financial issues) raised earlier. I was dismissed without any notice payment or notification on the premises.

I am questioning the deductions have been made from my wages during the period I used to work for Day Aggregates through Payco and 247staff: £6.50 /hour wage for 60-50 hours; and the other deductions (exclusive of national insurance and income tax deduction); no compulsory pension payment; statutory sick and holiday payments have not been exercised neither.

I am also questioning the discriminatory behaviour of Mr Eric, my supervisor at that time too, why he behaved to me in a physically assaulting, arrogant manner, coupled with de-humiliating sending home without reasonable reason incidents; whilst he did not behave in the same manner to the other permanent native workers."

5. Further on, in box 11, he named his representative at Krisztina Toth. She, it appears, is a lay person and a friend of the Claimant. Further on in box 15 for additional information, he wrote the following: "We would like to add Day Aggregates to the employer's section as well (as there was only two options) against whom we are raising the discrimination claim", and he gave the address and contact number.

6. I interject that it is not clear to me what the precise correct name of the company variously referred to as 247, 247 Staff and 247 Granby Chambers in fact is. However, it was certainly common ground that it is an employment business or agency and is a distinct entity from Payco. I shall refer to it as 247 Staff.

7. The Claimant, as I have noted, gave the same ACAS EC number for both Payco and 247 Staff. The ACAS EC certificate bearing that number identified the prospective employer

as Payco Services Limited. It appears that he did not have a certificate for 247 Staff, nor indeed for Day Aggregates.

8. The matter proceeded on the basis that the only live Respondent to the claims was Payco. The Tribunal also wrote to the Claimant on 28 January 2015 informing him that his claim against 247 Staff Granby Chambers had been rejected because he had not presented an ACAS early conciliation certificate identifying that company; and there were the usual accompanying explanatory notes which explained the possibility of seeking a reconsideration of such a decision.

9. The ET sent notice of claim to Payco and also, as it sometimes does, sent out a notice that a case management Preliminary Hearing would take place on 17 July 2018. As well as submitting a response form, Payco wrote to the Tribunal inviting it to dispense with the case management hearing and to list a substantive Preliminary Hearing on certain points right away. However, a Judge decided that whether or not that should happen should be considered initially at the case management hearing, as listed.

10. In its response form Payco set out its case that the Claimant was neither an employee nor a worker of it, but that he did have a contract with it, which was a contract for services, which, Payco said, had not been terminated. It indicated that it was seeking a Preliminary Hearing to consider whether the claims against it should be struck out or made the subject of a deposit order and/or to determine whether the Claimant was an employee or worker of the Respondent or neither, whether the Respondent was potentially liable for the conduct of any person alleged to have discriminated against him, and whether his engagement had been terminated, and, if so, when and by whom.

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11. Attached were more detailed grounds of response which expanded on Payco's case that the Claimant was engaged by it on a self-employed basis with a view to his services being provided to the end client, described as "Day Group Limited trading as Day Aggregates", and that the Claimant had registered with it using its online system and a contract had been formed. It went on to expand on its case that the terms of that contract were such that the relationship was not that of worker or employee, so that there was no jurisdiction to consider his claims for notice pay, redundancy pay, unlawful deduction from wages, holiday pay or otherwise for breach of contract. It also set out Payco's case that any person alleged to have discriminated against the Claimant was not an employee or agent of Payco.

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12. Payco also sent in the agenda form for the Case Management Hearing identifying the preliminary issues which it said should be considered at a Preliminary Hearing as follows:

> **"(1) Whether the Claimant was an employee or worker of the First Respondent;**
>
> **(2) Whether the person or persons cited by the Claimant as having committed acts of race discrimination were engaged as employees or agents of either Respondent;**
>
> **(3) Whether the Claimant's engagement has been terminated, and if so when and by who;**
>
> **(4) Whether any claim should be struck out on the grounds that it has no reasonable prospect of success; or**
>
> **(5) Whether any claim should be subject to a deposit order on the grounds that it presents little prospect of success."**

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It also sent in a corresponding draft list of issues.

13. The Case Management Preliminary Hearing took place as directed on 17 July 2018 and came before Judge Martin. A minute was sent to the parties on 10 August 2018. This recorded that the Claimant was represented by a friend, Ms Toth, and the Respondent by a consultant, Mr Chaudhuri. Paragraph one read as follows:

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> **"A public preliminary hearing has been listed for 9 October 2018 for one day commencing at 10am or as soon thereafter as possible. The purpose of this hearing is to address the matters set out in paragraph 4.2 of the Respondent's agenda prepared for this hearing".**

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14. I interpose that those were the five points to which I have just referred. The record also stated that the Judge had ensured that the Claimant understood the nature of the forthcoming Hearing and what he had to do, and was encouraged to seek legal advice, and that various organisations and names were given to him for that purpose. Further Orders were made, including for disclosure of documents, preparation of a bundle, exchange of witness statements and for the Claimant to identify the individual referred to hitherto as Eric.

15. I come then to the further public Preliminary Hearing that took place on 9 October 2018. This came before EJ Morton. The Claimant appeared in person assisted by a Hungarian interpreter, the Respondent, Payco, being once again represented by Mr Chaudhuri. The Judgment reads as follows:

> **"1. It is not possible to determine the issues arising in the preliminary hearing without joining as additional respondents to the claim 247 Granby Chambers and Day Aggregates.**
>
> **2. The Claimant does not have two years' service with the Respondent or any other potential respondent to the claim. His claim for a redundancy payment is therefore dismissed".**

16. In its Reasons the Tribunal started by referring to the claim form and then said this:

> **"1. … He brought his claim against two Respondents, Payco and 247 Staff Granby Chambers ("247"). His claim against 247 was not accepted as he did not have an early conciliation certificate in respect of that entity. He also stated in his claim form that he also wished to bring his discrimination claim against Day Aggregates, whose name and address he included in his claim form, but it appears from the Tribunal file that there was no early conciliation certificate for Day Aggregates either.**
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> **2. The claim therefore proceeded against Payco only and following a preliminary hearing for case management a one day preliminary hearing was listed to determine the issues set out in the list below. The Claimant was also ordered to give certain further particulars of his claim, which he did".**

17. After setting out that the Claimant and Mr Thomas on behalf of Payco had given evidence, and the witness statements that she had, and referring to the bundle of documents, the Judge set out the issues for the Hearing, being the five previously identified when the

Hearing was directed to take place by EJ Martin. The Judge went on to give herself a self-direction as to the law, citing various relevant statutory provisions.

18. There was then a section headed, "My Findings". This began as follows:

> **"13. Based on the witness and documentary evidence I find as follows. I have made only limited findings of fact and have made it clear where I am doing so.**
>
> **14. 1 find the following as facts: the Claimant is an excavator operator and a Hungarian national. The Respondent is a commercial contracting business and an umbrella company specialising in engagement of staff and tax regulation. It provides services to employment businesses such as 247. Mr Thomas described it as providing "commercial opportunities for subcontractors, freelancers and other self-employed professionals as well as engaging umbrella employees within a host of industries such as construction, engineering, power and waste management, medical, logistics and media". In an umbrella company arrangement the individual worker is engaged through an employment business (in this case 247) and has a contractual relationship of some kind with the umbrella company (in this case the Respondent) which then takes responsibility for paying tax and national insurance to HMRC in relation to work done for an end user client (in this case Day Aggregates). The nature of the Claimant's contractual relationship with the Respondent was one of the issues I was asked to decide.**
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> **15. It was the Respondent's case that the Claimant had been engaged by it as a self-employed subcontractor and not an employee or worker. It maintained that the Claimant had no relationship with it that conferred rights either as a worker or an employee. Its terms and conditions for subcontractors were set out at pages 32 — 48 and consisted of a contract for services which was accompanied by guides to 'status and the tax rules', 'substitution, 'invoicing and payment', 'insurance cover and claims', 'the health and safety manual' and policies on the apprenticeship levy, data protection and privacy. Only the contract for services and the guides on status and the tax rules, substitution and invoicing and payment were included in the bundle.**
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> **16. Whilst the nature of this documentation is clear enough, I have found it difficult to make clear findings about the process by which the Claimant was engaged, or the extent to which he was aware of or entered into the documentation which the Respondent maintains was relevant to him….".**

19. The Judge went on to review the evidence that she had, both from the Claimant and Mr Thomas, and the documents available to her, about various matters, including: what interactions the Claimant did or did not have with representatives of Payco, 247 Staff and/or Day Aggregates; what documents he did or did not sign; what interactions he or someone on his behalf had with Payco's website, to what extent their registration form was completed by him or on his behalf and/or other documents supplied to them; and so forth.

20. In the course of this section the Judge made some findings of fact including, for example, in relation to the extent to which Payco's online registration process was completed. However, she also indicated various points at which she found that there were conflicts of evidence, difficulties with the evidence or other lack of clarity or uncertainty.

21. The Judge also made some findings of fact about what actually happened when the Claimant was at work, including the following:

> **"24. The Claimant took his instructions from Mr Harding whilst at work and I find as a fact based on the limited evidence I was shown, that the Claimant did not receive instructions on how to carry out the work from the Respondent. Nevertheless, even if it had been the case that the Claimant had entered into a contract for services on the Respondent's terms - and it is not clear on the available evidence whether he did so - the written contract for services did not reflect the actual arrangements under which the Claimant described himself as working in a number of respects…".**

22. Further on, the Judge said the following:

> **"26. …But the documentation seemed designed to ensure that no employment rights arose as a consequence of that arrangement as between the Claimant and the Respondent, which begs the question why the Respondent thought that such rights might arise. Whatever the purpose of the drafting of the documentation I consider that the documentation was not accurate in depicting the Claimant as a self-employed contractor who provided his own insurance and was free to arrange for his work to be done by others, including his own employees."**

23. Under the heading "Submissions", the Judge said the following:

> **"27. Both parties made submissions at the end of the evidence, for which I was grateful. I do not propose to go into detail about them here given the course of action that I have decided to adopt, which does not involve the final determination of any issues at this stage. I will simply say that I was unable to do what Mr Chaudhuri urged me to do, which was to base my findings on the terms of the contract between the Claimant and the Respondent, for the reasons that I will now explain."**

24. Under the heading "Conclusions" I need to set out what the Judge said in full

> **"28. Bearing in mind the issues I was asked to determine and having heard and read the evidence that was available to me about the process by which the Claimant was recruited, I was unable to make clear findings as to the respective roles in that process of 247 and the Respondent. Consequently I was not able to make definitive findings about the relationship between the Claimant and the Respondent.**

29. The Respondent did not seek to say that there was no contractual relationship, but the one it described seems to me, based on the limited evidence I heard, to be remote from the reality of the way in which the Claimant was working. I was therefore unclear as to:

a. what, if any, part the Respondent played in the process leading to the Claimant's recruitment;
b. the nature of the ongoing relationship between the Claimant and the Respondent;
c. the relationship between 247 and the Respondent;
d. the relationship between 247 and the Claimant;
e. the relationships between 247, the Respondent, the Claimant and Day Aggregates.

The facts of these different relationships are interlinked and it seems to me that none of the relationships can be properly understood without understanding the others.

30. The Claimant made it clear in his claim form that he wished to bring a claim against 247 and Day Aggregates and I have concluded that the only way in which his claims can be fully considered and definitive findings of fact made is by joining both entities to these proceedings. I consider that adopting this course would be the outcome that is most in the interests of resolving this dispute justly and in accordance with the overriding objective set out in Rule 2 of the Tribunal Rules. I therefore propose to exercise my power under Rule 34 of the Tribunal Rules to order that both 247 and Day Aggregates should be joined as respondents to the proceedings and a further preliminary hearing be held to identify the issues as between all four parties and make orders for further management of the case. The lack of Early Conciliation certificates against the two additional respondents is not an obstacle to joining them to the claim as the addition of parties is treated as an amendment to the claim (Science Warehouse v Mills; Drake International v Blue Arrow).

31. I consider that the Claimant may be able to show that he is a worker within the wider definition set out in s83 Equality Act. The significance of this is that he has complained of race discrimination against Eric Harding, an employee of Day Aggregates. It seems to me that even if the Claimant cannot establish a contractual relationship with Day Aggregates (and I make no finding on that) the Claimant may, if he is a worker under s83 Equality Act, also be able to show that he is a contract worker within s41 Equality Act and hence entitled to the protection of the Act as regards discriminatory conduct.

32. I consider that any decision about the potential liability of the Respondent for the actions of Mr Harding under s 109 Equality Act should be made once full findings of fact have been made in proceedings involving all three respondents.

33. There is also a question about where liability may lie for the absence of further engagements for the Claimant after Eric Harding sent him off site (if he in fact did so — I make no finding on that). Mr Thomas's evidence was that it was 247's responsibility to signpost a potential employee or worker to the right route for further work. The Tribunal will be unable to answer this question unless 247 is joined as a party to the proceedings.

34. I am also unable to deal with the Respondent's application for strike out or a deposit at this stage, although the Respondent may renew those applications at a later stage if it wishes to do so.

35. I therefore order that the proceedings should be served on Day Aggregates and 247 and that the case be listed for a two hour preliminary hearing for case management (a longer hearing is necessary as the Claimant will need to participate through an interpreter).

36. 1t is of course a matter for the Claimant whether he wishes to continue with his claim against all three Respondents."

25. This was a reserved Judgment and Reasons sent to the parties on 11 December 2018. I am informed by Mr Chaudhuri, as reflected in his note of the July Case Management Hearing,

A that it was pointed out to the Claimant then that he could only claim a redundancy payment if he was employed by someone for at least two years. He then, at the July Hearing, withdrew the redundancy payment claim, which was dismissed by EJ Martin. However, this was not recorded in her minute of that hearing or otherwise; and as I have noted, a dismissal of that B claim was recorded as part of the Judgment of EJ Morton. In any event there has been no appeal in that respect. This appeal relates to paragraph one of EJ Morton's Judgment.

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26. Following the promulgation of EJ Morton's decision the ET wrote to the Claimant's representative, Payco's representative, Day Aggregates and 247 Staff indicating that the Judge had directed that the claim should be served on Day Aggregates and 247 Staff. It appears that D the ET sent them, at the addresses supplied in the claim form, copies of the claim form, notice of claim and ET3 response forms, with a deadline for completion and return thereof.

27. Thereafter a response form was entered by Day Aggregates. Mr Chaudhuri provided E me with a copy and I note that it disputes the claims against it on their merits. However, so far as Mr Chaudhuri knows, no response form was put in by 247 Staff. A direction was given for a further case management preliminary hearing to be listed, but that, and all further steps F in the ET, were then stayed pending the outcome of the present appeal.

The Appeal and Payco's Arguments

G 28. Payco's Notice of Appeal, as I have noted, challenges the decision of the ET that it was not possible to determine the issues arising in the October Preliminary Hearing without joining the two additional Respondents.

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29. As originally framed, there were 10 numbered grounds. However, when the notice was considered by me on the paper sift, it appeared to me that there was considerable overlap and interaction among them. I identified five principal themes, and set these out in my sift Decision. The first three were as follows:

> **(1) that the Tribunal erred in deciding not to decide the issues before it but instead to join two other Respondents before doing so;**
>
> **(2) that this error was compounded in the case of 247 Staff by the fact that the Claimant had not challenged the rejection of the claim against that Respondent for lack of an ACAS EC certificate, nor applied to join it at the preliminary hearing;**
>
> **(3) that that error was compounded in the case of Day Aggregates by the fact that the claim form did not identify it as a Respondent.**

I observed that this last point was not quite right, as there was a reference to Day Aggregates in box 15 of the claim form; but there was no ACAS EC for that Respondent.

30. The fourth theme of appeal which I extracted was that if, contrary to point one, the Tribunal was entitled to put off deciding the PH issues until the other proposed Respondents had been joined, then it should not, nevertheless, have made partial findings of fact at the hearing in October 2018. Finally, the fifth point was that some of the findings of fact made by the Tribunal were perverse.

31. I permitted all of the grounds to proceed to a Full Hearing, but I observed that the appellant needed to consolidate and focus the grounds in its skeleton argument. In the usual way my associated Order required the Claimant, now the Respondent to this appeal, to lodge an Answer within a specified time period. This he failed to do, notwithstanding reminder letters being sent and then an unless order being made by the Registrar. As a result of his failure to comply with that Order he was debarred from taking any further part in this appeal and did not therefore appear at the Hearing of it today.

32. My Orders permitted certain particular documents to be included in the bundle for this Hearing. There was also, in the run-up to this Hearing, an application by Payco for an order for production of the EJ's notes of evidence, but that was refused by Choudhury P.

33. Although the Claimant has been debarred and has therefore not participated in this appeal or Hearing, that does not mean that the appeal succeeds by default. I still have to consider it on its merits, and whether any grounds asserting that the ET erred in law are in fact made out. I have had the benefit of considering a written skeleton argument, and hearing oral argument today, from Mr Chaudhuri, who once again appears for Payco. Mr Chaudhuri has sensibly boiled down the 10 grounds set in the original notice of appeal to five grounds corresponding to the five themes that I identified in my paper sift Decision.

34. I turn now to those substantive grounds of appeal and it is convenient to consider first grounds one, two and three. I have considered all of the arguments advanced by Mr Chaudhuri in writing and orally. What follows is only a summary of what seemed to me to be the principal or most significant points he raised.

35. Ground one is the overarching ground at the heart of this appeal, being that the Tribunal erred in deciding not to determine the issues before it, but instead to join the other two Respondents before doing so. Mr Chaudhuri's principal argument is that there was no reason why the Tribunal could not determine the issues before it, on the evidence that was presented to it at the Hearing in October 2018. Additionally, it was indeed obliged to do so. In particular it could and should have determined the substantive issues, being: whether the Claimant had a contract with Payco; if so, whether he was Payco's employee, worker or

neither; whether Payco terminated the contract; and whether the alleged discriminator was its employee or agent or neither.

36. Secondly, he argued that the Tribunal failed properly to apply the overriding objective, in particular because it failed to consider the impact of its decision, declining to determine these issues. That was that Payco, and indeed the Claimant, were deprived of a determination of these issues, which the Tribunal had previously directed should be considered at the October Hearing, and indeed had been considered at that Hearing with the reserved Decision thereafter being awaited. It had also, he submitted, failed to consider whether its approach was proportionate to the complexity and importance of the issues.

37. Thirdly, Mr Chaudhuri said that the way that the Tribunal dealt with the matter was unfair to Payco, because there was no forewarning, whether at the Hearing itself or thereafter, prior to the Tribunal's Decision being promulgated, that the Tribunal was considering declining to determine the issues without joining the two other Respondents. Therefore, Payco had had no opportunity to make submissions about whether the Tribunal should or should not adopt that course.

38. Ground two argued that it was particularly wrong not to decide the issues until 247 Staff had been joined as a Respondent. That was said to be so, first, because the initial claim against 247 Staff had been rejected for lack of an ACAS EC certificate, and the Claimant had not applied for a reconsideration of that Decision. Mr Chaudhuri argued that this effectively circumvented the scheme of the ET's rules of procedure relating to starting a claim. He argued that the authorities relied on by the Judge, **Science Warehouse v Mills** [2016] ICR 252 and **Drake International v Blue Arrow** [2016] ICR 445, could both be distinguished.

At the least, he argued, the Tribunal should have regarded the unchallenged rejection of the original claim against this entity as a material circumstance.

39. Secondly, the Claimant had not, at either the July or October Hearings, indicated that he wanted to add or reintroduce 247 Staff as a Respondent, even though, at the July Hearing, the Judge had made it clear that the only live party other than him was Payco. He had also been encouraged to seek legal advice and, said Mr Chaudhuri, at the second Hearing indicated that he had sought advice. In all the circumstances the Tribunal was wrong, he submitted, to take this step of its own motion.

40. Ground three argued, similarly, that it was particularly wrong not to decide the issues before adding Day Aggregates as a Respondent. Mr Chaudhuri acknowledged that box 15 of the claim form had referred to it, and there had been no letter of rejection in relation to it. However, the Claimant had not identified it as a proposed third Respondent in the proper place in the claim form, nor had the Tribunal issued a letter *accepting* the claim against it. Whilst he acknowledged that the system should not be over-prescriptive, it was no fault of the Tribunal or Payco that the Claimant had not dealt with this matter in the right way. In any event, he said, if there had been, or was, a claim against Day Aggregates as a Respondent, it would have been bound to be rejected, because of the lack of an ACAS EC certificate. The Claimant should not, he said, have been put in any better position by virtue of not having properly instituted a claim against it with the benefit of such a certificate.

Discussion and Conclusions in Relation to Grounds One, Two and Three

41. The starting point, in my judgment, is that, at the July Case Management Preliminary Hearing, EJ Martin took a decision to list a public Preliminary Hearing to determine three

substantive preliminary issues as well as the strike-out and deposit-order questions. That was the Hearing that then indeed took place, and was completed, on 9 October 2018.

42. It is well established that, once made, case management decisions should not be revisited unless there has been a material change of circumstances or there is some other exceptional reason to do so. See **Hart v English Heritage** [2006] ICR 655. In **Goldman Sachs Services Limited v Montali** [2002] ICR 1251 a Judge directed a Preliminary Hearing on a limitation issue, but the Tribunal then constituted to hear that issue decided that the matter should be left to a Full Hearing. It was held by the EAT that it had erred in simply substituting its own view for that taken by the Judge who had taken the original decision.

43. It might, I suppose, be argued that this case is different from **Montali** on the basis that EJ Morton did not direct that all of the preliminary issues should, after all, be determined only as part of a full merits Hearing. She merely, it might be argued, declined to determine them without the other Respondents first being joined. However, the substantive effect of her decision was to substantially unravel what EJ Martin had ordered, and to set the proceedings on a new and different path. EJ Morton was, of course, entitled to reserve her decision, and there might have been some delay before it was promulgated; but the expected next event was the promulgation of her Decision arising from that Hearing, and determining the issues which had been considered at it (save perhaps to the extent that the determination of one or more issues might cause one or more others to fall by the wayside).

44. EJ Morton's decision instead not to determine the preliminary issues without first joining the two other Respondents was, in my judgment, in and of itself a material departure from what should have happened, and amounted in effect to a material revisiting of EJ

Martin's orders. Although EJ Morton no doubt envisaged that the three substantive issues would, at some point in due course, have to be determined at some further Hearing, her decision inevitably substantially altered the course of the litigation. This is reflected in the fact that EJ Morton herself directed that the next step should be a further Case Management Hearing to review the issues as between what she envisaged would then be four parties.

45. Accordingly, I conclude that EJ Morton should not have taken this step without first considering, at least, whether, and being properly satisfied that, there had been a material change of circumstances since EJ Martin made her decision and/or that there were other sufficiently exceptional reasons to depart from it. Whilst EJ Morton stated that she considered her decision to be in accordance with the interests of justice and the overriding objective, she did not, it appears to me, conduct that specific exercise.

46. It is abundantly clear that EJ Morton found aspects of the evidence presented to her contradictory, unsatisfactory and/or unclear. This apparently led her to her conclusion at paragraph 28 that she was not able to make, as she put it: "definitive findings about the relationship between the Claimant and the Respondent Payco".

47. In relation to the substantive issues as between the Claimant and Payco, which had been set down for the October PH, I do not think that the view that EJ Morton formed of the state of the evidence presented to her at that Hearing, could properly be viewed as justifying her decision. If, as appears in light of various passages in her Reasons, the Judge considered that there might be further and/or clearer evidence in the possession of 247 Staff and/or Day Aggregates relevant to those issues, nor was that sufficient justification for her Decision. Her task was, as best she could, to make findings of fact on the basis of the evidence that was

presented to her at the Hearing, bearing in mind where the burden of proof lay on any given issue and making findings, as necessary, on the balance of probabilities.

48. It appears to me that there was in fact some measure of agreement before her, for example, that the Claimant had had *some* interaction with Payco or its systems before starting work, that it was Payco that paid him, and that the alleged discriminator – identified by this time as Mr Harding – worked for Day Aggregates and did not have any role with Payco. The Judge's Reasons engaged with the evidence with a view to making further findings of fact in order to complete the picture, in particular in order to determine whether the Claimant was an employee or a worker of Payco or neither, up to a point. But then at a certain point, with respect, they abandoned the task. I can understand the Judge's hope that she might have had a firmer and clearer picture emerge from the evidence on some particular points of detail than she found to be the case; but that was not a sufficient reason to abandon the process of coming to her findings of fact and consequent decision.

49. I note also that at the July PH EJ Martin had made orders for disclosure of documents and exchange of witness statements prior to the October Hearing. If either party had considered, whether before or after that disclosure, that there were or might be documents in the possession of a third party that could be relevant to the issues to be determined at the next Hearing, they could have sought an order for third party disclosure under Rule 31. If either party had considered that there were grounds to seek a witness order under Rule 32 they could have done so. No such orders were sought prior to, or indeed at, the October PH.

A 50. Neither the fact that a third party may possess a relevant document nor the fact that it may be considered that an individual who works for a third party may have relevant evidence to give would, as such, alone justify the adding of that third party as a Respondent.

B 51. In paragraph 30 of her Reasons the Judge expressed the view that the Claimant had:

> **"30 … Made it clear in his claim form that he wished to bring a claim against 247 and Day Aggregates and I have concluded that the only way in which his claims can be fully considered and definitive findings of fact made it by joining both entities to these proceedings".**

C 52. She also went on, in paragraphs 31 and 33, to canvas possible bases on which certain of the claims might lie against either of those two companies. It appears that the Judge D therefore considered that the joining of them was necessary, not merely in order fairly to dispose of the issues as between the Claimant and the Respondent, but also the wider issues that she apprehended existed as between him and 247 Staff, or him and Day Aggregates. If so, she still, in my view, needed to consider whether this amounted to a material change in E circumstances since the hearing before EJ Martin, or other exceptional reasons for her not to determine the issues that had been considered and heard and argued at the 9 October Hearing.

F 53. Further and in any event, I agree with Mr Chaudhuri that it was wrong for the Judge to have taken this decision, without Payco, or indeed for that matter the Claimant, being in some way informed that she was considering doing so, and being allowed the opportunity to make G submissions about whether she should do so. The decision was a significant one involving a material change of direction, and one on which Payco certainly, plainly would have wished to make submissions. It was not fair that they did not have the opportunity to do so.

H 54. Pausing there, for those reasons I would allow this appeal on ground one alone.

55. Although the success of the appeal is not therefore dependent on them, grounds two and three do also provide *some* further support. The **Mills** and **Drake International** cases, and indeed **Mist v Derby Community NHS Trust** [2016] ICR 543 is also to similar effect, establish that, once a claim has been begun, a claimant is then no longer a prospective claimant, and it is not then an absolute or automatic pre-condition of a respondent being added, that a claimant have obtained an ACAS EC certificate in respect of them. The argument that this would undermine the ACAS early conciliation regime was fully considered and rejected in these authorities. The specific argument that it would lead to the absurdity that a claimant would be better off not naming a respondent in the claim form for which they did not have a certificate, and then applying to add them later, was addressed by the EAT in the **Drake** case at paragraph 30 (referring back to paragraph 8.4).

56. However, the discretion whether or not to add a party as a new respondent, exercising the powers that the Tribunal has under Rule 34 of the **2013 Rules of Procedure**, must of course be exercised judicially, including taking account of all relevant circumstances. In this case, that would have included the fact that there were no ACAS EC certificates in either case, as well as the fact that the claim against 247 Staff had been rejected, and there had been no application for reconsideration of that decision. There was also the fact that the Claimant had not, at the recent Hearings, specifically asked for either of these parties to be joined or treated as a respondent. Nor indeed had Payco. The Judge does not appear to me to have considered that full range of relevant circumstances before taking this decision of her own motion. To that extent I consider that grounds two and three provide further reasons for allowing this appeal.

Grounds Four and Five

57. Ground four argues that, even if the Judge was entitled to put off determining the preliminary issues, she should not, in this case, have made partial findings of fact. The way that Mr Chaudhuri put this was to argue that this would, in particular, be unfair to the two new Respondents, who would be bound by findings in relation to matters that could affect them, which had been made at a time when they had not had the chance to give evidence or otherwise be involved. As I have determined already that this appeal should be allowed on other grounds, this ground, strictly, falls away, although I certainly see the force of that submission. However, indeed because I am allowing this appeal, I do have to decide in any event where this leaves matters in relation to EJ Morton's decision, and what should happen next. I will return to this shortly.

58. Ground five argues that certain particular findings of fact made by EJ Morton were perverse. However, for reasons I will explain, I have concluded that none of the findings of fact made by her in this Decision can stand in any event. This ground also therefore falls away and therefore I do not need to engage with the detail of it.

Outcome

59. In the course of argument this morning Mr Chaudhuri confirmed and clarified his position as to the orders sought by him, were I to allow this appeal, and as to what should or should not happen next. His primary submission was that, having regard to the factual aspects that were not in dispute, the evidence that was presented, and the findings of fact that EJ Morton did make (presumably, I interpose, excluding those that he submitted were perverse), I could myself conclude that there was only one right answer to the main substantive questions that the Judge had to decide. I could therefore, he suggested, substitute my own

decision and I do not need to remit the matter to the Tribunal. In particular Mr Chaudhuri submitted that the only proper conclusion was that the Claimant was not an employee or a worker of Payco and he invited me to substitute a finding to that effect.

60. However, I decline to do so. That is, first, because the Tribunal did not complete the task of making all the findings of fact necessary to a determination of that issue. Secondly, I am not in a position to say that the Tribunal would be bound to have found that the Claimant either was, or was not, an employee, or worker of Payco. In particular, even if the Tribunal was, or should have been, satisfied that there was a contract of some sort between him and Payco, there were further issues as to what terms were or were not incorporated into that contract, and whether, if that included terms tending on their face to negative employee or worker status, those terms were, in the legal sense, a sham. The Judge made findings that could be said to be relevant to those questions, including findings which she herself regarded as having ramifications, for example, for the sham issue. However, she did not complete the fact-finding exercise, still less, of course, did she come to any conclusions.

61. Further, I have also come to the conclusion that the consequence of my allowing this appeal must be that such findings of fact as the Judge did make, and are contained within her Decision, cannot stand. The Judge should not have made partial findings, but should have reached a complete set of findings of fact on all matters necessary to determine the issues as a whole, in order to ensure that the overall findings had integrity and stood together and reflected the Judge's appreciation of the evidence as a whole. I have also come to the conclusion that in this case it would not be appropriate to remit the matter to the same Judge, given that she herself felt, first time around, that it was not possible for her to determine the

issues, and given that she did also, however, make some quite significant, or potentially significant, factual findings.

62. However, there is one issue in relation to which I am satisfied that only one right answer is possible, namely that of whether the person who allegedly discriminated against the Claimant was an agent or employee of Payco. The Claimant made only one allegation of race discrimination against the person initially described in his claim form as "My supervisor Eric" and later identified as "Eric Harding" who, it was common ground, was an employee or agent of Day Aggregates. The Claimant has never suggested that Mr Harding was an employee or agent of Payco, nor has he ever alleged discrimination by anyone else. While EJ Morton canvassed the possibility that, were the factual allegation about his conduct to be well-founded, Day Aggregates could potentially be liable under certain provisions of the **Equality Act 2010** for it, I cannot see any basis on which it was argued, or indeed could in fact and law be found, that *Payco* could be liable for his alleged conduct. I will therefore substitute a determination that Payco cannot be liable in respect of the claim of race discrimination.

63. For the reasons I have set out, however, the issues as to whether the Claimant was an employee or worker of Payco or neither, and as to whether Payco terminated the Claimant's engagement, will be remitted for fresh consideration at a Preliminary Hearing by a freshly constituted ET.

64. There are two remaining matters to address. Firstly, EJ Morton's Decision to join the two Respondents was predicated upon, and an integral part of, her decision not to decide the issues raised at the Preliminary Hearing before her. As such, a consequence of my allowing this appeal is that that decision also cannot stand.

65. I should say a little more about the consequences so that all concerned are clear. Matters are now to proceed in the ET as they would have, had EJ Morton not decided to join 247 Staff and Day Aggregates as Respondents. The re-run Preliminary Hearing on the foregoing issues affecting the Claimant and Payco will therefore be a Hearing involving the Claimant and Payco solely, as was previously directed. However, that would not, as such, preclude any party, should they so wish, from raising any issue as to the status of Day Aggregates in relation to these proceedings and/or by way of application for 247 Staff and/or Day Aggregates to be added as Respondents, *other than* in relation to the issues as between the Claimant and Payco that are to be determined at the re-run Preliminary Hearing involving just them. If any such matter is raised, or application made, in relation to 247 Staff and/or Day Aggregates, it will be a matter for the consideration of the ET.

66. Finally, I note that, included on the agenda for the hearing before EJ Morton were Payco's strikeout and deposit applications. I observe that it may merit reflection as to whether these add anything of substance, given the substantive issues which will be considered and determined, either way, at the re-run Preliminary Hearing as between Payco and the Claimant. However, if Payco wishes to maintain strike-out or deposit applications for consideration at the re-run Preliminary Hearing, the Tribunal may wish to consider directing it to clarify what, if any, other issues would fall to be considered, as part of consideration of such applications, separate from the substantive issues that will, in any event, need to be determined by the Tribunal, either way.