Appeal No. UKEAT/0110/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal on
26 and 27 February 2019
Judgment handed down on
8 March 2019

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

MR D AKHIGBE — APPELLANT

ST EDWARDS HOME LIMITED & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR D AKIHIGBE (The Appellant in Person)
For the Respondents	MR JAMES WILLIAMS (of Counsel) Instructed by: Goodman Derrick LLP 10 St Bride Street London EC4A 4AD

SUMMARY

JURISDICTIONAL POINTS – 2002 Act and pre-action requirements

The employment judge had erred in rejecting a second claim brought by the Claimant against the same two Respondents as an earlier claim (the first claim) brought by him. The first and second claims were claims "relating to" the same "matter" for the purposes of the early conciliation requirement in section 18A(1) of the **Employment Tribunals Act 1996**. The two claims could not be said to relate to different matters.

It is a question of fact and degree in each case, where successive claims are brought by the same Claimant against the same Respondent or Respondents, whether the second claim is a claim relating to the same "matter" as the first claim. The judge had not properly addressed that issue in the present case and his decision that a fresh early conciliation certificate was required before the second claim could be brought, was flawed.

He should not have rejected the second claim under Rule 12(1)(c) of the **Employment Tribunal Rules of Procedure 2013**. However, the error was immaterial since the judge was bound by Rule 12(1)(b) to reject the claim as an abuse of process. The second claim duplicated the first claim and sought to add to it a new race discrimination claim which could and should have been litigated, if at all, in the first claim. The judge's decision was upheld on that different ground.

THE HONOURABLE MR JUSTICE KERR

Introduction

1. This is the second of two appeals listed to be heard consecutively because they involve the same Claimant and (in the proceedings below) the two separate claims were brought against the same Respondents. I gave judgment in the first appeal (UKEAT/0005/18/JOJ) on 26 February 2019. I dismissed that appeal, which was concerned with whether a finding that a whistleblowing claim had no reasonable prospect of success and a decision to strike out that claim, could stand. I decided that the decision was lawful and that I could not interfere with it.

2. This second appeal is against a decision of Employment Judge Bedeau communicated by letter dated 28 December 2017 from the Watford Employment Tribunal, to reject the second of the two claims made by the Appellant (whom I shall call the Claimant, as he was below) against the Respondent to this appeal (also a Respondent below). The reason given for rejecting the second claim was that the "Claimant is using old ACAS number."

3. Simler J (P) considered that only the first of the grounds of appeal is arguable. That ground challenges reliance by the judge on Rule 12(1)(c) of the **Employment Tribunal Rules of Procedure**. The rejection letter did indeed cite Rule 12(1)(c) which, read with Rule 12(2), obliges a judge to reject a claim (or part of a claim) if the judge considers that it is made on a claim form that does not contain either an early conciliation number (an EC number) or confirmation that one of the "early conciliation exemptions" applies.

4. I shall refer to the two claims brought by the Claimant as the first claim and the second claim. It is agreed that the second claim cited the EC number already cited in the first claim. The inference from the decision set out in the rejection letter is that the judge considered that Rule 12(1)(c) applied because that number could not be re-used to support the second claim. The Claimant, representing himself with skill and courtesy, says the judge thereby erred because Rule 12(1)(c) "does not extend that far"; in other words, the judge was wrong to find that Rule 12(1)(c) applied; the Claimant was justified in relying on his pre-existing EC certificate and number.

5. The Respondent, through Mr Williams, defended the judge's decision. He submitted that the judge was right to find that the existing EC number could not be re-used; a fresh certificate and number were required and had not been obtained; therefore, the judge's decision that Rule 12(1)(c) applied, should stand. Alternatively, if the judge's decision was wrongly reasoned, Mr Williams invited me nonetheless to uphold it on the basis that the second claim fell to be rejected under Rule 12(1)(b) (read with Rule 12(2)) because it was "an abuse of the process …".

Facts

6. I will start by summarising the sequence of events as follows:

(1) The Claimant obtained an EC certificate and brought a whistleblowing claim on the back of it;

(2) the Claimant tried unsuccessfully to expand his claim by amendment, not adding any new causes of action but adding some new facts, more detail and some arguments;

(3) that claim was struck out on the ground that it had no reasonable prospect of succeeding at trial;

(4) a further similar but slightly expanded claim was then brought, relying on the same matters as pleaded in the rejected amendments, reiterating the whistleblowing claim;

(5) that claim added a new cause of action for race discrimination arising from the same factual matrix and from the new point that the employer was a dormant company; and

(6) for the second claim, the Claimant relied on the same EC certificate as he had relied upon when bringing the first claim.

7. In slightly more detail, the facts are as follows. The Claimant began working for the Respondent – or, possibly, for another company in the same group – on 22 September 2014. There is an unresolved issue (raised but not determined in the first of the two appeals) whether the judge correctly identified the Claimant's employer. I refer to the "Respondent" without prejudice to that issue and referring, unless the context otherwise requires, to whichever company employed the Claimant.

8. The Claimant's job was Apprentice Site Manager. He was subject to a probationary period of six months. To put it neutrally, the parties did not see eye to eye and on 13 February 2015, during the probationary period, his employment was terminated. The Claimant then entered into contentious correspondence with the Respondent, seeking disclosure of documents under the then **Data Protection Act 1998**. He was dissatisfied with the responses and obtained an EC certificate issued by ACAS on 7 December 2015.

9. Armed with that certificate, he presented the first claim on or about 6 January 2016. It was brought against St Edwards Home Limited (SEHL) and the Berkeley Group plc (BG). Those Respondents asserted that neither was the Claimant's former employer; rather, it was Berkeley Homes (Urban Renaissance) Limited (BHURL). All three companies are associated and were represented by the same solicitors.

10. In the first claim, the Claimant alleged that he had suffered numerous pre- and post-termination detriments and unfair dismissal on the ground of having made protected disclosures concerning safety on the site where he was working. For that claim to be in time, unless time were extended, the last in the series of post-termination detriments relied on (alleged persistent refusal to release personal data, on 9 October 2015) had to be a continuing state of affairs as well as a detriment in its own right.

11. Less than two months later, on 29 February 2016 he wrote to the tribunal, saying he had been preoccupied with family matters and a sudden trip to Nigeria. He said the effect of the amendments sought was "merely to add a new label to the facts already pleaded". The amendments consisted of 115 short numbered paragraphs which read in part (paragraphs 1-26) like a witness statement, giving a clear and concise chronological account of the alleged facts during the short period of his employment.

12. That was followed (at paragraphs 27-93) by a part that reads more like a pleading, giving particulars of the alleged detriments in more detail than in the grounds filed with the ET1 claim form. Then (paragraphs 94-107) there was a section headed "The Time Limit" which attempted to meet the Respondent's plea that the causes of action in the first claim were all out of time and included (at paragraph 101) a request for an extension of time on "just and equitable" grounds. The document then ended with a summary of the claims and the remedy sought, compensation and reinstatement or reengagement.

13. The Respondents resisted the application to amend and sought a ruling that the correct Respondent was BHURL. The Respondents also applied to strike out the claim on the ground that it had no reasonable prospect of success. These issues came before EJ Bedeau on 6 January

2017. He ruled that the correct Respondent was BHURL. It appears that the Claimant did not dispute that. The application to amend was refused; the judge said it was made late, added new material to the claim, could have been made earlier and the Respondent was prejudiced; the factual enquiry would be broader and some relevant employees had left the Respondent.

14. The judge also struck out the claim. Essentially, he reasoned that the last act relied on as a detriment did not have a reasonable prospect of succeeding and that without it succeeding the earlier events had occurred too early, such that the claim was inexorably out of time. He found that it was reasonably practicable for the claim to have been brought in time, the Claimant being an educated man who did his own legal research. He does not appear to have considered whether to extend time; I infer that he would not have been willing to do so.

15. The Claimant appealed against the striking out of his claim. Initially, the sift judge did not consider the appeal raised an arguable point of law; however, Simler J (P) was persuaded at a Rule 3(10) Hearing on 6 December 2017 that it was arguable the judge had erred in his treatment of aspects of the strike out application. On the same day, the Claimant presented the second claim. It was brought against the same two Respondents (leaving aside immaterial mis-spellings). It cited the same EC number as that cited in the first claim.

16. In the second claim, the Claimant reiterated the claim for automatic unfair dismissal by reason of having made protected disclosures and for having suffered pre- and post-termination detriments, as in the first claim. He added a new claim for "Automatic Unfair Dismissal due to my Race"; which must be taken to mean a claim for direct race discrimination founded on dismissal. He said that "[n]ew evidence" had "now emerged"; and asserted for the first time that

the Respondents "made me sign up to a bogus company, this I believe is due to my race … They look at the colour of my skin and got me to sign to a dormant company".

17. The Claimant explained to me at the hearing of the present appeal that, as a result of his researches following the Respondents in the first claim asking for BHURL to be substituted as the correct Respondent, he discovered that BHURL was dormant and not trading. He formed the view based on things he had been told while employed but had not believed at the time, that use of BHURL as a dormant employing company was racism. While employed, he had dismissed suggestions that there was racism within the Respondent. He now believed that those suggestions were true after all, which is why he added a race discrimination claim in the second claim.

18. The grounds of the claim repeated the "whistleblowing" elements of the first claim. The grounds concluded: "[a]ttached is more information". That additional information was a document containing 121 short paragraphs which encompassed the same material as the rejected amendments to the first claim (apart from the section on time limits) and added a few extra paragraphs complaining that the Respondents had misled the judge in a number of ways, including putting forward a dormant company as the correct employer.

19. As for the re-use of the pre-existing EC certificate number, the Claimant explained to me at the hearing that he did not consider himself to be a "prospective Claimant" (the phrase used in the legislation) in relation to the second claim before presenting it, because he had already litigated the first claim and it was still alive, being subject to pending appellate proceedings in the Appeal Tribunal.

20. That, then, was the procedural history leading up to the letter of rejection sent to the Claimant on 28 December 2017, recording Judge Bedeau's decision that the second claim must be rejected because the Claimant was "using old ACAS number". The Claimant then sought reconsideration of that decision. The same judge dealt with the application for reconsideration on the papers. In a short written decision dated 6 March 2018, he stated that the Claimant had "presented a new claim against a different Respondent using an old ACAS number". The judge went on to comment that to do so was "not in accordance with the rules" and that "[a]ccordingly, this claim is rejected under Rule 10 (2) (C) (i).

21. It is common ground that the judge was wrong to say the second claim was brought against a different Respondent; it is agreed that it was brought against SEHL and BG, the same two Respondents as in the first claim until a different Respondent, BHURL, was substituted. It is also agreed that there is no Rule 10(2)(c)(i) in the **ET Rules of Procedure** and that the judge must have intended to refer to Rule 10(1)(c)(i) which, materially for present purposes, requires the Tribunal to reject a claim if "it does not contain … an early conciliation number".

Law

22. Before instituting "relevant proceedings relating to any matter, the prospective Claimant must provide prescribed information to ACAS about that matter (section 18A(1) of the **Employment Tribunals Act 1996** ("ETA"). Section 18A is part of the group of provisions added by the **Enterprise and Regulatory Reform Act 2013**, providing for compulsory pre-action provision of information to ACAS. The familiar causes of action regularly litigated in Employment Tribunals - unfair dismissal, discrimination claims and protected disclosure claims among others – are all "relevant proceedings" (section 18(1) of the **ETA**).

23. Relevant proceedings may be brought without complying with the obligation under section 18A(1) to provide prescribed information to ACAS in cases prescribed by the Secretary of State. Prescribed cases where that exemption applies may in particular include cases where more than one person brings relevant proceedings relating to the same matter; or where ACAS is contacted by the other party to relevant proceedings (**ETA** section 18A(7)). Where an enactment provides for conciliation, Tribunal procedural rules must include a requirement that a copy of "the application by which the proceedings are instituted" is sent to ACAS.

24. In the corresponding Regulations, the **Employment Tribunals** (**Early Conciliation**: **Exemptions and Rules of Procedure**) **Regulations 2014** ("the 2014 Regulations"), a "prospective Claimant" is a person who is considering presenting a claim in relation to "relevant proceedings" (Regulation 2). Regulation 3(1)(a) enacts an exemption where a person has complied with a requirement for early conciliation in relation to the same dispute and another person wishes to bring proceedings "on the same claim form".

25. Regulation 4 empowers the Secretary of State to prescribe the use of forms to be used by all prospective Claimants for the purposes of complying with the early conciliation requirement. Regulation 8 sets out the information an EC certificate must contain: principally, the prospective Claimant's name and address, that of the prospective Respondent; the date of receipt of the form (or a telephone call); the unique reference number of the EC certificate; and the date it was issued.

26. The published "Early Conciliation Notification Form", available online, does not have space for more than one prospective Respondent and the notes at the end of the form say that if you want to claim against more than one Respondent "you must complete a separate form for

each one even if it is all part of the same matter" and that forms "that contain more than one Respondent will be rejected, causing a delay in your notification".

27. The **Employment Tribunal Rules of Procedure 2013** ("the ET Rules of Procedure") include provisions about when a claim should be rejected. One such is Rule 10, requiring rejection if insufficient information is provided on the claim form, including the absence of an early conciliation number (Rule 10(1)(c)(i)). A claim is also rejected if the appropriate fee is not paid, unless fee remission is applied for (Rule 11); or where there are "substantive defects" (Rule 12).

28. That Rule requires Tribunal staff to refer a claim to an employment judge if they consider the claim (or part of it) may be one the Tribunal has no jurisdiction to consider (Rule 12(1)(a)); or if it is in a form which cannot sensibly be responded to or is otherwise an abuse of the process (Rule 12(1)(b)); or institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the exemptions applies (Rule 12(1)(c)).

29. In such cases, Rule 12(2) compels the judge to reject the claim. In other cases, where the name of the person claiming or claimed against differs from the named prospective Claimant or Respondent on the EC certificate, the judge must reject the claim unless he or she consider there is only a "minor error" and that it would not be just to reject the claim (Rule 12(1)(e) and (f) and Rule 12(2A)).

30. Inevitably, satellite litigation has resulted from the provisions. They are supposed to help promote the settlement of differences. I do not know if they have succeeded in that aim to an

extent that makes the satellite litigation a price worth paying. The provisions have been considered in several appellate decisions of this Appeal Tribunal, some of which were cited to me in the course of argument, and to which I will return.

Submissions of the Parties

31. The Claimant submits that the employment judge went beyond what Rule 12(1)(c) of the **ET Rules of Procedure** permits and provides for; that the second claim was valid and that it should have been accepted, not rejected. He relied on the width of the word "matter" as distinct from "cause of action" or "claim" in section 18A of the ETA, noted by HHJ Eady QC in **Science Warehouse Ltd v. Mills** [2016] ICR 252 and by two former Presidents of the Appeal Tribunal, Langstaff J in **Drake International Systems Ltd v. Blue Arrow Ltd** [2016] ICR 445 and Simler J in **Compass Group UK & Ireland Ltd v. Morgan** [2017] ICR 73, at [18]-[23].

32. He submitted that it is not the law that there must be one certificate per claim. Thus, in multi-Claimant situations, a single EC certificate may be used more than once by different Claimants in the same matter. Or, in a single Claimant case, a claim can be amended to update it without a fresh EC certificate being required: **Science Warehouse Ltd v. Mills** per HHJ Eady QC at [28]-[29]. This does not undermine the legislative policy of requiring what Mr Williams called a structured opportunity for conciliation.

33. Mr Akhigbe reminded me that HHJ Eady QC had pointed out at [29] that the application to amend might be refused if the "matter" were entirely new and that the Claimant could then become a "prospective Claimant" in the new "matter", requiring him to obtain a fresh EC certificate. Simler J in **Compass Group** at [23] that an EC certificate is not "a free pass to bring

proceedings about any unrelated matter"; it is always "a question of fact and degree" in each case whether the new claim is one "relating to" the same "matter" as the old one.

34. Mr Akhigbe submitted forcefully that in the present case, there was no new "matter"; the second claim travelled the same ground as the first. He gave as an example of what would, arguably, be a new "matter" a distinct claim for unpaid wages earned during the course of his employment. Here, by contrast, the subject matter of the second claim is essentially the same as that of the first claim. The second therefore relates to the same matter as the first and section 18A(1) was complied with by obtaining the EC certificate before bringing the first claim.

35. Mr Akhigbe explained that when his application to amend the first claim was refused, he decided not to appeal against that decision. It was only when new information came to light in November 2018 that he decided to bring the second claim. That new information was that research into the Respondents' corporate structure had revealed to him that BHURL was dormant and not trading; a fact that induced him to bring the second claim and add to it a race discrimination claim founded on that newly discovered fact.

36. He further explained that in December 2017, when he brought the second claim, he did not regard himself as a "prospective Claimant" in relation to that claim because at the time his appeal against the striking out of the first claim was pending in this Appeal Tribunal. He reminded me that the Appeal Tribunal had interpreted the provisions sensibly in order to avoid promoting satellite litigation and injustice; and that the obtaining of unnecessary EC certificates where that is an "empty formality" (in Langstaff J's phrase in **Drake International** at [25]).

37. The Respondent submitted, through Mr Williams, that the judge's decision was correct either because he was right to decide that a fresh EC certificate was required or because, if he was wrong about that, the second claim is a flagrant abuse of process and his decision should be upheld under Rule 12(1)(b) of the **ET Rules of Procedure**.

38. There is a Respondent's notice, which is not a cross-appeal, seeking to uphold the judge's decision on that different ground. I would only accept the invitation to uphold the decision on different grounds from those of the judge if I were confident that the second claim is, manifestly, an abuse of the Tribunal process and that no reasonable tribunal would, for that reason, allow it to proceed.

39. In defence of the judge's reasoning and decision, Mr Williams makes three points. First, he submitted that the statutory framework and language of the provisions of the **ETA**, the **2014 Regulations** and the prescribed form, support the proposition that this was not the same "matter" as the subject matter of the first claim.

40. He offered as a general proposition "one claim, one certificate", i.e. that the provisions normally require one certificate per claim. He said that exceptions to that proposition were statutory and none of the exceptions applied here. He also relied on the breadth of the definition of "relevant proceedings" in section 18(1) of the **ETA** and on the point that the prescribed form allows for only one employer and (despite the **Drake International** case) requires a separate form to be completed for each prospective Respondent.

41. Secondly, Mr Williams reminded me that the provisions are not onerous; nothing need be said to ACAS about the nature of the dispute. Their purpose is to build into the conflict resolution

process a requirement for a Claimant to have a structured opportunity for conciliation. That purpose should not be regarded as fulfilled in a case where a second claim against the same Respondent is brought, perhaps years after the first claim, unless there is at that stage a second structured opportunity for conciliation.

42. Thirdly, he submitted that the major cases on the provisions at appellate level – i.e. those already mentioned above – did not address the factual position in this case, where successive claims are brought after a refusal of permission to amend the first claim; and that some of the observations were *obiter*, in particular HHJ Eady's broad notion of a "matter" in the **Science Warehouse Ltd** case.

43. I asked Mr Williams if he could think of an example of a hypothetical case in which two successive claims between the same parties would, exceptionally, not require a fresh EC certificate. He did not come up with one, but offered the following proposition: once you have issued your ET1 (after obtaining an EC certificate), you can include all sorts of allegations, assertions and claims in it, with great flexibility; but once that claim is presented, you become an existing Claimant.

44. Thereafter, he said, you have two options: either apply to amend the existing claim or become a "prospective Claimant" in a fresh claim, requiring a fresh EC certificate. This is the reasoning supporting his proposition "one claim, one certificate". He accepted on the "never say never" principle that there might be wholly exceptional cases in which a second EC certificate would not be needed but submitted they would be rare and that this was not one of them.

45. Mr Williams submitted that here the Claimant became a "prospective Claimant" in relation to the second claim. Were it not so, he argued, the Claimant would have succeeded in outflanking the refusal of his application to amend by the simple expedient of bringing a fresh claim for which, at least, he should have a fresh EC certificate and therefore a fresh opportunity for conciliation. He also said it would be anomalous if, in such a situation, a Claimant who tries to obtain a fresh EC certificate but makes an error, e.g. mis-identifying the Respondent, should be worse off than one who does not bother to obtain a fresh EC certificate at all.

46. As his alternative argument, Mr Williams argued that the second claim was plainly an abuse of the process and that I should dismiss the appeal because that inexorable conclusion meant that the second claim must be rejected under Rule 12(1)(b) of the **ET Rules of Procedure**, if not under Rule 12(1)(c). The particulars supporting the second claim were an attempt to get round the refusal of permission to amend the first claim; they duplicated the rejected draft amendments and added only the new race discrimination claim and the allegation that BHURL was a bogus company.

Reasoning and Conclusions

47. I have considered, first, the language of the provisions. There is no express provision stating that a single "matter" within the meaning of section 18A(1) is necessarily limited to a single claim. It is clear from the authorities that a single matter may comprise a variety of assertions, allegations and causes of action. Mr Williams is right to accept this. It is also clear that a fresh EC certificate is not required merely because events relied on as part of claim postdate the EC certificate: Simler J (P) in **Compass Group** at [21].

48. The approach of Simler J in that case was that a "matter" is an ordinary English word and there is no reason why it should be given an artificially restricted meaning. I agree and do not regard the specific exemptions that may be prescribed as provided for by section 18A(7) of the ETA as altering that conclusion. The important exemption is where an EC certificate is obtained in a multi-Claimant case by "another person instituting relevant proceedings relating to the same matter". I do not think the existence of that exemption helps to identify the boundary between single "matter" cases involving the same parties and cases where there are two different matters.

49. A number of commonplace examples may help to illustrate the point. Claimants quite often bring a discrimination claim followed a little later by a victimisation claim; the latter claim founded on the protected act of bringing proceedings in the former claim. Does the victimisation claim relate to the same matter as the original discrimination claim? It is a question of fact and degree but the probable answer is yes; the "matter" is the dispute arising out of the employment relationship and the alleged discrimination and subsequent alleged victimisation.

50. The same reasoning is likely to apply where, for example, a disability discrimination claim is brought relying on alleged detriments during employment; and then a few months later a further disability discrimination claim is brought relying on dismissal for reasons connected with the disability. In both examples, it should not in principle make any difference whether the second claim is made by amending the ET 1 presented in the first claim or by presenting a second claim in a separate ET 1.

51. Cases that fall the other side of the line would be those where the connection between the first and second claims is merely that the parties happen to be the same: such as, in Mr Akhigbe's example, a whistleblowing claim followed up with a claim for unpaid wages where the

withholding of wages is put forward as a separate issue and not a connected issue such as a further detriment suffered as a result of the whistleblowing. In such a case, there is merit in a further conciliation opportunity that may help settle the unpaid wages claim.

52. Considering examples such as those just mentioned, I am not enamoured of Mr Williams' "one claim, one certificate" proposition, to be applied other than in wholly exceptional cases. It is too rigid to fit with the breadth and flexibility of the words "relating to any matter" in section 18A(1). Proceedings may relate to the same matter whether brought as one claim or two or three.

53. In my judgment, the true principle is that identified by Simler J (P) in **Compass Group** at [23]:

> **"… it will be a question of fact and degree in every case where there is a challenge … to be determined by the good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided the requisite information to Acas…."**

54. In the present case, I am unable to conclude that the judge applied that proposition to the facts before him. In his initial decision, he merely stated that the Claimant was using an old ACAS number. That does not tell us what his reasoning was. In the Reconsideration Decision, he made two errors that are not of much importance: citing the wrong Rule and stating that the second claim was brought against "a different Respondent".

55. Of much greater importance is that there is nothing to indicate that the judge asked himself about the relationship between the subject matter of the first claim and that of the second claim. If he had done so, he would have appreciated that it was obvious both were claims "relating to" the same "matter" within section 18A(1) of the ETA. The second claim reiterated and amplified

A the first claim and then added to it a race discrimination claim grounded in contentious events that allegedly occurred during and after the short period of the Claimant's employment.

B 56. I do not think it could sensibly be said that the second claim introduced a new and different "matter" because of the introduction of the new race discrimination claim. That claim was grounded in the same disputed factual matrix as the first. It was not based on different and subsequent unconnected events involving the same parties.

C

57. I conclude that the judge misdirected himself by requiring a fresh EC certificate. I would therefore set aside the decision unless the error cannot have affected the outcome and the decision D is therefore not unlawful despite the error. Mr Williams submits that is the position here because the second claim is manifestly an abuse of process and the judge was therefore bound to reject the second claim as such, applying Rule 12(1)(b) of the **ET Rules of Procedure**.

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58. In support of that contention, Mr Williams relies on the very thing that fatally undermines his defence of the judge's reasoning in requiring a fresh EC certificate: the similarity between the subject matter of the first and second claims. In my judgment, Mr Williams is correct to submit F that the second claim is obviously an abuse of the process of the Tribunal, such that any reasonable Tribunal would reject the second claim applying Rule 12(1)(b).

G 59. First, the second claim duplicates the first claim which, at the time the second claim was brought, had been struck out subject to the outcome of the then pending appeal. It was a clear attempt to resurrect the first claim and undo the decision to strike it out. The fact that a new race discrimination claim was added to the second claim does not alter that proposition. The H

suggestion that BURHL was a bogus or dormant company was something the Claimant could have discovered earlier, if there were any truth in it.

60. As the judge commented, the Claimant is an educated man. He is also articulate and intelligent. The second claim sought to relitigate the struck out first claim and to litigate a new race discrimination claim which could and should have been litigated, if at all, in the first claim. I conclude without difficulty that the second claim is a manifest abuse of process.

61. The judge was therefore right in law to reject it, though he did so for the wrong reasons. The error cannot have affected the outcome. I therefore uphold the judge's decision to reject the claim on that different ground. The appeal is accordingly dismissed.