EMPLOYMENT TRIBUNALS

Claimants: Mrs A Ahmed & others

Respondents: (1) Sainsbury's Supermarkets Limited
(2) Lloyds Pharmacy Limited

PRELIMINARY HEARING

Heard at: Birmingham (in public) **On:** 8 & 9 April 2019

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimants: Mr D Short QC
For the respondents: Mr D Martin QC

RESERVED JUDGMENT

(1) The only relevant claims that were presented in accordance with rule 9 of the 2013 Rules of Procedure and are 'regular' are those in relation to which the respondents concede this was the case, being the claims made in the claim forms with the following 'lead' claimants: Bradley, Husselby, S Allison, Mason, Bragan, V Allison, Brumpton, Crabtree, Cooper, Brooker, Desouza, Atkinson, Collingwood, Jack.

(2) All irregularities caused by the non-compliance with rule 9 are waived.

REASONS

Introduction & background

1. These equal pay proceedings began in April 2015 with four claimants. Mainly because of appeals to the EAT and Court of Appeal, they have got almost nowhere in the intervening four years. There are now over 2,000 claims, with thousands more potentially related claims in the pipeline.

2. The claimants are typically women or contingent male claimants who work or worked in various roles within Sainsbury's supermarkets who compare themselves to men who work in distribution centres. The second respondent is involved as a TUPE transferee.

3. This preliminary hearing is concerned with issues connected with rules 6 and 9 of the 2013 Rules of Procedure.

4. Rule 9 is:

> *Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6.*

5. Rule 6 is:

> *A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following–*
>
> *(a) waiving or varying the requirement;*
>
> *(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;*
>
> *(c) barring or restricting a party's participation in the proceedings;*
>
> *(d) awarding costs in accordance with rules 74 to 84.*

6. From the outset, the respondents[1] have argued that: claims have been presented in breach of rule 9 in that they were not "*based on the same set of facts*" and so are irregular; the affected claims should be struck out, under rule 6. The respondents now contend that, as well as or instead of claims being struck out, costs orders should be made.

7. For convenience sake, I shall, as other Judges and the parties have done, discuss the issues connected with rule 6 as if the power to strike out claims for breach of rule 9 comes from rule 6. However, as I shall explain later in these Reasons, this is not technically correct.

8. Following a preliminary hearing in April 2016, Employment Judge Pirani (as he then was) decided that the claims before him were not presented in breach of rule 9. He did not go on to decide whether or not, if he was wrong about that, it would be appropriate to strike out the claims. In June 2017, his decision was overturned by Lewis J in the EAT (reported as Farmah & Others v Birmingham City Council [2018] ICR 921).

9. At the same time as considering Judge Pirani's decision, the EAT dealt with other first instance decisions in similar cases, including a decision of Employment Judge Woffenden (Farmah) and two of Regional Employment Judge Robertson (Brierley & Others v Asda Stores Limited and Fenton & Others v Asda Stores Limited). In Brierley, REJ Robertson's decision was to the effect that the claims were presented in breach of rule 9 and were irregular, but that the irregularity should be waived. In Farmah, EJ Woffenden decided

[1] Until relatively recently, the first respondent ("Sainsbury's") was the only respondent, but for the most part there is no need for me to differentiate between the respondents for the purposes of this decision. I shall, in the main, simply refer to them as the "respondents", meaning the "first and/or the second respondent".

some of the claims were irregular and some were not; and that some of the irregular claims should be struck out but that others should not be.

10. In the EAT, Lewis J decided REJ Robertson's approach to whether claims were presented in breach of rule 9 was the correct one, and that both Judge Pirani and (albeit to a limited extent) EJ Woffenden had erred in this respect. He also decided that the Judges' approaches to rule 6 in both Brierley and in Farmah had been wrong.

11. The EAT's decision was appealed. Shortly after the EAT's decision was handed down, the Supreme Court, in R (Unison) v Lord Chancellor [2017] UKSC 51, held the fees regime to be unlawful. This was potentially very significant for the appeal. One of the employers' main arguments in favour of striking out was that the breaches of rule 9 resulted in an underpayment of fees, and that this fact made the breaches particularly serious.[2] Fees loomed large over the ETs' and EAT's decisions.

12. In January this year, the Court of Appeal (Brierley & Ors v ASDA Stores Ltd [2019] EWCA Civ 8), broadly, endorsed REJ Robertson's approach both as to rule 9 and as to rule 6 / strike-out. 121 claims in these proceedings were remitted for the rule 6 issues and any remaining rule 9 issues to be decided. Ordinarily, the matter would have been dealt with on remittal by the Judge who had previously dealt with it – Judge Pirani. However, in light of Judge Pirani moving from being an Employment Judge in the Midlands (West) region to being Regional Employment Judge of the South West region, it was decided, on grounds of practicability, that these proceedings were best dealt with by a salaried Employment Judge based in Birmingham, which is how they came to be before me [Employment Judge Camp].

13. By the time the matter came before the Court of Appeal, Farmah had been compromised. One of the difficulties I have had is that a number of things that could be relevant to what I have to decide were dealt with by the EAT in connection with the Farmah proceedings and were not, at least not in terms, dealt with by the Court of Appeal. The respondents rely heavily on the EAT's decision. There is disagreement between the parties as to the extent to which that decision is binding on me and can be relied on, in light of the fact that it came before Unison and has, in part, been overturned by the Court of Appeal.

14. Fenton is largely irrelevant on any view. The claimants submit it is completely irrelevant. The claimants in Fenton were specially selected so as to provide a test case to challenge REJ Robertson's interpretation of rule 9 in Brierley. (As I understand it, their claim form was presented at a time when it was unclear whether there would be a full appeal hearing in Brierley). All along, the only basis upon which the Fenton claimants resisted the striking out of their claims was their argument that REJ Robertson was wrong about rule 9. The EAT and Court of Appeal duly upheld the striking out of their claims by REJ Robertson.

[2] In Brierley, it was even argued that there was no discretion to waive an irregularity where that would result in the avoidance of fees.

15. In relation to the 22 claim forms and 121 claimants' claims that are before me:

    15.1 the Court of Appeal decided 4 claimants' claims (on 1 claim form) were presented in breach of rule 9 and are irregular;

    15.2 the claimants accept that the claims on 7 further claim forms, from (by my count) 28 claimants in total, are irregular;

    15.3 the respondents concede that no rule 9 point arises in relation to 14 claim forms, comprising 38 claimants' claims;

    15.4 103 claimants have issued further claims to which no rule 9 points arise, in case their original claims are struck out. As I understand it, most or all of those who have not issued further claims did not do so because they accepted any further claim would face insurmountable time limits difficulties;

    15.5 each group of claimants will be referred to by the lead claimant on their respective claim forms, e.g. Ahmed means the 4 claimants' claims contained in a single claim form that was presented on 24 April 2015 (these are the claims the Court of Appeal decided were irregular).

Summary

16. My decision in a nutshell is:

    16.1 all of the disputed claim forms have been presented in breach of rule 9 and all the claims on those claim forms are irregular;

    16.2 it would be contrary to the overriding objective to do anything other than waive the irregularities and it would be wrong to make a costs order.

17. Perhaps I am guilty of adopting too simplistic an approach, and of making molehills out of mountains, but in light of the abolition of fees and the Court of Appeal's decision, I see this matter, overall, as straightforward and clear cut. It occurred to me during the hearing that if a comparable situation had arisen in any other type of case, the ET would in all likelihood have dealt with it almost summarily. Many genuinely interesting (and, in a different case, potentially significant) points have arisen during this hearing. It has been a pleasure to have Mr Short QC and Mr Martin QC appear before me and I am grateful to them both. However, the fundamentals are: whatever the defaults of the claimants and/or their solicitors (and I do not think they are so very great), they were not deliberate; a fair trial remains possible; and the balance of prejudice comes down firmly in the claimants' favour.

Issues

18. As just explained, the two 'headline' issues are, broadly: to the extent this is in dispute, has there been compliance with rule 9; where there hasn't, what should the consequences be? A number of subsidiary issues have been argued before me. No list of those subsidiary issues has been provided and so I have made my own.

19. The legal issues that have been raised in relation to rule 9 are:

    19.1 is the burden on claimants who choose to use the same claim form to show that their claims are "*based on the same set of facts*", or is it for a respondent that asserts there is an irregularity in this respect to show that they are not? Within this issue:

        19.1.1 are the parts of the EAT's decision suggesting the burden is on the claimants binding on me?

        19.1.2 am I assisted in relation to this issue by something said by Longmore LJ to leading counsel for Sainsbury's during the course of argument on day 2 of the hearing in the Court of Appeal in response to a submission that "*it is for the claimants to demonstrate that they satisfy the requirements of rule 9*", namely that he was, "*not quite sure about that. You apply. It's your application to strike out …. I would have thought that if you are making an application, it's for you to show*"?

    19.2 in deciding whether claims are "*based on the same set of facts*", to what extent should the tribunal look beyond the facts as alleged by the claimants in the claim form? Does paragraph 27 of the Court of Appeal's decision, and the reference to what is "*asserted by the claimants*" help answer that question?

    19.3 where a claim form breaches rule 9, are the claims of all of the claimants on it irregular, or just those of the claimants whose presence as claimants on that claim form could be said to have caused the irregularity? Connected with this: is the statement of Bean LJ in paragraph 28 of the Court of Appeal's decision, "*I do not accept the argument that the whole claim form is vitiated as a result*", an answer to that question; and if it is, was it part of the *ratio* or was it *obiter*? Similarly, am I bound by the part of the EAT's decision to the effect that in this situation the claims of all the claimants are irregular?

    19.4 in an equal pay claim, is there a breach of rule 9 where – all the claimants using the same claim form were doing the same job when the claim form was presented (or, in the case of claimants whose employment has ended, were doing that same job when it ended), but one of them is also complaining about a period of work in a materially different job? To put this another way: does the requirement that claimants must do the same or very similar work in order to be able to use the same claim form apply only to the work they were doing when the claim form was presented (or, in the case of a claimant whose employment has ended, had been doing when it ended), or does it apply to work they are making their claims about? I shall refer to this as the "previous jobs issue".

20. The factual issues arising in relation to rule 9 are:

    20.1 was the work done by claimants in the following jobs sufficiently similar for their claims to be "*based on the same set of facts*":

        20.1.1 Customer Service Assistants ("CSAs") and General Assistants ("GAs");

        20.1.2 local CSAs and GAs;

20.1.3 CSAs and local CSAs;

20.1.4 GAs and Warehouse Assistants;

20.1.5 Team Leaders of different teams (Bakery, Pharmacy, Admin, Online, CSAs & GAs)?

20.2 an issue specific to Michelle Oliver (claim number 1802759/2015), which affects only her and the other claimants on her claim form (the Carr claim form, presented on 10 November 2015, which has in total 8 claimants on it). The respondents designate her a 'Sainsbury's To You Shopper'. That role – which I shall refer to as "online shopper" – consists of going around the store collecting together items that have been ordered by customers online. The claimants accept that the work of someone who was purely an online shopper would be materially different from the work done by the other Carr claimants, who were GAs.[3] Their case is that as a matter of fact, although she did spend some of her time carrying out the work of an online shopper, she did other work too, and that "General Assistant" best describes the work she undertook. The factual issue that arises is therefore: was the work done by Ms Oliver sufficiently similar to that of the other claimants in Carr for their claims to be "*based on the same set of facts*"?

21. The following legal issues have been raised in connection with rule 6:

21.1 in relation to whether irregularities should be waived or claims struck out, is there a relevant burden of proof, e.g. is it for the claimants to persuade the tribunal that there should be a waiver or is it for the respondents to persuade the tribunal that claims should be struck out? And am I assisted in relation to this issue by the comments of Longmore LJ mentioned above?

21.2 do the changes that were made in 2013 to the wording of the equivalent to rule 9 in the 2004 Rules reflect a policy decision to tighten up the rules relating to the presentation of claims, meaning that a breach of rule 9 creates a particularly serious example of an irregularity under rule 6?

21.3 further to the previous issue, does a breach of rule 9 create a particularly serious example of an irregularity under rule 6 in any event?

21.4 in deciding whether to strike out or instead to waive the irregularity, is the approach to be adopted a version of that advocated in Blockbuster Entertainment v James [2006] IRLR 630, or is the important thing (or, at least, a very important thing) whether the claimants, through their solicitors, took "*sufficient care to ensure that*" they "*were including claims in a claim form which were based on the same set of facts*" (paragraph 102 of the EAT's decision) and whether there is a "*justifiable explanation*" (paragraph 104 of the EAT's decision) for what has occurred? Connected with this: to what extent, if at all, are the parts of the EAT's decision on this issue binding on me?

21.5 when choosing between waiving the irregularity and striking out claims, can an Employment Judge (as EJ Woffenden did in Farmah) legitimately

[3] If I am wrong about this, it is what I would have decided anyway.

distinguish between different claims brought in the same claim form on the basis that some belonged in that claim form whereas others did not, or would it be "*unprincipled*" (paragraph 113 of the EAT's decision), in the absence of "*identified … relevant legal differences*" (ditto), for there to be a different exercise of discretion in relation to claims brought in the same claim form? And (as with the previous issue) are the relevant parts of the EAT's decision binding on me?

22. There is a costs issue that was not raised or discussed during the hearing but which occurred to me when deliberating. The parties' submissions on costs seem to ignore the words "*in accordance with rules 74 to 84*" in rule 6(d), as if the rule had nothing after the words "*awarding costs*". The issue that arises is whether rule 6(d) in and of itself gives a discretion to award costs, or whether, instead, the tribunal must be satisfied that one of the conditions for awarding costs in rules 76 or 80 is met.

23. The following factual issues may need to be decided:

    23.1 to the extent this is in dispute, why did the breaches of rule 9 occur?

    23.2 did the claimants, through their solicitors, take "*sufficient care to ensure that*" they "*were including claims in a claim form which were based on the same set of facts*", and was there a "*justifiable explanation*" for what has occurred?

    23.3 what prejudice, if any, would the parties suffer if I waived irregularities or, alternatively, struck out claims?

    23.4 possibly, some factual issues relevant to costs.

24. In relation to factual matters, I note that the respondents did not pursue the suggestion that the reason the claimants had been inappropriately included together in claim forms was to avoid fees.

Relevant facts

25. By way of background, I refer to the "*Agreed facts document*" prepared for the preliminary hearing before Judge Pirani in April 2016 (which is a little out of date now) and to the very useful table provided by the respondents' legal team in February 2019 to accompany the respondents' position paper.

26. The respondents and the claimants called, respectively, two witnesses and one witness. For the claimants, I heard from Mr Chris Benson, a partner in Leigh Day solicitors, who are and have throughout been acting for the claimants. For the respondents we had Mr Steven Lutchmiah, who is the Retail Risk Manager for Sainsbury's, a senior management position, and Mr Michael Hawker, a Regional Operations Manager, responsible for 31 stores.

27. Although all three witnesses were cross-examined, none of their relevant evidence of fact was substantially disputed to any great extent. However, the point was made in relation to each of them – and legitimately so – that they lacked any detailed personal knowledge of the claimants and their cases.

28. Almost all of Mr Benson's evidence, to the extent it was relevant at all, was relevant only to the rule 6 issue. From his own knowledge, what he could tell

me about was how, in principle, his firm, and his subordinates within it, set about deciding which claimants should be included on which claim forms – a process referred to as 'batching'. That evidence is set out in the following paragraphs of his witness statement, to which I refer: 27, 28, and 32 to 41. Essentially, claimants were included in the same claim form – were, using the claimants' solicitors' terminology, batched together – if they had the same or a very similar job title and/or did the same or very similar work, taking into account all of the following: their sex; what the claimant gave as their current or last job title; any information provided by the claimant about the work they did; any relevant information provided by the respondents, particularly about job titles.

29. There was no real challenge to Mr Benson's evidence to the effect that a genuine attempt was made, in relation to all claims presented after REJ Robertson's decision in Brierley (23 July 2015), to ensure that the claim forms complied with REJ Robertson's interpretation of rule 9. I accept that evidence. To the extent claim forms did not comply with rule 9, it was down to human error: mistakes by the claimants and/or by their solicitors. It had nothing at all to do with fees, and the overall reduction in the fees payable caused by erroneous batching decisions was small.

30. So far as concerns the Ahmed group of claims, which were presented, irregularly, before REJ Robertson's decision in Brierley, the reason a single claim form was used was nothing more complicated than that Leigh Day were following their established practice – a practice dating back to well before tribunal fees came in – of batching together claims that were likely to be grouped together by the ET in a single multiple claim, and/or which would probably be dealt with together by the ET. As Judge Pirani recorded, and as was accepted by the Court of Appeal, there was a settled, or at least widespread, practice of claims like these being presented in a single claim form without anyone suggesting anything untoward was going on. Although the respondents' argument that multiple claims of this kind were irregular had first been raised before the Ahmed claim form was presented, the claimants' solicitors were not significantly concerned about it until the hearing before REJ Robertson.

31. Mr Benson's statement deals with Ms Oliver in paragraph 58 c. Unfortunately, what is set out in that paragraph is of limited evidential value, being second-hand hearsay: what his subordinates told him they had been told by Ms Oliver. For what it's worth, the relevant part of this evidence is as follows: "*she spent some of her time fulfilling online orders*"; "*online orders never took up her entire shift*"; she was never referred to as a Sainsbury's To You Shopper; she and colleagues with similar roles "*referred to themselves as General Assistants*", which title "*best describes the work*" she did; "*she was required to work in any other departments that required extra staff*". In his oral evidence, Mr Benson confirmed he does not know what proportion of Ms Oliver's time was, even according to Ms Oliver herself, spent doing online shopper work. In answer to a direct question from me, he said I should not assume from the way in which paragraph 58 c. of his statement has been drafted that she mostly worked as an online shopper.

32. There is very little other evidence in Mr Benson's statement that is potentially relevant to the rule 9 issue. What there is has negligible value, because it is, at

best, second-hand hearsay and because it cannot compete with the corresponding evidence of Mr Lutchmiah and Mr Hawker, the respondents' witnesses.

33. Unlike Mr Benson, the respondents' two witnesses were in a position to say from their own knowledge what work people holding particular job titles did. Their evidence about this was not dented in cross-examination.

34. Mr Lutchmiah and Mr Hawker gave no evidence about what individual claimants did in practice. It is possible that the job titles of some individuals did not reflect the work they carried out. However, apart from in relation to Ms Oliver, Mr Benson did not give evidence to the effect that the work of particular claimants was materially different from the work of colleagues with the same job titles. In the circumstances, having, it seems to me, no good reason to do otherwise, I find that the work the claimants did (putting Ms Oliver to one side for the time being) was typical of the work done by those with their job titles, as described by Mr Lutchmiah and Mr Hawker.

35. I shall now explain why it seems to me that I have "*no good reason to do otherwise*".

    35.1 There is, as I have already mentioned, a dearth of evidence directly or indirectly from individual claimants as to what work they actually did.

    35.2 In cross-examination, a lot of emphasis was placed on training records. However, I don't think the fact that some claimants with particular job titles had the same training as claimants with different job titles undermines to any significant extent the respondents' witnesses' clear evidence about what work people with particular job titles tend to do in practice. Similarly, I don't think it is safe for me to assume (as the claimants appear to be asking me to) that particular claimants must at relevant times have been doing significant amounts of a particular type of work just because they happen to have had training relevant to that particular type of work in the past. Generally, I think both sides relied too much on training records, in circumstances where the real issues were to do with what work people did in practice, not what work they had been trained to do and/or were capable of doing in theory.

    35.3 There is an issue relating to one of the 10 claimants in the Austin set of claims: Mark Styles. The claimants concede that this is an irregular claim form because of something that has nothing to do with Mr Styles, but the respondents' case is that Mr Styles being a claimant in the Austin claim form is an additional source of irregularity. They say he was a Warehouse Assistant not a General Assistant and that these two roles are materially different. They would like me to adjudicate on this. I decline to do so because it would be an entirely academic exercise. I shall be making my decision on article 6 on the assumption that the respondents are right about every alleged source of irregularity. In any event, that decision would be no different if the Austin claim form were irregular for both reasons and not just the one reason admitted by the claimants.

    For present purposes, what I am concerned with is an argument that was advanced in submissions in connection with Mr Styles. It may be that something similar is being relied on in relation to other claimants as well, for example Penelope Scott, who is one of the claimants on the

Bower claim form. It is along these lines: Mr Styles was described as a General Assistant in his claim form; he must, therefore, have described himself to the claimants' solicitors as a General Assistant and have described his work as similar to that of a General Assistant; I should therefore decide that his work was similar to that of a General Assistant.

Suffice it to say that in the absence of witness evidence from or even specifically about Mr Styles, accepting that argument would require me to make too many assumptions that are unsupported by anything of substance.

36. As to what work was done by those with relevant job titles, I refer to what is in the respondents' witnesses' witness statements. The gist of their evidence (written and oral) was:

36.1.1 although they might occasionally have to help out in other parts of the supermarket, CSAs spent the great majority of their time on the tills or supervising the self-scan area. In short, they were what most people would call checkout assistants. See section 2 of Mr Hawker's witness statement;

36.1.2 GAs could accurately be described as shelf-stackers, a term I do not mean pejoratively or dismissively. Although they might have been 'till trained', they would only rarely work on the tills. See section 5 of Mr Hawker's statement;

36.1.3 local CSAs, who worked in local convenience stores, had a broad role, taking in elements of what in supermarkets are a number of different roles. In particular, they would do the local convenience store equivalent of the roles of both GA and CSA, as well as dealing with deliveries and some work that in a supermarket is department specific. See section 6 of Mr Hawker's statement;

36.1.4 the day-to-day work of the team leaders was different depending on the team they were in, because all team leaders spent a significant part of their time undertaking the work of a 'colleague' in that department. The team leader roles are as different as the roles of those they are team leaders of. A Team Leader Admin, for example, would not be dealing with members of the general public or physically with retail goods, but with administrative tasks. A degree of department-specific technical knowledge was required, for example baking knowledge for a Team Leader Bakery and knowledge relating to the dispensing of controlled drugs for a Team Leader Pharmacy. The only thing the roles had in common was that they all involved some supervision and low-level management of other staff. See section 5 of Mr Lutchmiah's statement.

Legal issues – rule 9

37. Because of my decisions on other issues, because I do not think they are in practice important in this case, and because it is not necessary for me to do so to make my decisions about rule 9, I do not propose to deal with the following:

37.1 the burden of proof under rule 9;

37.2 the extent to which the tribunal should look beyond the facts as alleged by the claimants in the claim form in deciding whether claims are "*based on the same set of facts*".

38. The first legal issue I propose to address is: where a claim form breaches rule 9, are the claims of all of the claimants on it irregular, or just those of the claimants whose presence as claimants on that claim form could be said to have caused the irregularity? My decision on this issue is that all the claims on the claim form are irregular, for the following reasons:

38.1 I think the part of the EAT's decision dealing with this issue (paragraphs 94, 95, & 113), which related to Farmah, is binding on me. Farmah did not go to the Court of Appeal; the part of the EAT's decision that was successfully appealed related to rule 6, not rule 9; the Court of Appeal did not clearly address this issue whereas the EAT did; in my view, there is nothing in the *ratio* of the Court of Appeal's decision that contradicts or undermines or qualifies the EAT's decision on this issue; fees, and their abolition by Unison, are not relevant to this issue;

38.2 I respectfully agree with Lewis J. If two claims may not be presented in the same claim form in accordance with rule 9, there is no logical or principled basis for distinguishing between them in terms of whether they are regular or irregular;

38.3 further to the previous point, even if one could distinguish between claims in principle, rule 9 says nothing about how to decide which fall into the regular and which the irregular category in practice;

38.4 the relevant part of rule 9 is, "*Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6.*" I can see no scope within that wording for treating some of the claims as regular and others as irregular. There is a single "*irregularity*", which must mean the whole claim form is affected; for some claims to be irregular and others not, there would surely have to be multiple irregularities.

39. The claimants rely on the following part of the Court of Appeal's decision (*per* Bean LJ at paragraph 28):

> *A few of the multiple claimants are men bringing what are usually called "contingent" or "piggy-back" claims … I agree with REJ Robertson that such a claim is not "based on the same set of facts" as that of the women and its inclusion in their claim form, even if there are no other complications, is irregular, though I do not accept the argument that the whole claim form is vitiated as a result.*

40. At first blush, this does seem inconsistent with the part of the EAT's decision under discussion. However:

40.1 so far as I can tell, in none of the cases that were before the Court of Appeal was there a suggestion that some of the claims on an irregular claim form might be regular. It follows that if what Bean LJ meant was that this was possible in theory, what he was saying was *obiter*;

40.2 if Bean LJ was consciously expressing the view that an irregularity in a claim form does not necessarily make all the claims in it irregular, I would have expected him to say so clearly;

40.3 further to the previous point, Bean LJ's choice of words is a little odd if that was the view he wanted to express. There is no qualifying word between "*is*" and "*vitiated*", like "necessarily" or "automatically", but he can't have meant that in every case there would be some regular claims on an irregular claim form, not least because (as just mentioned) there weren't any cases before the Court of Appeal with irregular claim forms in which some claims were said to be regular. To refer to a "*claim form*" being "*vitiated*" would also be peculiar if what was meant was claims being made irregular. "Vitiated" is usually used to mean invalidated, and breaching rule 9 does not invalidate anything.

41. In conclusion on this point, all the claims on a claim form that breaches rule 9 are irregular.

42. The remaining legal issue relating to rule 9 is the one that affects the most claims: the previous jobs issue.

43. The Court of Appeal's decision (*per* Bean LJ at paragraph 27) was that:

> *REJ Robertson's formulation is the correct one. Multiple claims are allowed under Rule 9 where (whatever the titles attached) it is asserted by the claimants that their roles and the work they do are either the same, or so similar to one another that the claims can properly be said to be based on the same set of facts.*

44. The Court of Appeal had previously referred to the following part of REJ Robertson's decision in Brierley:

> *87. The difficulty, to my mind, with Mr Short's* [claimants' leading counsel's] *case lies with his assertion that these proceedings are not about individual jobs. It is clear to me that, in the equal pay context, they must be. Although the Bainbridge line of authorities relates to the identification of causes of action, and does not concern rule 9 or its predecessor, I find the cases of assistance in identifying the essential factual basis for an equal value claim. In such a claim, the irreducible minimum set of facts on which the claim is based consists of the work done by the claimant which is said to be equal to her comparator's. The claimant must establish (1) the work which she did, (2) the work which her comparator(s) did, and (3) that the work was of equal value. I agree with Mr Jeans* [for the respondent] *that a Checkout Operator, seeking to establish that her work is of equal value to a Warehouse Operative, cannot be said to base her claim on the same facts as, say, a Bakery Assistant in terms of the essential factual inquiry as to what work she did. It is not enough that the claims are thematically linked and essentially assert the same broad contentions. In the context of the particular characteristics of an equal value claim, the facts on which the claims are based are not the same.*
>
> *88. I agree with Mr Jeans that claimants might properly group themselves together as multiple claimants within rule 9 if they in practice undertook the*

> *same work because they were, for example, Checkout Operators, but what cannot be done is to bring together in a single claim form equal value claimants whose jobs are different and who rely on different sets of facts as to the work which they do. This is even more so in the case of the male contingent claimants whose claims proceed on the wholly different basis that they do like work as their female colleagues on whom they 'piggy-back'.*

45. This seems reasonably clear on the face of it: in an equal pay case, claimants may only use the same claim form if their claims relate to the same or similar work; if two claimants' claims relate to different work, e.g. one concerns the first claimant's work as a Bakery Assistant and the other the second claimant's work as a Checkout Operator, they may not use the same claim form; this is because they are not based on the same set of facts if the claims do not relate to the same or similar work.

46. In terms of the claimants' work, the critical issue is: what work does the claim relate to? I can see no proper basis, in REJ Robertson's or the Court of Appeal's decision, or in logic, for only looking at the claimants' most recent relevant work. If one claim is based on periods of work in two different jobs and another on a period of work in only one of those jobs then, self-evidently, they are not based on the same set of facts; set of facts *x* is not the same as set of facts *x* and *y*.

47. What, then, is the basis for the claimants' submission (skeleton argument, paragraph 16 a.) that, "*If two claimants have the same role at the point of issue … the claim form is* [not] *irregular because one also held a previous role or roles*"? It is no longer what Mr Benson said in evidence it was when the original batching decisions were made, namely that REJ Robertson had used the present tense in the relevant part of his decision ("*It will require careful consideration by claimants, and those advising them, as to what work they do.*"). I had a relatively long discussion with Mr Short QC during closing submissions, which appears at pages 56 to 68 of the transcript[4] of day 2 of the hearing, to which I refer. I hope I do him no disservice by summarising his argument as follows:

    47.1 a claimant, "A" whose claim is about work done in two different jobs actually has two "*claims*" in accordance with rule 9;

    47.2 if the claim of another claimant, "B", is about work done in one of those two jobs, then A and B have "*claims … based on the same set of facts*" and it does not matter that A has a second claim that is not based on the same set of facts.

48. I do not accept that argument.

49. First, I think that each claimant has only one claim, namely the claim set out in the claim form; and that where rule 9 refers to "*their claims*" it means the whole of the claim of each claimant. In the Rules – not consistently, but even so – a useful distinction is drawn between a "claim", meaning everything the claimant is complaining about in their claim form, and a "complaint", meaning each

[4] With my permission, the hearing was transcribed by stenographers and the transcripts were provided to all parties and to me.

separate and distinct thing the claimant is complaining about.[5] A "claim" will often consist of a number of "complaints", e.g. there may be an unfair dismissal complaint, three complaints of direct sex discrimination, and so on. A claimant whose equal pay claim is about work done in different jobs has more than one complaint, but only one claim.

50. Secondly, even if it is right that rule 9 contemplates one claimant having several "*claims*" within a single claim form, the rule requires "*their claims*" – without qualification – to be "*based on the same set of facts*", not "one or some or part of" their claims.

51. Thirdly, based on REJ Robertson's decision, endorsed by the Court of Appeal, the principle behind rule 9 seems to be that two claimants may only share a claim form where they are relying on essentially the same facts. Using REJ Robertson's words, "*a Checkout Operator, seeking to establish that her work is of equal value to a Warehouse Operative, cannot be said to base her claim on the same facts as, say, a Bakery Assistant in terms of the essential factual inquiry as to what work she did*". I can see no principled basis for saying that the position is, or should be, different just because, say, the Bakery Assistant became a Checkout Operator a week before the claim form was presented.

52. I wish it were not so. I think rule 9 would have been better had it included the additional words that I understand Underhill J (as he then was) wanted it to: "*or if it is otherwise reasonable for their claims to be made on a single claim form*". Post-fees, I don't think any useful purpose is served by a rule which requires people to present separate claim forms in circumstances where almost the first thing the ET will do when it receives them is to consolidate the claims.

53. As was discussed during the hearing, I am particularly concerned about the implications for claims other than equal pay claims. The majority of multiple claims I have dealt with as an Employment Judge were, with hindsight, irregular. The scope for satellite litigation is vast.

54. Be that as it may, what I think of rule 9 is legally irrelevant. I have a duty to apply the Rules as they are, not as I would like them to be. Doing so, the following sets of claims are irregular pursuant to rule 9 because of the previous jobs issue: Abid; Gurung; Bower; Ashcroft; Chappell.

Remaining rule 9 issues

55. I don't think it is necessary to make the issue of whether jobs are sufficiently similar for the claims of people doing them to be "*based on the same set of facts*" more complicated than this: given the findings I have made, above, they plainly aren't.

    55.1 Working on the tills and very occasionally stacking shelves is not essentially the same as stacking shelves and very occasionally working on the tills. Of course if, say, there was a 40/60 and a 60/40 split between these two tasks in the jobs of CSAs and GAs, that would be different; but that is not the picture the evidence paints. The fact that a CSA might be perfectly capable of doing the job of a GA and vice versa is almost

[5] See rule 1, although it has to be said that this distinction between a "*claim*" and a "*complaint*" is not as clear in the Rules as perhaps it could be.

completely irrelevant; as already mentioned, the question is what work claimants do, or did, in practice and not what they are, or were, capable of doing.

55.2 Similarly, someone who spends the great majority of their time on the tills or stacking shelves is not doing essentially the same work as someone – a local CSA – who does significant amounts of both activities and various other things as well.

55.3 In my findings of fact, above, I have emphasised the obvious, significant differences between the various Team Leader roles.

56. In assessing whether the relevant jobs are sufficiently similar for the claimants' purposes, questions I have asked myself are whether: there might need to be different evidence in relation to different jobs; there might be significantly different points made in defence of claims from claimants in the different jobs. My answer to both questions is that there might. For example: if the work of CSAs were assessed as equivalent to or of equal value to that of relevant male comparators, I don't think one could say that the same assessment would automatically be made of GAs' work (at least not on the evidence before me at the moment); material factor defences could be different.

57. The position in relation to Ms Oliver's claim and the Carr claim form is more finely balanced. However, I come down on the respondents' side, principally for these reasons:

57.1 Ms Oliver's official job title was "Sainsbury's To You Shopper" and she concedes that online shopper work took up more than a minimal amount of her time;

57.2 if it were her case that most of her time was spent doing something other than online shopper work, I would have expected her evidence to be to that effect, and the evidence that was provided on her behalf was not;

57.3 putting these two things together, and doing the best I can on the limited evidence available to me, I think it is more likely than not that most of her work was online shopper work;

57.4 even if there was a 50/50 split between online shopper work and other work, someone who does 50 percent online shopper work and 50 percent other work is not doing essentially the same work as a GA – there are material differences.

Rule 9 - summary

58. Apart from the 38 claims in the 14 claim forms the respondents concede are regular, all of the claims in all of the claim forms to which this preliminary hearing relates are irregular, pursuant to rule 9.

Rule 6

59. Possibly more so than any other court or tribunal, employment tribunals and their predecessor industrial tribunals have been about providing – or trying to provide – a relatively informal forum, with the minimum of complication and technicality, within which people can resolve their disputes without having to

have lawyers. Part and parcel of this has traditionally been that they are not places where procedural matters have been at the forefront. The focus has always been on getting a decision on the merits.

60. Over the years, there have been numerous statements of senior Judges to the above or similar effect, including the Blockbuster and Beddoes cases relied on by the claimants (Blockbuster Entertainment Limited v James [2006] EWCA Civ 684 & Beddoes & Others v Birmingham City Council [2010] UKEAT 0037_10_0905; [2011] 3 CMLR 42).

61. Where procedural issues have been deemed of great importance, this has usually been a knock-on effect of particular pieces of legislation, for example the parts of the Employment Act 2002 that introduced the short-lived statutory grievance procedures, or the statutory instruments bringing in fees, or the provisions concerning early conciliation.

62. In relation to the striking out of a case for unreasonable conduct and/or a procedural default, other than where there has been a breach of an unless order under rule 38 (something expressly excluded from the scope of rule 6) or, possibly, where the claimant acted deliberately and cynically, the key consideration is whether a fair trial remains possible or whether the respondent is irremediably prejudiced: see, for example, Weir Valves & Controls (UK) Ltd v Armitage [2004] ICR 371. This is because, although rules and orders should be obeyed and disobedience should not be encouraged or condoned, it will not normally be proportionate and in accordance with the overriding objective to strike a case out for breaches of rules or orders where a fair trial remains possible and the respondent is not irremediably prejudiced.

63. Turning to the law applicable to rule 6 specifically, I remind myself how that rule fits into the Rules as a whole and, in particular, the fact that it does not itself give the tribunal the power to strike claims out. That power is not contained in rule 6, but in rule 37, the relevant part of which is: "*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds … (c) for non-compliance with any of these Rules or with an order of the Tribunal*".

64. The way rules 9, 6, and 37 work together in a case like the present one is:

    64.1 rule 9 is the rule that has been breached and it makes clear, in terms, that if it is breached this is no more and no less than an irregularity under rule 6;

    64.2 rule 6 explains what an irregularity is, and in particular the fact that by itself it doesn't affect anything but does give the ET various options in accordance with other rules, such as striking out pursuant to rule 37;

    64.3 the relevant part of rule 37 is to the effect that where there has been a breach of the Rules – any part of the Rules – the tribunal may strike out.

65. I also note that in the situation in which they find themselves, the claimants do not need to ask the ET to do anything. Similarly to what happens if, say, a claimant misses a deadline set in an order or fails to copy correspondence with the ET to the respondents in breach of rule 92, if the tribunal does nothing, the claim continues unaffected: "*A failure to comply with any provision of these*

Rules … or any order of the Tribunal … does not of itself render void the proceedings or any step taken in the proceedings."

66. Unlike in the County or High Court, a claimant in this situation does not have to apply for relief from sanctions, or similar, and would not normally do so. The fact that rule 6 refers to the possibility of the ET doing various things, including "*waiving … the requirement*", does not mean anything has to be done. If a breach of a rule or order was drawn to its attention and its decision was to the effect that there should be no consequences for that breach, an ET would not normally make an order to the effect that it was "*waiving*" any particular "*requirement*". Instead, it would simply do nothing, because the default position is that nothing happens.

67. This brings me to the EAT's decision. In short: I do not think that what Lewis J had to say about rule 6 is binding on me; in any event, I think it is distinguishable. I take this view because the Court of Appeal allowed an appeal against Lewis J's decision on rule 6 and because, in any event, fees formed most of the foundations of that decision.

68. In paragraph 97 of the Judgment of Lewis J, he stated: "*The fact that a claim form includes claims made by Claimants which are wrongly included, with the result that there has been an underpayment of fees for presenting a claim will … be a highly material factor in considering how the discretion* [to strike out for breach of rule 9] *should be exercised.*"

69. In his reasoning on the issue that he labelled, "*The Approach to the Discretion Conferred by Rule 6 of the Rules*", contained in paragraphs 98 to 108 of the Judgment, Lewis J identified six factors "*which a Tribunal exercising its discretion judicially will need to take into account*", the fifth factor being a 'catch-all' "*any other relevant factor drawn to their attention*" and the sixth being the overriding objective. In relation to four out of six of those factors, fees were front and centre (the two exceptions being the balance of prejudice and the catch-all).

70. For example, Lewis J began his discussion of whether the approach advocated in the Blockbuster case should be adopted by stating (paragraph 101), "*Care needs to be taken with the application of that approach to the situation where there is a failure to comply with Rule 9 of the Rules resulting in fees not being paid when they should be paid.*" In paragraph 104 of his decision, he stated that he did not consider that approach to be applicable, and that the question was whether "*the legal representatives of Claimants*" had considered "*whether the Claimants could include their claims within one claim form and* [demonstrated] *how they consider that the requirements of the Rule are met*", and whether, "*If they cannot do so, … there is* [a] *justifiable explanation for that failure*". The main part of his reasoning was this: "*If Claimants include their claims in one claim form, they will obtain the benefit of lower fees. If that is irregular, then the Claimants will have obtained the benefit of the reduction in fees when they were not eligible for the reduction and in circumstances which run counter to the purpose underlying the Fees Order.*"

71. Of course Lewis J focussed on fees. At the time of his decision, paying fees was a cardinal feature of starting ET claims, failure to pay the proper fee would lead to a claim being rejected under rule 11 or dismissed under rule 40, and arguments around fees were central planks of the respondents' submissions.

The respondents now submit something to the effect that the parts of his Judgment relating to rule 6 that have not been expressly overruled by the Court of Appeal are binding decisions on points of legal principle. Those submissions seem to me to amount to an invitation to ignore the fact that fees have been abolished since the Judgment was handed down. I don't think they can possibly be right.

72. In addition, with fees out of the picture, the Blockbuster case remains binding authority governing how ETs should approach what is now rule 37(1)(c).

73. My decisions on the rule 6 legal issues, which I shall give now, are made in light of the above.

In relation to whether irregularities should be waived or claims struck out under rule 6, is there a relevant burden of proof?

74. It makes no difference to my decision, which would be the same even if the burden were entirely on the claimants, but given that the default position where there is a breach of rule 9 is that nothing happens, the burden must be on the party that wants something to happen – in this case, the respondents.

75. I think a lot of the respondents' submissions proceed from misapprehensions or mistakes about rule 6.

    75.1 The first of these is that rule 6 is about the tribunal taking action in response to irregularities whereas, in fact, its purpose is to make clear that irregularities do not in and of themselves have any consequences at all.

    75.2 The second is that rule 6 itself gives the tribunal powers, whereas, in fact, the rule is to the effect that the tribunal may do as it sees fit, in accordance with other rules.

    75.3 The third is that rule 6 requires the tribunal to do one of the things listed within it, whereas, in fact, it expressly states that "*the Tribunal may take such action as it considers just, which may include*" those things. The use of the word "*may*" means the ET is not obliged to do any of them, or anything at all; "or may not" is implicit. The use of the words "*include*" means the list of things, "*(a)*" to "*(d)*" that the ET "*may*" do is not meant to be prescriptive or exhaustive.

    75.4 The fourth misapprehension or mistake is thinking about rule 6 purely in connection with breaches of rule 9 and forgetting that it is, with limited exceptions, of general application, to all and any breaches of orders and rules, and must be interpreted accordingly.

76. One can test the validity of the respondents' general points about rule 6 by considering the kinds of things to which it most commonly applies: breaches of technical rules, such as the requirement in rule 92 to copy correspondence with the tribunal to other parties; missing a deadline in a case management order by a short period of time. No one would seriously suggest, as the respondents appear to me to be doing in the present case, that the starting point in those situations would be for the party in default to satisfy the ET that it should waive the breach and not strike out that party's case.

Do the changes that were made in 2013 to the wording of the equivalent to rule 9 in the 2004 Rules reflect a policy decision to tighten up the rules relating to the presentation of claims, meaning that a breach of rule 9 creates a particularly serious example of an irregularity under rule 6? In any event, does a breach of rule 9 create a particularly serious example of an irregularity under rule 6?

77. The short answer to both questions is: no.

78. No change of substance was made to the equivalent of rule 9 in the 2004 rules, rule 1(7), which stated that, "*Two or more claimants may present their claims in the same document if their claims arise out of the same set of facts.*"

79. Two relevant changes were made to the Rules in 2013.

80. The first was the creation of a rule – rule 6 – stating clearly that a breach of a rule or order, "*does not of itself render void the proceedings or any step taken in the proceedings*". That rule did not, however, materially alter the position as it was under the 2004 Rules; prior to the 2013 Rules coming in, it was not the case that breaches of rules or orders in and of themselves rendered void the proceedings or any step taken in them. Given this, it seems to me that rule 6 was created primarily for the avoidance of doubt.

81. By making explicit for the first time the fact that breaching rules and orders would not automatically have any consequences at all, rule 6 arguably represented a relaxing of the Rules. The respondents' suggestion that it represented a tightening of the Rules turns things upside down.

82. The respondents submit that the creation of rule 6 was a "*rule change intended to reflect, nay, mandate a cultural change*" (Mr Martin QC's "*Outline Submissions*", paragraph 63), the change being from an alleged culture where parties "*perhaps thought that they could fail to comply with the rules, without any real consequences*" (ditto). I am afraid I disagree entirely. Rule 6 has nothing to say about what the ET should do if there is a breach of a rule or an order. The argument that the rule advocates adopting a strict approach by mentioning (or, as the respondents would have it, 'emphasising') "*the availability of the strike out power*" (ditto) has no more merit than an argument that, by mentioning the possibility of "*waiving … the requirement*", the rule advocates the opposite.

83. The second relevant change in the rules was adding to the grounds upon which a claim or response might be struck out. The power to strike out in the 2004 Rules was contained in rules 13 and 18. They gave that power in circumstances where (rule 13), "*a party does not comply with an order made under these rules*" and in many other respects mirrored rule 37 in the 2013 Rules. However, one of the innovations the 2013 Rules introduced was a provision – rule 37(1)(c) – stating in terms that a claim may be struck out, "*for non-compliance with any of these Rules*".

84. Prior to the 2013 Rules coming in, if a respondent wanted to have a claim struck out for non-compliance with a rule, it had to argue that the non-compliance constituted unreasonable conduct, or had rendered a fair hearing impossible, or something of that kind.

85. I accept that this new provision in the 2013 Rules to an extent tightens things up. What I do not accept, though, is that it is particularly focussed on or

applicable to rule 9. To my mind there is literally no good reason for thinking that it is. Ignoring the exceptions, rule 6 applies to all breaches of all rules and so does rule 37(1)(c).

86. The exceptions to rule 6 are specified within the rule itself. They are all instances where breaches of rules have more drastic consequences than merely creating an irregularity, e.g. where a claimant fails to use the prescribed form when attempting to start a claim. When the 2013 Rules came in, particularly given that they came in at the same time as fees, it might well have been assumed that a breach of rule 9 would, similarly, have a special status. But rule 9 itself makes clear that it doesn't – that where it is breached, this is to be treated simply as an irregularity under rule 6, like a breach of any other rule.

87. What the respondents are left with, then, is an assertion that because rule 9 relates to the institution of proceedings, breaching it is necessarily a particularly serious matter. That assertion is, as just explained, unsupported by and to an extent contradicted by the Rules. Moreover, even when the fees regime was still in place, the most that could reasonably be argued was that where a breach of rule 9 resulted in the underpayment of fees, that made the breach more serious than it would otherwise have been. With fees gone, any argument that breaches of rule 9 should in principle be treated differently from breaches of other rules is unsupportable. Breaches of rules come in all shapes and sizes and degrees of seriousness. That applies as much to rule 9 as to other rules.

88. I do not even accept any suggestion that, in practice, breaches of rule 9 are likely to be more serious than breaches of other rules, whether because, supposedly (as Mr Martin QC submits in his outline submissions, at paragraph 66), "*for claims which are not based on the same set of facts to be brought in one multiple … presents substantial challenges in terms of the need to sift, sort and case manage the claims …* [and because] *a greater administrative burden would be imposed if cases initially assumed to be based on the same set of facts (and managed accordingly) were later revealed to be based on a different set of facts*", or otherwise.

    88.1 Multiple claims of all kinds, not just equal pay claims, were brought in a way that we now know to be irregular for years without this causing any noticeable difficulties. In saying this, I am not just relying on my memory – the lack of reported cases on the "*same set of facts*" point speaks volumes.

    88.2 Outside of the equal pay sphere, multiple claims continue routinely to be brought in this way, and no one complains or seems to think it is a problem. Certainly, it is not something that Employment Judges complain about amongst themselves.

    88.3 In my experience, proceedings involving multiple claims are never case managed on the basis of whether or not claimants' claims are "*based on the same set of facts*" in a narrow, rule 9 sense.

    88.4 It can be positively unhelpful from an administrative point of view for claimants whose claims are closely linked but don't satisfy the rule 9 test to be compelled to use separate claim forms.

In deciding whether to strike out or instead to waive the irregularity, is the approach to be adopted a version of that advocated in the Blockbuster case, or is the important thing (or, at least, a very important thing) whether the claimants, through their solicitors, took "sufficient care to ensure that" they "were including claims in a claim form which were based on the same set of facts" (paragraph 102 of the EAT's decision) and whether there is a "justifiable explanation" (paragraph 104 of the EAT's decision) for what has occurred?

89. I have already answered this question:

    89.1 the correct approach is the Blockbuster approach, and, in any event, that case is binding on me in the present situation;

    89.2 Lewis J's decision that this was not the right approach was predicated on the existence of the fees regime, which no longer exists.

90. Even following the Unison decision, there remains a legitimate argument for saying that Blockbuster does not apply, but it is not an argument that, as far as I can see, has been advanced by the respondents. As explained in my decision on the previous legal issue, prior to the 2013 Rules, there was no rule stating that claims and responses could be struck out for breaching the Rules. Further, although the 2004 Rules did contain provisions (rules 13(1)(b) and 18(7)(e)) permitting strike-outs for breaches of orders, and although the Blockbuster case concerned a claimant who repeatedly breached tribunal orders, the grounds upon which the ET had in that case struck out the claimant's originating applications was that, "*the manner in which the proceedings have been conducted by or on behalf of the applicant … has been scandalous, unreasonable or vexatious*".

91. The reasons I do not accept that argument, and take the view that the Blockbuster line of authority does apply, are as follows:

    91.1 usually, those who apply for their opponent's cases to be struck out for breaches of orders allege, as part of their application, that the breaches constitute unreasonable conduct. Appellate authorities – such as the Blockbuster case itself – have tended to deal with breaches of orders and unreasonable conduct in the same breath;

    91.2 for example, in Weir Valves v Armitage [2004] ICR 371, referred to and approved in the Blockbuster case, the EAT were considering a case where an ET had struck out a response because of the respondent's failure to exchange witness statements on time. It isn't entirely clear, but it appears that the basis of the strike-out was both breach of an order and unreasonable conduct. In any event, the EAT mentioned (in paragraph 11 of its decision) the powers to strike out both for breach of an order and for unreasonable conduct. In its discussion (from paragraph 16) about the situation where "*there is a court order and there has been disobedience to it*", the EAT did not say whether they were dealing with the rule concerning breaches of orders or the rule concerning unreasonable conduct or both. The unspoken assumption seems to have been that it didn't matter because the same principles would apply;

91.3 the Blockbuster line of authorities has always been understood to apply to applications to strike out for breaches of orders as much as to applications to strike out for unreasonable conduct;

91.4 in the 2013 Rules, the powers to strike out for breaches of order and for breaches of rules are contained in the same part of the same rule – rule 37(1)(c), which provides that "*all or part of a claim or response*" may be struck out, "*for non-compliance with any of these Rules or with an order of the Tribunal*";

91.5 if Blockbuster applies to the second half of rule 37(1)(c) – and it does – it must, logically and in accordance with the normal rules of interpretation, apply to the first half too.

92. This is not to say that the factors mentioned by Lewis J in the EAT in the present case – the seriousness of the breach, the circumstances in which the breach came about, the balance of prejudice – are irrelevant. Far from it. They are the kind of factors that have appeared in checklists in the past, such as that set out in the pre-2013 version of CPR 3.9, routinely used by ETs in the noughties until the Court of Appeal, in Governing Body of St Albans Girls' School v Neary [2009] EWCA Civ 1190, held that its use was not obligatory. But the respondents' submission is to the effect that, as a matter of law, of pre-eminent importance is whether the claimants and their legal representatives can demonstrate that they took reasonable care to ensure that rule 9 was complied with. I do not accept that submission, not least because it would be contrary to authority and to the overriding objective to accord pre-eminence to any single factor of that kind.

93. The respondents' last throw of the dice in relation to this issue is to refer to what Bean LJ said in the Court of Appeal, in paragraph 45 of the decision, in relation to Fenton: "*Where the ET has already held in a published decision that a multiple claim of this type was irregularly presented there could, he* [Mr Short QC] *accepted, be no viable argument for waiving the irregularity.*"

94. The respondents' submissions on this seem to be along these lines:

94.1 Bean LJ was saying that REJ Robertson's decision should have been treated as definitive from the outset, and should have been followed to the letter by anyone aware of it, and that there could be no excuse for not following it, and that, therefore, if claimants aware of it did not follow it, their claims should be struck out without mercy;

94.2 this demonstrates that the Court of Appeal thinks breaches of rule 9 should be treated particularly seriously.

95. I disagree. Bean LJ's comments were *obiter*. They related to an issue that had not been argued before the Court of Appeal, which was not actually before the Court of Appeal or the EAT, and which had not even been argued before the ET at first instance. That issue was whether, if the claimants were wrong as to how rule 9 should be interpreted, the Fenton claimants' claims should be struck out. The Fenton claim form was deliberately put together in breach of REJ Robertson's decision in Brierley. The claimants wanted and expected REJ Robertson to strike it out, to ensure that the question of how rule 9 should be interpreted could be tested on appeal. It would not have been open to Mr Short

QC to raise a "*viable argument for waiving the irregularity*" in the Court of Appeal, even if he had wanted to.

96. I think the most that can reasonably be taken from this part of the decision of Bean LJ is that if someone chooses deliberately to flout rule 9, a strike-out is likely; and even that is arguable because, consistent with the rest of the Court of Appeal's decision, what should happen will always depend on all the circumstances of the case.

97. The final rule 6 legal issue that was discussed during the hearing is whether, when choosing between waiving the irregularity and striking out claims, an ET can legitimately distinguish between different claims brought in the same irregular claim form. I don't propose to deal with this issue because it is unnecessary for me to do so, my firm view being that no claims on any claim forms should be struck out.

Rule 6 / striking-out – conclusions

98. I shall now explain why I think it would be contrary to the overriding objective and disproportionate to strike out any of the irregular claims.

99. None of the failures to comply with rule 9 was wilful or reckless, or stemmed from potentially improper motives such as a desire to avoid or minimise fees. In every case, the claimants' solicitors genuinely believed they were complying with the rule.

100. In relation to the 4 Ahmed claims, I think it would be unfair to criticise the claimants' solicitors in any way. I would echo the comments of Longmore LJ about Brierley, contained in paragraph 53 of the Court of Appeal's decision: "*one is just left in the position that the parties were bona fide disputing the true meaning of Rule 9. I cannot see that arguing a point of construction of the rules is inexcusable. Of course, the claimants' construction has turned out to be wrong, but it cannot be inexcusable or unjustifiable to argue for a construction of the rule with which a court ultimately disagrees*".

101. If it is being suggested that the claimants' arguments about how rule 9 should be interpreted were hopeless and should never have been advanced, and that their solicitors should all along – or at least once the respondents' raised the point in Brierley – have known what the correct interpretation was, and have acted accordingly, I would remind the respondents that they lost, and that the claimants won, before Judge Pirani.

102. In relation to the other claims, the claimants' solicitors got it wrong, and by taking more care and being more cautious where there was (to me) obvious room for doubt – for example in relation to Ms Oliver – they could quite easily have got it right. However, I am not satisfied that there was negligence here. Some of the decisions that were taken about what compliance with REJ Robertson's decision required appear surprising. The previous jobs issue in particular I can only see one way. However, I have the benefit of hindsight and of the EAT's and Court of Appeal's decisions, things the claimants' solicitors did not have at the time these claims were presented. And I note that the claimants have continued vigorously to argue their points. It may well be that the EAT or Court of Appeal, in this or in some future case, will prove them right and me wrong.

103. The breaches of rule 9 have not themselves caused any problems for the ET. The regular and irregular claim forms have not been case managed differently and I can at present see no reason to case manage them differently in the future.

104. For much the same reasons, I would not class these as serious breaches of rule 9. An example of a non-deliberate but serious breach of rule 9 might be a case where the claim form contained a significant number of claims that had little to do with each other and did not belong together on any reasonable view; that would never be case managed, let alone heard, together; and that would inevitably have to be 'deconsolidated' by the ET.

105. No significant prejudice would be caused to the respondents by "*waiving … the requirement*" in every case. Having had most of their prejudice arguments rejected by the EAT and/or Court of Appeal already, the respondents are left with the following (outline submissions, paragraphs 74 to 75):

> *the Respondent faces prejudice in having to face undifferentiated claims, and the costs and inconvenience of the procedural consequences of that …. A multiple claim form that complies with rule 9 assists with the grouping together of Claimants for case management purposes. An irregular multiple claim form hampers this process as there is a need to establish the correct position in respect of each claim, and to address the irregularity. This work must take place before it is possible to move on to more substantive case management. The failure on the part of the Claimants to comply with rule 9 has made case management more complex and has created delay and increased costs*.

106. This is incorrect.

106.1 The breaches of rule 9 have not, as a matter of fact, hampered case management in this case or made it more complex, to the best of my knowledge.

106.2 Above, I made the general point that case management does not and never has proceeded by reference to whether all the claimants' claims are based on the same set of facts. That would be too narrow a test to be useful for case management purposes.

106.3 It would be fair to say that many of the claimants' claims are not pleaded with the precision and detail that one would ideally like, but that is not a product of any breaches of rule 9, and applies equally to regular and irregular claim forms.

106.4 Similarly, although case management in equal pay proceedings is greatly facilitated by the ET being able to discover, readily, which claimants rely on periods of work in the same jobs, that can be achieved just as easily with irregular claim forms as with regular ones, and in many instances is easier if a small number of irregular claim forms are used.

106.5 Essentially, assuming the claimants have not taken leave of their senses and included on the same claim form claims that don't even belong in the same piece of litigation, or something like that, compliance or non-compliance with rule 9 is in practice irrelevant to case management. I again refer to the fact that until 2014, despite non-

compliance with rule 9 and its predecessors being endemic for a decade or more, no one identified a problem.

106.6 Breaches of rule 9 have not in themselves caused delay and increased costs. These were caused by the respondents' tactical decision to take and pursue the rule 9 point, which has been to the Court of Appeal and back. The respondents' argument that it was the claimants' fault that there was a point to take, and that, therefore, the delay and expense is also all the claimants' fault, is superficially logical, but flawed. The fact that the respondents did not get their costs in the Court of Appeal, where they won, suggests that Court did not accept it. I express no view on whether it was reasonable or unreasonable for the respondents to have sought to have claims struck out for non-compliance with rule 9. But a party to litigation is not obliged to take every potentially valid point that it is open to it to take, and the fact that the respondents won on the rule 9 point does not necessarily make it reasonable for the respondents to have sought a strike-out.

106.7 Additionally, it occurs to me that there is a circularity to this part of the respondents' submissions, which amount to saying that I should strike out because of the costs and delay caused by their application to strike out.

107. The claimants would suffer significant prejudice were I to strike out the irregular claims:

107.1 a dozen or so claimants, who did not reissue claims because of limitation problems, would lose their claims completely;

107.2 the other claimants would be obliged to rely on their reissued claims. At least half of the claimants have more than 6 years' continuous employment with the respondents and so would lose part of their claims if they had to rely on their reissued claims;

107.3 as I understand it, the respondents have not completely disavowed the argument that if the original claims are struck out, the reissued claims are an abuse of process. If that argument is correct, for me to strike out the irregular claims would result in every affected claimant losing the whole of their claims.

108. A fair trial remains possible. No one has seriously suggested otherwise.

109. In summary, virtually everything of relevance points away from striking out.

110. I should add that if I am wrong and the respondents are right about the law relating to rule 6, and were I to apply the law as the respondents have argued I should, I don't think my overall decision would be any different. If the claimants have to demonstrate that they took reasonable care to ensure that rule 9 was complied with in relation to every irregular claim form, I agree they have not done this; but even so, and even if this is a particularly important factor, it would still not be proportionate to strike these claims out.

Costs

111. Rule 6 states that where there has been non-compliance with a rule, such as rule 9, "*the Tribunal may take such action as it considers just*". Other than

striking out claims, the only action the respondents have suggested I take in relation to the claimants non-compliance with rule 9 is to make a costs order.

112. No specific costs application has been prepared and there is no costs schedule. During submissions, Mr Martin QC told me that, in light of the Court of Appeal's decision on costs, the only costs being sought at this stage are the costs of this hearing and of preparing for it, or a proportion of them. He also confirmed that the basis upon which the respondents were seeking those costs was that the claimants had breached rule 9 and that this hearing would never have needed to take place had that rule been complied with.

113. The relevant part of rule 6 that relates to costs is:

> *A failure to comply with any provision of these Rules … does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include … –*
>
> *…. (d) awarding costs in accordance with rules 74 to 84.*

114. As I noted earlier in these Reasons, rule 6 does not itself empower an ET to strike claims out. For similar reasons to those given, above, in relation to striking-out, I don't think rule 6 itself gives the ET a power to award costs either. It refers to the possibility of awarding costs, "*in accordance with rules 74 to 84*". It must follow that one can only award costs 'under' rule 6 if the conditions for awarding costs in rules 74 to 84 are satisfied.

115. The formulation "*in accordance with*" in the part of rule 6 relating to striking-out causes the respondents no particular difficulties. This is because the rule referred to in that part of rule 6 – rule 37 – itself contains an express power to strike claims out where there has been non-compliance with one of the Rules: rule 37(1)(c).

116. Rules 74 to 84 contain no similar power to award costs for breaching rules. In the costs rules, the nearest equivalent to rule 37(1)(c) is the first half of rule 76(2): "*A Tribunal may … make* [a costs order] *where a party has been in breach of any order or practice direction …*". In the 2004 Rules, the ET's powers to award costs roughly mirrored its strike-out powers. It seems that, for whatever reason, when an express power to strike out for breaches of the Rules was added to the ET's armoury in 2013, no new power to award costs was created to mirror it.

117. What this means is that if a respondent wants its costs caused by a claimant's breach of one of the 2013 Rules, it has to argue that the claimant's breach was unreasonable conduct, or otherwise engages a discretion to award costs under rules 74 to 84.

118. Reminding myself, from the transcript, of Mr Martin QC's oral submissions about costs, he said that we were not concerned with an application under rule 76, and that any such application "*is for later*". He also said that we were solely concerned with rule 6. The problem with this is that rule 6, if it empowers the ET to do anything in relation to costs, permits the ET only to award costs "*in accordance with rules 74 to 84*".

119. In fairness to Mr Martin QC, this point about the relationship between rule 6(d) and rules 74 to 84 was not discussed during the hearing. It did not occur to me

until afterwards. I shall assume in the respondents' favour that the costs application is made on the only conceivable basis it could validly be being made: on the basis that the breaches of rule 9 constituted unreasonable conduct.

120. Consistent with my decisions on other issues, there was no unreasonable conduct here. The claimants interpreted rule 9 wrongly, but I repeat the observations I made earlier in these Reasons about not being satisfied that there was negligence, and about rejecting any argument to the effect that the claimants' case on rule 9 was always hopeless.

121. Perhaps more importantly, I reject the notion that the claimants breaches of rule 9 in any meaningful sense caused this hearing to take place. Again, I repeat another part of this decision: paragraph 106.6 above.

122. In submissions on costs, Mr Short QC commented that if I decided, as I have done, not to strike out claims, then what the respondents would really be seeking would be their costs of a failed application. His point is well made. Given that the Court of Appeal did not award them their costs when they won, it would be rather strange for me to award the respondents their costs when, overall, they have lost.

123. In summary on costs, I do not think I have any discretion to award costs in the absence of any unreasonable conduct or similar. Even if I am wrong on this, I would not make a costs order in the respondents' favour in relation to this hearing because: it is not the claimants' fault that this hearing has taken place; if I had to say who 'won' this hearing, I would say the claimants.

Signed by: Employment Judge Camp
Signed on: 06 June 2019