Appeal No. UKEAT/0003/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 June 2019
Judgment handed down on
19 July 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

E.ON CONTROL SOLUTIONS LIMITED — APPELLANT

MR SIMON CASPALL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS CORDREY (Of Counsel) Instructed by: Eversheds Sutherland LLP Eversheds House 70 Great Bridgewater Street Manchester Lancashire M1 5ES
For the Respondent	MR KWEKU AGGREY-ORLEANS (Of Counsel) Instructed by: Whitecross Solicitors 150 Whitecross Street London EC1Y 8JL

SUMMARY

PRACTICE AND PROCEDURE – Application/Claim

PRACTICE AND PROCEDURE – Amendment

JURISDICTIONAL POINTS

The ET was concerned with two claims lodged by the Claimant. The first gave an incorrect ACAS early conciliation ("EC") number – relating to a different Claimant and a different claim; the second gave the number of an EC certificate that was invalid. Neither had been rejected by the ET under Rule 10 **ET Rules** nor had the claims been referred to an Employment Judge under Rule 12. At a Preliminary Hearing before the ET, the Claimant applied to amend his claim to correct the ACAS EC number. The ET allowed the application, seeing this as consistent with the overriding objective and the general principle of access to justice given that this was a minor amendment to rectify a technical error. The Respondent appealed.

Held: *allowing the appeal*

The Claimant's claims failed to include an accurate ACAS EC number and were thus of a kind described at Rule 12(1)(c) **ET Rules**. Pursuant to Rule 12(2), the Employment Judge was therefore required to reject the claims and return the claims to the Claimant; that was a mandatory requirement that was not limited to a particular stage of the proceedings. As this would mean that there was no longer a claim before the ET, the Employment Judge had no power to allow the Claimant to amend; the correct procedure was instead that laid down by Rule 13. The Claimant argued that the ET's decision could be upheld by virtue of Rule 6, read together with the overriding objective. Rule 6 could not, however, import a discretion into a mandatory Rule **Cranwell v Cullen** UKEATPAS/0046/14 and **Baisley v South Lanarkshire Council** [2017] ICR 365 applied. Moreover, Rule 6 applied to ET proceedings but the mandatory rejection and return of the claim under Rule 12(2) meant that there were no proceedings before the ET.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal arises from the ACAS early conciliation ("EC") provisions. The rationale of the EC scheme is to encourage the settlement of employment disputes at an early stage and so avoid the institution of Employment Tribunal ("ET") proceedings (see the commentary in *Harvey on Industrial Relations and Employment Law* at PI [286.04]). That is a laudable aim but the requirements then imposed in relation to prospective ET proceedings (in particular, the mandatory provisions of Rules 10 and 12 Schedule 1 **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** (the "ET Rules")) are giving rise to satellite disputes, with a number of such cases having reached the EAT in recent years. It seems unlikely that this was Parliament's intention and it might be thought that the time had come for a review of ET procedures relating to ACAS EC. That, however, is plainly a matter for others; my role in deciding the issues raised by this appeal has to be to apply the law as it currently stands.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Respondent's appeal against the Judgment of the East London Employment Tribunal (Employment Judge Allen, sitting alone at a Preliminary Hearing on 19 September 2018; "the ET"), sent to the parties on 15 October 2018, and by which the ET permitted an amendment to the Claimant's first claim form, to alter the ACAS EC number. The Claimant was represented before the ET by Mr Aggrey-Orleans, of counsel, as he is today; the Respondent then appeared by its solicitor but is now represented by Mr Cordrey, of counsel.

3. The oral hearing of this appeal took place on 28 June 2019. Having heard counsels' submissions, I reserved my Judgment. Subsequently, those acting for the Respondent wrote to the EAT to draw attention to a further authority, not referenced in oral argument. I duly allowed both parties the opportunity to make further written representations on that case, if considered appropriate. That has led to a slight delay in the handing-down of this Judgment.

The Procedural History

4. The Claimant was employed by the Respondent – then known as Matrix Control Solutions Ltd ("MCS") – from August 2011, until his dismissal with effect from 15 March 2018 (in his ET claim, the Claimant stated that his dismissal took effect on 14 March but the Respondent has said the effective date of termination was 15 March 2018 and, as this is marginally more favourable for the Claimant, I have taken this to be the relevant termination date).

5. On 26 February 2018 – while still employed by the Respondent - the Claimant contacted ACAS to commence EC. At that stage he named MCS as the prospective Respondent; accordingly, that entity was named on the subsequently issued EC certificate ("the first certificate").

6. On 3 April 2018, MCS changed its registered name to E.ON Control Solutions Limited ("ECS").

7. On 5 June 2018, the Claimant contacted ACAS to again commence EC, naming ECS as the prospective Respondent. On 20 June 2018, ACAS issued a second EC certificate for the Claimant, now naming ECS as the Respondent ("the second certificate").

8. Thereafter, between 6 June 2018 and 13 July 2018, the Claimant's solicitors submitted three ET claims in his name. They were all identical claims of unfair dismissal and unauthorised deductions from wages, but with variations in the name of the Respondent (named as either MCS or ECS or as both MCS and ECS) and the EC certificate relied on (see further, below).

9. The Claimant's solicitors also represented a former colleague of the Claimant, Mr Pownall. Mr Pownall had contacted ACAS on 23 March 2018 to commence EC, naming MCS as the prospective Respondent, and ACAS had subsequently issued an EC certificate for Mr Pownall ("the Pownall certificate"). The same solicitors also lodged ET claims for Mr Pownall - four in total - again giving various names for the Respondent.

10. It is common ground that, although there was some overlap in the unauthorised deductions claims pursued by both the Claimant and Mr Pownall, otherwise their claims were different. Mr Pownall had resigned from his employment and was claiming 'ordinary' constructive unfair dismissal, with an effective date of termination of 28 December 2017; the Claimant had been dismissed, purportedly by reason of redundancy, with an effective date of termination of 15 March 2018, and was claiming both 'ordinary' unfair dismissal and automatic unfair dismissal on the ground of having made protected disclosures.

11. For reasons that neither party can explain, it seems the ET treated one of Mr Pownall's claims as also being a claim made on behalf of the Claimant – referring to this as the Claimant's first claim. For present purposes, I have adopted the same course although I am currently unable to see why the ET1 in question should have been treated as including a claim by the Claimant.

12. In any event, both the claims of the Claimant and those of Mr Pownall were before the ET at the Preliminary Hearing on 19 September 2018. The ET proceeded on the basis that each had presented four claims; the relevant details of those of the Claimant were as follows:

(1) The Claimant's first claim (so far as the ET was concerned – see para 11 above) was presented on 6 June 2018 and named both MCS and ECS as Respondents but used the EC number from the Pownall certificate (issued for Mr Pownall against MCS). This claim had been accepted by the ET in respect of MCS but rejected under Rule 12(1)(f) of the **ET Rules** as against ECS.

(2) The Claimant's second ET claim was presented on 11 June 2018 and named ECS as the sole Respondent. It again gave the EC number relating to the Pownall certificate, which had named MCS as the Respondent. The second claim had been rejected by the ET under Rule 12(1)(f) **ET Rules**, again because ECS was not named on the EC certificate.

(3) The Claimant's third claim was also presented on 11 June 2018 but named both MCS and ECS as Respondents. It also gave the EC number of the Pownall certificate. This claim was again accepted by the ET against MCS but rejected under Rule 12(1)(f) in respect of ECS.

(4) The Claimant's fourth claim was lodged on 13 July 2018 and named ECS as the Respondent. On this occasion the EC certificate number provided was in the Claimant's name and was the certificate relating to ECS (that is, the second certificate obtained by the Claimant). The ET had accepted this claim.

13. In the interest of clarity, I should make clear that I have referred to the ET having "accepted" various of the Claimant's claims because that is the language used in the ET's Judgment. The **ET Rules** do not, however, refer to the acceptance of a claim (so far as I can see, it is only a response to a claim that the ET might "accept" as such, see Rule 22 **ET Rules**), although specific provision is made for claims to be rejected (see Rules 10-13 and the discussion below).

14. In the present case, it is common ground that the ET had been wrong to reject the Claimant's claims because of any difference in the name of the Respondent on his ET claim forms and the EC certificates he had relied on; MCS and ECS are the same entity and it made no difference which title the Claimant used. On the face of the claims, the ET should, however, have rejected the Claimant's ET1s for using the wrong EC certificate number. It did not do so.

15. Returning to the narrative, only the third and fourth claims relating to the Claimant were served on the Respondent (it was served with the first claim but that was in the name of Mr Pownall). In filing its response to the third claim, the Respondent objected that the wrong EC certificate – that relating to Mr Pownall – had been used and argued that the ET must reject that claim under Rules 10 and 12 of the **ET Rules**. As for the fourth claim, the Respondent contended that it gave details of a second, invalid EC certificate and was out of time.

16. For completeness, I note that, in responding to the third claim, the Respondent also made clear its contention that Rule 3(1)(a) of the **Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014** (the "Exemption Regulations") was incapable of applying in this case. Rule 3(1)(a) of the **Exemption Regulations** allows for an exemption from the requirement to comply with ACAS EC where "*another person ("B") has*

complied with the requirement in relation to the same dispute and A [the Claimant] wishes to institute proceedings on the same claims form as B". At no stage has the Claimant sought to suggest that this provision applies in this case.

The ET's Decision and Reasoning

17. At the Preliminary Hearing before the ET, it was agreed that MCS and ECS were the same entity and that no point should be taken in relation to the Respondent's former name being used on any EC certificate or ET claim form; to the extent the ET had rejected claims against the Respondent because the Claimant had used EC certificate numbers relating to MCS, those decisions should be set aside. The problem that remained, however, was that, although the Claimant's first, second and third ET claims had been lodged within the primary time limit - having been presented before the expiration of three months from the effective date of termination (and see section 111 **Employment Rights Act 1996**; the "ERA") – they had each cited the wrong EC certificate, having given the details of the Pownall certificate and not that relating to the Claimant. As for the fourth claim, it had given the details for an EC certificate for the Claimant but (1) those were the details for the second of the two EC certificates obtained by the Claimant, which was accordingly invalid (see **HM Revenue & Customs v Serra Garau** [2017] ICR 1121, EAT), and (2) the claim had been presented after the expiration of the primary time limit (the three months expired on 14 June 2018).

18. At the Preliminary Hearing, the Claimant sought (1) to rely on the first claim form, but amended to correct the EC number, so as to show the details of his first EC certificate (the certificate naming MCS), and/or (2) to rely on his fourth claim, which he contended was either in time or in respect of which it had not been reasonably practicable to present the claim in time and it was presented within a reasonable period thereafter. For reasons that are opaque, the

Respondent raised no objection to the first ET1 being treated as a claim made by the Claimant; the hearing before the ET seems to have simply proceeded on the basis that this was the Claimant's first claim.

19. The ET first considered the arguments relating to the Claimant's fourth ET claim, noting that this was clearly presented after the expiration of the primary time limit. Moreover, although section 207B **ERA** makes provision for time to be extended by up to a month to facilitate EC before the institution of ET proceedings, that could not apply to the second certificate – the EC certificate relied on in the fourth ET claim: only the first certificate obtained by the Claimant was effective for the purpose of stopping the clock and extending time under section 207B; the second certificate could not operate to stop the clock for a second time, see **Serra Garau**.

20. The ET considered whether it could be said that it had not been reasonably practicable for the fourth claim to have been presented within the primary time limit, so that time might be extended for such further period as the ET considered reasonable (section 111(2)(a) **ERA**). It noted that, in **North East London NHS Foundation Trust v Zhou** UKEAT/0066/18, the EAT had suggested that a mistake in transcribing the ACAS EC number need not mean the conduct of a Claimant or her solicitor was unreasonable. In **Zhou**, the mistake had been minor and technical (the last forward slash and final two digits of the EC certificate number had been missed when transcribed into the ET claim form) and it had been allowed that this might be a reasonable mistake for the purpose of determining whether it had been reasonably practicable to have lodged the claim in time. In the present case, the ET had itself focussed on the identity of the Respondent, mistakenly drawing a distinction between MCS and ECS, when they were the same entity. It had not rejected the claim on the basis of the incorrect EC number, as it should have done; had it done so, that might have enabled the Claimant to make good the error and re-submit his claim in time.

In the circumstances, and noting the absence of any prejudice to the Respondent, the ET considered it at least arguable that the Claimant's mistake was not unreasonable; arguably it had not been reasonably practicable for the claim to be brought in time. If that was right, the question would be whether the claim was presented within a reasonable period thereafter.

21. The ET did not, however, determine that issue. It instead turned to consider the first claim. Had that claim been rejected by the ET under Rule 10(2) or Rule 12(3) **ET Rules**, the ET would have been required to provide the Claimant with the reasons for the rejection and the Claimant could have applied for a reconsideration of that decision or could have corrected the error (the citation of the wrong EC certificate). In fact, there had been no relevant rejection of this claim and the ET considered that it remained open to the Claimant to apply to amend this claim to correct the error in the EC certificate number. In considering that application, the ET observed that there was no prejudice to the Respondent in allowing such an amendment; the error that would be corrected was one of a technical nature. Having considered the relevant guidance (see the ET **Presidential Guidance – General Case Management** (January 2018)), the ET considered it was clearly in line with the overriding objective and the general principle of access to justice to allow the Claimant's application to amend so that the EC number could be corrected from that applicable to Mr Pownall to that of the first certificate obtained by the Claimant.

The Appeal and the Respondent's Arguments in Support

22. The Respondent's appeal is pursued on three grounds. Although unable to say why the ET treated the first claim as relating to the Claimant, the Respondent has not, however, sought to object to the ET's approach on that basis.

A

23. By its first ground of appeal, the Respondent contends it was an error of law for the ET to conclude that the Claimant had made any validly instituted claim: (1) the first, second and third claims had not included the minimum information required by Rules 10 and 12 **ET Rules** because they did not include the correct EC certificate details relating to the Claimant (and see, by analogy, **Sterling v United Learning Trust** UKEAT/0439/14 at para 22); (2) the requirement to provide that information was a jurisdictional matter and the fact that the ET had erroneously failed to reject the claims on that basis did not change the position - jurisdiction could not be conferred on the ET by its failure to properly implement the mandatory provisions of the **ET Rules** (again, see **Sterling**) – if the Claimant's error meant the claim should have been rejected, everything that followed had been a nullity (just as if he had failed to use the correct claim form); (3) moreover, Rule 12(2) made clear that the Employment Judge was required to reject a claim in these circumstances, whenever the failure became apparent; (4) although the fourth claim included information relating to an EC certificate naming the Claimant, it was lodged outside the relevant time limit and the ET did not grant an extension of time, and could not have done so in circumstances in which the Claimant (i) was represented by solicitors, (ii) had lodged three claims within the primary time limit and merely needed to cite the first certificate number (in existence before the expiry of the time limit) on any of those claims for them to be validly instituted, and (iii) had failed to provide a good reason for the failure to do so.

24. By its second ground, the Respondent contends the ET further erred by purporting to use the power of amendment, allowed by Rule 29 **ET Rules**, to abrogate the mandatory requirements of Rules 10 and 12: (1) under Rule 12(1)(e) **ET Rules**, the fact that the Claimant's name on the claim form did not match that of the prospective Claimant on the EC certificate was a substantive defect, requiring the ET to reject the claim unless the Judge considered the Claimant had made a "minor error" and it would not be in the interests of justice to do so – the Claimant had not argued

that below and the ET had not found that this was the case; (2) as there had been no validly instituted claim, there was nothing to amend and it was an error of law for the ET to purport to use the power in Rule 29 to do so, thereby circumventing the provisions of rules 10 and 12 (and see the ruling of Langstaff P in **Cranwell v Cullen** UKEATPAS/0046/14).

25. By its third ground of appeal, the Respondent argues that, in any event, the ET erred in its approach to the application to amend: (1) by categorising an amendment to substitute a different EC certificate as "minor" or as seeing the defect in this regard as "technical" (see **Tesco Stores Ltd v Kayani** UKEAT/0128/16 at para 28); (2) by relying on the overriding objective and the "*general principles of access to justice*" as determinative reasons for allowing the amendment – the implication being that these broad principles justified ignoring a breach of a mandatory requirement of the **ET Rules**; (3) by failing to have regard to the length of the delay and the reasons for that (the amendment was substantially out of time (by some two and a half months) and there was no good reason for concluding it had not been reasonably practicable to lodge a valid claim in time – the Claimant's solicitors had been unsure whether they had submitted a valid claim on his behalf but failed to take reasonable steps to protect his position even after the point had been raised by the Respondent) and there was a failure to apply the principles laid down in **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 CA.

26. As for the Claimant's submission that the ET's decision should be upheld on an alternative basis, relying on Rule 6 **ET Rules** (which dealt with irregularities and non-compliance) and/or the overriding objective: as the case-law made clear, neither could circumvent the mandatory requirements of Rules 10 and 12 (see **Cranwell** para 11, **Zhou** para 43, and **Baisley v South Lanarkshire Council** [2017] ICR 365 para 27). There was no limitation of time in respect of

A the operation of Rule 12(2), so the Claimant's claim still fell to be rejected under that provision even if the failing had not been identified at an earlier stage.

B **The Case for the Claimant**

27. The Claimant's primary submission was that the Respondent was, in truth, seeking to challenge a permissible exercise of discretion on the part of the ET to allow an amendment to correct an irregularity. The ET had correctly had regard to the overriding objective, to the C technical nature of the defect, the lack of prejudice to the Respondent and the minor nature of the amendment sought. In the circumstances, it would not be in the interests of justice to allow the appeal.

D

28. To the extent that the case fell outside the normal exercise of the ET's case management discretion, the ET was dealing with a novel situation, where there had been a failure on the ET's part to reject the claims. Although errors had been made in the lodging of the claims, there was E a regime under the **ET Rules** that provided how a claim is to be rejected but that had not been followed by the ET in this case, giving rise to an inherent unfairness for the Claimant: had his claim been properly rejected and the reasons for that explained, it could be taken that he would F have taken the necessary steps to rectify the error. Rules 10 and 12 provided a complete process and it was wrong to cherry pick certain aspects of that regime and ignore others. The Claimant did not fall under this regime because the ET had not rejected his claim and sent him notice of G the reasons for its rejection. Rules 10 and 12 did not provide for the situation, as here, where the ET had in fact accepted the claim. It was in this real-world context that the ET was making its decision – approaching the question of amendment consistently with the overriding objective and grappling with issues of fairness and with the interests of justice in this case. Having regard to H the statutory requirements under section 18A, the Claimant had complied with the obligation to

notify ACAS and had obtained the necessary certificate. The ET had reached a permissible decision in the circumstances of this case.

29. In the alternative, Rule 6 **ET Rules** permitted the amendment: (1) although the ET had not relied on Rule 6 in its reasoning, this was an argument the Claimant had taken below; (2) it was plainly open to the ET to use Rule 6 in this context - the application of Rule 6 was not exempted in relation to Rules 10 and 12; (3) although Rule 6 did not apply to Rule 8, that only related to the requirement that a claim be started by using a completed, prescribed claim form; (4) other cases addressing Rule 6 in the EC context were dealing with post-rejection scenarios, not with cases where the ET had failed to reject the claim; (5) Rule 6 was plainly intended to be used to avoid arid technical points being taken, that was precisely this case - there had been substantive compliance and the Claimant had lodged a completed claim, on the prescribed form, but with an error in the EC number; (6) Rule 6 permitted the ET to exercise its discretion to allow the correction of such a mistake by way of amendment, where it was in the interests of justice for it to do so, without voiding anything that had gone before.

30. It was thus wrong for the Respondent to contend that a failure to comply with Rules 10 and 12 in this case rendered the claim a nullity. Indeed, by Rule 6, the contrary must be the case: that provided the ET with the discretion to amend the claim form and make good non-compliance with rules 10 and 12. In summary: (1) Rules 10 and 12 (and a failure to comply with those Rules) were subject to the application of Rule 6; (2) the ET had taken proper account of the relevant facts, including the balance of prejudice to the parties; (3) the ET's decision was consistent with the overriding objective; (4) Rules 10 and 12 provided the ET with a mechanism for rejecting a claim form, that had not occurred and the Claimant had thereby been deprived of the opportunity to rectify the error; (5) had the ET rejected the claim under Rules 10 and 12, the Claimant would

have been able to rectify the error within the primary time limit and it was unfair that he should be deprived of that opportunity; (6) if the claim was to be rejected at some later stage, the amendment should be allowed on the basis that it was not reasonably practicable for the Claimant to have presented his claim in time; (7) further or in the alternative, either the ET or the EAT could (and should) exercise its discretion to allow the amendment.

The Relevant Legal Framework

31. From 6 May 2014, most prospective ET Claimants have had to undertake ACAS EC. As section 18A of the **Employment Tribunals Act 1996** (inserted by section 7 of the **Enterprise and Regulatory Reform Act 2013**) provides:

> ***"Requirement to contact Acas before instituting proceedings***
>
> **"18A(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. …"**

32. The EC process is then described (relevantly) as follows:

> **"….**
>
> **(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.**
>
> **(4) If—**
>
> > **(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or**
> >
> > **(b) the prescribed period expires without a settlement having been reached,**
> >
> > **the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.**
>
> **…**
>
> **(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).**
>
> **…**
>
> **(11) The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).**
>
> **(12) Employment tribunal procedure regulations may (in particular) make provision—**

(a) authorising the Secretary of State to prescribe, or proscribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to Acas under subsection (1) or issuing a certificate under subsection (4)

…"

33. Where a certificate is issued under section 18A(4), there cannot thereafter be a second valid EC certificate regarding "that matter", see per Kerr J at para 21 **HM Revenue & Customs v Serra Garau** [2017] ICR 1121, EAT.

34. As for the relevant "employment tribunal procedure regulations" for these purposes, these are largely to be found within the general rules governing proceedings before the ET, which are set out in the **ET Rules** (Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure Regulations 2013**).

35. Rules 1-7 **ET Rules** appear under the heading "*Introductory and General*"; it is here that the overriding objective of the **ET Rules** is set out, at Rule 2:

"2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a). ensuring that the parties are on an equal footing;

(b). dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c). avoiding unnecessary formality and seeking flexibility in the proceedings;

(d). avoiding delay, so far as compatible with proper consideration of the issues; and

(e). saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

A 36. Within the same section of the **ET Rules** ("*Introductory and General*"), Rule 6 addresses "*Irregularities and non-compliance*"; it provides:

> **"6. 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."**

37. By Rules 8-14, the **ET Rules** then set out the provisions that apply to "*Starting a Claim*". By Rule 8 it is provided that:

> **"(1). - A claim shall be started by presenting a completed claim form (using a prescribed form) …."**

38. By Rule 10, provision is made for a claim to be rejected. The Rule is headed "*Rejection: form not used or failure to supply minimum information*". By para (1), it provides in mandatory terms that an ET:

> **"10.- … shall reject a claim if-**
>
> **(a). it is not made on a prescribed form;**
>
> **(b). …**
>
> **[(c). it does not contain all of the following information-**
>
> **(i). an early conciliation number;**
>
> **…"**

And, by para (2), it is then provided that:

> **"The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection."**

39. Rule 12 of the **ET Rules** deals with "*Rejection: substantive defects*"; it provides as follows:

> **12. - (1). The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—**
>
> **(a). one which the Tribunal has no jurisdiction to consider;**
>
> **(b). in a form which cannot sensibly be responded to or is otherwise an abuse of the process;**
>
> **[(c). one which 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 early conciliation exemptions applies;**
>
> **(d). one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;**
>
> **(e). one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or**
>
> **(f). one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates]; (a)**
>
> **(2). The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) [(b), (c) or (d)] of paragraph (1).**
>
> **[(2A). The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.] (b)**
>
> **(3). If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.**

40. In **Sterling v United Learning Trust** UKEAT/0439/14 (Langstaff J presiding), it was held that where the rule requires an EC number to be set out, it is implicit that the number is an accurate number. Although the EAT in **Sterling** was expressly considering the wording of Rule 10, it is common ground between the parties that the same must be true of the requirement at Rule 12(1)(c). Moreover, as was also agreed by the parties before me, the requirement to include an EC number must be the accurate number on the EC certificate pertaining to the Claimant (as opposed to a different EC certificate relating to an entirely different Claimant).

41. In **Sterling**, the EAT went on to note that, once the ET had found that the claim form did not include an accurate EC number, it was obliged to reject it. Again, although **Sterling** was concerned with Rule 10 **ET Rules**, the effect of Rule 12 is the same: although an Employment Judge might allow that a claim should not be rejected where there was a minor error of a kind described in Rule 12(1)(e) or (f), and it would not be in the interests of justice for it to be rejected (see Rule 12(2A)), that escape route does not apply to an error (whether minor or otherwise) in relation to the EC certificate number itself (see **Adams v British Telecommunications Plc** [2017] ICR 382 and **North East London NHS Foundation Trust v Zhou** UKEAT/0066/18).

42. On its face, Rule 12 **ET Rules** would seem to envisage that the input of the Judge (under para (2)) will arise after the claim form has been the subject of a reference under para (1). I am unable, however, to see that this is a necessary requirement. The language of Rule 12(2) obliges the ET to reject the claim if the Judge considers sub-paras (1)(a), (b), (c) or (d) apply; the obligation is not stated to be limited to a particular stage in the process but is expressed in general terms, so as to arise at whatever stage the relevant judicial consideration is undertaken.

43. That said, where a claim is rejected by the ET under Rule 12, para (3) provides that:

> **"3. … the form shall be returned to the claimant together with a notice of rejection giving the Judges's reasons for rejecting the claim … The notice shall contain information about how to apply for a reconsideration of the rejection".**

44. Rule 13 deals with reconsideration and provides that a Claimant, whose claim has been rejected, under either Rule 10 or Rule 12, may apply for reconsideration on the basis that the decision to reject it was wrong or that the notified defect can be rectified. By Rule 13(4), however, it is provided that:

> **"4. If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified".**

45. In the present case, had either of the claims in issue (the first or the fourth claim being considered by the ET) been rejected for failure to provide an accurate EC number, the ET would have been required to notify the Claimant of that fact and explain how he might apply for reconsideration of the rejection. In either case, it is not in dispute that the rejection would have been correct: both the first and fourth claims failed to provide an accurate EC number. The Claimant would have needed to rectify the error by providing a claim form containing an accurate EC number – that of the first certificate. Had he done so, the claim would have been treated as presented on the date he submitted the rectified claim form.

46. In the present case, the Claimant did not seek to rectify the EC number on the fourth claim but did ask the ET to correct the error made in the first claim form, amending the EC certificate on that form to substitute the number on his first certificate. The ET purported to allow this amendment by exercising its case management powers under Rule 29 **ET Rules**. Rule 29 permits the ET a broad discretion to case manage the proceedings before it, albeit that is a discretion to exercised "*in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions"*, see per Mummery J (as he then was) in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 EAT. In **Selkent**, it was observed that there is no time limit for making an application to amend but "*time limits in respect of new claims and issues of delay will be relevant factors for the tribunal to take into account in exercising its discretion*."

47. In seeking to uphold the ET's decision, the Claimant also relies on Rule 6 of the **ET Rules**, set out at para 36 above. That raises the question whether Rule 6 permits the ET a discretion to waive or vary the requirement to include an accurate EC number notwithstanding the apparently mandatory obligation under Rule 12 that it reject such a claim.

48. In **Sterling**, Langstaff J noted that:

> **"26. …. It may be open to argument, … that Rule 6, which permits a Tribunal to excuse irregularities and non-compliance might have some applicability….."**

That, however, was not a point that had been taken before the ET and the EAT did not consider it was necessary for it to express any view on the argument.

49. Just over a month later, however, the EAT (Langstaff J again presiding) had to deal with the point head-on, in a hearing under Rule 3(10) **Employment Appeal Tribunal Rules 1993**, see **Cranwell v Cullen** UKEATPAS/0046/14. Specifically, the Claimant's claim had been rejected because she had failed to comply with EC and could not demonstrate that her case fell within any of the exempted categories. Nevertheless, it was argued on her behalf, that if the **ET Rules** allowed for no discretion, this would be unduly harsh and pay insufficient regard to the requirement that there be access to justice or to the overriding objective; it was in this context that reliance was placed on Rule 6. Although sympathetic to the submissions made on Ms Cranwell's behalf, the EAT rejected this argument, holding:

> **"11. The difficulty … with asserting that this gives a discretion to a Tribunal Judge is, in my view, threefold. First, it has to read this rule as modifying the requirements which are otherwise laid down in statute at the outset of the Employment Tribunals Act 1996 and in respect of which the word "prescribed" appears. If there is to be an exemption from the regime set out in the Act, then it must be a prescribed one. "Prescribed" suggests an element of targeting, and an element of focus. There is nothing in Rule 6 which gives that necessary focus. Secondly, Rule 6 is, in the way it is constructed, plainly designed to allow a Tribunal to relieve litigants of the consequences of their failure to comply. It makes little sense to construe it as entitling the Tribunal to avoid having to satisfactory an obligation which is placed upon the Tribunal itself in absolute and strict terms. To say in one part of the Rules "The Tribunal has no option but to do X" and then to read is as subject to the proviso "except where it does not want to" is incoherent. But thirdly, the failure to comply envisages that there is non-compliance in the first place. There has been no non-compliance here because the Tribunal has complied with its obligation. On that view of the rule, the occasion for its exercise simply does not occur.**
>
> **12. For those three reasons, tempting though it is in the particular circumstances of this case, I cannot construe Rule 6 as providing the necessary discretion to avoid the consequences of Rule 12(1)(d) and Rule 12(2). It follows that in this case the Claimant's claim was rightly rejected by Judge Gall because there was nothing else he could do. The fact that the merits of the case might suggest that an exception for conciliation might be made have nothing to do with the case."**

50. The potential scope of Rule 6 was also considered by a different division of the EAT (Lady Wise presiding) in **Baisley v South Lanarkshire Council** [2017] ICR 365, albeit that case involved the rejection of a claim under Rule 11 **ET Rules**, which concerned the failure to pay the relevant fee or include an application for remission – requirements abolished, along with the fee regime to which they related, as a consequence of the Supreme Court's ruling in **R (oao Unison) v Lord Chancellor** [2017] UKSC 51. Addressing a similarly mandatory regime, whereby the claim would be rejected for non-compliance, in **Baisley** the Claimant argued that a purposive interpretation was required to allow Rule 6 to be invoked, so as to create a remedy for those who had fallen foul of Rule 11. Lady Wise rejected that submission, reasoning (relevantly) as follows:

> **"27 … First, Rule 11(3) sets out the unavoidable consequence of failure to comply. Whatever avenues may be available to relieve a party of those consequences there is no doubt that rejection in terms of Rule 11(3) brings a claim to an end initially. To that extent the language of Rule 6 does not lend itself to being applicable as it talks in terms of not rendering void proceedings merely because of a failure to comply. In other words in the face of the clear language of the two rules it would be inapposite and illogical to seek to invoke Rule 6 such that something that Rule 11(3) has brought to an end is not then brought to an end. Secondly, there was authority binding on the Employment Tribunal and to which I afford the greatest respect, consistent with the interpretation I have given. In particular, Langstaff J in Cranwell v Cullen was also of the view that it makes no sense to construe a rule that is in absolute and strict terms so far as the Tribunal is concerned with another rule (Rule 6) that gives the Tribunal power to relieve a party of a failure to comply with the Rules generally. … The Employment Tribunal was correct in reaching a conclusion that Rule 6 could not be invoked to allow the Tribunal to waive the requirement imposed upon it in terms of Rule 11(3). …"**

Discussion and Conclusions

51. In the present case, the Claimant had provided the requisite information to ACAS for the purpose of the EC process and had obtained an EC certificate pursuant to section 18A(4) **Employment Tribunals Act 1996**. That should have enabled him to launch his ET claim against the Respondent but, in order to be able to do so, he still needed to comply with the relevant employment tribunal procedure regulations. Specifically, the Claimant needed to present his claim on the prescribed form and to include the accurate EC certificate number. Whether he sought to rely on the first or the fourth claim (or, indeed, either of the other claims also before the ET at the Preliminary Hearing), he had failed to do so. The first claim gave an inaccurate EC certificate number, which related to a different Claimant and a different claim; the fourth claim

gave a number for an EC certificate that was simply invalid (the second certificate having no validity for section 18A purposes, see **Serra Garau**).

52. Having set out the relevant legal framework, however, it is apparent what should then have happened: in each instance, the ET was bound to reject the Claimant's claim and to return the claim form to him with a notice explaining why it had been rejected and providing him with information about how to apply for a reconsideration. The obligation to reject the claim could have arisen under Rule 10(1)(c)(i) or under Rule 12(1)(c) **ET Rules**. If rejected under Rule 12, the decision would have been taken by a Judge under Rule 12(2).

53. It is apparent, however, that, in both instances, the ET neither rejected the claim under Rule 10 nor did any staff member refer the claim to an Employment Judge under Rule 12(1). It was left to the Respondent to take up this point and object that both claims should have been rejected by the ET. This was the point that was thus before the ET at the Preliminary Hearing on 19 September 2018. Although the matter had not been referred to him under Rule 12(1) **ET Rules**, I cannot see that the obligation arising under Rule 12(2) had ceased to apply: at that stage the Employment Judge ought properly to have considered that both claims were of a kind described in Rule 12(1)(c) - both claim forms failed to contain an accurate EC number.

54. The consequence of a failure to include the correct EC number is made clear under Rules 10 and 12: the claim in question shall be rejected and the form returned to the would-be Claimant. That being so, when it became apparent to the Employment Judge that the Claimant's claim forms were of a kind described by Rule 12(1)(c), he was mandated by Rule 12(2) to reject the claims and return the forms to the Claimant. Having complied with that obligation, there would no longer have been any claim before the ET that could have been amended by exercise of the

Employment Judge's case management powers under Rule 29, although it would have been open to the Claimant to re-submit a rectified claim form, now including the correct EC number from the first certificate. Had the Claimant adopted this course, the Employment Judge would have been required to treat the claim as thus validly presented on the date that the defect was rectified (Rule 13(4) **ET Rules**). The claim would have been lodged out of time but it would then have been for the ET to determine whether it had not been reasonably practicable to present the claim in time. In this regard, the ET might have seen it as relevant that the Claimant had not been given a notice of rejection and advised of the means by which he might apply for a reconsideration at an earlier stage (and see the discussion of the interplay between errors under Rules 10 and 12 and the "reasonable practicability" test in **Adams v British Telecommunications Plc** [2017] ICR 382 and **North East London NHS Foundation Trust v Zhou** UKEAT/0066/18), although no doubt the Respondent would have countered this suggestion by pointing out that it had raised the issue some time before the Preliminary Hearing and the Claimant (who was legally represented throughout) had taken no steps to rectify the error earlier. In any event, the ET did not adopt this course but, instead, purported to allow an amendment to a claim that it ought to have rejected and returned to the Claimant. I understand the Employment Judge's desire to adopt this course but I consider that, by doing so, he erred in law.

55. The Claimant objects that the ET must have been entitled to adopt the course that it did by virtue of Rule 6, which permits an ET to waive or vary any requirement under the **ET Rules**, save as provided by Rules 8(1), 16(1), 23 or 25. That, the Claimant argues, is apparent from the wording of Rule 6 itself but, if any further support was needed for this proposition, this is the way Rule 6 should be interpreted, in accordance with the overriding objective.

56. It is tempting to think that Rule 6 might be used in the way the Claimant suggests. After all, the Claimant had complied with the substantive requirement upon him to engage in ACAS EC and the mistake made in transcribing the EC certificate number can be seen as an unfortunate error that caused no substantive prejudice to the Respondent. I can also agree with the Claimant that provision could have been made for Rules 10 and 12 to be included within the exceptions to Rule 6, the same way as Rules 8(1), 16(1), 23 or 25 (and, although Rule 8(1) lays down the requirement that a claim is to be started by presenting a "*completed claim form*", I can allow that this does not mean that the requirements of Rules 10 and 12 are thus incorporated into Rule 8 for the purposes of creating a wider exception to Rule 6). All that said, I do not accept that Rule 6 thus imports a discretion for the ET when considering failures to comply with Rules 10 and 12, when no such discretion exists under the mandatory terms of those Rules.

57. Firstly, I note that this is an argument that has already been rejected by two EAT Judges, in **Cranwell** and in **Baisley**. Even allowing for the fact that **Cranwell** was a Judgment on a Rule 3(10) Hearing and that **Baisley** did not specifically concern the requirements relating to the EC number under Rules 10 and 12, I would be reluctant to depart from the consistent view that can be discerned from those cases. Secondly, I would, in any event, respectfully agree with the reasoning in **Cranwell** and **Baisley**. Specifically, I do not consider it can have been intended that a mandatory requirement to reject a claim under Rule 12(2) should be made subject to an exercise of judicial discretion by means of Rule 6: to paraphrase Lady Wise in **Baisley**, it would be inapposite and illogical to seek to invoke Rule 6 such that something that Rule 12(2) has brought to an end is not then brought to an end. After all, had it been intended that Rule 12(2) should allow for the exercise of a discretion as to whether or not to reject a claim that did not include an accurate EC number, this could have been treated in the same way as errors made in relation to the name of the prospective Claimant or Respondent (see Rule 12(1)(e) and (f) and the discretion

afforded under Rule 12(2) in these respects). Thirdly, I do not think that the language of Rule 6 is apt to apply to these circumstances. Rule 6 speaks of "*the proceedings*" but the proceedings can only start with the presentation of a claim. Where the claim fails to comply with the requirements of Rules 10 and 12, it is to be rejected and returned to the Claimant: there are no proceedings before the ET in respect of which Rule 6 might apply. In this regard, the position in respect of a requirement under Rules 10 and 12 might be contrasted with the provision made for multiple Claimants under Rule 9. That allows that, where two or more Claimants wrongly include claims on the same claim form, "*this shall be treated as an irregularity falling under rule 6*". Although Rule 6 is not limited to those provisions within the **ET Rules** that specifically refer to it, I do not consider it is apt to apply to a requirement under those Rules that expressly oblige the ET to reject the claim, the means by which proceedings are instituted.

58. For completeness, I make clear that I am unable to see that the overriding objective changes the position in this regard. I do not consider it can be said that ignoring mandatory requirements imposed under the **ET Rules** is fair or just and, although importing a discretion into Rule 12(2) that could apply to claims of a kind described at Rule 12(1)(c) might well assist the ET in avoiding "unnecessary formality and seeking flexibility", that would be contrary to the express language of the Rule and I cannot see that it is open to the ET (or the EAT) to effectively re-write Rule 12 to allow for an exercise of judicial discretion in this way.

59. For the reasons thus given, I consider the Respondent is correct in its contention that the ET erred in its approach to this case. It was wrong to treat the Claimant's error as something that could be remedied by way of amendment and erred in failing to comply with its obligation under Rule 12(2) to reject the claims and return the claim forms to the Claimant. Although the ET did not state that it was exercising any power afforded by Rule 6 (whether, or not, read together with

the overriding objective), that provision would not have assisted it: Rule 6 could not import a discretion that would have allowed the ET to avoid the mandatory requirement to reject the claims. I accordingly allow the appeal.

Disposal

60. Turning then to the question of disposal, by section 35 **Employment Tribunals Act 1996**, I am able to exercise any of the powers of the body from which the appeal was brought, albeit I should remit the case to the ET unless there is only one possible outcome (or, where the parties agree), see **Jafri v Lincoln College** [2014] EWCA Civ 449. Here, I am satisfied that there is only one possible answer in this case. As all accept, both the claims that were the subject of the ET's decision failed to comply with the requirements of Rules 10 and 12 **ET Rules**; they both were of a kind described by Rule 12(1)(c). That being so, stepping into the shoes of the Employment Judge, I am bound to reject those claims pursuant to Rule 12(2). Accordingly, my Order on this appeal will include a notice of rejection giving my reasons for rejecting the claims and information as to the right to apply for reconsideration under Rule 13.

61. To the extent, however, that any application for reconsideration is made on the basis that the notified defect can be rectified, the position may be different – it might then be argued that there could be more than one answer to the question thus raised and I should, therefore, direct that issue be remitted for determination by the ET. As I have not received submissions from the parties on this question, or as to whether any remission should be to the same or to a different ET, I direct that any further representations on this point should be sent to the EAT in writing, within 7 days of the handing down of this Judgment.