**Case Number: 2206935/2018**

# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **and** | **Respondents** |
|---|---|---|
| **Mr M Johnson** | | **The Chambers of Mr Andrew Trollope QC and Mr Richard Christie QC** |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**SITTING AT: London Central** **ON: 26 November 2019**

**BEFORE: Employment Judge A M Snelson (in chambers)**

On reading the written representations of the parties, the Tribunal adjudges that:

(1) On the Claimant's application for reconsideration of the decision given orally on 13 September and confirmed in writing on 16 September 2019 to reject the claim form, that decision is confirmed.
(2) The (re-presented) claim, delivered to the Tribunal on 13 September 2019, was presented out of time and the Tribunal has no jurisdiction to consider it.
(3) Accordingly, the proceedings are dismissed.

## REASONS

*Introduction*

1. The Respondents are a set of barristers' chambers under the joint headship of Mr Andrew Trollope QC and Mr Richard Christie QC. The Claimant was employed by the Respondents in the capacity of Senior Clerk for just under six years ending with his summary dismissal on 2 August 2018.

2. By his claim form presented on 6 December 2018, which named the Respondents as they appear in the title above, the Claimant brought complaints of unfair and wrongful dismissal. In box 2.3 of the form he entered an ACAS early conciliation ('EC') number. The certificate bearing that number, which named the Respondents as they appear above, was issued on 12 November 2018 and gave the date of receipt by ACAS of EC notification as

28 October 2018.

3. In their response the Respondents pleaded, *inter alia*, that the claims were outside the Tribunal's jurisdiction because the Claimant impermissibly sought to rely on a second ACAS certificate. By reference to a prior certificate[1] and, on the Respondents' case, the only relevant certificate ('the first certificate'), time for presenting both claims had expired on 15 November 2018, three weeks before the claim form was submitted to the Tribunal. This arithmetic is not disputed by the Claimant.

4. In subsequent correspondence the solicitor for the Claimant did not dispute the existence of the first certificate but maintained that it had wrongly named the prospective respondent as "the Chambers of Andrew Trollope QC" and had accordingly been invalid. It followed that the certificate issued on 12 November 2018, which correctly identified the Claimant's employer, was the only material certificate. On this footing, the claim form was in time by about six days. The Respondents do not challenge this arithmetic.

5. At a case management hearing held by telephone on 8 August 2019, Employment Judge Glennie directed that a preliminary hearing be held in public to determine three points, the first of which was formulated as:

> **Whether the Tribunal lacks jurisdiction to hear the claim by reason of a previous ACAS certificate having been issued.**

6. That preliminary hearing came before me on 13 September this year. Ms Anna Macey, counsel, appeared for the Claimant and Mr Thomas Kibling, counsel, for the Respondent. Addressing the jurisdictional point first, I held that the claim form must be rejected[2] pursuant to the Employment Tribunals Rules of Procedure 2013, r12(1)(c) and (2). On that basis, the other preliminary issues fell away. I gave oral reasons for my decision, which were confirmed in a letter from the Tribunal dated 16 September.

7. In the meantime, later on 13 September, the Claimant had re-submitted his claim form, this time citing the first certificate number.

8. On 30 September the Claimant, through Ms Macey, applied for reconsideration of my decision to reject the claim form.

9. Under cover of an email of 16 October the Respondents, through Mr Kibling, opposed the application.

10. As the parties have requested, I deal with the matter on the basis of their written representations.

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[1] With a different number. The ACAS notification was on 6 August and the certificate issued on 21 August 2018.

[2] The Respondents had sought a striking-out order, but, as will be explained, I took the view that rejection was the appropriate procedural measure.

*The applicable law*

11. In *E.ON Control Solutions Ltd v Caspall* UKEAT 0003/19/1907 HHJ Eady QC (as she then was) set out the relevant statutory framework as follows.

> **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). …**
>
> **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."**

**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];**

**(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.**

**(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, [2015] UKEAT 0439_14_1802 (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, [2018] UKEAT 0066_18_0507).**

**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, [2015] UKEAT 0046_14_2003. 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 it 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. Following this exegesis, Judge Eady QC addressed the dispute before her. I cannot do better than to reproduce her informal summary.

> **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, [2015] UKEAT 0046_14_2003 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.**

13. The statutory time limit for presentation of the claim form in unfair dismissal and wrongful dismissal cases expires three months less one day after the effective date of termination: see the Employment Rights Act 1996, s111(2)(a) and the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, art 7(a). The period is now extendable under the EC provisions by the period taken up with conciliation.

14. The primary time limit is subject to the Tribunal's power to substitute "such other period as [it] considers reasonable" where it is satisfied (the burden being on the claimant) that it was "not reasonably practicable" to present the

claim within the primary period. The authorities show that the "not reasonably practicable" formulation sets a high standard. The statutory test has been roughly equated to one of "reasonable feasibility" (see *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 CA).

*The decision under challenge*

15. In summary, my reasons for rejecting the claim were that:

    (1) The claim form cited a second ACAS certificate number.
    (2) A second ACAS certificate is of no effect for the purposes of the EC scheme: see *Serra Garau* and *Caspall.*
    (3) Accordingly, the claim was defective under the 2013 Rules, rule 12(1)(c), the second certificate number not being "an early conciliation number" for the purposes of that rule (*Serra Garau*, para 21) and the Tribunal was mandated to reject it.
    (4) That obligation applied regardless of the stage at which the judicial consideration was undertaken: *Caspall*, para 42.

*The rival submissions*

16. Pursuing both avenues open to her under the 2013 Rules, rule 13, Ms Macey submits that the decision to reject the claim was wrong and, in the alternative, that if there was a defect, it has been remedied.

17. In support of her first submission, Ms Macey contended that the cases of *Serra Garau* and *Caspall* are not in point. She argued as follows.

    (1) The error in the first certificate was major. It was not merely a slip in the name of the Chambers. The omission of one of the two Heads of Chambers, who jointly shared administrative and financial control, went to the very essence and character of the unincorporated association against which the claim was directed. The error was if anything *more* serious than in *Giny v SNA Transport Ltd* UKEAT/0317/16/RN (where the claim form named the employing company and the certificate the owner of the company, and the EAT found no error of law in the Tribunal's rejection of the claim under r12(1)(f) and (2A)).
    (2) The fact that the Tribunal has power to excuse 'minor' discrepancies in the names of parties as between the ACAS certificate and the claim form (the 2013 Rules, r12(1)(e) and (f) and (2A) does not warrant the conclusion that a certificate cannot be 'replaced'. If it did, the claimant who makes a major error might be in a better position than one who makes a minor error. An error in the name communicated to ACAS the day after a dismissal might leave a claimant months later with no answer to a limitation defence.
    (3) *Serra Garau* was to be distinguished. There two identical certificates were submitted, the second for the sole purpose of engineering a limitation extension. There is no basis for imputing any underhand purpose to the Claimant in the instant case.
    (4) The implications of the Respondents' case were stark. If they were

right that the option of obtaining a second certificate was excluded, the logic must be that the Claimant had no choice but to submit a claim with a discrepancy between the claim form and the certificate and run the risk of rejection under r12(1)(f) if (as in *Giny*) the Judge was not persuaded that the error was minor and that r12(2A) applied).

(5) The solution of deliberately naming the wrong respondent in the claim form has been deprecated as reasoning that can discredit the law (see *Chard v Trowbridge Office Cleaning Services Ltd* UKEAT/0254/16/DM, Kerr J, para 76).

(6) Another possibility mooted in the reasons of 16 September, that an application could have been made for the certificate to be amended to correct the title of the Respondents was wrong: ACAS cannot change the name on a certificate after it has been issued (no authority is cited for this proposition).

18. In support of her second submission, Ms Macey argued as follows.

(1) On the premise that the claim was properly rejected, the Claimant reacted immediately be remedying the defect and re-presenting the claim form the same day.

(2) The Tribunal was responsible for the considerable delay between the presentation of the claim form and the preliminary hearing before me.

(3) The *Caspall* judgment was published in July 2019, just before the summer vacation.

(4) In all the circumstances, the Claimant had had "no reason to believe" that she was required to rely on the first certificate and it had not been reasonably practicable to present the (re-presented) claim form any earlier than the date on which it was delivered, 13 September 2019.

19. Mr Kibling responded to Ms Macey's first submission as follows.

(1) The reconsideration application, submitted on 30 September 2019, was out of time.

(2) The decision given on 13 September was correct. The outcome was mandated by the 2013 Rules, r12(1)(c), the second certificate being invalid. The Tribunal has no power to forgive or correct the error.

(3) The point on which the Respondents had succeeded was not new. It had been taken in the response form and pressed ever since. The Claimant could have reacted by re-submitting the claim at an early stage, citing the correct certificate, but had not done so.

20. As to Ms Macey's second submission, Mr Kibling contended as follows.

(1) Point (3) above was repeated.

(2) *Caspall* did not make new law. The impermissibiity of seeking to rely on a second certificate was clear from prior authority, most notably *Serra Garau* (in which judgment was given on 24 March 2017).

(3) The Claimant had been legally represented throughout.

(4) In the circumstances it had plainly been reasonably practicable to present the claim in time.

*Analysis and conclusions – the reconsideration application*

21. I do not understand why Mr Kibling says that the reconsideration application is out of time. By my reckoning, it is not. However, despite Ms Macey's submissions, I am satisfied that my decision under challenge was correct. I have several reasons.

22. First, the argument that the first certificate was 'invalid' and of no effect because it misnamed the Claimant could not be accepted because an error in the name on the certificate does not invalidate it. If it did, the discretion under r12(2A) (applicable to naming errors and discrepancies offending against rule 12(1)(e) and (f)) to decline to reject the claim form on the ground that such an error was 'minor' would make no sense.

23. Second, the Tribunal is bound by decisions of the EAT. *Serra Garau* and *Caspall* unequivocally hold that a second certificate has no validity. It does not stand as a 'certificate' within the meaning of the Employment Tribunals Act 1996, s18A(4). The authorities establish or confirm general principles and cannot be distinguished on their facts.

24. Third, it inevitably follows that the claim form offended against the 2013 Rules, r12(1)(c).

25. Fourth, that being so, rejection was mandatory, as that provision makes clear.

26. Fifth, the fact that the Rules envisage errors of this sort being picked up at an earlier stage in the proceedings is nothing to the point. As *Caspall* makes clear, the Tribunal is obliged to inquire into and, if applicable, give effect to, any duty to reject, regardless of when the issue is raised.

27. Sixth (although the reasoning thus far concludes the matter), the submission that rejection in these circumstances would involve the Tribunal holding that the only correct course open to the Claimant had been to repeat in the claim form the error in the Respondents' name contained in the first certificate could not be accepted. In the first place, he could have approached ACAS to have the error in the (first) certificate corrected. I cannot accept Ms Macey's bare assertion that this cannot be done. The implication seems to be that a correction *can* be made *before* the certificate is issued, but that is not easy to follow: while the conciliation period is underway how can there be a certificate to correct?

28. Seventh and in any event, as an alternative, he could have ((a) repeated the error in the Respondents' title in the claim form and accompanied it with an application to amend *or* (b) named the Respondents correctly in the claim form and asked the Tribunal to exercise its discretion not to reject (citing rule 12(2A). Given the nature of the error (omission of the name of one of the two heads of chambers) it is exceedingly difficult to see how the Tribunal could permissibly have refused either application. As to (a), amendment applications in such cases are routinely granted. As to (b), the decision of the

EAT in *Chard* is illuminating. There, the prospective respondent named in the certificate was the controlling shareholder of the company named as the respondent in the claim form. Overturning (necessarily, as wrong in law) the first-instance decision to reject the claim, Kerr J commented (para 63) that the reference in the definition of the overriding objective to avoiding formality and seeking flexibility included the need to avoid elevating form over substance. His judgment also included these passages:

> **67. I consider also the wording of Rule 12(2A) in the light of the overriding objective, with which it was presumably intended to operate harmoniously. It has been pointed out that it appears to enact a two-stage test. On a literal reading, the first stage is to consider whether the error is minor without regard to the interests of justice. The second stage then arises only if the judge has already concluded, ignoring the interests of justice, that the error is minor. If but only if she has reached that conclusion must she go on to consider whether it would not be in the interests of justice to reject the claim.**
>
> **68. In my judgment, that literal reading is too purist. It is inconsistent with the overriding objective and risks causing injustice. I prefer to read Rule 12(2A) as indicating that the "interests of justice" part of the Rule is a useful pointer to what sort of errors ought to be considered minor. To put the point another way, minor errors are ones that are likely to be such that it will not be in the interests of justice to reject the claim on the strength of them. The Judge never got as far as the interests of justice. It appears that was because she did not think that the error was minor.**
>
> **…**
>
> **74. I do not say that a mistake as to the identity of a Respondent and a case of confusion between an individual and a company controlled by that individual is necessarily always a minor error; it could be one of real substance. However, in the present case, it seems to me incontestable that the error was minor, and that the interests of justice require that the claim not be rejected. An error will often, in my opinion, be minor if it causes no prejudice to the other side beyond the defeat of what would otherwise be a windfall limitation defence, in a case such as this where, subject to the error, the claim was issued in time and not out of time.**

The entity against which the Claimant was seeking to claim, a well-known set of Chambers operating at a particular Fleet Street address, was never in doubt. It is hard to imagine a more obvious instance of form triumphing over substance than the imaginary decision posited by Ms Macey to reject the claim and hand a windfall to the Respondents because the name of one of the two Heads of Chambers was omitted from the ACAS certificate.

*Analysis and conclusions – the time point*

29. Again, I have reached a very clear conclusion. The claim is treated as presented on 13 September 2019 (the 2013 Rules, r13(4)). In my judgment it was plainly reasonably practicable to present a valid claim based on the first certificate within the primary period, which expired on 15 November 2018. The original minor error is unexplained. It could and should have been corrected. In any event, it did not argue for the course taken, of abandoning reliance upon the one and only certificate that could be relied upon. The Claimant was legally represented throughout. The law was clear at least since *Serra Garau,*

published in March 2017.

*Outcome*

30. For the reasons stated, the decision of 13 September is confirmed on reconsideration. The claim re-presented the same day is out of time and the Tribunal has no jurisdiction to consider it. Accordingly, the proceedings are at an end.

31. No doubt those acting for the Claimant will advise him to obtain independent advice as to whether some separate remedy may be available to him in respect of the loss of the chance to pursue his complaints of unfair and wrongful dismissal.

EMPLOYMENT JUDGE – Snelson
27 Nov 2019

**Judgment sent to the parties on 28/11/2019**

**For Office of the Tribunals**