Case number: 2201437/2020

EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Mr F Zishaan	**AND**	**1. NCR Corporation** **2. NCR Limited** **3. James Bedore** **4. Evan Glover**

Heard at: London Central **On**: 28 July 2020

Before: Employment Judge Brown

Representation

For the Claimant: **Ms C McCann, Counsel**
For the Respondent: **Ms M-Y Shiu ,Counsel**

JUDGMENT AT A PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. Permission to serve out of the jurisdiction on the First, Third and Fourth Respondent is not required.

2. The claim has come to the attention of the First, Third and Fourth Respondents in any event and, if permission to serve out of the jurisdiction ie required, the claim shall be treated as having already been delivered to those Respondents in accordance with r91 ET Rules of Procedure 2013.

3. The ACAS Certificates were obtained in accordance with the prescribed requirements of the Early Conciliation Scheme.

4. The ET1 should not have been rejected; the correct addresses for the First, Third and Fourth Respondents were contained in it.

5. The ET1 contained Early Conciliation numbers and should not be rejected.

.

REASONS

The Claim and the Respondents

1. By a claim form presented on 6 March 2020 the Claimant brought complaints of constructive ordinary unfair dismissal (*sections 95(1)(c) and 98(4) of the Employment Rights Act 1996*), protected disclosure automatically unfair dismissal (*s103A ERA 1996*) and *Regulation 7(1) TUPE 2006* automatic unfair dismissal, protected disclosure detriment (*ss43B & 47 ERA 1996)* and breach of *Article 38(3) Regulation (EU) 2016/6789, General Data Protection Regulation*, as enacted by the *Data Protection Act 2018*, against the Respondents.

2. The Claimant was employed by the Second Respondent, a UK company.

3. The Claimant also contends that he was employed by the First Respondent, which is the parent company of NCR UK Group Limited, which in turn is the holding company for the Second Respondent. The First Respondent is a US corporation incorporated in Maryland in the USA and headquartered in Atlanta, Georgia, USA. The Third Respondent is James Bedore, Executive Vice President, General Counsel and Secretary to the First Respondent. The Fourth Respondent was the Claimant's line manager is the Law President, Chief Counsel of Software and Services and, since October 2018, the Chief Privacy Officer of the First Respondent. The Third and Fourth Respondents are not resident, domiciled or otherwise present in the United Kingdom. They are resident in the USA.

4. The Claimant alleges that the First Respondent is an employer for the purposes of *s43K(2) ERA 1996* and that the Third and Fourth Respondents are "other workers" of the First Respondent (as the Claimant's employer), pursuant to *s47B(1A) ERA 1996.* The Claimant contends, for these purposes, that: the Third and Fourth Respondent were responsible for the Claimant's work duties; the First Respondent operated an annual incentive scheme applicable to the Claimant, which depended on the Claimant and the Third Respondent's performance; the Claimant's individual appraisal process and annual performance review were managed by the Fourth Respondent; the Claimant was required to adhere to the First Respondent's Code of Conduct which created contractual obligations; and that he was required to required to make protected disclosures through the First Respondent's ethics and compliance office.

5. The Respondents contend that the Claimant required permission to serve the First, Third and Fourth Respondents out of the jurisdiction, which the Claimant did not obtain. They also contend that there were defects in the ACAS EC process and certificates and that the Tribunal should not have accepted the Claimant's claims.

Open Preliminary Hearing

6. This Open Preliminary Hearing was listed to determine the following issues:

Jurisdiction issue

6.1. Whether permission to serve the claims outside of the Jurisdiction on the First, Third and Fourth Respondent is required.

Validity of ET1

6.2. Whether the ACAS certificate appended to the ET1 was obtained in accordance with the prescribed requirements of the Early Conciliation Scheme under ECR SI 2014/254 Sch r 2 (2); and, if not, whether the Claimant should not be permitted to present his claim under s18A Employment Tribunals Act 1998.

~~6.3. Whether the ACAS certificate was validly served on the Respondents; and, if not, whether the ET1 should be rejected under rule 10(1)(c) of the 2013 Rules of Procedure.~~

6.4. Whether the ET1 should be rejected as against the First, Third and Fourth Respondents on the basis that correct addresses were not contained in the ET1, contrary to rule 10(1)(b) of the 2013 Rules of Procedure.

6.5. Whether the ET1 does not contain the Early Conciliation numbers and, as such, falls to be rejected under rule 12(1)(c) of the 2013 Rules of Procedure

7. Issue 3 was not pursued by the Respondents. The remaining issues were the only issues to be determined at this Open Preliminary hearing. The Respondents do not raise arguments on territorial jurisdiction at this stage. They reserve their position in this regard.

8. This Hearing was conducted remotely by videolink (CVP – Cloud Video Platform). Members of the public could attend the hearing.

9. The parties presented detailed skeleton arguments. There was a bundle of authorities and a bundle of documents.

Permission to Serve out of the Jurisdiction

10. The Claimant contends that permission to serve outside of the jurisdiction is not required in the Employment Tribunals (“ETs”), at least for statutory employment claims, which the Claimant in this case brings. In the civil courts, permission to serve is ordinarily required when service will take place outside England and Wales, CPR r6.30 and PD6B. However, the Claimant says that the procedural rules of the Employment Tribunal contain no such provisions. The Claimant contends that the less stringent procedural requirements of the ETs reflect the intention that Claimants and Respondents should be capable of representing themselves in ET proceedings without the undue formality of the civil courts.

11. The Respondents contend that the United Kingdom is a signatory to various international civil procedure treaties regarding the service of judicial documents abroad, such as a claim form, including the Hague Convention 1965, which applies in all civil and commercial matters where there is occasion to transmit a judicial or extrajudicial document abroad.

12. The Respondents contend that, until a person has been effectively served, proceedings cannot be duly constituted against them. Service on a person abroad is a potential intrusion into a foreign jurisdiction. The Claimant in this case is attempting to cause Respondents to be served or to treat them as having been served without regard to fundamental principles against extraterritoriality and international treaties regarding service on persons abroad, which are reflected in both the CPR and the ET Rules of Procedure 2013.

13. The Respondents say that the ET Rules of Procedure 2013 must be construed to be consistent with the international civil procedure treaties to which the UK is a signatory.

ET Rules of Procedure 2013

14. The overriding objective (r.2, Sched 1, ETs (Constitution & Rules of Procedure) Regulations 2013 ("the ET Rules")) requires ETs to avoid unnecessary formality and seek flexibility in the proceedings, avoid delay and save expense. The President of the Employment Tribunals (England & Wales) has a statutory responsibility for securing, as far as practicable, the "speedy and efficient" disposal of proceedings (Reg 7(1)(a) ET Rules).

15. R8 ET Rules of Procedure 2013 provides:

" 8 Presenting the claim

(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.

(2) A claim may be presented in England and Wales if—

(a) the respondent, or one of the respondents, resides or carries on business in England and Wales;

(b) one or more of the acts or omissions complained of took place in England and Wales;

(c) the claim relates to a contract under which the work is or has been performed partly in England and Wales; or

(d) the Tribunal has jurisdiction to determine the claim by virtue of a connection with Great Britain and the connection in question is at least partly a connection with England and Wales."

16. By Rules 10 and 12 ET Rules of Procedure 2013, the claim form shall be rejected in certain circumstances. These rules do not contain any specific provisions regarding Respondents outside the jurisdiction, albeit r12(1)(a) & r12(2) provide that a claim, or part of it, will be rejected if an Employment Judge considers that it is one which the Tribunal has no jurisdiction to consider.

"10 Rejection: form not used or failure to supply minimum information

(1) The Tribunal shall reject a claim if –

(a) it is not made on a prescribed form; …

(b) it does not contain all of the following information
(i) each claimant's name;
(ii) each claimant's address;
(iii) each respondent's name;
(iv) each respondent's address[; or

(c) it does not contain all of the following information—
(i) an early conciliation number;
(ii) confirmation that the claim does not institute any relevant proceedings; or
(iii) confirmation that one of the early conciliation exemptions applies].

(2) 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."

17. Rule 15 specifically governs sending the claim form to respondents, and provides that the Tribunal itself shall do this:

" **15 Sending claim form to respondents**

(1) Unless the claim is rejected, the Tribunal shall send a copy of the claim form, together with a prescribed response form, to each respondent with a notice which includes information on—

(a) whether any part of the claim has been rejected; and

(b) how to submit a response to the claim, the time limit for doing so and what will happen if a response is not received by the Tribunal within that time limit."

18. *Rules 87 – 91 ET Rules of Procedure 2013* contain provisions regarding the service of documents.

" 86 Delivery to parties

(1) Documents may be delivered to a party (whether by the Tribunal or by another party)—

(a) by post;

(b) by direct delivery to that party's address (including delivery by a courier or messenger service);

(c) by electronic communication; or

(d) by being handed personally to that party, if an individual and if no representative has been named in the claim form or response; or to any individual representative named in the claim form or response; or, on the occasion of a hearing, to any person identified by the party as representing that party at that hearing.

(2) For the purposes of sub-paragraphs (a) to (c) of paragraph (1), the document shall be delivered to the address given in the claim form or response (which shall be the address of the party's representative, if one is named) or to a different address as notified in writing by the party in question.

(3) If a party has given both a postal address and one or more electronic addresses, any of them may be used unless the party has indicated in writing that a particular address should or should not be used.

87 Delivery to non-parties

(1) Subject to the special cases which are the subject of rule 88, documents shall be sent to non-parties at any address for service which they may have notified and otherwise at any known address or place of business in the United Kingdom or, if the party is a corporate body, at its registered or principal office in the United Kingdom or, if permitted by the President, at an address outside the United Kingdom."

19. **"91 Irregular service**

A Tribunal may treat any document as delivered to a person, notwithstanding any non-compliance with rules 86 to 88, if satisfied that the document in question, or its substance, has in fact come to the attention of that person."

Previous Versions of ET Rules of Procedure

20. Rule 87 of the 2013 rules differs to previous versions of the rule in earlier Employment Tribunal Procedure Rules.

21. *Rule 23(4)(e) of the Rules of Procedure 2001* provided:

"23.— **Notices, etc…**

(4) All notices and documents required or authorised by these rules to be sent or given to any person hereinafter mentioned may be sent by post (subject to paragraph (6)) or delivered to or at—

(e) in the case of a notice or document directed to a party

(i) the address specified in his originating application or notice of appearance.

(ii) if no such address has been specified, or if a notice sent to such an address has been returned, to any other known address or place of business in the United Kingdom or, if the party is a corporate body, the body's registered or principal office in the United Kingdom, or, in any case, such address or place outside the United Kingdom as the President or a Regional Chairman may allow;…"

22. *R 8* of the *2013 Rules* also differs from the equivalent *r19* in *ET Rules of Procedure 2004*

"**19.— Jurisdiction of tribunals in Scotland and in England & Wales**

(1) An employment tribunal in England or Wales shall only have jurisdiction to deal with proceedings (referred to as "English and Welsh proceedings") where–

(a) the respondent or one of the respondents resides or carries on business in England and Wales;

(b) had the remedy been by way of action in the county court, the cause of action would have arisen wholly or partly in England and Wales;

(c) the proceedings are to determine a question which has been referred to the tribunal by a court in England and Wales; or

(d) in the case of proceedings to which Schedule 3, 4 or 5 applies, the proceedings relate to matters arising in England and Wales.

(2) An employment tribunal in Scotland shall only have jurisdiction to deal with proceedings (referred to as "Scottish proceedings") where–

(a) the respondent or one of the respondents resides or carries on business in Scotland;

(b) the proceedings relate to a contract of employment the place of execution or performance of which is in Scotland;

(c) the proceedings are to determine a question which has been referred to the tribunal by a sheriff in Scotland; or

(d) in the case of proceedings to which Schedule 3, 4 or 5 applies, the proceedings relate to matters arising in Scotland."

Civil Procedure Rules

23. Under the Civil Procedure Rules in the civil courts, there is a procedure for obtaining permission to serve a claim form on a defendant outside the jurisdiction (other than where permission is not required under the CPR r. 6.32 or 6.33). The claimant must demonstrate: (a) that he has a good arguable case that at least

one of the grounds, or "gateways", under CPR 6BPD 3.1 applies; (b) that the claim has a reasonable prospect of success; and (c) the defendant's address. The court will not give permission unless satisfied that England and Wales is the proper place to bring a claim (which is a reference to the principles of forum non conveniens).

24. Under the CPRs, the Claimant serves the relevant proceedings on the Defendant. The court itself does not effect service.

The State Immunity Act 1978 and the Hague Convention 1965

25. The SIA 1978 provides a statutory requirement for service on an, ordinarily immune, state party. It incorporates the European Convention on State Immunity into primary legislation such that it has the force of law in the UK.

26. The Hague Convention 1965, while signed by the United Kingdom, and mentioned by the CPR, has not been given statutory effect.

Previous Employment Law Caselaw

27. In *Embassy of Brazil v Mr D A De Castro Cerqueira* [2014] ICR 7031, the EAT considered a case concerning the mandatory provisions of *s. 12(1) State Immunity Act 1978*, which require service on foreign States to be effected by the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State concerned.

28. In that case, the EAT considered the CPR provisions regarding service, including permission to serve out of the jurisdiction, and their applicability to Employment Tribunals.

29. The EAT said,

" 18. For completeness, reference was made to the provisions of the CPR. They only apply to proceedings in the county court, the High Court and the Civil Division of the Court of Appeal: see CPR 2.1. They do not apply to proceedings in the employment tribunal. There is provision for requiring the permission of the court to serve proceedings out of the jurisdiction in specified cases: see CPR 6.36. General rules about the method of service outside the jurisdiction are included in CPR 6.40. Where a document is to be served outside the jurisdiction, then CPR 6.40(3) permits service by a number of methods, including by service under CPR 6.44.

……

20. The argument originally proceeded on the basis that, as the provisions of the Regulations were silent on service outside the jurisdiction, employment tribunals could derive assistance from the provisions of the CPR, including CPR 6.40(4), even though those provisions were not directly applicable to proceedings in the employment tribunal. Reliance was placed upon the decision in *Nowicka-Price v Chief Constable of Gwent Constabulary* UKEAT/0268/09/ZT.

21 That approach, in my judgment, is not a permissible approach. Section 12 of the Act deals with the method of service on states of documents instituting proceedings. …. Furthermore, it would not be permissible for a court to seek to restrict the words of the Act by reference to provisions of other subordinate legislation, such as the CPR provisions, which are not applicable to proceedings in employment tribunals."

30. The EAT in *Embassy of Brazil v Mr D A De Castro Cerqueira* [2014] ICR 7031, therefore, specifically stated in both paragraphs [18] and [21] of its judgment that the CPR provisions on service, including service outside the jurisdiction, are not directly applicable to proceedings in the employment tribunal.

31. In *Pervez v Macquarie Bank Ltd* [2011] ICR 266, the EAT considered a case which involved an international corporate structure and an employee working in the UK.

32. The EAT (Underhill J) held that the employment judge had been right to find that the Claimant was entitled to the protection of the statutes and regulations on which his claims were based, and, on the face of it, the wording of regulation *19(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004* meant that he could not in fact enforce those rights in the employment tribunal. However, the EAT decided that it was wrong in principle that a group of employees should notionally enjoy protection for which there was no forum for enforcement and, to avoid that result, it was necessary to hold that in the context of *regulation 19a ET Rules of Procedure 2004*, a company could carry on business in England by seconding an employee to work at an establishment there even if the supply of workers to third parties was not part of its ordinary business.

33. The EAT held that, accordingly, while accepting that it could not be said in the ordinary sense that the Hong Kong company carries on business in England, it should nevertheless be joined as a respondent to the claims.

34. At paragraph [22] of the judgment, Underhill J said,

" In my view, therefore, the judge was wrong to hold that regulation 19 had the effect of depriving the tribunal of jurisdiction to entertain a claim against MCSL. Since that is the only basis of objection to the joinder application, I substitute a finding that MCSL be joined as a respondent. It will be necessary for the details of claim to be amended in order accurately to formulate the claim against MCSL. I direct that the amended details of claim be served on MCSL by no later than 23December 2010, with liberty to MCSL to serve an amended response by no later than 14 January 2011."

35. Underhill J, apparently, did not consider that permission to serve the proceedings on MCSL (the Hong Kong company) was required.

36. In *Financial Times Ltd v Bishop* [2003] 11 WLUK 702, another case about the territorial scope of the ERA 1996), the EAT referred to the prevailing practice that

ET pleadings (and other documents) being served without territorial or jurisdictional limitation and without the need for permission:

" 29….. Rule 23(4) of Schedule 1 to the 2001 Regulations contains no limitation on the geographical extent to which Tribunal proceedings may be sent to Respondents as is required by Rule 2(1); and in practice Tribunals, we are told, regularly send Originating Applications and other documents to Respondents based abroad, although we understand that there has been a Tribunal decision that overseas service should only be effected with the permission of a Regional Chairman (see E.L.A Briefing Volume 10 No 3 April 2003 page 47). Service is not the central consideration; the central consideration is whether, in each case, the employee has the benefit of the statutory right upon which he bases his claim; if he does have such a right, then prima facie the Tribunal has jurisdiction to entertain his claim; if he does not, the position is otherwise."

37. Insofar as there is discussion in *Bishop* of any need for permission to serve in the ET, as with the doctrine of forum non conveniens, that is in respect of contract claims (by reference to the *Extension of Jurisdiction (England and Wales) Order 1994*): at [75].

Discussion and Decision

38. There is no specific requirement in the ET Rules of Procedure 2013 for permission to serve respondents out of the jurisdiction to be obtained. This is to be contrasted with the position under the CPRs, which have been stated by the EAT not to apply to the Tribunal in this context, *Embassy of Brazil v Mr D A De Castro Cerqueira* [2014] ICR 7031, at paragraphs [18] and [21].

39. The Respondents contend that, nevertheless, the *r87 ET Rules of Procedure 2013* does indeed require permission to be obtained from the President to serve proceedings on a potential Respondent outside the jurisdiction. The Respondents contend that a potential Respondent is not a "party" within *r86 ET Rules of Procedure 2013*. They say that, given that the UK government is a signatory to the Hague Convention, the *2013 Rules of Procedure* should be interpreted as requiring permission. The tribunal, as part of the court system, ought to comply with UK treaty obligations.

40. This interpretation of the 2013 would appear to be novel – the only known case in which permission to serve was apparently required by a Tribunal was a 2003 ET case (mentioned in *Bishop*). That decision is a judgment of the Employment Tribunal at first instance and is, therefore, not binding. The judgment is not reported in the law reports. The sole reference to the judgment in any case law is in *Bishop,* above, which did not apply it. Its reasoning no longer strictly applies as it is based on a textual interpretation of the 2001 ET Rules then in force and which are not replicated in the current ET Rules.

41. The r23 ET Rules 2001 specified that documents could be sent by post or delivered to or at— "(e) in the case of a notice or document directed to a party (i) the address specified in his originating application or notice of appearance." Where there was no such address specified, the rules contained provisions for

sending the document to any other known address or place of business in the United Kingdom or, a corporate body's registered or principal office in the United Kingdom. In the case of addresses outside the UK, the rules provided for service on " such address or place outside the United Kingdom as the President or a Regional Chairman may allow."

42. The 2013 Rules do not contain the wording "the address specified in his originating application or notice of appearance"; but, rather, they provide under r86 that "the document shall be delivered to the address given in the claim form or response (which shall be the address of the party's representative, if one is named) or to a different address as notified in writing by the party in question."

43. *R86* appears to allow service of documents on a respondent at an address given either on the claim form, or on the response – not just on the respondent's own response.

44. Further, *r87* of the 2013 rules, which contains very similar wording to the wording of *r23(4)(e)(ii)* of the 2001 rules regarding permission to serve out of the jurisdiction, applies to "non-parties", not parties - " documents shall be sent to non-parties at any address for service which they may have notified and otherwise at any known address or place of business in the United Kingdom or, if the party is a corporate body, at its registered or principal office in the United Kingdom or, if permitted by the President, at an address outside the United Kingdom."

45. Under the 2013 rules, therefore, service of documents on non-parties outside the jurisdiction requires permission of the President, but not service of documents on parties.

46. I did not agree that the rules treat a respondent as a non-party until it has been served. This is inconsistent with the way in which "party" is used elsewhere in the rules. Party simply means a claimant or respondent, within the meaning of the interpretation provision - Reg 1 ET Regs 2103: "claimant" means the person bringing the claim; "respondent" means the person or persons against whom the claim is made.

47. The rules envisage that "party" applies both to "prospective" claimants and "prospective" respondents – that is, parties who have yet to be formally accepted as parties, or served, by the Tribunal. For example, in the same interpretation provision Reg 1 ET Regs 2013, '"Tribunal fee" means any fee which is payable by a party under any enactment in respect of a claim, employer's contract claim, application or judicial mediation in an Employment Tribunal. (emphasis supplied)' When fees were required to be paid, a prospective claimant was required to pay a fee before the claim had been accepted by the Tribunal. The overriding objective also applies to "parties" – if a respondent was not a party until it had been served, it would not have the benefit of the overriding objective. A respondent would also not have any standing under the rules to apply to the Tribunal for reconsideration of a judgment under r70 ET Rules of Procedure, for example where the respondent had never been served and had thus not entered a response, so that a default judgment had been entered against it.

48. Underhill J undertook the last review of the ET Rules in 2012/2013, and he devised the 2013 rules. This was after he heard *Pervez.*

49. Underhill J made clear in *Pervez*, in relation to r.19 of the ET Rules 2004 (the predecessor to r.8 ET Rules 2013) that the purpose of the rule was not simply to regulate the distribution of jurisdiction between tribunals in England & Wales, on the one hand, and Scotland on the other. On the contrary, the wording of the rule had the effect of conferring international jurisdiction on the employment tribunal for cases with a "non-GB" element; "the employment tribunal will have jurisdiction in respect of a particular claim if the acts or omissions which it is necessary to establish in order to constitute a cause of action, or any part of them, are alleged to have occurred in England and Wales", at para [15(2)].

50. R.8 ET Rules 2013, which Underhill J was responsible for drafting, even more clearly confers jurisdiction for claims with a foreign element, because only part of the claim requires a connection with GB*, r.8(2)(a) to (d).*

51. Therefore, in interpreting the 2013 rules, it is relevant that there is an express contemplation of a potential foreign element in ET proceedings and, specifically, proceedings against persons outside the UK in *rule 8*. Nevertheless, the rules do not specifically require permission to serve respondents out of the jurisdiction.

52. This interpretation of the 2013 Rules as not requiring permission to serve proceedings on a respondent outside the jurisdiction appears consistent with the EAT decisions in *Embassy of Brazil v Mr D A De Castro Cerqueira* [2014] ICR 7031, *Pervez v Macquarie Bank Ltd* [2011] ICR 266, and *Financial Times Ltd v Bishop* [2003] 11 WLUK 702.

53. In *Embassy of Brazil v Mr D A De Castro Cerqueira* [2014] ICR 7031 the EAT specifically stated in both paragraphs [18] and [21] that the CPR provisions on service, including service outside the jurisdiction, are not directly applicable to proceedings in the employment tribunal.

54. In *Pervez v Macquarie Bank Ltd* [2011] ICR 266, the President of the EAT ordered that proceedings be served on a Hong Kong company, apparently without considering that permission to serve outside the jurisdiction was required.

55. In *Financial Times Ltd v Bishop* [2003] 11 WLUK 702, another case about the territorial scope of the ERA 1996), the EAT said that "Rule 23(4) of Schedule 1 to the 2001 Regulations contains no limitation on the geographical extent to which Tribunal proceedings may be sent to Respondents as is required by Rule 2(1); and in practice Tribunals, we are told, regularly send Originating Applications and other documents to Respondents based abroad." It noted, but did not apply or approve, an ET decision that service on respondents outside the jurisdiction required the permission of the Tribunal.

56. Insofar as the Respondents contend that the *2013 rules* ought to be interpreted in accordance with the Hague Convention, so that the Respondent in a claim is a non-party until it has been served, it is notable that the rules of service on foreign States in *State Immunity Act 1978* do override the provisions of the *ET Rules*

2013. However, the SIA 1978 incorporates the European Convention on State Immunity into primary legislation, such that it has the force of law and is applicable to ETs. The Hague Convention, however, has not been incorporated in a similar way. Other features of the ET regulations, including the overriding objective, suggest that the rules should be interpreted in such a way as to avoid formality.

57. The Respondents rely on *Re Harrods (Buenos Aires)* [1992] Ch 72, CA, in contending that any enactment which empowers service on persons abroad without any requirements for permission being met would have to be clear and express in contemplating proceedings against persons who are not within the jurisdiction of the court. The Respondents contend that, as a creature of statute, this equally applies to the Tribunal; the empowering statute would have to be clear and express if service abroad were to be contemplated.

58. *Re Harrods* concerned the question of service outside the jurisdiction in respect of a petition (under the Companies Act 1985 and the Insolvency Act 1986) concerning the conduct of affairs of an English company operating solely in Argentina, where the act or failure took place in Argentina. An issue arose as to whether permission to serve "out" of the jurisdiction was required under R.S.C. Order 11 (the predecessor civil procedural rule as to service to the CPR);

59. The question was whether R.S.C. Ord 11, r.1(2)(b) permitted service out of the jurisdiction without leave (where the rule provided that: "Service of a writ out of the jurisdiction is permissible without the leave of the court provided that each claim made by the writ is either (a)….; or (b) a claim which by virtue of any other enactment" – sc. other than the Civil Jurisdiction and Judgments Act 1982 – "the High Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction").

60. The Court of Appeal held that, to be within Ord 11, r.1(2)(b), an enactment conferring jurisdiction on the High Court, "must, if it does not use the precise wording in the rule [i.e. Ord 11, r.1(2)(b)], at least indicate on its face that it is expressly contemplating proceedings against persons who are not within the jurisdiction of the court or where the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction. It is not enough, in my judgment, that the enactment, like the Companies Act 1985, gives a remedy in general cases – against "other members of the company" – without any express contemplation of a foreign element": @ 116C-D (per Dillon LJ).

61. I considered that the ET is a creature of statute and has its own procedural rules. The statutes relied on in this case confer jurisdiction on the ET. The ET Rules 2013 do expressly contemplate proceedings against persons outside Great Britain (r.8(2)(a) ET Rules 2013) and where acts or omissions complained of took place outside GB (as long as one of them took place in GB) (r.8(2)(b) ET Rules 2013), but do not contain provisions regarding service out of the jurisdiction on respondents. The issue in *Re Harrods,* concerning the particular provisions of the High Court procedural rules, does not arise in the ET.

62. I did not agree with the Respondents' contention that service of an ET1 abroad, without having to seek formal permission to serve outside the UK, would represent an exorbitant exercise of jurisdiction of the Tribunals over persons abroad.

63. The ET rules themselves and the relevant statute law are limited in their territorial scope. *R.8(2) ET Rules 2013* requires a connection with England & Wales in order for the Tribunal to have international jurisdiction. The substantive statutory employment rights relied on in this case have implied circumscribed territorial scope, *Lawson v Serco* [2006] IRLR 289). Where an employee's employment is based outside the UK and has no sufficient connection with the UK and UK employment law, those statutory protections will not be conferred on that employee and the ET will have no territorial jurisdiction over the claim.

64. Taking all these matters into account, I decided that permission to serve the claims outside of the Jurisdiction on the First, Third and Fourth Respondent is not required.

R91 ET Rules of Procedure 2013

65. *R.91 ET Rules 2013* confers a discretion on the Tribunal to "treat any document as delivered to a person, notwithstanding any non-compliance with rules 86 to 88, if satisfied that the document in question, or its substance, has in fact come to the attention of that person".

66. It appears that the ET1 has come to the attention of the First, Third and Fourth Respondents, through the Second Respondents and solicitors instructed by them.

67. I did not accept the Respondents' contention that the irregularity should not be waived because the Claimant had deliberately or cynically used the Second Respondent's address in the ET1 form to avoid the requirement for permission to serve out of the jurisdiction.

68. I accepted Ms McCann's submission that it was more likely that the Claimant was unaware that there was a requirement for permission to serve out of the jurisdiction. The rules are silent on it and there are no reported cases stating that there is such a requirement. The reported ET cases suggest that there is no such requirement. As venerable an employment lawyer as Underhill J did not appear to consider that there was any such requirement when ordering service on a Hong Kong company in *Pervez*. In those circumstances, it is unlikely that the Claimant had superior knowledge of the requirement, compared to specialist employment law judges who had encountered the issue. It is considerably more likely that he was unaware of the requirement.

69. I considered that the Claimant should not be penalised for this entirely reasonable misunderstanding. The overriding objective requires Tribunals to deal with cases "fairly and justly" and "avoiding unnecessary formality and seeking flexibility in the proceedings". I concluded that it would be in the interests of justice to treat the

claim as having been delivered to all the Respondents in accordance with the rules.

Brussels Recast and r8 ET Rules of Procedure

70. It was not necessary for me to decide whether permission to serve outside the jurisdiction was, in any event, not required in respect of the First Respondent because the application of the Recast Brussels Regulation negated the requirement for permission, by analogy with CPR r6.33(2)(b)(iii).

71. Nor was it necessary for me to decide the Claimant's arguments regarding the jurisdiction of the Tribunal over the Third and Fourth Respondents due to application of r.8(2) ET Rules 2013.

Validity of ACAS Certificates and ET1

72. The Respondents contend that the ACAS Certificates in this case were defective. They say that the claimant gave ACAS the wrong address information ("c/o NCR Limited" - the address of the Second Respondent) and the ACAS certificates were therefore not issued in the prescribed manner.

73. Under *s. 18A(1) Employment Tribunals Act 1996,* before presenting 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. The prescribed information is set out in *ECR Sch 2(2)* and provides that an early conciliation form must contain the prospective respondent's name and address. Further, under s. *18A(4)* and *ECR Sch 2(8)* the early conciliation certificate must be issued to the Claimant containing the address of the prospective respondent.

74. The Respondents contend that It is obvious that the address given to ACAS must be the correct address of the prospective respondent. Providing an incorrect address does not comply with the requirement to provide the prescribed information. If a claimant provides an incorrect address for a respondent, the ACAS conciliation procedure will clearly not follow the intended course.

75. The Respondents also contend that, as the Claimant did not comply with *ECR Sch 2(2),* he was not entitled to present the claim under *s. 18A(1) ETA 1996.* Therefore the Claimant did not have certificates within the meaning of s. 18A(4). Under *s. 18A(8)* the claimant may not present an application to institute relevant proceedings without a certificate under *s. 18A(4).* Therefore the Claimant was also not entitled to present the claim under s. *18A(8).*

76. The Respondents further say that the addresses inserted in the ET1 for the First, Third and Fourth Respondents were also incorrect in the same way. Indeed, the Claimant did not indicate "c/o NCR Limited" so as to indicate that it was not the actual address, unlike on the ACAS certificates.

77. The Respondents therefore argue that the ET1 should have been rejected under *rule 10(1)(b)(iv) ET Rules of Procedure 2013* against First, Third and Fourth

Respondents on the basis that the correct addresses were not contained in the ET1. The misinformation provided in the ET1 was of the Claimant's own making and a deliberate choice. This is not a case of mere typographical or inconsequential errors. As referred to above, had the Claimant inserted the correct addresses, the Tribunal service would have been alerted to the foreign addresses of R1, R3 and R4 and could have referred the matter to an Employment Judge regarding the issues of service abroad and jurisdiction.

78. The Respondents say that there is no power to remedy a defective claim form if the form is not returned under *rule 10(2)* or *rule 12(3)* and the necessary application for reconsideration made under *rule 13; Cranwell v Cullen* UKEATPAS/0046/14, unreported, 20 March 2015.

79. For the reasons same reasons the Respondents say that the claim form did not contain an early conciliation number in respect of the First, Third and Fourth Respondents, as the certificates were not issued in accordance with the ECR. Accordingly, the ET1 ought to have been rejected under rule 10(1)(c). Although the tribunal has a discretion to overlook certain kinds of "minor errors" under rule 12(2A), there is no discretion to overlook minor errors in the EC certificate number on a claim form; Sterling v United Learning Trust UKEAT/0439/14 (18 February 2015, unreported).

Relevant Provisions

80. Rule 12 ET Rules of Procedure 2013 provides:

Rejection: substantive defects

(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.

81. *S18 A Employment Tribunals Act 1996* provides:

" [18A Requirement to contact ACAS before instituting proceedings
(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.

This is subject to subsection (7).

(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.

(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.

82. Rule 2. Early Conciliation Rules Of Procedure 2014 provides:

"2(1) An early conciliation form which is presented to ACAS must be—

(a) submitted using the online form on the ACAS website; or

(b) sent by post to the ACAS address set out on the early conciliation form.

(2) An early conciliation form must contain—

(a) the prospective claimant's name and address; and

(b) the prospective respondent's name and address.

(3) ACAS may reject a form that does not contain the information specified in paragraph (2) or may contact the prospective claimant to obtain any missing information.

(4) If ACAS rejects a form under paragraph (3), it must return the form to the prospective claimant.

Discussion and Decision

83. I did not find that the ACAS EC certificates were defective or that the ET1s should have been rejected in respect of the First, Third and Fourth Respondents.

84. In accordance with *s18A(1) ETA 1996*, the Claimant notified ACAS of disputes against all four respondents. ACAS EC Certificates were issued by ACAS in respect of all four respondents.

85. The Claim forms contained ACAS EC numbers in compliance with r12(1)(c) ET Rules of Procedure 2013.

86. The Tribunal does not examine the validity of an ACAS certificate which has been issued. There is no requirement for Early Conciliation to have been carried out by ACAS in accordance with the prescribed requirements and ETs must not examine the process prior to the grant of an EC Certificate in order to assess whether a claimant should be barred from proceedings by s18A ETA 1996 - *De Mota v ADR Network and the Cooperative Group Ltd* UKEAT/0305/16/DA , at para [33].

87. In *Peacock v Murreyfield Lodge Limited* UKEAT/0117/19/JOJ at [12], the EAT held that a defect in the address, or a difference between an address in the EC certificate and the claim form is not something which the Tribunal staff is required to refer to a Judge to consider with a view to rejection.

88. Likewise, on the facts in the present case, there is no provision for staff to refer a claim form to a judge where the claim form contains an EC number which corresponds with the relevant EC certificate for that Respondent. Where the claim form contains such an EC number, that is the end of the matter.

89. Also in *Peacock v Murreyfield Lodge Limited* UKEAT/0117/19/JOJ at [18], the EAT held that the provision of an address, known to be an address at which business in relation to a prospective respondent is carried out, is an address which is compliant with the Early Conciliation regulations.

90. On the facts of the present case, the First Respondent is the parent company of NCR UK Group Limited, which in turn is the holding company for the Second Respondent. The Second Respondent is a subsidiary of the First Respondent's business. Business in relation to the First Respondent was therefore carried out at the Second Respondent's address. Furthermore, the facts alleged by the Claimant, included that the Third and Fourth Respondent were responsible for the

Claimant's work duties; the First Respondent operated an annual incentive scheme applicable to the Claimant; and the Claimant's individual appraisal process and annual performance review were managed by the Fourth Respondent. I considered that the First, Third and Fourth Respondents were therefore alleged in the claim to be engaged with the Claimant's employment, which was itself at the Second Respondent's address.

91. I accepted the Claimant's submission that the Second Respondent's address was an address at which all Respondents could be contacted and from which the Claimant had work dealings with all four Respondents. Furthermore, the Claimant pointed out that the First Respondent's website refers to the Second Respondent's UK address as one of its locations: https://www.ncr.com/company/locations/europe.

92. Provision of the Second Respondent's address on the EC certificate and claim form therefore complied with the EAT's decision in *Peacock v Murreyfield Lodge Limited* UKEAT/0117/19/JOJ.

93. In some cases, a Claimant may not know any address other than the address at which they encountered an individual Respondent, albeit that that Respondent might not be employed the company which operates at that address. It would potentially defeat the protections contained in protected disclosure and discrimination legislation if the Claimant's claim was rejected as invalid because that was not the correct address for the potential Respondent (even though the claim had, in fact, come to the Respondent's attention).

94. In this regard, the higher courts have said that *rs10 & 12 ET Rules 2013* must be read in light of the overriding objective to deal with cases "fairly and justly" and "avoiding unnecessary formality and seeking flexibility in the proceedings" (r.2 ET Rules 2013). This includes the need to avoid elevating form over substance in procedural matters (*Chard v Trowbridge Office Cleaning Services Ltd* (UKEAT/0254/16/DM) at [62] & [63]. Further, it is no part of the purpose of the EC provisions to encourage satellite litigation (*De Mota,* at [32]).

95. Insofar as an incorrect name or address for a Respondent is inserted on a claim form, this does not mean that the claim form itself should be rejected, but it may mean that the Respondent does not receive the claim, so that any judgment against him should be set aside, see *Chowles t/a Granary Pine v West* UKEAT/0473/08/DM.

96. In any event, it was not in dispute that the US address for all the Respondents was contained in particulars attached to the claim form, although not on the prescribed form itself. *Rule 10 ET Rules of Procedure 2013* simply requires "the claim" to contain the Respondent's address.

97. In *Unison v National Probation Service South Yorkshire* [2010] IRLR 930, the claim form did not contain the name and address of the second claimant, although their name and their solicitor's address was elsewhere in the attached particulars. The EAT held that the EJ should have decided that omission was immaterial and accepted the claim.

98. I also noted that, in *Hamling v Coxlease School Ltd* (UKEAT/0181/06), the claimant failed to provide her address at all but the EAT held that the omission was irrelevant and immaterial notwithstanding that the information was mandated by the ET rules then in force.

99. I decided that the ACAS EC certificates were not defective and that there were no grounds for rejecting the claim forms.

100. If I was wrong about that, in all the circumstances, I decided that any error as to the addresses for the First, Third and Fourth Respondents was minor and neither relevant nor material. Taking into account that *r.10* must be read in light of the overriding objective to deal with cases "fairly and justly" and "avoiding unnecessary formality and seeking flexibility in the proceedings", I decided it would not be in the interests of justice to reject the claim.

Consequential Directions

101. I made some consequential directions.

102. The First, Third and Fourth Respondents shall present responses by 28 August 2020.

103. The date by which the parties shall provide mutual disclosure is changed to 14 September 2020.

_____

Employment Judge **Brown**

Date: 31 July 2020

SENT to the PARTIES ON

31/07/2020.

.....
FOR THE TRIBUNAL OFFICE