



## EMPLOYMENT TRIBUNALS

**Claimant**  
Mrs S Thomas

**Respondent**  
v Department for Work and Pensions

### PRELIMINARY HEARING by CVP

**On:** 9 March 2021

**Before:** Employment Judge Martin

**Appearances**

**For the Claimant:** Mr R Johns - Counsel

**For the Respondent:** Mr N Roberts – Counsel

## RESERVED JUDGMENT

The decision of the Tribunal is that the Claimant's claims are rejected as they do not comply with Rule 12(2) Employment Tribunal Rules of Procedure 2013.

## RESERVED REASONS

1. This matter was heard by CVP with the agreement of the parties due to the current pandemic. The hearing was listed to consider whether the Claimant's had presented a valid claim to the Tribunal and also whether her claims were brought in time. The Claimant had very recently sought legal advice and Mr Johns had very recently been instructed. There was no witness statement from the Claimant in relation to why she had not brought her claim in time and following submissions from both parties I decided it was in the interests of justice to defer that issue to be dealt with at a later date in the event that I allowed the claim to proceed. In the event I have not allowed the claim to proceed and therefore the hearing listed for 21 May 2021 has been vacated.
2. The issue before me is whether the Claimant's claim should be rejected under rule 12 of the Employment Tribunal Rules 2013 in that the Claimant did not engage in early conciliation before issuing her claim. Her claim form therefore did not have

an ACAS early conciliation number but the Claimant ticked that she was claiming interim relief and the exemption applied. However there was no application for interim relief and in any event even if there had been, it was substantially out of time. This was accepted by the Claimant.

3. s.18A(1) Employment Tribunals Act 1996 (“ETA 1996”) provides that claimants must conduct ACAS early conciliation before bringing tribunal proceedings. The rules for complying with this requirement are set out in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (“2014 Regulations”). The exceptions to the requirement for early conciliation are narrow: s.18A(7) ETA 1996 and reg. 3 of the 2014 Regulations.

4. The Tribunal must reject a claim form, under rule 12 Employment Tribunal Rules 2013, if the claim is:

“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” Rule 12(1)(c); or

“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” Rule 12(1)(d).

5. The relevant dates are:

15 July 2019 EDT

1 November ET1 – no ACAS certificate number entered but ticked that interim relief was sought

19 December Early conciliation started

27 December ACAS certificate sent to the Tribunal with no covering email or letter

9 January 2020 ET1 ‘accepted’ after referral to EJ – “*deemed presented on day EC Certificate was provided*”. Therefore presented on 27 December 2019.

6. The Respondent provided a written skeleton argument which in essence said that the claim was not validly presented as there was no ACAS early conciliation number on the form as is prescribed, the exemption did not apply and that as a consequence the only step open to the Tribunal was to reject the claim.

7. **The Respondent’s submissions** - It was submitted by the Respondent that what should have happened is that the Tribunal should have rejected the claim when it was presented. The Claimant would then have been sent the reasons for rejection and how to apply for a reconsideration. The Claimant could then apply to rectify the defect in the form. She did not do this and therefore the failure was never rectified. It was submitted that the authorities cited in the skeleton argument are

clear that there is no discretion that can be applied and that the Tribunal must reject the claim form and return it in these situations. It would then be open to the Claimant to make an application to rectify which had not been done until today's hearing.

8. **The Claimant's submissions** – the Claimant did not disagree with the Respondent as to what should have happened. It was submitted that if the correct procedure did happen the Tribunal would have told the Claimant why the claim form had been rejected and provide the reconsideration procedure to her. This would have put the Claimant, as a litigant in person as she was then, on notice of what she should do. It was accepted that early conciliation had not been started when the Claim was presented and it was put forward that the Claimant had spoken to ACAS before and there was some confusion.
9. The Claimant submitted that whether judge had made an error or not when considering the form as presented, if things had worked through as rule 12 suggests they should, the Claimant would be in a different position and could have applied to amend the form to rectify defect. The Claimant asks that the Tribunal now grants her an extension of time to submit an amended claim form with the ACAS number on it.
10. **The Respondent's reply** –The authorities cited make it clear that there is no discretionary case management power in these circumstances. It is a mandatory process so there is no discretion. Secondly, of particular importance to this rule, is that the primary legislation provides for early conciliation before bringing claims. The defect here is that the Claimant did not engage with the early conciliation process before making her claim, so it would be wrong to allow a rectification to allow reverse order of events i.e. submit a claim then start early conciliation.
11. **My decision** – In coming to my decision I reviewed the authorities cited by the Respondent in its skeleton argument. There were not authorities put forward by the Claimant.
12. The authorities cited are **Cranwell v Cullen [2015] UKEAT(S)46/14** and **E.ON Control Solutions Ltd v Caspall [2020] ICR 552**. I have considered both of these authorities carefully.
13. The E.ON case is similar to this case in that the defect related to the ACAS early conciliation number. It was held that this was a defect of a kind described at rule 12(1)(c) ET Rules. 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 Tribunal, 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 Tribunal proceedings but the mandatory rejection and return of the claim under Rule 12(2) meant that there were no proceedings before the ET.

14. I am satisfied that it was mandatory to reject the Claimant's claim as she had not put a correct ACAS number on the form. I can understand the desire of my colleague to allow the claim to proceed as by the time he had been referred the claim form to consider rejection as there was not ACAS number on the face of the form and the exemption cited did not apply (interim relief), the Claimant had sent an ACAS early conciliation certificate. However this does not negate that early conciliation was entered into after proceedings had been initiated and that the discretionary powers held by the Tribunal under rule 6 and the overriding objective are not applicable to mandatory provisions. The case law is clear that neither of these two rules can get round the mandatory requirements of rule 12. This was made clear by the Judgment of Her Honour Judge Eady QC in the E.ON case. The Claimant's application to amend can not therefore be granted.
15. This judgment is therefore a rejection of the Claimant's claims pursuant to Rule 12(2). The reason being that the Claimant did not put a valid ACAS early conciliation number on her form. The Claimant can apply for reconsideration on the basis that the defect can be rectified. By the time of this hearing the defect had not been rectified. I had not been provided with an amended claim form showing on the face of it the correct ACAS early conciliation number.
16. It follows that I do not need to consider whether the Claimant's claims were brought in time, and that the hearing listed for 21 May 2021 is vacated.

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Employment Judge Martin  
Date: 9 March 2021