EA-2019-SCO-000111-SH
(previously UKEATS/0015/20/SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 6th September 2021

Before :

THE HONOURABLE LORD SUMMERS

- -

Between :

MR G ADAMS & OTHERS	**Appellants**
- and -	
CORNERSTONE COMMUNITY CARE	**Respondent**

- -
- -

Mr D Hutcheon (instructed by Thompsons Scotland) for the **Appellants**
Mr D Morgan (Burness LLP) for the **Respondent**

Hearing date: 28 April 2021

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JUDGMENT

SUMMARY

Topic 8 - Practice and Procedure

Where a series of claim forms were submitted with incomplete early conciliation numbers held that the tribunal was correct to reject the claims under paragraph 10(1)(c)(i) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** schedule 1. Where reconsideration was sought, held further that the employment tribunal had been entitled to accept the claims after the full ACAS early conciliation number was supplied because the defect had been remedied. It was not necessary to hold a hearing. The employment tribunal was entitled to treat the claims as having been lodged on the date when the new claims were submitted.

THE HONOURABLE LORD SUMMERS:

1. In this case the Claimants appeal two decisions of the Employment Tribunal. The first is dated 14 November 2019. The decision was one taken administratively and was communicated to the Claimants by letter. The Employment Tribunal advised the Claimants that it had rejected a series of claims because they had failed to provide "a correct and complete early conciliation number or confirmation that there is no requirement for early conciliation in respect of [their] claim". The Claimants had sent a series of eight digit numbers.

2. I was advised that ACAS early conciliation numbers consist of ten digits. The first six digits of an ACAS early conciliation number are referred to as the "EC reference number". This number is assigned in sequence through the course of a year. Thus it signifies the number of conciliations in the year in question to the point when the number is issued. The next two digits represent the year in which the conciliation process began. The final two digits are generated by an algorithm from the digits in the 6 digit reference and the year. The ten digit number ACAS early conciliation number is the product of the EC reference number. The ACAS early conciliation number appears on the early conciliation certificate.

3. The numbers submitted by the Claimants to the Employment Tribunal omitted the last two digits. The Claimants did not advise me why this error had occurred. It would appear that the numbers had come from a list of numbers and for some reason the final two digits on this list were missing. Since this appeal involved multiple claims, this error was repeated 432 times**.**

4. The Claimants on realising their error re-submitted the claims with accurate ACAS early conciliation numbers and sought reconsideration of the decision to reject the claims. In its

reconsideration decision dated 2 December 2019 the Employment Tribunal accepted the claims because the correct conciliation number had now been supplied. The Tribunal decided that these should be treated as having been presented on 19 November 2019, the date the claims with correct conciliations numbers were supplied.

This appeal concerns the terms of rule 10 of the Employment Tribunal Rules of Procedure found in the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** schedule 1. Paragraph 10 provides as follows -

> 10 (1) The Tribunal shall reject a claim if—
>
> (c) it does not contain one of the following—
>
> (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.

5. The interpretation provision in the Rules, rule 1, defines an "early conciliation number" as "the unique reference number which appears on an early conciliation certificate". Rule 10(2) states that the Tribunal must return the form if the early conciliation number is absent "with a notice of rejection explaining why it has been rejected". In **Mrs M Sterling v United Learning Trust** [2015] 2 WLUK 590) the EAT held that on a proper interpretation of rule 10 a notice of rejection should be sent not only where an early conciliation number has been omitted but also where the number supplied is inaccurate. Although rule 12 permits the staff of a tribunal office to refer such an omission or error to an Employment Judge for decision (see rule 12(1)(c)), this was not the course followed in this case. In this case the procedure under rule 10 was followed. The Claimants do not dispute the propriety of that course of action.

6. The Employment Tribunal's rejection letter was based on the understanding that "the ACAS Certificate should consist of a letter and 10 digits (e.g.: R123456/19/12)". The numbers supplied did not consist of ten digits and the claims were as a result correctly rejected. The rule is in mandatory terms. In **Mrs M Sterling v United Learning Trust** (above) at paragraph 22 Langstaff, J (as he then was) states, "it is implicit that that number is an accurate number". Simler, J (as she then was) in **Miss M Adams v British Telecommunications Plc** [2017] I.C.R. 382 states at paragraph 5 –

> …if the minimum information is not provided within the form, the tribunal has no option but to reject the claim unless that omission is capable of being excused by considering some other rule.

7. At paragraph 9 after referring to **Sterling** (above) Simler, J likewise accepted that the ACAS early conciliation number must be accurate. I have been given no reason to doubt the authority of these decisions both of which emanate from past presidents of the Employment Appeal Tribunal.

8. The Claimants submitted that because the eight digits supplied were unique to each claimant the Employment Tribunal could have conducted some form of enquiry so as to identify the individual in question so as to be satisfied that early conciliation had taken place. Such an approach would be inconsistent with the wording of the Rules and subvert a process that has the administrative advantage of obviating the delays that arise from enquiry. A letter from ACAS dated 25 June 2021 was placed before me. In the letter ACAS explain that if the full number is not supplied the Employment Tribunal Service cannot check with the ACAS database to confirm that the claimant has engaged in early conciliation, as required by statute. The Claimants submitted that it would be possible to alter the computerised system so that it could search for eight digit numbers. But in the absence of an indication that this is feasible I consider this suggestion to be speculative. In any event it is not in point. The Employment Tribunal is obliged to follow the Rules.

9. The Claimants sought refuge in the "overriding objective" in rule 2. It requires tribunals to deal with cases fairly and justly. Rule 2(c) requires so far as practicable tribunals to avoid "unnecessary formality". !But the overriding objective cannot override the authority of **Sterling** and **Adams**. Justice must be done to all parties and the Respondent's sense of justice would no doubt be outraged if I ignored the plain words of rule 10 and the weight of authority represented by two EAT decisions. The requirement to provide the correct ACAS number is not onerous or unfair. It serves a useful purpose designed to benefit all parties. In doing justice the Tribunal must have regard to the need to provide an effective system of justice that benefits all who utilise it. An effective system of justice will inevitably require information of various sorts from its users. While these requirements may occasionally catch people out, they serve a valuable purpose. What may seem unfair to an individual may in fact be entirely fair when the broader interests of justice are weighed up. For these reasons rule 2 cannot avail the Claimants nor can their appeal to article 6 of the **European Convention on Human Rights**. If rule 10 restricts access to justice, it is because the Claimants have through oversight or error failed to comply with its terms. I accordingly reject the appeal against the decision of the Employment Tribunal to reject the claims.

10. Although it may be cold comfort to the Claimants, I note that the law has been changed to deal with this type of error (see **Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020**/1003 paragraph 12). The change came into effect on 8 October 2020, after these claims were submitted. Since the change to the law cannot affect this appeal it is not necessary to set out the terms of regulation 12.

11. The Claimants also appealed the Employment Tribunal's reconsideration judgement. The issue in this ground of appeal is whether the Employment Tribunal was correct to decide that the date

of presentation of the claims was 19 November 2019, the date upon which the amended claims were received. Rule 13(4) of the Employment Tribunal Rules of Procedure provides that, where an employment judge concludes that the original rejection was correct but that the defect has been corrected, the claim shall be treated as presented "on the date that the defect was rectified". The question that arises is when that was.

12. Although it was clear that the Employment Tribunal had concluded that 19 November 2019 was the operative date, there was little indication of why it came to that view. The parties agreed that the employment judge who had decided the matter should be asked to give his views. The EAT accordingly ordered him to answer the following questions -

> Was the decision to accept the claims because the decision of the Employment Tribunal dated 14 November 2019 rejecting the claims was wrong (Rule 13(1)(a))?; or
>
> Was the decision to accept the claims because the Claimants' representative rectified the notified defect (Rule 13(1)(b)) by way of the schedule submitted with her application for reconsideration dated 19 November 2019?

13. Employment Judge Whitcombe responded in due course and gave his reasons for the decision made on 2 December 2019. He explained that he was unaware that there had been an appeal against reconsideration. It would seem that the Claimants' request for reasons had not been relayed to him. The Employment Judge freely accepts that because he was not advised of the Claimants' request some time has passed and he accepts that he has no "real memory" of his decision. I have read his response to the EAT's request for assistance and it is evident that he has reacquainted himself with the file and the application and has sought to assist the EAT. His response explains the background to the rejection of the ET1. He notes that where an ET1 lacks necessary information it is rejected by Employment Tribunal staff. The relative letter of 14 November 2019 was sent out by T Callaghan, a

member of the administrative staff. The Employment Judge provides a helpful explanation of the administrative process and explains that the letter sent to the Claimants was in accord with the ET1 Pre-acceptance check list operated by the employment tribunal. The check list required a match between the early conciliation number on the ET1 and the number on the early conciliation certificate. He advises that when there is an application for reconsideration of an administrative rejection of a claim form the "duty judge" deals with such applications. He was the duty judge at the time in question. He then goes on to deal with the two questions passed by the EAT. He explains why he considered the decision to reject the claims was correct and why he accepted the claims on 19 November.

14. The Claimants submit that he should simply have answered the questions asked of him and that he erred in in law in providing an explanation of why he made the decisions he did. Speaking for myself I found his explanation of the process and his reasons informative and helpful. I would be very sorry if there was a rule of law that prevented employment judges from attempting to explain their decisions even where they had no "real memory" of the decision. Employment Judge Whitcombe's decision as the duty judge who saw the application was terse. He directed the staff as follows, "Please accept with effect from 19/11/19, the date on which Cs corrected the error re the last two digits". Given the brevity of his direction I am grateful to Employment Judge Whitcombe for his further explanation. I consider that it is useful to know why the Employment Judge thinks he reached his decision. I am not averse to the provision of reconstructed reasoning where it is likely to mirror the reasoning followed at the time. Contrary to the Claimants' submission, his response to the **Burns Barke** request is not an exercise in apologetics. Mummery, LJ in **Woodhouse School v Webster** [2009] IRLR 568 at paragraphs 26-29 deplored the use of "advocacy" in **Burns Barke** responses. Employment Judge Whitcombe does not fall into that trap. He is not defending his decision but providing an explanation of the reasoning which he considers he must have followed at the time. I

have no difficulty with his response and do not consider that any error of law attaches to the reasons he has given the Employment Appeal Tribunal.

15. The Respondent submitted that the Employment Tribunal made the correct decision. It submitted that the Tribunal could not on any view backdate the claim.

16. I was referred to **Miss A Thomas v Nationwide Building Society** [2014] WLUK 531 a decision of Employment Judge Clarke sitting in the employment tribunal at Cardiff. In that case the claimant did not realise an ACAS early conciliation number was necessary and her claim was rejected. She applied to ACAS for a number. The claimant also sought a reconsideration of the decision to reject the claim under rule 13(4). The hearing took place. Remarkably, as the employment judge was in the process of giving judgement, the certificate was made available to the claimant and was produced to the employment tribunal. It stated that early conciliation had taken place from 3 to 7 October 2014. She submitted that her application should be treated having been properly constituted now that the certificate had been issued and produced to the tribunal. Employment Judge Clarke accepted that she was entitled to put her mistake right and held that her rectified claim should be treated as having been presented on 7 October, the date when early conciliation had been completed. Employment Judge Clarke did not hold that the Claimant's erroneous initial application was cured retrospectively and that the claim should be treated as having been lodged with an ACAS early conciliation number from the outset. It is not authority for the proposition that provided a claimant has an ACAS number, the provision of an erroneous figure can be overlooked.

17. The effect of Employment Judge Whitcombe's decision on 2 December 2019 was that the decision dated 14 November 2019 was reconsidered. Since he had accepted the claims in full (rule 13(3)) he did not consider there was a need for a hearing. The Claimants submit that he was obliged

to hold a hearing since he had not accepted the claim "in full". The Claimants submitted that since he had accepted a revised claim he could not be said to have accepted the claim "in full". I do not accept this submission. The words "in full" refers to the possibility that claim may be rejected "in part". Rule 13(1) provides -

> A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration

18. Here the Employment Judge admitted the whole claim. In admitting the claim "in full" all other rights were preserved, including the Respondents right to assert that the claim is time barred. Thus, although the Claimants had asked for a hearing, I consider Employment Judge Whitcombe took the correct course. The Claimants had been given all that they could ask for. He was entitled to conclude that a hearing did not require to be held because it was unnecessary.

19. The Respondents have abandoned their cross appeal against EJ Whitcombe's decision to reconsider.

20. I therefore reject the appeals and adhere to the Employment Judge's orders. As I understand it a further hearing has been listed to consider whether the claims were time barred.