Appeal No. UKEAT/0015/20/VP

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 April 2021

Before

JUDGE KEITH

(SITTING ALONE)

MR B WEBSTER — APPELLANT

ROTALA PLC T/A DIAMOND BUS NORTH WEST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR B WEBSTER (The Appellant in person)
For the Respondent	MS REBECCA JONES (Of Counsel) Instructed by: Backhouse Jones Solicitors The Printworks Hey Road Clitheroe Lancashire BB7 9WD

SUMMARY

PRACTICE AND PROCEDURE

The Employment Tribunal was correct to reject claims that were not 'exempt' from the requirement to comply with early conciliation and were "relevant proceedings" for the purposes of regulation 2 of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, in circumstances where the Claim Form did not contain an early conciliation certificate number. However, the Employment Tribunal erred in rejecting the part of the claim which was for proceedings under Part X of the Employment Rights Act 1996 and an application for interim relief under section 128 of that Act.

JUDGE KEITH

Preliminary matter – the conduct of the hearing

1. This is the transcript of the decision I gave orally on 27th April 2021. I conducted the hearing via Teams, attending the Employment Appeal Tribunal in person, while the parties attended remotely. Ms Jones was able to see and hear me and hear the appellant throughout the hearing. The appellant was unable to download the Teams application on his mobile telephone, and so instead attended the hearing by telephone, using the alternative dial-in details provided with the Notice of Hearing. He was therefore only able to hear us, and we could only hear him.

2. I considered whether it was appropriate to continue with the hearing where one party could see and hear the proceedings, while the other party could only hear and be heard. I also considered the fact that the appellant was representing himself, without a lawyer. I canvassed his views on whether we needed to adjourn the hearing pending a face-to-face hearing or conduct the hearing in a different way, to ensure a level playing field in terms of effective participation in this hearing. I discussed with the appellant that there could be certain circumstances in which one party attended via telephone only, while the other could also be seen, which would be clearly inappropriate, such as where there were contested facts or the need to adduce evidence. In this case, none of the facts was disputed and no evidence was being adduced. The appeal, which I will come on to discuss, was a narrow technical point which turned solely on correspondence between the appellant and the Employment Tribunal. The appellant's understanding of the issues was excellent and he was keen for the hearing today to proceed. He was content for us to proceed based on his attending by telephone only, and for Ms Jones to attend via Teams. I continued to monitor the hearing as we progressed and asked the appellant to notify us straightaway if he had any difficulties in either hearing or understanding what was being said. Apart from one brief

moment when Ms Jones's microphone sound was slightly distorted, which she was able to correct, throughout the hearing, neither the appellant nor Ms Jones indicated further difficulty and I was satisfied that the parties had a fair opportunity to participate effectively in the Hearing.

Background to the appeal

3. The appellant appeals against the Employment Tribunal's decisions to reject his claim pursuant to rule 12(1)(d) of the Employment Tribunals Rules of Procedure 2013, on the basis that: he had not provided an ACAS Early Conciliation number; nor had he indicated whether any exemptions applied and his claims appeared to be "relevant proceedings," for the purposes of sections 18 and 18A of the Employment Tribunals Act 1996. The Employment Tribunal's original decision on 10 July 2020 to reject his claim does not refer to a specific claim number, (presumably based on rejection of the claim) but it is common ground between the parties that the rejection related to the second of three claims that the appellant has brought, claim number: 2408947/2020.

4. The background to the appeal can be most succinctly summarised by reference to the reasons for the decision of The Honourable Mrs Justice Eady DBE, who granted permission to appeal to this Tribunal, of 5th February 2021. She stated as follows:

> **"The Appellant (the Claimant before the Employment Tribunal) seeks to appeal against the ET's rejection of his claim 2408947/20. I am satisfied that a reasonably arguable basis of appeal has been identified in this case, which should be heard as soon as practicable given that it relates to a claim that included an application for interim relief.**
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> **In order to assist others, I have sought to set out the relevant background to this appeal fairly fully. That background starts with an earlier claim lodged by the Appellant with the Employment Tribunal, under case no. 2405507/20, by which he made various complaints of unpaid wages, calculation of holiday pay and in relation to the Working Time Regulations. At that time the Appellant remained in the Respondent's employment and it is his case that, during the conciliation process relating to that claim, the Respondent proposed that he should leave his employment as part of any settlement.**

Subsequently, on 8 July 2020, the Appellant says he was dismissed from his employment.

On 9 July 2020, the Appellant submitted a second claim to the Employment Tribunal, relating to his dismissal, which he said was unfair. In the particulars included within the Form ET1, the Appellant stated that it was his case that the real reason for his dismissal had been due to claim 2405507/20, which he said was "*an assertion of statutory rights and working time regulations*". In specifying the remedy sought, the Appellant included a claim for interim relief.

By letter of 10 July 2020, the ET purported to reject this second claim on the basis that the Appellant had not complied with the early conciliation requirements of the Employment Tribunals Act 1996 ("ETA"). The Appellant responded by email of the same date to state that his claim included an application for interim relief, referring to "section 128". Section 128 Employment Rights Act 1996 ("ERA") provides that an application for interim relief may be made where a claim of unfair dismissal is made and it is claimed that the reason for the dismissal is (relevantly) as specified by section 103A (protected disclosure) of the ERA. The point being made by the Appellant was that, in such circumstances, he was not required to comply with the early conciliation obligations otherwise imposed by section 18A ETA.

On 23 July 2020, the ET wrote to the Appellant, referring to his first claim (case no. 2405507/20). Although referring to the Appellant's email of 10 July 2020 (which related to a claim that had not yet been accepted by the ET), the Employment Tribunal stated that the email ought to have been copied to the Respondent and asked whether the Appellant was seeking to amend his claim to include a complaint of unfair dismissal. As for the application for interim relief, the ET asked for further particulars as to the reason relied on by the Appellant for section 128 ERA purposes and for the date of dismissal.

The Appellant had specified the date of his dismissal in his second ET claim but, by email response to the ET's letter of 23 July 2020 (sent by the Appellant the same day), he clarified that he was relying on a protected disclosure as the reason for his dismissal and, therefore, as giving rise to his right to claim interim relief.

On 7 August 2020, the Employment Tribunal wrote out to the Appellant, for the first time referring to his second claim under the reference case no. 2408947. Acknowledging the Appellant's email of 10 July 2020, the Employment Tribunal nevertheless confirmed that his claim remained rejected as a claim for interim relief could only be pursued in cases where it was contended that the reason for dismissal was one of those specified by section 128 ERA. To the extent that the Appellant was pursuing claims that did not relate to his dismissal, the Employment Tribunal further stated that these could not be pursued as the early conciliation provisions had not been complied with.

The Appellant seeks to challenge this decision by the Employment Tribunal on the basis that it is apparent that it has confused his two claims and has failed to have regard to the particulars he provided in respect of his application for interim relief, which made it apparent that he was claiming that his dismissal had been by reason of a protected disclosure. Whilst it might be objected that the Appellant's original claim of unfair dismissal did not make this clear, I consider it reasonably arguable that the subsequent particulars, provided by the Appellant in response to the Employment Tribunal's correspondence, remedied any such defect and the Employment Tribunal thus erred in the decision reached."

5. Given that the appellant was legally represented, both parties were content that Ms Jones set out the respondent's position first, to which the appellant could respond.

The respondent's submissions

6. Ms Jones helpfully provided a written chronology and skeleton argument, and I was grateful to her and the appellant for the clarity of their submissions. In addition, she provided an authorities bundle, which included the relevant statutory provisions and a copy of the authority of Cranwell v Cullen UKEATPAS/0046/14/SM. In further oral submissions, she emphasised a few of the key dates, as per her chronology. The appellant had been dismissed on 8 July 2020, having already presented a claim. He presented the second of his claims on 9 July 2020 (2408947/2020). On 10 July 2020, the Employment Tribunal rejected the second claim, albeit not referring expressly to the claim number. The rejection letter, (a copy of which was at page [27] of the Appellant's Bundle – "AB"), stated:

> **"The Judge's reasons for this decision are as follows:**
>
> 1. **the claim appears to be "relevant proceedings" to which the early conciliation provisions apply, in accordance with sections 18 and 18A of the Employment Tribunals Act 1996;**
> 2. **if the claim is "relevant proceedings", it may not be brought until the claimant has gone through the early conciliation with ACAS unless one or more of the early conciliation exemptions applies;**
> 3. **in section 2 of the claim form, the claimant didn't give an early conciliation number or confirmed that one or more of the early conciliation exemptions applies by ticking one or more of the boxes that come immediately after the question, "If No, why don't you have this number?""**

The Employment Tribunal's letter enclosed standard explanatory notes, entitled, 'Claim Rejection – Early Conciliation: Your Questions Answered', which included information about applying for reconsideration of the decision to reject his claim.

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7. Following that decision, on the same day, 10 July 2020, the appellant sent a brief e-mail to the Employment Tribunal (at page [29] AB), in which he said:

> **"Dear Sirs,**
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> **This claim includes an application for interim relief (s128)."**

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8. On 23 July 2020, the Employment Tribunal wrote to the appellant, (at page [30] AB) referring incorrectly to his first presented claim (number: 2405507/2020) but referring to his email of 10 July 2020. Relevant passages of that letter stated:

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> **"2. Your email of 14 July 2020 [sic] appears to be an application to amend your claim to include a claim of unfair dismissal. Is this correct?**
>
> **3. An interim relief application is only relevant to an unfair dismissal claim and where a claimant claims that the reason for the dismissal was one of the reasons listed at s128(1). Please state which of the reason under s128(1) you say is applicable.**
>
> **4. An interim relief application can only be made where it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (s128(2). Please state when your employment ended."**

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9. As Mrs Justice Eady had noted, the appellant had already specified the effective date of termination of his employment in his second Claim Form (page [15] AB), at box [5.1], as 8 July 2020. The appellant responded the same day, 23 July 2020, (page [32] AB), by reference to the incorrect claim number, (but in response to correspondence that had used that same incorrect number), in the following terms:

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> **"Dear Sirs,**
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> **The interim relief application is submit [sic] regarding a protected disclosure defined by 103a. The protected disclosure is 43B(1)(b)."**

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10. The Employment Tribunal then reiterated its rejection of the appellant's claim in a letter to him dated 7 August 2020, listing the basis on which interim applications could be made (including protected disclosures) and referring to the appellant's additional claims, including for notice pay, holiday pay, and arrears of pay (page [33] AB).

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11. Having referred to the key events, Ms Jones turned to her skeleton argument (which I have considered in full, even if I do not refer to every aspect of it). She expressed no view on the question of whether the Employment Tribunal was right to reject the application for interim relief because it did not fall within one of the relevant statutory provisions. Instead, she focussed on sections 18 and 18A ETA. Section 18 defines "relevant proceedings" and section 18A requires a person, before they present such a claim, to provide ACAS with prescribed information. Following this, a conciliation officer will endeavour to promote settlement, and if not possible or reached within a relevant time period, will issue a certificate to that effect, unless specified exemptions apply.

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12. Ms Jones referred next to rule 10 of the Employment Tribunals Rules of Procedure 2013 (the 'Rules'), which state that an Employment Tribunal "shall" reject a claim if it does not contain one of the following: an early conciliation number (rule 10(c)(i)); confirmation that the claim does not institute "relevant proceedings" (rule 10(c)(ii)); or confirmation that one of the early conciliation exemptions applies (rule (c)(iii)).

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13. Rule 12 of the Rules, entitled "Rejection: substantive defects"), requires Tribunal staff to refer a claim form to an Employment Judge, if they consider that a claim, or any part of it, fails to comply with rule 10.

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14. Ms Jones then referred to the Employment Appeal Tribunal's decision in Cranwell v Cullen, and particularly paragraphs [11] and [12], as authority for the proposition that the requirement to comply with section 18A ETA is an absolute one, which an Employment Tribunal has no power to vary or waive under rule 6 of the Rules.

15. Ms Jones identified and elaborated upon the two issues, as she saw them, in this appeal: first, whether the Employment Tribunal was correct to reject the second claim; second, whether the subsequent details provided by the appellant (namely, his emails of 10 and 23 July 2020) remedied any defects in the original claim form.

16. Ms Jones asserted that the Employment Tribunal was right to reject the claim form. The appellant had not completed all of the mandatory information in box [2.3] (page [13] AB). As is standard, the section had an asterisk next to it. The claim form clearly said at the beginning, (page [12] AB):

> **"You must complete all questions marked with an '*'.**

17. Box [2.3] stated:

> **"2.3* Do you have an ACAS early conciliation certificate number?"**

18. The section of the form stated that nearly everyone should have such a number before they completed a claim form, which could be found on the ACAS certificate and that prospective claimants could telephone ACAS for help and advice using a specified telephone number. The appellant had ticked 'No', next to box [2.3]. The same section continued with a further series of boxes, entitled,

"If No, why don't you have this number?"

19. The four boxes that followed provided alternative reasons why the early conciliation number had not been provided, one of which was that the complaint consisted 'only' of a complaint of unfair dismissal which contained an application for interim relief. The appellant had not ticked any of the boxes. In the circumstances, he had failed to provide mandatory information, and this was the first reason why the Employment Tribunal was correct to reject the claim form.

20. The second reason why the Employment Tribunal was correct, related to Regional Employment Judge Franey's reconsideration decision dated 20 October 2020 (page [44] AB). The decision had stated:

> **"Firstly, you had not provided confirmation that one of the early conciliation exemptions applies. You had simply left blank the boxes in section 2.3. Rule 10(1)(c) of the Employment Tribunal Rules of procedure requires rejection.**
>
> **Secondly, the exemption from early conciliation for an interim relief applies only where the unfair dismissal claim is the only claim, as the final box at 2.3 makes clear. Your claim raised other complaints for which an early conciliation certificate is required."**

21. The Regional Employment Judge was unarguably required to refuse reconsideration because of a combination of the Rules and regulation 3 of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. Regulation 3 sets out the exemptions from having to comply with early conciliation requirements before presenting a claim. It includes, at regulation 3(1)(d), where the proceedings are under Part X of the ERA 1996 and the application is accompanied by an application for interim relief. In the appellant's case, the claim form had clearly included claims in addition to unfair dismissal and an application for interim relief. Therefore, the appellant could not rely on the exemption, although Ms Jones accepted that she could not refer me to any authority for the proposition that the exemption under

regulation 3(1)(d) could not apply to part of a claim, namely the Part X claim and application for interim relief, where the claim form also contained other claims.

The appellant's submissions

22. The appellant reiterated that in the claim form, at box [9.2] (page [19] CB), he had specifically included an application for interim relief. In the previous box, [8.2], he had claimed unfair dismissal and stated:

> **"I submit that the real reason for dismissal is due to the claim of 2405507/20 which is an assertion of statutory rights and working time regulations."**

23. While the appellant had not ticked the boxes under [2.3] as to why he had not got an ACAS early conciliation number, he had already obtained such numbers for his prior and subsequent claims. He argued that he should not be penalised for failing to tick a box when the claim form was clear that an exemption applied – namely he had claimed unfair dismissal and applied for interim relief. He had reiterated this in his email of 10 July 2020, which clarified the point, if there were any confusion, and had referred expressly to a protected disclosure (as opposed to the assertion of a statutory right in the claim form) in his email of 23 July 2020.

The respondent's response

24. Ms Jones said that the appellant's emails were not capable of remedying any defects in the claim form, as they did not, and could not, provide an early conciliation certificate number or confirmation of an applicable exemption.

The appellant's final reply

25. The appellant added that in the letter dated 7 August 2020, the Employment Tribunal had referred to a reason for rejection (namely by reference to a list of permissible bases for applying for interim relief) which had never been mentioned in the 10 July 2020 letter, and which post-dated the appellant's email of 23 July 2020, which had referred to a protected disclosure, without referring to that later email or considering it.

Discussion and Conclusions

26. I conclude that the Employment Tribunal erred in law in rejecting the parts of the second claim form, claim number: 2408947/2020, which were the claim under Part X ERA and the application for interim relief, on the basis that the appellant had not complied with early conciliation requirements. The Employment Tribunal was, however, unarguably required to reject the additional claims in the claim form other than those two claims.

27. The crux of this appeal, as Ms Jones rightly accepts, is first, the scope of the exemption under regulation 3(1)(d) of the 2014 Regulations; and second, how that exemption applies to the mandatory parts of the claim form, as they related to the appellant.

28. Dealing first with the scope of the exemption, regulation 3 states:

> **"Exemptions from early conciliation**
>
> **3.—(1) A person ("A") may institute relevant proceedings without complying with the requirement for early conciliation where—**
> **…**
> **(b) A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings….**

> **(d) the proceedings are proceedings under Part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under section 128 of that Act …"**

29. What Ms Jones sought to persuade me was that if the claim form included any claims in addition to those under Part X ERA and an application for interim relief, in the absence of an early conciliation certificate number, the Employment Tribunal must reject the claim form in its entirety. She drew support for this from the format of the claim form itself, at box [2.3], which provided four boxes to tick, one which was that a claimant's claim consists 'only' of a complaint of unfair dismissal and an application for interim relief.

30. I reject Ms Jones's submissions that the exemption is limited in this way. Bearing in mind the draconian effects of falling outside an exemption, if regulation 3(1)(d) were so limited, it could have included the word 'only,' but does not.

31. I am conscious that regulation 3(1)(b) has specific wording in dealing with the different scenario of where a claimant has instituted "relevant proceedings" and proceedings that are "not relevant" on the "same claim form". In such a case, a claimant has the benefit of an exemption for the entirety of the claim form. Regulation 3(1)(d) does not go that far, but regulation 3(1)(b) clearly illustrates that specific consideration has been given in regulation 3(1) to claims of different kinds on the same claim form. Regulation 3(1)(d) does not refer to "the same claim form", because the exemption does not have the same effect as regulation 3(1)(b). The whole of the claim form does not benefit from the exemption under regulation 3(1)(d). Rather, the exemption relates to the parts of the claim under Part X ERA which are accompanied by applications for interim relief. However, by including additional claims in the same claim form, a potential claimant does not then lose the exemption in its entirety. Instead, a potential claimant must comply with the early conciliation requirements for the additional claims.

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32. I am fortified in the conclusion that by including additional claims in the same claim form, a claimant does not lose the benefit of the exemption for the Part X ERA claim and interim relief application, by referring back to rules 12(1) and (2) of the Rules. These make clear that, on consideration of substantive defects in a claim form, the claim, or part of it, may be rejected, if the claim, or part of it, does not comply with the relevant requirements. Clearly, the Rules expressly permit consideration of part of a claim, and mandate rejection of part of a claim, for non-compliance. Not only is the exemption under regulation 3(1)(d) not drafted as narrowly as contended by Ms Jones, but also rule 12(2) does not mandate rejection of the entirety of the claim form, as contended.

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33. Moreover, the format of box [2.3] of the claim form is consistent with such an interpretation. The box requires a person to indicate whether they have an ACAS early conciliation number. If they do not, they are asked whether one of four reasons apply, including whether a claim consists only of a complaint of unfair dismissal which contains an application for interim relief. If that box is ticked, no early conciliation claim number is needed. In contrast, the appellant's claim form is a hybrid scenario, containing claims which require an early conciliation certificate, and some which do not.

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34. In the appellant's specific circumstances, while he can be criticised for not obtaining an early conciliation certificate for the additional, 'non-exempt' claims, he cannot be criticised for not completing one of the four boxes, as none applied to him (his claim did not consist only of 'exempt' claims). Instead, what he did provide, in his answers at boxes [5.1]; [8.2]; and [9] of the claim form, were the facts of: his dismissal; the effective date of termination; the reason for his dismissal (which had referred to a claim and a reference to the Working Time Regulations); and an application for interim relief. Ms Jones did not seek to argue that the Employment

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A Tribunal was entitled to reject the application for interim relief, on the basis that the claim form referred to the assertion of a statutory right, but which the appellant later clarified in his email dated 23 July 2020 related to interim relief based on a protected disclosure. The Employment Tribunal's decisions of 7 August and 20 October 2020 (the reconsideration decision) do not engage with, or refer to, that email.

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35. Ms Jones argued that the Employment Tribunal was nevertheless bound to reject the claims in their entirety under rule 10, even if part of them were exempt. Rule 10 provides:

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> **"Rejection: form not used for failure to supply minimum information**
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> **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."**

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E 36. Ms Jones argued that the claim form failed to supply any of the three categories of minimum information above. The answer to that challenge is two-fold. First, box [2.3] provides only for four possible answers in the event of a potential claimant not having an early conciliation certificate, none of which applied to the appellant's hybrid claim and so does not cater for claims where an exemption applies to part of the claim.

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37. Second, the reviewer of a claim form may read the whole claim form, not just box [2.3], to determine whether it includes the relevant minimum information, in this case, confirmation that an early conciliation exemption applies. There is no requirement for a specific form of words, provided that when the claim form is read as a whole, such an exemption is clearly discernible. Bearing in mind the very limited number of exemptions, in the appellant's case, I conclude that the Employment Tribunal erred in concluding that the claim form, which clearly included a Part

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X ERA claim and application for interim relief, did not provide confirmation that one of the exemptions applied, when read as a whole. I conclude this, based on the claim form alone, without the need for the further clarification provided by the appellant in his emails of 10 and 23 July 2020. The original claim form referred to interim relief. The Employment Tribunal's purported rejection on 10 July 2020 related solely to non-compliance with the early conciliation requirements. I accept the force of the appellant's argument that by the time of the respondent's further decision of 7 August 2020, when the issue of the statutory basis of the interim relief application was raised for the first time as a new matter, the Employment Tribunal had already received the appellant's email of 23 July 2020, but had failed to engage with it and so also erred in that regard.

38. In summary, the Employment Tribunal was correct to regard itself as bound to dismiss the appellant's claims in the claim form, which were other than those under Part X ERA/an application for interim relief. The appellant has already presented a third claim form in relation to those additional claims, complying with the early conciliation requirements in respect of those claims. Where the Employment Tribunal erred was to reject the entirety of the claim form, for the reasons outlined. The consequence of this decision is that the Employment Tribunal will need to decide the appellant's application for interim relief, followed by the Part X ERA claim as a whole.