



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110596/2019; 4110600/2019 & 4110601/2019

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Held via Cloud Video Platform (CVP) on 20 January 2021

Employment Judge L Doherty

10 **Mrs F Dearie**

**First Claimant
Represented by:
Mr D Hutchison -
Solicitor**

15 **Mrs R Walker**

**Second Claimant
Represented by:
Mr D Hutchison -
Solicitor**

20 **Miss J Lakes**

**Third Claimant
Represented by:
Mr D Hutchison -
Solicitor**

25 **Co-Operative Group Limited**

**Respondent
Represented by:
Mr Bredenkamp -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Employment Tribunal is that the claims are struck out under 6 (b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules).

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REASONS

1. This was Preliminary Hearing to consider the respondent's application for strike out of the claimant claims under Rule 6 of the Rules, on the basis that the claims were presented irregularly in terms of Rule 9 of the Rules.
2. The claimants were represented by Mr Hutchison and the respondents by Mr Bredenkamp. Both parties helpfully produced written submissions.

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3. The factual background to this application is that the claimants' presented claims claiming inequality in pay against the respondents in August 2019. The claim was originally presented on behalf of the three female claimants, who are the claimants in these proceedings, and 3 male claimants. Case management directions were issued in January 2020, further to which additional information was produced. The three male claimants withdrew their claims, and re-presented them in May 2020.
4. It is accepted that the claimants in respect of whom this claim was originally presented, and those who remain a party to these proceedings, do not all carry out the same job, and therefore that the claims are not based on the same of facts for the purposes of Rule 9 of the Rules.

Respondents Submissions

5. Mr Bredenkamp submitted the claims should be struck out under Rule 6 on the basis that they had been presented irregularly under Rule 9. He submitted that the point in issue has been dealt with authoritatively by the Court of Appeal in the case of *Brierley v Asda Stores (2019) EWCA 8 (civ)*.
6. Mr Bredenkamp submitted that of the three cases looked at in that appeal, the case of *Fenton v Asda* was most closely aligned to the case before this Tribunal. The history of case was that that Regional Employment Judge (REJ) Robertson struck the claims and on the basis that they were presented irregularly, having already dealt with that point in earlier claims (*Brierley*) involving the same agents. While the respondents accept that the Tribunal has a wide discretion under Rule 6 as to whether claims should be struck out on the basis that they have been presented irregularly, it was accepted before the Court of Appeal that where there had been a published judgement that multiple claims of this type were presented irregularly, there could be no viable argument for waving the irregularity.
7. Mr Bradenkamp submitted that *Brierley*, in which the Court of Appeal set out the factors which could be taken into account in exercising discretion as to whether an irregularity should be waived, could be distinguished on the basis of timing. The claims in *Brierley* were presented first. The reason the REJ

struck out the claims in *Fenton* was because by this stage when they were lodged, the position on lodging multiple claims been made clear.

Claimant's submissions

8. Mr Hutchison adopted his written submissions, and took the Tribunal to the terms of the relevant Rules. He accepted that the claims did not proceed on the same set of facts and were therefore irregularly presented under Rule 9. He submitted however that the Tribunal should exercise its discretion under Rule 6 to wave the irregularity. To do otherwise would occasion significant prejudice to the claimants, who would lose part of the value of the claim. He also submitted that the Tribunal should seek to avoid formality in proceedings where possible, and should act in a manner which is consistent with the overriding objective in the Rules.
9. Mr Hutchison submitted that the practice of lodging multiple claims was significantly relied upon in equal pay litigations. It is a practice which he submitted continues, and not all jurisdictions have adopted the approach of the REJ Robertson. Mr Hutchison submitted that multiple claims continue to be accepted by the Glasgow Tribunal Office in support of his position. He also submitted that the Court of Appeal allowed the claims in *Brierley* to continue, and it set out factors which were relevant to the exercise of discretion under Rule 6 in doing so. Mr Hutchison submitted that the fact that the it did so supported the contention that the blanket approach advocated by the respondents should not be adopted.
10. In support of his arguments, Mr Hutchison referred the Tribunal to the case of *Farmah and others v Birmingham City Council and other UK EAT/0286/15/JOJ*

Consideration

11. Rule 9 of the Rules states;

‘Two or more claimants may make their claims on the same form if the claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this should be treated as an irregularity falling under rule 6.’

5 12. Rule 6 states:

‘A failure to comply with any provision of these rules (except rule 81(1), 16(1),23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take
10 *such action as it considers just, which may include all or any of the following-*

(a) waving or restricting the requirement

(b) striking out the claim or response, in whole or in part, in accordance with rule 37

(c) by restricting a party’s participation in the proceeding.

15 *(d) awarding costs in accordance with rules 74 to 84.’*

13. In its judgement in *Brierley* the Court Appeal (*Lord Justice Bean - paragraph 27*) set out the basis upon which multiple claims could be presented on a single claim form. That is where it is asserted by the claimants that their roles and they work they do is either the same, or so similar to one another, that
20 the claims can properly be said to be based on the same set of facts. LJ Bean went on to say that it would be advisable in the future for claimants’ solicitors to err on the side of caution, and issue multiple claims which comply with this interpretation of Rule 9, applying if appropriate at the stage of case management for more than one multiple claim to be heard together.

25 14. It accepted that the claims in this case were presented irregularly under Rule 9, and the question for the Tribunal is whether it should exercise this discretion under Rule 6 to waive the requirements imposed by Rule 9 or if it should strike the claim out in accordance with rule 37.

15. It is common ground Rule 6 confers a broad discretion on the Tribunal.

16. There is no presumption that an irregularity under Rule 9 should lead to claims being struck out. In the exercise of its discretion the Tribunal must act judicially, balancing the hardship and prejudice to each party, and having regard to the overriding objective, in order to deal with the case fairly.
- 5 17. In the exercise of discretion, the Tribunal takes into account that in the event claims are struck out there will be prejudice to the claimants, in that they will have to present new claims, potentially losing out on a period of the claim. Mr Hutchison made reference in his written submissions to claims becoming time-barred, however he did not draw attention to this in the course of his oral
10 submissions, relying rather on the position that a claim of around 18 months of backpay might be lost to the claimants. The Tribunal also takes into account that the re-presentation of the claims will involve additional work and potentially experience for the parties, but also that it is open to the claimants to potentially re-present their claims
- 15 18. The Tribunal also has to consider that at the point when the claims were presented it was, or should have been, apparent that presentation of multiple claims which do not rest on the same facts in a single claim form was not permitted in terms of Rule 9.
19. The claimant's position in this regard is different to that which applied in
20 *Brierley*. In *Brierley* in exercising his discretion under Rule 6, REJ Robertson took into account that the claimants had not deliberately presented the claims knowing that it was not permitted by Rule 9, and that until the decision of the REJ in *Brierley*, that would not have been apparent to the claimant's solicitors.
- 25 20. The significance of the timing of the claims is also dealt with in *Brierley* by the Court of Appeal. In his judgment in *Brierley*, LJ Bean dealt with the appeal in *Fenton v Asda*, where the claimants had brought claims after the decision of REJ Robertson in *Brierley* had been issued. At paragraph 45 of the judgment he states in relation to the Fenton appeal:
- 30 *'This is a small group claims brought against Asda after the decision of the REJ Robertson in Brierley. Mr Short accepted that if we find in favour of the*

employers on the Rule 9 issue this appeal could not succeed. Where the ET has already held in a published decision that a multiple claim of this type was irregularly presented there could, he accepted, be no viable argument for waving the irregularity. I would dismiss the claimant's appeal in *Fenton v Asda*.'

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21. Mr Hutchinson relies on the fact that it has been common practice in equal pay litigations to present claims, which do not necessarily rest on the same facts, on a single claim forms. He further submitted that the practice adopted by REJ Robertson was not universal, and that multiple claims which are not based on the same facts but are presented on one ET1, continue to be accepted, in a number of jurisdictions including the Glasgow Tribunal office.

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22. Mr Hutchison however, did not give any specific examples of where this had occurred. While Tribunals may well accept multiple claims, there could be a number of reasons for them doing so, not least that it is not apparent when multiple claims are presented and accepted by the Tribunal, that they do not rest upon the same facts. The Tribunal did not consider this could be taken into account as a factor to which it should have significant regard in exercising its discretion under Rule 6, in light of the clear authority which has emerged to the effect that claims which do not rest on the same facts should not be included in a single claim form. Nor did the fact that historically equal pay claims which did not rest on the same facts were lodged as multiples assist, in light of what is said in *Brierley* about the inclusion of multiple claims in a single claim form.

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23. The Tribunal also had regard to Mr Hutchison's argument that the Court of Appeal allowed the cases in *Brierley* to proceed, which he submitted, did not support the blanket approach suggested by Mr Bredenkamp.

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24. The Tribunal had regard to the factors which were taken into account by the Court of Appeal in *Brierley*. These included that the practice was irregular but until decision of the REJ in *Brierley*, that would not have been apparent to the claimant's solicitor (*LJ Bean para 35*).

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25. That cannot be said to be the case here, as when these claims were issued in September 2019 the Court of Appeal judgment in *Brierley*, which makes the position on when claims can be properly included in the same claim form under Rule 9 clear, had been issued.
- 5 26. The Tribunal considered that the fact that the claims were presented irregularly at a point when it was or should have been known that it was not permissible in terms of Rule 9 to include multiple claims which do not rest on the same facts in single claim form, and no reason or explanation beyond that it has generally been the practice in an equal pay litigation to do so was provided for this, was a factor to which it was entitled to attach very significant weight.
- 10 27. The Tribunal balanced that irregular presentation of the claims against the other factors identified above which would occasion prejudice to the claimants, and taking into account that it potentially remains open to the claimant to re-present their claims, the Tribunal and was satisfied that the proper exercise of its discretion under Rule 6 was to strike the claims out.
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20 **Employment Judge: L Doherty**
Date of Judgment: 22 January 2021
Entered in register: 01 February 2021
and copied to parties