Appeal No. UKEAT/0098/20/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 November 2020

Before

HER HONOUR JUDGE TUCKER

(SITTING ALONE)

MR JAMES ASH — APPELLANT

ISS FACILITY SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES ASH (The Appellant in Person)
For the Respondent	MISS ELIZABETH GRACE (of Counsel) Instructed by: ISS UK Ltd Velocity 1 Brooklands Drives Weybridge Surrey KT13 0SL

SUMMARY

PRACTICE AND PROCEDURE

The facts of this case, as they appeared before the EAT, were unusual. The Claimant's claims were rejected by an Employment Judge because the Claimant had not included an ACAS Early Conciliation Certificate number on his claim form. On the facts then before the Employment Judge that was not an error of law. However, during the appeal process information became available which had not been before the Employment Judge, importantly that the Claimant had obtained an EC Certificate prior to issuing his claim and that that had been sent to the Respondent, but had gone to the 'junk' inbox belonging to the relevant manager in the Respondent organisation. The Claimant believed that he had then requested a copy of the EC Certificate from ACAS. In fact he was given a further, different EC certificate which post dated the issuing of his claim and (because the circumstances leading to it being issued were not clear until the appeal) only served to further complicate matters before the Tribunal.

The EAT dismissed the appeal, but noted that the Claimant could apply for a reconsideration of the decision to reject the claim form out of time in light of the further information which had come to light during the appeal hearing.

HER HONOUR JUDGE TUCKER

1. This is an appeal against the Order of Employment Judge Beard dated 19 November 2019, in which the Judge rejected a claim for unlawful deduction of wages made by the Appellant. The reason he did so was that the claim had not been presented in accordance with Rules 10 and 12 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules of Procedure 2013"). I shall refer to the Appellant employee as the Claimant, and to the Respondent employer as the Respondent, as they were before the Employment Tribunal ("ET").

2. The appeal took place by way of a remote Hearing. The Claimant represented himself, as he has done throughout proceedings. The Respondent was represented by Miss Grace of counsel.

The facts

3. The Claimant began working for the Respondent on 23 March 2018. Although the Claimant contended that he worked for the Respondent during March 2019 and, possibly, April 2019, he now accepts that, as a matter of law, his employment ended once the Respondent accepted his notice of resignation on 15 March 2019. The Claimant contended, however, during the course of this appeal, that, at the time, he believed that his one month's notice was effective so as to extend his employment to the end of April 2019.

4. I noted that on page 4 of his claim form the Claimant stated that his employment ended on 26 April 2019, that being the date he said he had an 'exit' meeting with the Respondent. I make those observations because those facts, and the Claimant's, then, belief may later be relevant in this matter.

5. On 22 June 2019, the Claimant issued a claim before the Employment Tribunal. In that claim, he asserted that he had been unfairly dismissed. He also made claims for holiday pay and for overtime payments.

6. In paragraph 2.3 of the claim form, the Claimant was required to answer the following question, "Do you have an ACAS Early Conciliation certificate?" The Claimant ticked the "No" box. He did not provide an ACAS Early Conciliation certificate number on the claim form. In response to the question, "If no, why don't you have this number?" he ticked the box to indicate that "ACAS doesn't have the power to conciliate on some or all of my claim."

7. Shortly after issue of the claim, the Claimant's claim for unfair dismissal was rejected by the Employment Tribunal because the Claimant did not have two years' qualifying service of employment with the Respondent. His other claims, however, were not rejected at that stage.

8. The Respondent lodged its Response on 26 July 2019. At paragraph 3.1, the Respondent ticked the "No" box in response to the question, "Do you agree with the details given by the Claimant about the Early Conciliation with ACAS?" By way of explanation, the Respondent stated, "The Claimant has not filled in paragraph 2.6 of form ET1 and the claim should therefore be struck out."

9. In paragraph 3 of the Response, the Respondent stated that:

> **"The Claimant has not completed paragraph 2.6 of his form ET1 to confirm an Early Conciliation number. In fact, the claim does not institute relevant proceedings or that the EC exemption applies. As a consequence, the Claimant's Claim Form should be rejected and the claim barred from proceedings."**

References to paragraph 2.6 should, it would seem, have been to paragraph 2.3 of the ET1. However, it was clear that in its Response, the Respondent raised its view that the Claimant had not complied with the Early Conciliation procedure and that, as a result, the claim form should be rejected and that there should be a bar upon proceedings continuing. In addition, the Respondent stated that the Tribunal did not have jurisdiction to hear the Claimant's claim because they were lodged out of time, noting that the primary three-month time limit had not been extended due to Early Conciliation ('EC') and in, respect of the unfair dismissal claim, because the Claimant did not have sufficient continuity of employment.

10. For reasons which remain unclear to me, the Claim Form was not rejected by the Tribunal, either on its presentation to the Tribunal, or, after the Tribunal received the Respondent's Response. For reasons which are set out below, I consider that to have been a significant failure, because the rejection of a claim form, together with an explanation of how to apply for reconsideration of that rejection, is an important safeguard within the EC procedural rules.

The hearing before the Tribunal Judge

11. The Hearing took place on 18 November 2019. At that Hearing, the Judge considered whether the Claimant's claims had been presented in accordance with the relevant procedural requirements for presenting a claim to the Tribunal. The Judge expressly stated that the Respondent contended that the claim was out of time but noted that he was not required to address that issue. (The Judgment later sent to the parties which purported to do so was agreed to be an error, possibly being a Judgment in respect of a different case).

12. In the opening paragraph of the Reasons, the Judge stated as follows:

> **"This hearing required me to consider whether the claimant's claim had been presented in accordance with the requirements for presenting a claim to the tribunal. The respondent contends that the tribunal has no jurisdiction to hear the claimant's complaints because he**

> **failed to include an ACAS certificate number on his ET1 application. The respondent also contends that the claim is out of time, it has not been necessary for me to address that argument."**

13. The Judge set out the facts that he found in paragraph 3 of the Judgment. They were as follows:

> **"3. On 22 June 2019 the claimant presented an ET1 Claim Form contending that he had been unfairly dismissed and that the respondent owed him holiday pay and overtime payments (unlawful deduction of wages claims).**
>
> **3.1.The claimant had commenced the Early Conciliation process by contacting ACAS on 17 June 2019. However, the ACAS certificate demonstrates that the process was not concluded until 24 June 2019.**
>
> **3.2.At section 2.3 of the ET1 form the claimant does not include an ACAS certificate number but also ticked the box to indicate that he did not have the number because ACAS did not have the power to conciliate on some or all of his claim.**
>
> **3.3.The claimant was unfamiliar with the legal procedural requirements of presenting a claim and as he did not have a number when completing the form simply ticked a box to move on.**
>
> **3.4. The claimant's claim of unfair dismissal was rejected by the tribunal on the grounds that the claimant had insufficient service. However, the claimant's other claims were not immediately rejected for failing to provide a certificate number."**

14. In addition, at paragraph 2 of his Reasons, the Judge stated that he accepted the Claimant's account that he is not a lawyer and, more significantly, that he had had difficulty navigating the procedural requirements for presenting a claim. Finally, Miss Grace on behalf of the Respondent, very fairly informed the EAT in submissions that at the hearing, the Judge had said that it was with great reluctance that he had found for the Respondent on a jurisdictional point, but that he considered that once it had been raised, he had little option but to reach the conclusion which he did.

The Appeal before the EAT and additional information which came to light regarding the EC Certificate

15. The Claimant lodged on appeal on 4 December 2019. The Notice of Appeal set out the grounds of appeal relied upon which were as follows:

> **'I believe that the Respondent hid the fact they knew that the process was completed correctly by having ACAS involved to issue the certification. This was presented to both parties on 3 June 2019, which was within the timeframe and I have both emails and payments made into my account to prove that my notice was worked until the end of March not the 15th and also the certification emailed to both parties. This was read out in court**

and I was accused of not filing the process correctly. Also, due to the fact I was mentally unwell, I did not understand the process to follow and I have certification from my GP to prove this as I am representing myself and all they are looking to diagnose me with which will take a month to arrive. I asked for them on 20 November."

16. The appeal was considered by Linden J at the sift stage on the Employment Appeal Tribunal ("EAT") procedure. He sifted the appeal to a Full Hearing, but noted that the Tribunal recorded in its Reasons that the Claimant had begun the Early Conciliation process on 17 June 2019 and that the certificate demonstrated that the process was not concluded until 24 June 2019, two days after the Claimant Form was presented on 22 June 2019. Linden J noted that if, in fact, the Claimant did have a EC certificate dated 3 June 2019 (as he contended in the grounds of appeal), and he drew this to the attention of the ET, it was arguable that the Tribunal had erred in law in dismissing the unlawful deduction of wages claim on the basis that he had not commenced the EC procedure before issuing proceedings.

17. During the case management of the appeal some difficulties arose in the preparation of the case for today's hearing. The Claimant believed that he had done everything which he was meant to do, and had some difficulty understanding what, precisely, was further required. As a result, the case was listed before His Honour Judge Auerbach on Tuesday, 3 November 2020. HHJ Auerbach made directions for the Appeal Hearing. Helpfully, the Respondent agreed to prepare a bundle.

18. In addition, the Claimant was given an opportunity to lodge further documents, which he did. Importantly, the documents which the Claimant had believed he had submitted with his appeal (that is an email trail together with attachments) were made available during that Hearing. HHJ Auerbach asked the Respondent's counsel to take instructions on whether those documents had been received by the Respondent.

19. Today, at the outset of the Appeal Hearing, counsel for the Respondent stated that a search for the email which the Claimant had attached to his appeal had previously been undertaken in the summer of 2020, but that it had not been successful. However, after the hearing before HHJ Auerbach, a further search was undertaken. That led to the discovery of the email in a manager's (Mr Simcox's) 'junk' inbox.

20. That was significant,; the email included an EC certificate dated 3rd June 2019 and it showed that that had been sent to the Respondent as the Claimant contended. Consequently, there was, at the appeal hearing, no dispute that the Claimant had in fact initiated the ACAS Early Conciliation process on 15 May 2019, and that a certificate was issued by ACAS on 3 June 2019, some time before the Claimant issued his claim on 22 June 2019.

21. The Claimant accepted that at the hearing before the Employment Judge in November 2019, he only referred to having received one ACAS EC certificate. At the hearing today, he explained why he did so and how (it appears) the Judge will have thought that that was a certificate which post-dated the issuing of the Claim. The Claimant stated that he received an email with an EC certificate on 3 June 2019. However, when he came to fill in his ET application form, he discovered that he could not find that EC certificate. He believes that that was because he has 'auto-delete' activated on his mobile phone, which operates across his emails, both on his mobile phone, and on his computer. When he was unable to locate a copy of the EC certificate, he contacted ACAS and asked them to issue a copy, i.e. duplicate of the certificate.

22. He explained that he now understands that, rather than simply issuing him with a copy of the 3 June 2019 EC Certificate, ACAS in fact issued a fresh EC Certificate. That is the certificate which the Judge refers to in his judgment. At the hearing before the Judge, the Claimant,

however, believed that the Judge was talking about the original certificate, because he had asked ACAS for a duplicate/copy certificate.

23. The Claimant also explained during the appeal that he ticked the box as he did in paragraph 2.3 of his Claim Form because he was unsure what he was doing. He accepts that he made a mistake. Those assertions appeared to be entirely consistent with the finding of fact made by the Judge that the Claimant was not familiar with the legal procedural requirements of presenting a claim, that he did not have a number when he completed the form, so simply ticked the box 'to move on'. They were also consistent with the Judge's finding that the Claimant had difficulty navigating the procedural requirements for presenting a claim.

24. The Claimant stated that after the Hearing on 19 November 2019, he called ACAS once more. He stated that ACAS reiterated that he definitely had engaged properly in the ACAS Early Conciliation procedure before issuing his claim. They then sent him the original 3 June 2019 email and certificate. He explained that that was how he attached that document to his appeal. He said that ACAS advised that he should appeal against the Judge's decision. The Claimant said that that was why he issued this appeal.

The Law

25. In 2014, legislation was introduced to create a mandatory Early Conciliation procedure through which would-be litigants before Employment Tribunals proceedings were required to conciliate certain disputes before issuing proceedings. The objective of that legislation, and the linked procedural rules set out in the **ET Rules of Procedure 2013** was, no doubt, to encourage parties to seek to resolve disputes before issuing claims in the Tribunal; to encourage early resolution of those claims; and, thereby minimise the costs and time spent on litigation which

A could reasonably have been avoided. It was hoped that only those cases that could not be compromised and settled early would then need to proceed to a Hearing before the Tribunal.

B 26. Whilst that may be a sound and legitimate objective, one unfortunate, unseen by some, consequence of the legislation, and the way in which it can operate, has been to create more litigation, through which the technical, procedural issues are litigated because they can bring an early end to litigation, sometimes even when the dispute is one not capable of resolution via

C conciliation and is a genuine one.

27. Not only is that precisely the opposite of what the legislation sought to do, but in some

D cases, if there is no judicial discretion to mitigate the effect of the rule in an appropriate case, there is a risk that mandatory procedural rules lead to harsh and, potentially, unjust results. It is difficult for rules to make provision for all the many, different factual circumstances which make

E their way before the Courts in disputes between litigants. Strict procedural rules, and adherence to them, have an important role to play in the administration of justice: they are part of a process through which litigation can be fairly managed, and managed in the interests of justice for all. However, strict procedural rules which serve to limit access to a court or tribunal without

F determination of the underlying dispute, and where no judicial discretion exists for an exceptional circumstance, or a wholly unforeseen situation, are particularly susceptible to that risk, namely of leading to a harsh, and potentially, unjust result.

G

28. Section18A of the **ETA 1996** provides as follows:

> **"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**

H **subject to subsection (7)."**

29. Section 18A(1) **ETA 1996** therefore imposes a mandatory obligation upon a prospective Claimant to contact ACAS about their claim before instituting proceedings. That mandatory obligation is subject to a limited to a number of exceptions set out in subsection (7). It is agreed that none of those exemptions apply in this case.

30. Section 18A(8) of the **ETA 1996** provides as follows:

> **"(8)A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)."**

The certificate issued under subsection (4) of section 18 is routinely referred to as an EC Certificate. It certifies that the relevant conciliation officer has concluded that a settlement is not possible between prospective parties to the claim.

31. In principle, therefore, once an EC certificate has been obtained by prospective Claimants, the bar imposed by Section 18A(8) of the **ETA 1996** on issuing proceedings is lifted. However, those statutory provisions, set out in primary legislation, are mirrored by obligations imposed upon the Tribunal, its Judges and staff set out in Rules 10 and 12 of Schedule 1 of the **ET Rules of Procedure 2013**.

32. As far as material, they provide as follows:

> **"Rejection: form not used or failure to supply minimum information**
>
> **10. (1) The Tribunal shall reject a claim if –**
>
> **…**
>
> **(c) it does not contain all of the following information –**
>
> **(i) an early conciliation number;**
>
> **…**
>
> **(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 pply for a reconsideration of the rejection.**

Rejection: substantive defects

12.—(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—

…

(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;

…

(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 … (c) or (d) of paragraph (1)."

(Emphasis added).

33. Rule 6 of the ET **Rules of Procedure 2013** provides that:

> **"A failure to comply with any provision in these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal … does not of itself render void proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following –**
>
> **(a) Waiving or varyin the requirement;**
>
> **(b) …"**

34. These provisions have been considered in a number of cases. Those authorities have established that the use of the word "shall" in Rule 12(1) and (2) denotes that the effect of the rule is mandatory and that there is no discretion in its application. See per Langstaff P in **Cranwell v Cullen** UKEATPAS/0046/14/SM. In that case, the EAT held that there was no discretion to waive a failure to include an EC number or the erroneous claim that an exemption applies (i.e. the circumstances described in rule 12(1)(c) or (d)); that was the effect of the rule. In **Adams v British Telecommunications Plc** [2017] ICR 382, Simler P. considered the provisions of Rules 12. She noted that Rule 12(2)(a) provided an escape route for some minor errors in compliance within the EC rules relating to names and addresses of employers (as a Judge had a discretion not to reject the claim if it was not in the interests of justice to do so) but that a minor error in relation to the EC number itself is not capable of being corrected in the same way. She stated (paragraph 7) that,

"It is difficult to see any justification for this distinction. None was advanced by either counsel and I cannot identify any. Both are minor errors but no escape route is provided for the certificate number errors."

Thereafter, by amendment which took effect from 8 October 2020, Judges were given a discretion not to reject a claim if the claimant made an error in relation to an early conciliation number and they were satisfied that "it would not be in the interests of justice to reject the claim". See r.12(2ZA) inserted by the Employment Tribunals **(Constitution and Rules of Procedure) (Amendment) Regulations 2020**, SI 2020/1003.

35. The analysis in **Cranwell** was subsequently applied by Her Honour Judge Eady QC in **E.ON Control Solutions Limited v Caspall** [2020] ICR 552. HHJ Eady held that a failure to include an accurate Early Conciliation number fell within the scope of Rule 12(1)(c) and that accordingly a Tribunal was required to reject claims where such an inaccurate number was included on the form. Importantly, she held that Rule 6 of the **ET Rules of Procedure 2013** did not provide a discretion to an employment judge in respect of that mandatory rule. In the opening paragraph of her Judgment in **Caspall**, HHJ Eady commented on the effect of the procedural rules regarding the Early Conciliation Procedure:

" 1. ….. The rationale of the early conciliation scheme is to encourage the settlement of employment disputes at an early stage and so avoid the institution of employment tribunal proceedings … That is a laudable aim but the requirements then imposed in relation to prospective employment tribunals proceedings (in particular, the mandatory provisions of rules 10 to 12 of the Employment Tribunals Rules of Procedure 2013) are giving rise to satellite disputes, with a number of such cases having reached the Employment Appeal Tribunal in recent years. It seems unlikely that this was Parliament's intention and it might be thought that the time had come for a review of employment tribunal procedures relating to Acas early conciliation. That, however, is plainly a matter for others; my role in deciding the issues raised by this appeal has to be to apply the law as it currently stands."

A 36. So too is my role. As regards the other points made, I refer to paragraphs 25-27 above. I note the amendments which were introduced with effect from October 2020 as set out at paragraph 34.

B 37. In November 2019, the safety net built into the **ET Rules of Procedure 2013** in respect of failures to include an accurate Early Conciliation certificate number (which should have served to prevent unjust decisions or outcomes where a relatively minor error had taken place which C could prevent an individual from accessing justice) was that under Rule 10(2) or under Rule 12(3) a form which failed to contain an accurate EC number, or, as in this case, did not include such a number, 'shall' be returned to the Claimant with a notice of rejection explaining why it was D rejected. That notice should also contain information about how to apply for reconsideration of the rejection. That term 'shall' denotes a mandatory requirement, placed, this time, upon the Tribunal.

E 38. Logically, this should give a claimant an opportunity to correct the error and promptly resubmit his/her claim to the Tribunal. Pursuant to Rule 13, the Claimant should do so within 14 days of the date of the notice of rejection. The application can be dealt with either on the papers F or at a Hearing. If a Judge subsequently decides that the original rejection was correct, but that that defect can be rectified, the claim shall be treated as validly presented on the date when the defect was rectified as set out in Rule 13(4). Limitation issues may then need to be considered G depending on the circumstances of the individual case.

39. In **Caspall**, HHJ Eady held that in circumstances where a claim was lodged and an H inaccurate certificate numbers included on it, the Tribunal had been bound to reject the claim. Further, she held that had that been done, as it should have been, there would no longer be any

claim for the Tribunal which could have been amended by exercise of case management powers. She held that although Rule 6 of Schedule 1 permitted the Tribunal to waive compliance with the requirement of Rules, the Rule could not have been intended to provide a discretion to override a mandatory requirement to reject a claim when there was no expressed expression within the terms of the Rule. She noted that two other Appeal Tribunal Judges in **Cranwell** and **Baisley v South Lanarkshire Council** [2017] ICR 365 had also reached that view. She considered that that it would inapposite and illogical that a judicial discretion could be invoked under Rule 6 to do something which had been rendered mandatory by Rule 12. She noted the discretion to reject the claim had been included within the Rules in respect of the names or addresses of the employer or employee, but that that had not been the case in respect of errors regarding the ACAS conciliation certificate number.

40. Finally, HHJ Eady noted that Rule 6 referred to 'proceedings'. She observed that proceedings can only start with the presentation of a claim and that logically when a claim fails to comply with the requirements of Rules 10 and 12, it is to be rejected. There can therefore be no proceedings before the Tribunal to which any discretion set out in Rule 6 could be applied. HHJ Eady did not consider that the overriding objection changed the position. With some regret, I agree that this is the correct analysis and interpretation of the Rules. My regret arises not from the interpretation of the Rules per se, but in respect of the practical outcome for litigants, this case being one of the very clear examples of the type of difficulties which can arise and the consequent satellite litigation. I also draw particular attention to the mandatory requirements placed upon the Tribunal to reject a claim and return it to a litigant with an explanation of what has occurred and how to apply for reconsideration. That is an important procedural safeguard.

The present case

41. As will be seen from the background facts set out above, there is now before the Appeal Tribunal evidence and information which was not before the EJ when he made his decision. In particular, the EC certificate dated 3 June was not before the Tribunal in November 2019. That appears to show that the Claimant in this case did comply with the mandatory requirements imposed upon him by Section 18(4) and (8) of the **ETA 1996** and therefore, but for the effect of the procedural rules, the embargo upon lodging a claim should have been lifted.

42. However, the Judge did not know that at that Hearing in November 2019. He also did not have the explanation given to me during the hearing by the Claimant as to how the certificate of 24 June 2019 came into existence. Furthermore, the Judge did not know that the ACAS conciliation had in fact been sent to the Respondent, as is now known to be the case.

Conclusions and deliberations

43. In my judgement, as the EC certificate number was not included on the claim that was lodged with the Tribunal, the Employment Judge was obliged to reject the claim. It should in fact have been rejected on receipt, or receipt of the Response. That was not done as it should have been done.

44. Nonetheless, once the issue came before the Judge, on the information he had at the time, he had no option but to reject the claim. My reasons for reaching that conclusion are simply that the provisions of the rules in Rule 10 and 12 are mandatory and did not provide any discretion for the Judge. I cannot see that the Judge erred in law. The consequence of that is that this appeal must be dismissed, and I cannot, because I have dismissed the appeal, exercise the powers of the ET.

45. However, it is significant in this case, that the built-in safety net failed. The claim form should have been returned to the Claimant with an explanation of how could apply for reconsideration. That did not happen. It should have happened. I consider that that is more than 'unfortunate', as the Judge described it. The onus for doing so was upon the Tribunal. The step is an important safeguard against potentially unjust results occurring. Had that occurred in this case, the difficulties in terms of the duplicate/fresh certificate may have come to light much earlier.

46. The Claimant has complied with his obligation to undertake an Early Conciliation and the EC Certificate was sent to the Respondent. The Claimant did not comply with the requirement to include the number on the application to the Tribunal. That was because he had lost the original certificate. On his account, he tried to obtain a copy of the original certificate, but was unsuccessful. He spoke to ACAS. Rather than re-issuing a copy of the original certificate, a new one was issued, further complicating matters. The Judge made his decision. The Claimant went back to ACAS. They advised that he had complied with the Early Conciliation procedure and that he should lodge an appeal. He did so, but then had to wait a considerable period of time until this appeal has been heard.

47. It is of course a matter for the Claimant, what, if any, steps to take now. He could, for example, apply for a reconsideration out of time of the Decision of EJ Beard on the grounds that the defect in the application can be remedied by including the EC certificate number of 3 June 2019 on the claim form. application. He could provide to the Tribunal the information he has provided to the EAT.

48. If that application for a reconsideration were allowed, the Tribunal would then need to consider whether the substantive claims of unlawful deduction from wages in respects of salary and holiday pay were made in time, and if not, whether time should be extended. At that point, the Tribunal would be required to consider the primary limitation periods and take into account the impact of the conciliation process upon the primary time limit.

49. No formal application to admit new evidence was made in respect of the matters set out above. Had I been required to consider one, I may well have concluded that there was merit in it. On the information presented to me, it appears that it may not have been possible to put the information now before the EAT before the Tribunal using reasonable diligence. Taking that which both the Claimant and the Respondent say as accurate as to their knowledge at the time, it would appear that the Respondent had received the ACAS conciliation certificate of 3 June 2019, but had not seen it because it had gone into a manager's junk email box, and the Claimant believed that he had obtained a copy of that certificate. The Tribunal found as a fact that the Claimant was unfamiliar with legal procedural requirements which applied. He explained to me in submissions that he had tried to comply with the requirement by obtaining a copy of the certificate which he knew existed and which he had lost and that he had thought that he done so, whereas, in fact what he obtained and provided was a further and different certificate. Further, I consider that that evidence and information if available could have had or would have had an important influence on the case. Thirdly and finally, the new information presented to me appears to be entirely credible. The existence of the earlier conciliation certificate is no longer in dispute, nor is the fact that it was sent to the Respondent, and the explanation and account of the Hearing offered by the Claimant has not been challenged by the Respondent and appears to be largely agreed.

50. However, even if I had been asked to formerly admit fresh evidence, I do not consider that it would take issues in this appeal significantly further. Pursuant to the EAT Practice Direction, before considering evidence not placed before an ET, the EAT will usually expect that a prior application has been made to the ET to reconsider its Judgment. The Judge at that point in time would still be bound by the fact that the original claim form did not contain a conciliation number and, therefore, would still be bound to reject the claim. The Claimant could then immediately apply in writing for a reconsideration of that decision on the grounds that the defect in the application could be remedied by the insertion of the correct certificate number. The claim would then be treated as having been lodged on the date when the defect is rectified. The Tribunal would then be required to consider whether or not the underlying claims of unlawful deduction were lodged in time. In practice, it would be quicker for an application for reconsideration out of time to be made to the Tribunal.