EMPLOYMENT TRIBUNALS

Claimants: Mrs A Ahmed & others

Respondents: (1) Sainsbury's Supermarkets Limited
(2) Lloyds Pharmacy Limited

PRELIMINARY HEARING

Heard at: Birmingham (in public) **On:** 28 February & 2 March (reading days), 3, 5 & 10 March 2020

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimants: Mr D Short QC
For the respondents: Ms N Ellenbogen QC & Mr D Martin QC

JUDGMENT BY CONSENT

(1) The following claims were presented outside the relevant time limits and have been withdrawn: Gerald Crookall (2403984/2016); Barnaby Crawford (1302914/2016); Diane Green (1303034/2016); Kurt Molloy (1303213/2016); Amy Hooper (1300409/2017).

(2) The following claims were presented in time: Daniel Jones (1300677/2017)[1]; Robert Beck (2403978/2016).

RESERVED JUDGMENT

(3) If and to the extent there is any dispute about this, the above-withdrawn claims are not dismissed pursuant to rule 52 of the Employment Tribunals Rules of Procedure. The reasons for this are that the claimants have expressed at the time of withdrawal a wish to reserve the right to bring a further claim against the respondent raising the same, or substantially the same, complaints, and there would be a legitimate reason for them doing so, namely: that the limitation period in the civil courts is 6 years and not 6 months; and that they should not be denied the right, if they so wish, to take full advantage of that longer limitation period just because they initially brought a claim in the Employment Tribunals.

[1] Note that there is another Daniel Jones who is also bringing a claim, with claim number 1303195/2016.

(4) The following claims, and only them, are of a kind described in sub-paragraph (c) and/or (e) of paragraph (1) of rule 12 of the Employment Tribunals Rules of Procedure and shall be rejected in accordance with paragraphs (2) and (2A) of that rule: the claims of all claimants who did not in their claim forms give any early conciliation number, of any kind, from any certificate on which they are named, whether on the front of the certificate or elsewhere.

(5) None of the "test claimants" (identified in paragraph 4.2 of the Reasons, below) needs permission to amend in any of the following situations that applies to them:

a. where the job title given in their claim form, or originally given in the register, is different from the job title the respondents contend for during the period to which their claim related when first presented;

b. where the job title given in their claim form or originally given in the register is the same as the job title the respondents contend for during part of the period to which their claim related when first presented, but they also held one or more other job titles during that period in relation to which they wish to make a claim;

c. where they wish to make a claim in respect of a period when they allege they were working under a different job title to that given in their claim form or originally in the register and the respondents allege that the different job title specified by the claimants is not a job title they had at any relevant time.

REASONS

Introduction

1. This is the fifth preliminary hearing I have dealt with in this piece of substantial equal pay litigation. By way of background, I refer to the written records of the previous preliminary hearings and to my previous judgments and orders and the reasons that go with them. In particular, this preliminary hearing, which is being referred to as the Register Hearing, was set up at a telephone hearing on 14 November 2019 and the issues I was to be dealing with are summarised in the written record of that hearing.

2. There is a List of Issues and an "*Agreed Facts*" document. Copies are annexed to these Reasons for ease of reference.

3. This hearing had a time estimate of 10 days, including two reading days (there was a very large quantity of documentation) and several days of witness evidence. For reasons it is unnecessary to explain at this stage, we ended up with just a single day of witness evidence and two days of submissions. 11 March 2020, which was to have been day 9, was a case management preliminary hearing in private, and has been written up separately.

4. There are two substantive matters in dispute that I am dealing with:

4.1 an application to strike out the claims of various claimants because they did not give an ACAS early conciliation number personal to them in their

claim forms. My decision on this application is summarised in paragraphs 65 and 66 (page 24) below;

4.2 an application to strike out the whole or parts of the claims of seven so-called 'test claimants'[2] – N Vaughan (2302194/2016), R Wiltshire (3200040/2016), J Froggatt (1303030/2016), J Whiteway (1302939/2016), L Smyth (3300077/2016), N Scholes (2402494/2016), and R Minter (1303211/2016) – on the basis that the relevant claim or part of a claim is not at present before the Tribunal, that the claimant needs permission to amend in order to pursue it, and that permission to amend should be refused. My decision on this application starts at paragraph 67 (page 24) and is summarised in paragraph 136 (page 41) below.

5. These two matters are separate and distinct, and not in any way interdependent or linked. I shall deal with them separately and have split the rest of these Reasons into two parts accordingly. The early conciliation issue is one of principle. It potentially applies to over 700 of the 865 claimants with whose claims I am directly concerned at this hearing. I shall start with that.

PART 1 – EARLY CONCILIATION

6. The early conciliation issues are set out in the List of Issues as follows:

2. Early Conciliation Requirements

*2.1 In the circumstances respectively specified below, have all, or any, of the Claimants identified in **Schedule A** to this document failed to comply with rule 10(1)(c)(i) of the ET Rules of Procedure 2013?*

2.1.1 The claim form identifies both the Lead Claimant's unique reference number and the multiple number for the EC Certificate in which the Claimant appears, but not the Claimant's own unique reference number;

2.1.2 The claim form identifies the unique reference number for the Lead Claimant, or for another Claimant in the multiple (but not the multiple number for the EC Certificate in which the relevant Claimant appears), and does not identify the relevant Claimant's own unique reference number; alternatively, the purported unique reference number for the relevant Claimant is incorrect. The relevant sub-categories are:

2.1.2.1 The claim form identifies the Lead Claimant's unique reference number but not the relevant Claimant's unique reference number; and

2.1.2.2 The claim form identifies a different Claimant's unique reference number but not the relevant Claimant's unique reference number.

2.2 If so, is each of the relevant claims liable to be struck out under rule 12(1)(c) of the ET Rules of Procedure 2013?

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[2] They are not test or lead claimants under rule 36, but are being referred to as test claimants for wont of a better expression. See paragraphs 41 to 50 of the written Reasons for the Case Management Orders made at and following the telephone hearing on 14 November 2019.

7. All of the claimants in these proceedings presented their claims after the process of ACAS early conciliation ("EC") was introduced. They were therefore all subject to the requirement to go through EC before presentation, unless an exemption applied.

8. All of the potentially affected claimants went through EC before presenting their claims and none of them is relying on an exemption.

Early conciliation law

9. The requirements to go through EC, for ACAS to issue an EC certificate ("certificate"), and for a claimant who is not exempt to have a certificate before presenting a claim form are contained in section 18A ("section 18A") of the Employment Tribunals Act 1996 ("ETA"), the relevant parts of which are as follows:

> *(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 subject to subsection (7). ….*
>
> *(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.*
>
> *(4) If –*
>
> *(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or*
> *(b) the prescribed period expires without a settlement having been reached,*
>
> *the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant. …*
>
> *(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.*
>
> *The cases that may be prescribed include (in particular) –*
>
> *cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter; …*
>
> *(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).*
>
> *(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.*
>
> *(11) The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).*
>
> *(12) Employment tribunal procedure regulations may (in particular) make provision –*
>
> *(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such*

regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4); …

10. Regulations made under section 18A include the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 ("2014 Regulations"), the relevant parts of which are:

2. In these Regulations and in the Schedule – …

"early conciliation certificate" means the certificate prescribed by the Secretary of State in accordance with regulation 4(b) [sic]*;*

3. (1) A person ("A") may institute relevant proceedings without complying with the requirement for early conciliation where –

(a) another person ("B") has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B;

4. (1) The Secretary of State may prescribe – …

(b) a certificate to be issued by ACAS if rule 7 of the Schedule applies. ….

Schedule

The Early Conciliation Rules of Procedure

….

7. (1) If at any point during the period for early conciliation, or during any extension of that period, the conciliation officer concludes that a settlement of a dispute, or part of it, is not possible, ACAS must issue an early conciliation certificate.

(2) If the period for early conciliation, including any extension of that period, expires without a settlement having been reached, ACAS must issue an early conciliation certificate.

8. An early conciliation certificate must contain—

(a) the name and address of the prospective claimant; …
(d) the unique reference number given by ACAS to the early conciliation certificate; …

11. One of the things the 2014 Regulations introduce which is not in section 18A is EC numbers: "*the unique reference number given by ACAS to the early conciliation certificate*". The respondents' EC arguments I am adjudicating on in this decision are wholly based on EC numbers

12. Pausing there, there are some oddities and anomalies in and in relation to the legislation surrounding EC. The parties did not make anything of them during this hearing, but they are at least potentially relevant to what I have to decide.

13. There is an example in the part of the 2014 Regulations just quoted: the definition of "*early conciliation certificate*" in regulation 2 refers to a non-existent "*regulation 4(b)*", when what is clearly meant is regulation 4(1)(b).

14. Something else I include under the heading of 'oddities and anomalies', although that may not quite be the right phrase in this instance, stems from the fact that the Secretary of State is obliged, by regulations 2 and 4 read together, to prescribe a form of EC certificate. This was not mentioned during the hearing, but it seemed to me, when thinking about my decision, that what the Secretary of State had prescribed could be important. What is, possibly, odd and anomalous is that I have been unable to find out whether anything has been prescribed and, if so, what.[3]

15. Returning to the legislation, these are the relevant parts of the Employment Tribunals Rules of Procedure ("Rules"):

> *1. (1) In these Rules—*
>
> *"claim" means any proceedings before an Employment Tribunal making a complaint;*
> *"claimant" means the person bringing the claim;*
> *"complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal;*
> *"early conciliation certificate" means a certificate issued by ACAS in accordance with the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2013*[4] [sic]*;*
> *"early conciliation exemption" means an exemption contained in regulation 3(1) of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014;*
> *"early conciliation number" means the unique reference number which appears on an early conciliation certificate;*
>
> *2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. …. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.*
>
> *10. (1) The Tribunal shall reject a claim if – …*
>
> *(b) it does not contain all of the following information –*
> *(i) each claimant's name;*
> *(ii) each claimant's address;*
> *(iii) each respondent's name;*
> *(iv) each respondent's address ;or*
>
> *(c) it does not contain one*[5] *of the following –*
> *(i) an early conciliation number;*

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[3] The contents of the Regulations cannot be what has been "*prescribed*" for these purposes, as the Regulations envisage something separate from themselves that is to be prescribed. The closest thing I have found published anywhere to a prescribed form of EC certificate – and it isn't remotely close – is a draft form annexed to the "*Early Conciliation: Government Response to consultation on proposals for implementation*" document of July 2013 from the Department of Business, Innovation & Skills.

[4] Another obvious error in the legislation relating to early conciliation. This error appears to have arisen because when the amendments to the Rules were first drafted the early conciliation regulations were also in a draft, 2013 form.

[5] Butterworths Employment Law Handbook has a typographical error here: "*all*" instead of "*one*".

(ii) confirmation that the claim does not institute any relevant proceedings; or

(iii) confirmation that one of the early conciliation exemptions applies.

(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 apply for a reconsideration of the rejection.

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;

(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates;

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

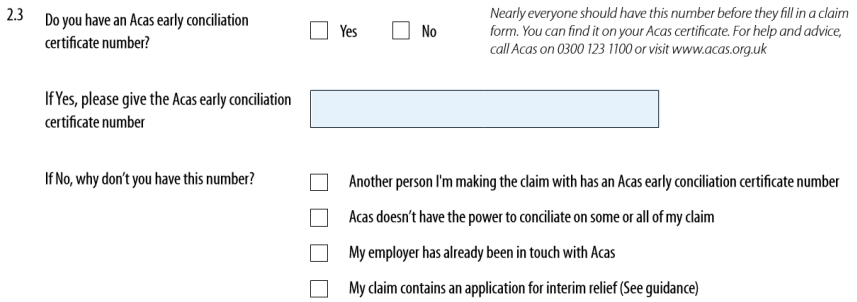
(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs … (c) or (d) of paragraph (1).

(2A) 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-paragraph (e) … of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name … and it would not be in the interests of justice to reject the claim.

16. I have quoted rule 10 as well as rule 12 because, as both sides agree, they are two sides of the same coin, and should, as far as possible, be read consistently with one another.

17. Until this hearing, the respondents have been relying solely on rule 12(1)(c) and that is reflected in the wording of the issues. However, during the hearing, it became clear that, in relation to a particular group of claimants, they were also relying on rule 12(1)(e). Mr Short QC objected to the respondents doing so. Given the length of the gestation period of this hearing and the fact that the respondents had, unequivocally, based their application to strike out on rule 12(1)(c) alone, there is a valid basis for his objections. However, as I shall explain shortly, the relevant case law is to the effect that these parts of rule 12 are jurisdictional and that if they come to the attention of the Tribunal, it should take these points for itself. Given this, if I agree with the respondents that rule 12(1)(e) applies to claims, the fact that the respondents did not raise this until the hearing will not assist the affected claimants.

18. Before leaving Tribunal practice and procedure, I note that the claim form being used includes this:



2.3 Do you have an Acas early conciliation certificate number? ☐ Yes ☐ No

Nearly everyone should have this number before they fill in a claim form. You can find it on your Acas certificate. For help and advice, call Acas on 0300 123 1100 or visit www.acas.org.uk

If Yes, please give the Acas early conciliation certificate number

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

- ☐ Another person I'm making the claim with has an Acas early conciliation certificate number
- ☐ Acas doesn't have the power to conciliate on some or all of my claim
- ☐ My employer has already been in touch with Acas
- ☐ My claim contains an application for interim relief (See guidance)

and that in section 15 of it, under the heading "*Additional Information*", it states, "*You can provide additional information about your claim in this section. If you're part of a group claim, give the Acas early conciliation certificate numbers for other people in your group. If they don't have numbers, tell us why.*"

19. The significance of what is in section 2.3 of the claim form is that if claimants have been through EC it is assumed they will not seek to take advantage of an exemption. This is despite the fact that there is nothing in rules 10 and 12 that prevents claimants who have conciliated relying on exemptions. The possibility of claimants going through EC despite an exemption applying – which is the situation of many of the claimants in this case – and using exemptions as 'back-up', just in case, seems not to have been envisaged.

20. The potential significance of what is written at the top of section 15 of the claim form is that it appears to show that those responsible for drafting the claim form – in practice, I believe, civil servants and senior Employment Judges – took the view that in a multiple case, all claimants have either to give an EC number or to say why they are exempt from having to do so. No one is suggesting that this means rules 10 and 12 have to be interpreted in a particular way, but, arguably, for reasons that will become obvious, it provides some support to the respondents' case.

21. In terms of case law, I don't think it is necessary to go beyond the EAT's decision in E.ON Control Solutions Ltd v Caspall (referred to here as Caspall), which built on previous EAT decisions: Sterling v United Learning Trust [2015] UKEAT 0439_14_1802 & Cranwell v Cullen [2015] UKEAT 0046_14_2003.

22. The basic facts of Caspall, taken from the EAT's summary, were:

> *The ET was concerned with two claims lodged by the Claimant. The first gave an incorrect ACAS early conciliation ("EC") number – relating to a different Claimant and a different claim; the second gave the number of an EC certificate that was invalid. Neither had been rejected by the ET under Rule 10 ET Rules nor had the claims been referred to an Employment Judge under Rule 12. At a Preliminary Hearing before the ET, the Claimant applied to amend his claim to correct the ACAS EC number. The ET allowed the application, seeing this as consistent with the overriding objective and the general principle of access to justice given that this was a minor amendment to rectify a technical error. The Respondent appealed.*

23. The following principles derive from the EAT's decision in the respondent's favour:

    23.1 there is no need for a referral from Tribunal office staff in accordance with rule 12(1) and it does not matter at what stage of the proceedings the point about the claimant's claim allegedly being of the kind described in one of the sub-paragraphs of that rule is taken. The EAT decided that referral is not "*a necessary requirement. The language of Rule 12(2) obliges the ET to reject the claim if the Judge considers sub-paras (1)(a), (b), (c) or (d) apply; the obligation is not stated to be limited to a particular stage in the process but is expressed in general terms, so as to arise at whatever stage the relevant judicial consideration is undertaken*"[6];

    23.2 "*the requirement to include an EC number* [in rules 10(1)(c) & 12(1)(c)] *must be the accurate number on the EC certificate pertaining to the Claimant (as opposed to a different EC certificate relating to an entirely different Claimant)*"[7];

    23.3 it is not the case "*that Rule 6 … imports a discretion for the ET when considering failures to comply with Rules 10 and 12*"[8], nor "*that the overriding objective changes the position in this regard*"[9];

    23.4 "*the Claimant's error* [was not] *something that could be remedied by way of amendment*"[10];

    23.5 in conclusion (from the EAT's summary): "*The Claimant's claims failed to include an accurate ACAS EC number and were thus of a kind described at Rule 12(1)(c) ET Rules. Pursuant to Rule 12(2), the Employment Judge was therefore required to reject the claims and return the claims to the Claimant*".

Arguments for any appeal

24. The claimants accept that if I decide particular claims fall foul of rule 12(1)(c), I am bound by Caspall to reject them. They reserve the right to challenge the correctness of the previous EAT authorities, on the basis of an argument (as I understand it) that rule 12(2) only applies where there has been a referral by a member of Tribunal staff in accordance with rule 12(1); and that if the claim form is not referred, rule 6 applies to any defect and it can be waived or dealt with in some way other than by rejection of the affected claim.

25. There is another, related argument the claimants reserve the right to raise on appeal, but which they accept I would be bound to decide against them on the law as it stands. This is that the respondents, having failed to identify these EC points until very recently, in breach of Tribunal orders – or having, in one instance (in relation to Mr Gurung – case number 3303255/2015), initially taken the point and then withdrawn it – the points should be rejected. It is said that whatever the

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6 [2019] UKEAT 0003_19_1907, at paragraph 42.

7 Paragraph 40.

8 Paragraph 57.

9 Paragraph 58.

10 Paragraph 59.

merits of those points might have been had they been identified and pursued timeously, it would be unfair to the claimants to do otherwise.

26. The merits of these arguments the claimants may wish to argue on appeal are not something it would be appropriate for me to comment on and I shan't mention them again.

Types of EC certificate

27. The respondents' application, and any difficulties the claimants have, derive partly from the fact that ACAS's practice, in terms of the certificates it issues, is not consistent. At this hearing, we have been looking at three or possibly four different types of ACAS certificate.

27.1 First, the standard certificate that is issued in a single case, with a single number on it, starting with an "R" (an "R number"), which can conceivably only 'belong' to that certificate and to that prospective claimant.

27.2 Secondly, a certificate identical to the first type, but the prospective claimant is also named on a multiple certificate with a number starting with "M" (an "M number"), as described immediately below. Mr Z Abid (case number 2402321/2016) has this type of certificate.

27.3 Third, what I understand to be the standard certificate that is (or was at the relevant time) issued in a multiple case.

27.3.1 On the first page of the certificate: it gives, after the words, "*ACAS EC Reference Number Multiple*", an M number; it names, as "*Prospective Claimants*", the 'lead' prospective claimant "*and others*" and then states, "*(names/addresses of all prospective claimants appended at Annex 1)*".

27.3.2 Towards the bottom, it states: "*Please keep this Certificate securely as you will need to quote the reference number (in its entirety) in any Employment Tribunal application concerning this matter*".

27.3.3 Behind the first page of the certificate there is a table, headed "*Annex 1 Names/Addresses of all Prospective Claimants*", in which the names and addresses of all of the prospective claimants covered by that certificate appear, alongside, in a column headed "*EC Reference*", R numbers for each of them.

27.3.4 An example of a case with this type of certificate is Mrs M Delaney's (case number 2402320/2016).

27.4 Fourth, what I understand to be a type of certificate that is (or was at the relevant time) issued where a large group of claimants had gone through EC together by sending their relevant details by post or email to ACAS rather than by using ACAS's online 'portal'.

27.4.1 It is the same as the 'standard' multiple certificate, except that:

27.4.1.1 it has a similar "*Annex 1*" on a single page and then, on separate pages (in what originated, in the example put before me, as a separate document – see below), a list of names and addresses of all of the prospective claimants, including the lead one;

27.4.1.2 the details of only one prospective claimant – the lead one – are on the page headed "*Annex 1*";

27.4.1.3 there is only one R number given anywhere on the certificate – beside the lead prospective claimant's name on the page headed "*Annex 1*" (but not next to their name in the separate list of names and addresses).

27.4.2 Mr Abid, already mentioned, is the lead prospective claimant on a certificate of this type and Mr D Bradley (case number 2303033/2015), who is the lead claimant on a claim form presented on 9 November 2015, is one of the claimants listed separately in that certificate, after the page headed "*Annex 1*".

27.4.3 I understand that what ACAS did in relation to the certificate with Messrs Abid's and Bradley's names on it – presumably to save themselves time and trouble – was simply to include as part of that certificate, without alteration, the list of names and addresses of prospective claimants that the prospective claimants themselves had, through their solicitors, sent into ACAS for the purposes of EC.

28. Based on the certificates that I was asked to consider at this hearing:

28.1 some claimants are on two certificates relating to the same matter – one an individual certificate with an R number and one a multiple certificate which has on it the same R number and an M number as well;

28.2 R numbers appear unique to one individual, but not necessarily unique to one certificate;

28.3 M numbers appear unique to one certificate, although obviously, by definition, not to one individual.

29. In addition, I note that although a claimant cannot have more than one valid certificate in relation to a particular "*matter*"[11] – HMRC v Serra Garau [2017] UKEAT 0348_16_2403 – it is relatively common, where, usually over a period of months or years, a claimant has made a number of claims in a number of claim forms that have been consolidated, for the claimant to have been through EC more than once and therefore to have more than one certificate. So long as those certificates relate to different 'matters' in a technical sense, they are potentially all valid. In this way, a claimant may have a number of valid certificates, each with different EC numbers on them, in the same proceedings.

30. The respondents' case in summary is that the claim of every claimant in whose claim form an R number particular to them was not set out should be rejected, and that to deal with the fact that section 2.3 of a claim form can only accommodate one EC number, the other EC numbers should be set out elsewhere in the claim form, for example in section 15. I note, in passing as it were, that:

30.1 the respondents accept that rule 12(1)(c) does not apply to the claim of any claimant who gives an R number particular to them in their claim form, even

[11] Section 18A.

if that R number only appears in an annex to the relevant EC certificate and the only number on the front of that certificate is an M number;

30.2 the respondents also accept that an entire multiple claim form is not invalidated where only some of the claimants on it fall foul of rule 12(1)(c). But for that to be right, and if it is also right that (as mentioned above) rule 10 and rule 12 should be read together and consistently with one another, it is necessary to interpret paragraph (1) of rule 10 – "*The Tribunal shall reject a claim if… it …*" – in a profoundly unnatural way.[12]

Types of potentially affected claim

31. Prior to the hearing, the claims potentially affected by this EC issue were split into three, potentially partially-overlapping categories, corresponding with issues 2.1.1, 2.1.2.1, and 2.1.2.2. However, during the hearing it became clear that there were four:

31.1 category 1 – cases where the only number given in the claim form was the M number;

31.2 category 2 – cases where there was a certificate giving an M number and which also specified R numbers for all prospective claimants, but the only number on the claim form was one claimant's – normally the lead claimant's – R number;

31.3 category 3 – cases where there was a certificate like Mr Abid's, with an M number and, as in category 2, all the claimants' details on it; but with only one R number, next to the name of the lead prospective claimant in the table immediately under the heading "*Annex* 1"; and in the claim form, only that R number was given;

31.4 category 4 is a bit different. The focus was not on the type of certificate. Instead, what was relevant was that only the lead claimant's R number was given in the claim form, and that that number came from a certificate which did not have all the claimants' names on it.

The parties' arguments

32. These are the respondents' arguments as I understand them to be, in summary.

32.1 ETA section 18A(4) requires the conciliation officer to issue a certificate to every prospective claimant who has gone through EC and by section 18A(8) no prospective claimant may start a claim without such a certificate.

32.2 Under the 2014 Regulations, every certificate must contain a "*unique reference number*" and, similarly, rule 1 [of the Rules] defines "*early conciliation number*" as "*the unique reference number which appears on an early conciliation certificate*".

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[12] In case it is not obvious what I mean, if what has been accepted is right, then in a multiple case "*a claim*" in paragraph (1) of rule 10 means something like 'the claim of the affected claimant', whereas "*it*" in sub-paragraph (1)(b) ("*it does not contain all of the following information*") means something different – something like 'the claim form' – even though the "*it*" in question is plainly the "*claim*" that "*The Tribunal shall reject*". It is puzzling that rule 10 was not drafted similarly to rule 12, using a formula like, "*The claim, or part of it, shall be rejected if…*".

32.3 The certificate, and the reference number that goes with it, is there to show that a particular claimant has gone through EC and has a certificate. The very purpose of the relevant parts of rule 12 is to make a claimant give their certificate number to prove that they have complied with section 18A.

32.4 It follows:

32.4.1 that, in accordance with the Rules and other relevant legislation, an EC number must be a particular claimant's "*unique reference number*";

32.4.2 that that number should and does 'belong' to a particular claimant in a meaningful way; *and*

32.4.3 that it is correct and appropriate, notwithstanding the definition of "*early conciliation number*" in the 2014 Regulations being "*the unique reference number given by ACAS to the early conciliation certificate*", to refer to a claimant's EC number and not merely a certificate's number.

32.5 The only type of number that is a "*unique reference number*" which shows that a particular claimant has both gone through EC and got a certificate in accordance with section 18A is that claimant's R number.

32.6 An 'M' number is by definition not a "*unique*" number, in that it applies to multiple claimants.

32.7 The fact that rules 10 and 12 refer to "*an*" EC number but to "*each claimant's*" and "*each respondent's*" name and address is not significant. If it were otherwise, it would mean anyone's EC number would do, and:

32.7.1 Caspall is to the effect that it means the claimant's EC number – "*the accurate number on the EC certificate pertaining to the Claimant*";

32.7.2 the whole purpose of the exercise is for each claimant to show they have complied with section 18A by going through EC and getting a certificate, and another claimant's EC number does not show this.

32.8 The Rules require claimants to put their EC numbers on their claim forms as a means to an end, namely to enable the Tribunal, at the start of proceedings, to enforce section 18A. The intention must be for the Tribunal to be able to enforce it in relation to all claimants in a multiple case. What would be the point of rules that required only one claimant in a multiple case to show they had complied with that section? How can the Tribunal and respondents know whether a particular claimant has complied without their certificate number?

32.9 The parts of rules 10 and 12 referring to "*an*" EC number also refer to "*one of the early conciliation exemptions*". Claimants cannot rely on another's EC number any more than they could rely on EC exemptions that did not apply to their claims. Again, the reason the requirement to specify EC numbers, or identify exemptions, on claim forms exists is to make all claimants prove they have gone through EC and obtained certificates, or that they are entitled not to have done so.

32.10 In accordance with the normal rules of legislative interpretation, the phrase "*early conciliation number*" must be interpreted consistently in different

cases. Relevantly to these proceedings, it must be interpreted in the same way when a Tribunal is considering a single claim as when it is considering a multiple claim. In rules 10 and 12, which do not themselves distinguish between single and multiple claims, it can only, in a single claim, mean the relevant claimant's R number. There is no basis for giving it a different meaning in a multiple claim.

32.11 An ACAS practice of wrongly issuing certificates not showing every claimants' R number is not relevant to legislative interpretation. Anyway, affected claimants could and should have been asking ACAS for correct certificates showing their R numbers.

32.12 On any view, category 4 claimants are seeking to rely on certificates that do not 'pertain to' them in accordance with Caspall and their names "*on the claim form* [are] n*ot the same as the name of the prospective claimant*[s] *on the early conciliation certificate*" in accordance with rule 12(1)(e).

33. This is my summary of the claimants' arguments.

33.1 The distinction the respondents draw between R numbers and M numbers is not based on anything in the legislation. Neither the 2014 Regulations nor the Rules mention R numbers as opposed to M numbers, or any other particular type of number for that matter. They do not refer to "*claimants'* " EC numbers either.

33.2 This part of the respondents' arguments is, in fact, directly contrary to the legislation, which is unequivocal in this respect. Numbers belong to certificates, not to claimants: 2014 Regulations, schedule 1, paragraph 8(d), "*the unique reference number given by ACAS to the early conciliation certificate*"; rules 12(1)(e) & (f), "*the early conciliation certificate to which the early conciliation number relates*". Although it is convenient to refer to a particular individual's EC number, especially when discussing R numbers, this is technically inaccurate, because an EC number is by definition a number relating to a particular certificate.

33.3 It follows that it does not matter what letter the EC number starts with, nor whether that number covers several claimants. The question is what "*unique reference number*" has been *"given by ACAS*" to the "*early conciliation certificate*" in question (or, in accordance with the definition of "*early conciliation number*" in rule 1(1), what is the "*unique reference number which appears on*" it)? The number or numbers on the certificate are the important things.

33.4 M numbers are at least as "*unique*" as R numbers, being unique to a particular certificate.

33.5 So far as concerns whether a number for every claimant needs to be given, rules 10(1) and 12(1)(c) are equally clear: while "*each claimant's*" name and address is needed, only "*an*" EC number has to be given.

33.6 As to whether rule 12(1)(c) applies where a claimant uses in their claim form an R number associated with someone else:

33.6.1 only "*an*" EC number needs to be provided;

33.6.2 all parties agree that a claimant is entitled to use their own R number even where the number on the front of the certificate they rely on is an M number;

33.6.3 the respondents must therefore accept that an R number which appears within a certificate that has an M number on the front of it (for example in an annex to that certificate) is "*the unique reference number which appears on an early conciliation certificate*" in accordance with the definition of "*early conciliation number*" in rule 1;

33.6.4 therefore, if and to the extent that, in a multiple case like this, "*the requirement to include an EC number must be the accurate number on the EC certificate pertaining to the Claimant*" (Caspall) – as to which, see below – where claimant A and claimant B were named as prospective claimants in the same certificate, if claimant A gives in her claim form any R number from that certificate, even if it is associated with claimant B, she *is* including an accurate and valid EC number from a certificate which pertained to her [claimant A]. The EAT in Caspall stated merely that the certificate must pertain to the claimant and that the number given must be on that certificate and must be accurate.

33.7 If giving the M number does not satisfy rule 12(1)(c) and R numbers must be given, affected claimants in category 3 cases – those without R numbers on the only relevant certificate – would be unable to bring claims. If they adopted the respondents' suggestion and asked ACAS to issue another certificate, one with 'their' R numbers on it, and ACAS did so, the new certificate would be invalid, in accordance with the Serra Garau case.

33.8 It might be thought that rule 12(1)(e) would catch category 4 cases, because that category concerns claimants whose names are "*not the same as the name of* [any] *prospective claimant on the early conciliation certificate to which the early conciliation number* [given on the claim form] *relates*". However, consistent with there being a requirement only to specify "*an*" EC number and with the fact that EC numbers are the numbers of certificates and not of claimants, so long as the name of one of the claimants (or, possibly, of the lead claimant) on the claim form is "*the same as the name of the prospective claimant on the early conciliation certificate* [etc.]", rule 12(1)(e) does not apply.

33.9 Caspall is distinguishable, being concerned with a single and not a multiple claim and, moreover, in Caspall the number wrongly given did not pertain to *any* claimant on the claim form. In relation to category 4 cases, Caspall means only that the EC number given on the claim form must be that of a certificate "*pertaining to*" *a* claimant (i.e. on which one of the claimants in the claim form – or, possibly, on which the lead claimant in the claim form – is named). At best for the respondents, any certificate on which someone is named as a prospective claimant must 'pertain to' them, so it is conceivable category 4 cases might be affected, but no others.

Decision on EC issues

34. Although the respondents are right up to a point, I broadly agree with the claimants' submissions, except in relation to category 4 cases.

Preliminaries

35. To construe rules 12(1)(c) & (e), it is helpful, first, to consider why they exist; what useful purpose they serve. I am conscious that there is, necessarily, some speculation involved in this. It is, though, informed, logical, and (I hope) appropriate speculation and I do not apologise for it.

36. The obligation to go through EC before presenting a claim form, unless an exemption applies, could have been enforced in a number of different ways, many of which would have been much simpler than what has been adopted. For example, that the claimant had not gone through EC could simply have been made a defence to a claim, like time limits; the Rules could have been left untouched; and EC certificates and certificate numbers need never have existed.

37. However, a decision seems to have been made that where an unexempt claimant had not gone through EC, not only should the respondent have a cast-iron defence, but the claimant should, if possible, be blocked from even starting the claim. In my view, everything in the relevant legislation with which this hearing has been concerned, over and above the simple obligation to go through EC, wholly or partly stems from that decision.

38. The first of those things is the free-standing requirement in section 18A to have a certificate before bringing a claim. No doubt it is useful for there to be some kind of formal record of a prospective claimant having been through EC, and of the dates when they did so. But requiring claimants to have a certificate in order to present a claim form when they are already required to have been through EC must be to do with creating a means by which claimants can formally prove that they have been through EC, so that this can be checked at the outset of proceedings. Why else would this be required?

39. If the aim was not to have something that allowed for objective verification of whether a claimant had been through EC, all that would have been needed in the legislation was the requirement to go through EC and, possibly, provision for the claimant to tick a box on the claim form confirming that they had done so. Evidently, self-certification of this kind was deemed inadequate; although it is effectively all that is done to verify exemptions, presumably because no one could think of a better but still straightforward way of testing them.

40. Giving certificates numbers which could be quoted makes most sense to me as a mechanism for claimants to prove they have certificates – certificates which, in turn, prove they have been through EC. Once again, this could have been done in a different way. For example, claimants could have been made to attach their EC certificates to their claim forms. But I can see why it was deemed better simply to have a number.

41. To work as such a mechanism, EC numbers have to attach to the right certificates, the right certificates being the ones that prove particular claimants went through EC before presenting their claims. For this to be done efficiently and effectively: only one certificate should be issued in relation to a particular instance of EC; the given number should be unique in the sense that it relates only to one certificate.

42. In other words, if someone is checking whether a claimant actually went through EC, they will want a number that leads them straight to a single certificate they

can obtain and look at and which will show this one way or the other, and not to lots of certificates and/or to one or more irrelevant certificates.

43. However, EC certificates and numbers work equally well as a way for claimants to prove that they have gone through EC whether they – both the certificates and the numbers – relate to one individual or to many. If a dozen prospective claimants went through EC together between the same dates and against the same respondent, there is no inherent conceptual or practical difficulty I can think of in them having a single certificate shared between them, with a single number, or two or three or many numbers on it. So long as all of the claimants are named on that certificate, and so long as the number or numbers all relate only to that certificate:

    43.1 any of those claimants can prove they went through EC by giving any of those numbers; and

    43.2 anyone wanting to check whether a particular claimant has indeed gone through EC only needs to be told one of those numbers, as that number will take them straight to, and only to, a certificate with (or, if the claimant is lying, without) that claimant's name on it.

44. In conclusion in relation to the purpose of rules 12(1)(c) and (e):

    44.1 they exist because it is deemed necessary not only for prospective claimants to have gone through EC but for them to prove that they have done so, and to do so in a way that can be verified relatively easily;

    44.2 given this, one would, logically, expect all prospective claimants to have to prove this in a similar way;

    44.3 nothing connected with that purpose mandates every claimant in a multiple case having, or giving in their claim form, an EC number unique to them.

45. A further and related preliminary point is that what I am doing is interpreting the Rules and that I must seek to give effect to the overriding objective of dealing with cases justly and fairly when doing so. As just explained, rules 12(1)(c) and (e) are concerned with ensuring that claimants who are not exempt go through EC before bringing claims. All of the potentially affected claimants in this case went through EC and many of them were exempt. Given this, it would, all other things being equal, be unjust and unfair for me to direct that their claims should be rejected because of those rules. This is particularly so when rejection would result in many of them losing their claims altogether and the others losing years'-worth of arrears. If those rules can only properly be interpreted so as to give that result then so be it, but I have a duty to seek to interpret them in some other way.

46. I have one last preliminary point: many, perhaps most, or even all of the EC issues I have to decide might well have been resolved had the form of certificate prescribed by the Secretary of State in accordance with regulation 4(1)(b) of the 2014 Regulations been identified and put before me. Unfortunately, it hasn't, and I have not been able to find out for myself even whether anything has been prescribed, let alone what. However, as neither side has made anything of this, I shall leave it there.

Certificate numbers or claimant numbers?

47. With all that in mind, I turn to the main thing I have to decide: in the context of a multiple claim, what does "*does not contain … an early conciliation number*" in rule 12(1)(c) mean?

48. In accordance with rule 1(1): "*an early conciliation number*" means a number which is "*the unique reference number which appears on an early conciliation certificate*"; "*an early conciliation certificate*" is "*a certificate issued by ACAS in accordance with the* [2014 Regulations]". Essentially, then, the Rules take one straight to the 2014 Regulations.

49. In the 2014 Regulations, an EC certificate is whatever has been prescribed by the Secretary of State to be issued by ACAS if, to put it simply, EC fails. The closest it has been possible to get to something prescribed by the Secretary of State is what is in paragraph 8 of *The Early Conciliation Rules of Procedure* in the schedule to the 2014 Regulations themselves: that a certificate "*must contain the unique reference number given by ACAS to the early conciliation certificate*".

50. It follows that "*an early conciliation number*" in rule 12(1)(c) is a "*unique reference number*" which has been "*given by ACAS*" to a particular certificate.

51. The natural and ordinary meaning of these provisions is that an EC number is the number ACAS has given to a certificate and that it is unique in the sense that it has not been given to any other certificate. That is consistent with other parts of the 2014 Regulations and the Rules, such as rules 12(1)(e) and (f), both of which include the phrase, "*the early conciliation certificate to which the early conciliation number relates*". It is also entirely compatible with what I have suggested, above, the purpose of the relevant parts of the Rules is.

52. The gist of the respondents' submissions about this is that an EC number is a unique reference number given by ACAS to a particular claimant in relation to a particular matter[13]. That is quite simply not what the legislation says; there is no proper basis for those submissions.

53. Once it is appreciated that EC numbers are the numbers of certificates, and that their uniqueness is therefore an attribute relating to certificates, any good reason to object to more than one claimant relying on the same EC number evaporates. Such an objection would only be sustainable if there were a similar objection to more than one claimant appearing in the same certificate, and this has never been suggested. If ACAS can validly issue one certificate to multiple prospective claimants, and it can, then whatever is "*the unique reference number given by ACAS to*" that certificate can be relied on by all of them.

R numbers vs M numbers

54. That brings me to the respondents' arguments about the validity of R numbers versus that of M numbers, the implication of which is that there is not merely a typographical but a legal distinction between the two types of number and that an M number does not constitute an "*early conciliation number*" under the Rules as a matter of law. If this is based on anything of substance at all, it is on one of

[13] The phrase "*in relation to a particular matter*" has to be added to deal with the fact, mentioned in paragraph 29 above, that claimants may, over a period of time, legitimately go through early conciliation more than once and consequently be issued with more than one valid EC certificate.

the submissions I have just rejected, namely that an EC number must be unique to a particular claimant.

55. Part of those arguments is the that because "*early conciliation number*" can only mean an R number in single cases, it must, for consistency, be interpreted as meaning an R number (and not an M number) in multiple cases too. This is misconceived. ACAS happen to issue certificates with an R number on the front in single cases and an M number on the front in multiple cases. In legal terms, that administrative practice has no more significance than if ACAS used different sized fonts for the EC numbers on certificates in single and in multiple cases. R numbers and M numbers are not conceptually different things. They are both strings of characters used as reference numbers on EC certificates by ACAS. The only difference is that one starts with an "*R*" and the other with an "*M*".

56. The fact that an R number, in a single case at least, relates just to one individual is similarly no more than the product of ACAS's practice of using a string of characters starting with an R as the EC number in single cases. Whatever EC number is used on a certificate in a single case is necessarily going to relate to one prospective claimant only and it is natural to think of it as that individual's EC number. But strictly speaking – and legal technicality is important in this context – it does not belong to the prospective claimant but to the certificate: a valid EC number is one that has been "*given … to the certificate*".

More than one EC number

57. The next question to be dealt with is: does it matter that there is more than one EC reference number on multiple certificates?

58. It is only the respondents who are suggesting the existence of more than one number on a multiple certificate has any significance at all, their suggestion being the one already dealt with, namely that M numbers are invalid and that each claimant can use only the R number particular to them that appears, or should appear, on 'their' certificate. But even the respondents agree that an EC certificate can have more than one valid EC number on it. In fact, they do more than agree: their suggestion just mentioned requires there to be as many EC numbers as there are prospective claimants.

59. The respondents therefore don't just concede that a number that appears annexed to an EC certificate and not on its front is, "*the unique reference number which appears on an early conciliation certificate*"[14], and that several numbers on the same certificate can each be, "*the unique reference number which appears on an early conciliation certificate*", these are central planks of the respondents' case.

60. The respondents' case would have been considerably stronger had their position been that there could only be one valid EC number on an EC certificate and that in a multiple case, that is the M number. That was my own preliminary view at the start of the hearing. This was because the language used in the 2014 Regulations and in the Rules suggests there should only be one EC number on any given certificate: in both it is "*the unique reference number*" [my emphasis] that is "*on* " or "*given*" to a/the certificate. An uninitiated person, shown a multiple EC certificate for the first time and asked to identify "*the unique reference number*

[14] In accordance with the definition of EC number in rule 1(1) of the Rules.

which appears on" it, would surely pick the M number, being the only reference number on the front of it and being something – the only thing anywhere on the certificate – labelled "*EC Reference Number*" and not merely "*EC Reference*".

61. However, I have decided that my preliminary view was wrong and that the claimants are right: any EC reference number, whether it is an R number or an M number, and wherever it appears on a certificate, constitutes an "*early conciliation number*" under the Rules. The main reasons for this decision are:

    61.1 putting to one side the R numbers associated with claimants in Mr Abid's position (which I will consider shortly), each of these numbers appears on the certificate and is unique to it;

    61.2 going back to the purpose of the relevant parts of the Rules, it follows from the previous point that to check whether a claimant has gone through EC and got a certificate, it is (or ought to be[15]) equally easy to find the relevant certificate from any of the EC reference numbers that appear on it;

    61.3 as just mentioned, the respondents are not arguing that there is only one valid EC number on any given multiple certificate, nor that, if there is, it is the M number, and in practice they are arguing to the contrary;

    61.4 in accordance with section 6 of the Interpretation Act 1978, unless the contrary intention appears, words in the singular include the plural;

    61.5 rules 10(1)(c) and 12(1)(c) require a claimant to give "*an*" and not "*the*" EC number;

    61.6 interpreting "*the unique reference number that appears on an early conciliation certificate*" in this way maximises the chances of claimants who have been through EC not having their claims rejected, without introducing any additional risk of those who have not been through EC having their claims accepted, and is therefore the interpretation to be preferred in accordance with the overriding objective;

    61.7 in the absence of any evidence or even suggestion that the Secretary of State has prescribed the use of more than one reference number on certificates in multiple cases, I think it is unfortunate that ACAS have chosen to do this. Matters are much simpler if there is only one number on any given certificate, as it avoids any doubt as to which of several numbers should be used. The scope for confusing unrepresented claimants is considerable. As these proceedings illustrate, even experienced, specialist legal representatives can adopt different approaches – as the claimants' solicitors have with different claim forms. I suspect that those who made the 2014 Regulations and the related parts of the Rules, to the extent they thought at all about how EC should operate in multiple claims, envisaged that there would only be one number per certificate. However, I don't think there is anything that prohibits there being more than one, and if there is more than one, each of them, for the reasons just given, is an EC number for the purposes of the Rules.

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[15] I do not know how ACAS keeps its records, but it is reasonable to assume that if a number appears on a certificate, ACAS can produce a copy of the certificate if given the number, whether it is an R number or an M number.

Mr Abid

62. Turning to claimants in Mr Abid's position, or who are relying on an R number associated with a claimant in his position and who share a certificate with that claimant, I have found the issues particularly difficult to decide. What I shall, for convenience sake, refer to as Mr Abid's R number appears on two certificates. On one of those two certificates, none of the other claimants together with whom he went through EC is named. I am sure that EC numbers are supposed to be unique to a particular certificate and that that is what makes them "*unique*". EC numbers may not serve their purpose if they link to two certificates, one of which gives the misleading impression that the lead prospective claimant went through EC by himself. And which of the two certificates is "*the early conciliation certificate to which* [Mr Abid's R number] *relates*" in accordance with rule 12(1)(e)?

63. The question is: does the fact that ACAS have issued Mr Abid with two certificates, both with his R number on them, invalidate that number, so that it no longer constitutes "*the unique reference number which appears on an early conciliation certificate*" in accordance with the Rules? With some misgivings, my answer is: no. My reasons are:

    63.1 again, this is not something the respondents have raised and, moreover, if their arguments were right, Mr Abid was duty-bound to give his R number in his claim form and had he given any other number his claim would have been liable to be rejected;

    63.2 there is only one multiple certificate with Mr Abid's R number on it and any claimant other than Mr Abid who gave that number could only be relying on that multiple certificate;

    63.3 I would expect ACAS, if asked for the certificate with Mr Abid's R number on it, to produce both certificates;

    63.4 there is no tension or contradiction between the two certificates, in that they have the same information about Mr Abid and the respondent and the same dates of EC, so in his case there is no problem, as there was in Serra Garau, of 'competing' certificates;

    63.5 if Mr Abid's R number were no longer a valid EC number, it would be just as invalid for Mr Abid as for anyone else. It would mean that he could not rely on the number that appears with his name on two certificates, which are the only certificates he could conceivably rely on. That would be a decidedly odd state of affairs, particularly given it is not his fault there are two certificates when there should (in my view) be only one;

    63.6 equally, if Mr Abid's R number is a valid EC number for him, then it is equally valid for all other claimants whose names appear on the same multiple certificate as him, for reasons already given. If it is valid for him, their position would be no different from that of any other claimant who gives an R number associated with another claimant but from a certificate on which both of them are named;

    63.7 if the validity of anything is affected by ACAS issuing a certificate for Mr Abid that has just 'his' R number on it and that looks like a certificate issued for a single claim, it should, in accordance with the overriding objective, be

to invalidate that certificate, on the basis that what has gone wrong is the issuing of that certificate and that nothing has gone wrong with Mr Abid's R number.

Category 4 claims

64. The last question of principle is: does rule 12(1)(c) require the claim form to contain an EC number "*on the EC certificate pertaining to*"[16] every claimant? I think it does.

64.1 An EC certificate pertains to a claimant if they are named on it. I have already explained my decision is that any of the EC numbers that appears on such a certificate may be relied on by that claimant. Part of my reasoning for that decision was that the purpose of requiring claimants to give EC numbers is to act as a check on whether they have been through EC, and that any of the numbers on a certificate on which they are named serves that purpose equally well. If claimants may rely on numbers on certificates that do not pertain to them, no such check exists on all of the claimants on a claim form other than a check on what could potentially be the one and only claimant named on the certificate the number of which is contained in the claim form.

64.2 It is difficult to accept that the intention of those who made the Rules was that while every unexempt claimant in a single claim was to be required to prove they had been through EC by giving a relevant certificate number on their claim form (and have their claim rejected if they failed to do this), the majority of claimants in multiple claims were not. There is no obvious principled basis for making it easier to bring multiple claims than single claims, nor for requiring the same individual to give a certificate number pertaining to them if they are bringing their claim on a single claim form but not if they happen to be bringing the same claim on a multiple claim form.

64.3 Similarly, if the number of a certificate pertaining only to one claimant has to be given in multiple case, on what basis, other than arbitrarily, is that claimant to be selected? Mr Short QC's suggestion was that it should be the lead claimant, but the lead claimant is no more than the individual whose name is put first on the claim form.

64.4 The overriding objective is not well served by making it impracticable for a respondent and the Tribunal to check whether the majority of claimants have been through EC unless and until those claimants, voluntarily or by order of the Tribunal, disclose the numbers of the certificates pertaining to them or copies of the certificates themselves.

64.5 Although Caspall might in principle be distinguishable, because it concerns a single claim and not a multiple claim, the rationale of the decision would apply equally to multiple claims and there is no good reason for saying that it was not intended to apply, or should not apply, to them.

64.6 I think the reason rules 10 and 12 refer to "*an*" EC number but rule 10 refers to "***each claimant's***" name and address is simply because (as already mentioned several times) EC numbers are the numbers of certificates and

[16] Caspall, paragraph 40.

not of claimants, so it would have been wrong to demand "*each claimant's*" EC number.

64.7 Following on from the previous point, the EAT in Caspall decided that "*an*" EC number in both rules 10 and 12 does not mean 'any old' EC number but instead means a number from the certificate pertaining to the claimant. In a single case, then, both rules should be read as if the phrase "*on a certificate pertaining to the claimant*" was written after the phrase "*an early conciliation number*". The peculiarity of the drafting of rule 10 when applied to multiple cases has already been commented on.[17] In particular, the word "*claim*"[18] in rule 10(1) is used simultaneously to mean one individual's claim and the entire contents of the claim form, consisting of all claimants' claims. Rule 12 is more happily worded, in that it uses the phrase *"the claim, or part of it*". The whole of rule 12 can be applied without any adjustment to make singular nouns plural if, and only if, there is one claimant and one respondent. Where there are two respondents, some such adjustment is needed. Every day, in Tribunals up and down the country, where a claimant has been through EC with only the first out of two prospective respondents, the claim against the second is rejected, on the basis that in relation to that "*part of*" the claim, "*the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number* [given on the claim form] *relates*", in accordance with rule 12(1)(f). I don't think I have ever heard it suggested – and it was not suggested by Mr Short QC in argument[19] – that that rule should be read differently, so that it applies only to one out of two or more respondents.

64.8 For the sake of consistency, it seems to me that rules 12(1)(c) and (e) should be interpreted in a similar way to rule 12(1)(f), i.e. where there are multiple claimants, the claim of each of them is "*part of*" a claim and in relation to each part of the claim that consists of one claimant's claim:

64.8.1 "*an*" EC number of a certificate pertaining to the claimant must be given;

64.8.2 "*the name of the claimant on the claim form*" must be "*the same as the name of the prospective claimant on the early conciliation certificate to which* [one of] *the early conciliation number*[s given on the claim form] *relates*";

64.9 if rules 12(1)(c) and (e) did not apply to multiple claims so long as an EC number of a certificate pertaining to one of the claimants was given in the claim form, there would be no need for the following exemption from the requirement to go through EC: "*another person ("B") has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B*"[20].

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[17] See paragraph 30.2 above.

[18] "*The Tribunal shall reject a claim if – it….*"

[19] In fairness, the precise point was not discussed.

[20] 2014 Regulations, regulation 3(1)(a).

EARLY CONCILIATION:
SUMMARY & CONCLUSIONS FOR THE 4 CATEGORIES OF CLAIMS

65. Using the four categories identified in paragraph 31 above, the claims of the following claimants do not fall foul of rules 12(1)(c) or (e) of the Rules for the following main reasons:

65.1 those in category 1, whose claim forms contain only the M number on the certificate on which they are named, because, for all of them, that number is "*the unique reference number which appears on an early conciliation certificate*"[21] "*pertaining to*"[22] them;

65.2 those in categories 2 and 3, being claimants whose claim forms contain an R number – any R number – on the certificate on which they are named. This is because:

65.2.1 it is common ground between the parties that any R number which appears anywhere on any certificate constitutes an "*early conciliation number*" in accordance with the Rules;

65.2.2 given this, a claimant who gives in her claim form an R number from a certificate on which she is named gives one of the unique reference numbers appearing on an EC certificate pertaining to her.

66. The claims of all claimants who did not in their claim form give a number from a certificate on which they are named (category 4 claimants) must be rejected pursuant to rules 12(1)(c) and (e). Their claim forms do not "*contain … an early conciliation number*" (rule 12(1)(c) "*pertaining to*" (Caspall) them and their names are not "*the same as the name of* [any] *prospective claimant on the early conciliation certificate to which the early conciliation number* [given on the claim form] *relates*" (rule 12(1)(e)).

PART 2 – AMENDMENT

67. What I am calling the amendment issues are set out in the List of Issues as follows:

3. Job roles

3.1 Does any claimant need permission to amend their claim:

3.1.1 where the job title given in their claim form, or originally given in the register, is different from the job title the respondents contend for during the period to which their claim related when first presented?

3.1.2 where the job title given in their claim form or originally given in the register is the same as the job title the respondents contend for during part of the period to which their claim related when first presented, but they also held one or more other job titles during that period in relation to which they wish to make a claim?

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[21] Rule 1(1).

[22] Caspall, paragraph 40.

3.1.3 where the claimants wish to make a claim in respect of a period when they allege they were working under a different job title to that given in their claim form or originally in the register and the respondents allege that the different job title specified by the claimants is not a job title the claimants had at any relevant time.

3.2 The respondents' position is that permission to amend is required in every case.

3.3 If the Tribunal decides any claimant needs permission to amend, an application to amend will be deemed to have been made.

3.4 If a claimant needs permission to amend:

3.4.1 do the respondents object to them being given permission? The respondents object in every instance, other than as set out in schedules C and D;

3.4.2 if so on what basis?

3.4.3 should they be given permission to amend?

3.4.4 if they are not given permission to amend, should any part of any claimant's claim be struck out under rule 37(a), (c) and/or (d)?

68. Those issues are being dealt with in relation to the seven claimants identified in paragraph 4.2 above, who I will, without intending any disrespect to them, refer to by surname, for convenience sake: Vaughan, Wiltshire, Froggatt, Whiteway, Smyth, Scholes, and Minter. Prior to the hearing, the respondents had conceded the points in dispute in relation to a dozen or so others who were originally also going to be test claimants.

69. What the amendment issues are in practice all about may not be particularly obvious from the List of Issues. Although there are potentially relevant factual differences between the test claimants' cases, the basic position in every case is much the same.

70. For claimants whose claims are made on multiple claim forms (Vaughan, Froggatt, Whiteway, Scholes, and Minter), the claim forms contain the following "Details of Claim", or something very similar:

> *The Claimants are female and male hourly paid employees and former employees of the Respondent who work or worked at one or more of various Sainsbury's stores. The following details for the Claimants are set out in the attached schedule:*
> *a. job title; …*
> *d. dates of employment; …*
>
> *The Male Claimants' claim is contingent on that of the female claimants…*
>
> *The Female Claimants have, during the periods of employment detailed in the attached schedule, been employed to do equal work …*
>
> *In the premises, the Female Claimants are and have been entitled to the benefit of equality clauses under the Equality Act 2010 and/or under the Equal Pay Act 1970 modifying their terms of employment (where they are less favourable than those of the Comparators) so as to be no less*

favourable in any respect than the corresponding terms enjoyed by their Comparators. ….

Male Claimants bring contingent claims, comparing themselves to the Female Claimants carrying out like work or work of equal value, and whose contracts are modified by the Equality Clause for the reasons set out above.

In addition to the job titles provided, this claim relates to any jobs that the Claimants have held in the past 6 years that form part of a stable working relationship with the Respondent.

71. There is a Schedule to the Details of Claim with a table in it that has, for every claimant, amongst other things, a job title and dates of employment.

72. For claimants with single claim forms (Wiltshire, Smyth), the claim form gives their dates of employment in the usual way[23] and the Details of Claim include a statement that the claimant was/is "*employed as a* [job title]". The Details of Claim continue with this:

The Claimant's claim is contingent on that of the female claimants…

The Female Claimants have, during the periods of employment detailed in the attached schedule, been employed to do equal work …

The Claimant compares himself to Female Claimants carrying out … work of equal value.

In addition to the job titles provided, this claim relates to any jobs that the Claimant has held in the past 6 years that form part of a stable working relationship with the Respondent.

73. In this instance, contrary to what is suggested in the Details of Claim, the attached schedules do not give any details of the relevant periods of employment of Female Claimants.

74. The amendment issues relate to the register. At a preliminary hearing on 10 July 2015, as has become customary in large multiple equal pay claims, an order was made creating a schedule of claims, called the "register". The terms of the order were that: "*The claimants shall by 1 August 2015 send the respondent a schedule ("the register") setting out in respect of each claimant the following information as at 10 July 2015: Name; … Job title of each job performed by the claimant in respect of which there is a claim; In respect of each job title … the dates between which the claimant performed it; Dates of employment …*". Sainsbury's (at the time the sole respondent) was ordered to respond. Provision was then made for ongoing monthly updating of the register by both the claimants and Sainsbury's.

75. What gives rise to the respondents' application to strike out claims is changes to job titles in the register. Typically, what has happened is that in a version of the register prepared by the respondents, they have suggested that the job title used by a claimant in their claim form and in their previous version of the register is the wrong one, and the claimant in question has sought to adopt the job title

[23] In Mr Smyth's case, there is a mistake in the Details of Claim (but not the ET1, which was accurate in this respect), which suggest that he was a "*former*" employee who "*was*" employed when, in fact, he was still employed by Sainsbury's at the date of presentation.

proposed by the respondents. The respondents have then opposed the claimants doing this, arguing that changing a job title in the register, or, as in some cases, adding another job title in the register, amounts to a substantive amendment to the claimant's claim, for which they need permission to amend, and that permission to amend should be refused for various reasons.

76. The basis of the respondents' argument that changing a job title in the register constitutes making a substantive amendment to the claim seemingly boils down to this:

    76.1 job titles are synonymous with job roles;

    76.2 complaints about different job roles are substantively different complaints – as I accepted in relation to the rule 9 / rule 6 issue[24] in my Judgment signed on 6 June 2019.

77. The three issues numbered 3.1.1, 3.1.2, and 3.1.3 in the List of Issues respectively correspond with the following situations, which are not necessarily mutually exclusive:

    77.1.1 the job title the claimant originally used is different from the job title suggested by the respondents;

    77.1.2 the respondents suggest that, although the job title the claimant originally used is correct, the claimant also had other job titles during the period to which the claim relates;

    77.1.3 the job title the claimant originally used is not a job title they ever had at any relevant time.

78. Both sides also produced witness evidence for the purposes of dealing with the amendment issues. Much of it – particularly that from the respondents – was only peripherally, if at all, relevant. At the start of the hearing, on 3 March 2020, much was made by Ms Ellenbogen QC on the respondents' behalf about the fact that the claimants were proposing to rely as witnesses on claimants who never had been, or who were no longer, test claimants and that some of the claimants' proposed witnesses were not attending to give oral evidence. The respondents' case was that the evidence of the relevant witnesses should not be admitted at all. I ruled against the respondents, and made the order that is at the top of this decision, under the heading "*ORDER*".

79. One of the main arguments advanced by Ms Ellenbogen QC when objecting to certain witness evidence being admitted was that the Tribunal could not properly assess the weight to be given to evidence from witnesses that had not been tested in cross-examination. Given how strenuously those objections had been put forward, it was a little surprising that, the following day, the respondents decided that they did not need to cross-examine any of the claimants' witnesses and that it was unnecessary for them to attend. Be that as it may, this meant that the only 'live' witnesses were Mr Steve Lutchmiah, Retail Risk Manager for the first respondent, Sainsbury's (who had also given evidence at the hearing in April 2019 on the rule 9 / rule 6 issue) and Ms Hannah Sargeant, Sainsbury's Head of HR Change. I have already noted the limited value of their evidence in relation to the issues I had to decide. The main reason for this was that neither of them

[24] The issue dealt with in Brierley & Ors v ASDA Stores Ltd [2019] EWCA Civ 8.

was able to comment from personal knowledge on the test claimants or the stores in which they worked; all of their evidence that consisted of something other than describing the contents of documents relating to individual test claimants (documents Mr Lutchmiah and Ms Sargeant had not themselves created or had anything to do with) could fairly be described as generic.

80. A noteworthy aspect of what the respondents' witnesses told me was the absence of evidence as to the source of the job titles they contended for. At the case management preliminary hearing on 14 November 2019, the respondents, through leading counsel, said definitively (as recorded in paragraph 35 of the written Reasons for the orders made on that occasion) that, "*The job titles the respondents rely on are those allegedly specified in statements of employment particulars or statements of changes provided in accordance with the Employment Rights Act 1996*". Based on the evidence presented to me at this hearing, that is simply not true.

81. The respondents' witnesses insisted (I am paraphrasing): that only 'correct' job titles were used in Sainsbury's stores; that each Sainsbury's job title was strictly used only to refer to one particular job role; that each job role was only referred to by one job title; and that Sainsbury's was assiduous in ensuring that individuals were given statements of employment particulars with the 'correct' job title in them and in ensuring that whenever an individual's job role changed, they were given a statement of change with the new 'correct' job title in it. The documents suggest otherwise, to the extent that the reality seems to have been almost the precise opposite: job titles other than those the respondents deem to be correct ones were used; generally, job titles were used loosely and were used to refer to different job roles; Sainsbury's did not always give individuals statements of employment particulars with the 'right' job title on it; and there are no or almost no examples in the evidence that was drawn to my attention of someone whose job role is said to have changed being given a statement of changes at the appropriate time with the supposedly correct job title in it.

82. The evidence and documents I am referring to are the documents the respondents have disclosed relating to the test claimants, which come from Sainsbury's equivalent of their personnel files. In relation to Wiltshire, Vaughan, Whiteway, Froggatt, and Minter, the relevant documents have been helpfully summarised in a series of tables produced during the hearing by the claimants' legal team, to which I refer.

83. Although the test claimants make up only a tiny percentage of the claimants as a whole, it should be emphasised that the documents had not been disclosed when the test claimants were selected, and that the respondents had the opportunity to challenge the selection. If the general picture were really as painted by the respondents' witnesses, the chances of the claimants' legal team being able to select as test claimants only individuals who did not fit it are negligible. It is telling that I was not taken by the respondents' witnesses or leading counsel to a single example of a claimant whose documents were as one would expect them to be were the respondents' witnesses' evidence accurate in this respect.

84. In addition, I note that the respondents relied heavily on findings I made last year in my decision on the rule 9 / rule 6 point: that claimants holding particular job titles did particular work and "*that the work the claimants did … was typical of the work done by those with their job titles, as described by* [the respondents'

witnesses]"[25]. However, upon analysis, those findings provide little if any assistance to the respondents in relation to the amendment issues:

84.1 the amendment issues concern what claimants meant when they used particular job titles in their claim forms, not what the respondents meant by them, and not what job roles the respondents' preferred job titles equated with;

84.2 on the rule 9 / rule 6 point, I made no findings to the effect that only the respondents' preferred job titles were valid;

84.3 had I decided that one of the test claimants was making a substantive amendment to their claim form, I would have needed to consider the respondents' submissions on time limits. These seem to incorporate an unspoken and invalid assumption that if claims about two job roles are not "*based on the same facts*" under rule 9, there will necessarily, or probably, have been a break in the stable working relationship when someone moves from one of those job roles to the other one;

84.4 in any event, the findings I made apply only to the 122 claimants whose cases I was considering.

85. With all that in mind, I shall now deal with each of the test claimants in relation to whom the respondents are still pursuing the amendment issues.

Ms J Froggatt

86. In the schedule attached to her claim form, Ms Froggatt gave her job title as "*Sales Assistant*". The respondents' case is that at all relevant times (up to 2018, when everyone got new contracts) she was a General Assistant.

87. Up to 30 November 2016 when she presented her claim, although she is referred to as a General Assistant (or an abbreviation of that job title) in some of the documents disclosed by the respondent, such as a "*Change of Contract Hours*" form dated 21 January 2009:

87.1 she is referred to as various other things as well;

87.2 she is not referred to by that title in any document dating from after 2011;

87.3 in her contract and in the only contract change forms where she is given a job title, she is referred to, variously, as a "*JSR Assistant*", a "*Catering Assistant*", and a "*Bakery Assistant*".

88. This means the respondents' case is[26]:

88.1 that Ms Froggatt should in her claim form have referred to herself by a title Sainsbury's never formally used in relation to her, and had not used in relation to her even informally in any documents since 2011;

88.2 that had she referred to herself in the claim form by any of the titles Sainsbury's used to refer to her, formally or informally, between 2012 and

[25] From paragraph 34 of the Reasons for my Reserved Judgment of June 2019.

[26] By which I mean: this is what the respondents' case is in practice, whatever it purports to be in theory.

the date of presentation, this would have been wrong and her claim would (presumably[27]) have been invalid.

89. I have just used the word "*invalid*" because it is a necessary part of the respondents' case that claimants who, like Ms Froggatt, used the supposedly 'wrong' job title in their claim forms have not, upon analysis, made any claim at all that the Tribunal could deal with; that they have made a nonsensical claim that does not relate to their own employment.

90. The main and probably only question I have to ask myself in relation to the amendment issues is: what do the claimants' claim forms mean, i.e. objectively construed, what job role(s) was/were being referred to? To answer that question, I have, in turn, to ask myself what a reasonable person in the position of Sainsbury's, with the knowledge of the claimants that Sainsbury's had, would have thought the claimants were referring to.

91. It is relatively common in any type of case for a claimant in their claim form to give their job title as one thing and for the respondent in their response to suggest that their official job title was something else. Where the claimant, like Ms Froggatt, had only ever had one job role with the respondent at the time the claim form was presented, anyone casting an objective eye over her claim form would assume that she was making a claim about that job role, whatever job title she used.

92. To put it another way, even if Sainsbury's paperwork was immaculate and only ever referred to Ms Froggatt as a General Assistant, even if the evidence showed that her job role had never in practice been referred to by any other title, and even if she had in her claim form used a job title that had no connection at all with the work she did, on what basis would any sensible person think it more likely that she genuinely meant to make a claim she could not make, about a role she had never performed, than that either she (or her representatives) had made a mistake, or she genuinely referred to her own role by a different title from the one Sainsbury's used?

93. The respondents seem to be wanting to ignore job roles completely and make job titles pre-eminent. For example Mr Lutchmiah states something like this about each of the test claimants: "*Ms Froggatt is claiming as a sales assistant*"[28]. The only basis for that statement is Ms Froggatt giving her job title as sales assistant in her claim form. What the respondents, through Mr Lutchmiah, are inviting me to do is to read the claim form as if it contained something like this: "The claimant is making her claim about any work she did at a time when, in Sainsbury's view, her official job title was 'sales assistant' and not about any other work she did". It does not say or imply any such thing. And particularly bearing in mind Sainsbury's professed view that her official job title was never "sales assistant" (which, if the respondents were right, would mean her claim form had to be read as meaning, "The claimant is not making any claim at all"), but in any event, it would be very peculiar indeed if it did.

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[27] The respondents have agreed to the claims of some claimants who used the 'wrong' job title going forward, although the basis upon which they have decided which 'wrong' job titles are permissible and which are not is a little obscure to me.

[28] From paragraph 117.1 of his second statement, of January 2020.

94. Ms Froggatt's claim, like that of every other claimant (and as the respondents have – correctly – been emphasising in relation to other issues) is not about a job title. Instead, it is about a particular job role: her job role. As Ms Froggatt's claim was always about her job role, she is not amending her claim in any material way by changing the title used to refer to that job role in the register.

95. This would be so even if the register were part of the claim form, which it is not. The register is primarily a case management tool and if it is anything else, it is a vehicle for providing further particulars of the claim and the response.

96. In the written Reasons for the reserved decision I made following the preliminary hearing in June last year, I made some observations about what I labelled a "*procedural war that seems to bedevil these proceedings*" concerning "*pleadings and: the claimants' contention that the information they have provided about their case is adequate, at least for now; the respondents' that it is not*" (observations referred to by the EAT in paragraphs 16 and 17 of its decision, sealed on 22 May 2020, rejecting the respondents' appeal[29]). I do not intend to repeat them, but I note that they include expressions of concern about claimants potentially being able to obtain an unfair tactical advantage by failing properly to particularise their cases.

97. The reason I mention them here is because I would like to make clear that I do not think that that is what either Ms Froggatt or any of the other lead claimants is doing. There is no unfair tactical advantage because in reality: the respondents are, or should be, well able to understand the lead claimants' cases, as set out in the claim forms and without further particularisation, in every way that is material to the amendment issues; by changing or adding job titles in the register, none of the lead claimants is substantially changing their case from that put forward in their claim forms.

98. In summary, in relation to Ms Froggatt there is no ambiguity or scope for genuine confusion as to what job role she was referring to in her claim form: she obviously meant the one and only job role she had, which the respondents now, retrospectively, call a "General Assistant" but which Ms Froggatt thought of by another name.

Ms R Minter

99. Ms Minter is in all important respects in exactly the same position as Ms Froggatt, in that she only ever had one job role and used a job title in her claim form – General Assistant in her case – that the respondents contend was never the correct one, the respondents' case being that she was at all relevant times a "Merchandising Controller".

100. As with Ms Froggatt, I can think of no good reason at all why Sainsbury's might have been confused by Ms Minter's claim form and/or might have thought that she was not making a claim about her own job role. I am completely unable to think of circumstances that would genuinely make Sainsbury's think such a thing in relation to someone in Ms Minter's (or Ms Froggatt's) position.

101. Again as with Ms Froggatt, Sainsbury's internal documents that date from before presentation of the claim form do not support the respondents' case that the only

[29] UKEAT/0306/19/RN

job title used in relation to Ms Minter is the one they allege is correct. This makes the respondents' arguments even more unsustainable. Within those documents, there are no statements of employment particulars or statements of change relating to Ms Minter that give her job title as Merchandising Controller, and numerous other internal documents (e.g. return to work forms) in which she is referred to as a General Assistant.

Mrs N Vaughan

102. Mrs Vaughan's position is much the same as Ms Froggatt's and Ms Minter's. The differences are not significant, but they have led me to some additional points, many of which would apply equally to Ms Froggatt and Ms Minter.

103. In her claim form, presented on 1 November 2016, Mrs Vaughan stated (by the entries relating to her in the "*CLAIMANTS' DETAILS*" schedule read together with the generic Details of Claim) that she had, during the period from 7 July 2009 and 4 July 2016, "*been employed to do equal work … to that carried out by male employees of the* [first] *Respondent … at one or more of the* [first] *Respondent's … distribution centres*", that she was, "*entitled to the benefit of equality clauses under the Equality Act 2010 and/or under the Equal Pay Act 1970 modifying* [her] *terms of employment … so as to be no less favourable in any respect than the corresponding terms enjoyed by* [her] *Comparators*", and that she claimed, "*arrears of remuneration*" and "*a declaration that the terms of* [her contract] *shall be treated as modified so as to be no less favourable than the corresponding terms in the Comparators' contracts*". No one reading any of that by itself would have cause to question whether Mrs Vaughan's claim related to any period of time other than 7 July 2009 to 4 July 2016[30], whatever job titles she held during that period.

104. In the schedule to the claim form, Mrs Vaughan's job title was given as General Assistant. The respondents' case is not merely that the claim form is ambiguous, but that its correct construction is either: that (like Ms Froggatt and Ms Winter, whose claim forms are similar to hers) Mrs Vaughan was making no claim at all – because, allegedly, that was never her job title; or that she has no claim from 27 March 2016 onwards because on that date, it is said, she moved from the bakery to the checkouts and became a Customer Service Assistant. If her claim related only to the period up to 27 March 2016, and if there was a break in the stable working relationship (which the respondents may be arguing; or, at least, might have been going to argue, for all she knew, when her claim form was presented) then her claim would have been presented out of time.

105. The argument that Mrs Vaughan has no claim at all is as baseless as the similar argument raised in relation to Mrs Vaughan and Ms Winter. No rational person would look at her claim form and think to themselves that despite her stating that she carried out work of equal value to comparators throughout her nearly 7 years of employment and was claiming a declaration and arrears of remuneration for an unspecified period, Mrs Vaughan's true intention was not to make any claim.

106. There is a relevant question that someone rationally considering Mrs Vaughan's claim form when it was presented, and who thought she had changed job roles in March 2016, might pose. Such a person would appreciate that she must be

[30] Or, more accurately, the 5 years and 8 months (or so) back from July 2016 to November 2010 for which she could potentially claim arrears.

making an equal pay claim about one or more job roles that she had actually performed. They would also remind themselves that her Details of Claim included this: "*In addition to the job titles provided, this claim relates to any jobs that the Claimants have held in the past 6 years that form part of a stable working relationship with the Respondent.*"

107. The relevant question is this: when she put "General Assistant" as her job title in her claim form, did she mean she was limiting her claim in some way, perhaps to the period up to March 2016, or to the period from March to July 2016?

108. Without even taking Sainsbury's job title paperwork relating to Mrs Vaughan into account the – to me – obvious answer to that question would be: almost certainly not.

    108.1 In her claim form, Mrs Vaughan is making a statement to the effect that – whatever the respondents might think – she thinks her job title was General Assistant throughout her employment.

    108.2 No date in or around March 2016 is mentioned in her claim form, nor is there anything else in the claim form suggesting that there was any relevant change in job title or job role at any relevant stage, nor that there might be two relevant periods of time during her employment: one in respect of which a claim is made and one in respect of which no claim is made.

    108.3 The only dates or periods of time explicitly or implicitly referred to in her claim form are the start and end dates of employment and a period of 6 years back from the date of presentation of the claim form.

    108.4 Mrs Vaughan made clear in the claim form that she is claiming in relation to all and any jobs she held from November 2010. Although this is qualified by the phrase "*that form part of a stable working relationship with the Respondent*", there is nothing in the claim form to suggest (again, whatever the respondents may think) that she thinks there was a relevant break in the stable working relationship in her case.

    108.5 Even if she had not made that clear, a reasonable person in the position of Sainsbury's would assume that every claimant who had been employed for 6 years or more would be wanting to make their claim for the full 6-year period up to the date of presentation of the claim form, unless the claim form said this was not so. If there were relevant ambiguity in Mrs Vaughan's claim form – and in my view there isn't – it would remain unarguable that the claim form is unequivocally to the effect that she is not claiming for that period. The reasonable person would make this assumption because they would ask themselves: why would any claimant – particularly a professionally represented one – do otherwise? They would also assume, in the absence of evidence to the contrary, that any claimant was not unnecessarily making a claim that that claimant – through their legal advisers – would know might arguably be out of time.[31]

[31] An argument that there was a break in the stable working relationship in March 2016 would, of course, be open to the respondents in any event. But for a claimant to make an equal pay claim only about a period of work that ended more than 6 months before the claim form was presented is an open invitation to a respondent to take time limits points.

108.6 In order to construe Mrs Vaughan's claim form as the respondents submit it should be construed, one would have to go through a convoluted thought process along these lines:

108.6.1 Mrs Vaughan was never a General Assistant;

108.6.2 when she gives her job title as General Assistant she is not making any kind of mistake and she means exactly the same as the respondents do when they use that job title;

108.6.3 she therefore means to make, as her primary claim, a claim about a job role she has never done, i.e. to make a claim she cannot make;

108.6.4 although she puts forward a secondary claim in relation "*to any jobs that* [she has] *held in the past 6 years that form part of a stable working relationship with the Respondent*", she does not say what those jobs are, nor what breaks in the stable working relationship there have been in the past 6 years (nor, if there has been more than one stable working relationship in the past 6 years, which one is being referred to);

108.6.5 because of this (and, possibly, because the respondents may want to argue that there was a break in the stable working relationship in March 2016) the part of the claim form relating to this secondary claim should either be interpreted as meaningless and as making no claim at all, or as meaning that she is limiting her secondary claim to a period of time that expired more than 6 months (plus early conciliation extension) before the date of presentation of the claim form.

109. I do not accept that anyone did, or would, go through such a thought process.

110. Yet again, Sainsbury's paperwork serves only to underline the weakness of the respondents' position: Mrs Vaughan is referred to as a General Assistant in a number of Sainsbury's internal documents; the contractual change form relating to the move from the bakery to checkouts doesn't mention any job title at all; the only document I have seen in which she is referred to as a Customer Service Assistant is what looks like a print-out from Sainsbury's central HR computer database, and there is no evidence that Mrs Vaughan would ever have seen it or known about it during her employment. Moreover, Mrs Vaughan's own evidence to the following effect went unchallenged: that General Assistant was the most accurate label to put on her job role at all relevant times; that she did not believe, nor was it suggested to her, that she was changing job titles in March 2016.

111. In conclusion, Mrs Vaughan's claim has always been about the whole period of her employment with Sainsbury's and about all job roles she performed. She can change and add to the job title used in the register without substantively amending her claim.

Mr R Wiltshire

112. Mr Wiltshire's case is much the same as Mrs Vaughan's. He gave his job title in his claim form as "General Assistant". In his case, the respondents accept that that was his correct job title, but only up to approximately 3 May 2015. Their case is that from that point onwards his correct job title was "CSA Café", and that he

needs permission to amend his claim form in order to make a claim about the work he did after that date.

113. It is common ground that Mr Wiltshire's employment with Sainsbury's ended on 21 June 2015 and that his claim form was presented on 8 January 2016. I am not certain of the dates when Mr Wiltshire went through early conciliation, but based on the fact that most claimants when through early conciliation in a single day, if his stable working relationship ended on 3 May 2015 (and I am not sure the respondents are arguing that it did, but they may be), his entire claim would be out of time.

114. As already mentioned, Mr Wiltshire's claim was made on a single claim form and so its wording is slightly different from Mrs Vaughan's, which was a multiple claim form. What is relevant about its wording is: the only job title or job role mentioned in the ET1 or in the Details of Claim is "General Assistant", with no hint that Mr Wiltshire thought he was ever anything else; the Details of Claim contain the same paragraph stating that, "*In addition to the job titles provided, this claim relates to any jobs that the Claimant has held in the past 6 years that form part of a stable working relationship with the Respondent*"; the only specific dates mentioned are the dates of employment given in section 5.1 of the ET1, which have 21 June 2015 as the end-date; there is no mention, direct or indirect, of any date in May 2015.

115. As with Mrs Vaughan, and for many of the same reasons (and even ignoring the documentary evidence), I doubt that anyone looking at Mr Wiltshire's claim form when it was presented, with the knowledge that Sainsbury's corporately had at the time, would entertain for more than a moment the notion that what he meant was that he was making a claim only up to 3 May 2015 and not to the end of his employment.

115.1 For a claimant whose employment has ended to cut off their equal pay claim, for no apparent reason, at a date before the termination date would be a decidedly odd thing to do, particularly where they are professionally represented. One's starting point in construing any equal pay claimant's claim form is that it is inherently improbable that that is what they mean to do.

115.2 What moves it from inherently improbable to fanciful in Mr Wiltshire's case is the fact that:

115.2.1 on the face of his claim form there is no hint at all of any cut-off, no mention of the supposed cut-off date, no suggestion that he thought his job title was ever anything other than General Assistant or of any change of job role, and nothing that would explain why he might want to cut off his claim;

115.2.2 as with Mrs Vaughan, the supposed cut-off date might place his whole claim out of time.

115.3 Conversely, someone would need to make some odd assumptions in order to convince themselves that Mr Wiltshire was cutting off his claim at 3 May 2015:

115.3.1 that despite him not mentioning it, he agreed with the respondent that his job title changed from General Assistant, and did so on 3 May 2015, a date he also did not mention;

115.3.2 that he was counting on Sainsbury's being able to work out, purely from the fact that he called himself a General Assistant in his claim form, that that was what he was doing;

115.3.3 that someone with a highly experienced, specialist legal team behind them would choose not to maximise their claim, but to make a lesser claim, and one that encouraged the taking of time limits points, instead.

115.4 As with Mrs Vaughan, it is most unlikely that someone at the respondent wondered to themselves whether, because Mr Wiltshire referred to himself as a General Assistant and because they thought he had ceased to be a General Assistant 1½ months or so before his employment ended, he meant to make no claim about that 1½ month period. But if they did, they would, if they were at all reasonable, stop wondering as soon as they read in his Details of Claim the paragraph, "*In addition to the job titles provided, this claim relates to any jobs that the Claimant has held in the past 6 years that form part of a stable working relationship with the Respondent.*"

115.5 It might with hindsight have been better if the words after "*6 years*" had been omitted[32], but in the absence of any hint in the claim form that Mr Wiltshire thought there had been any break in his stable working relationship with Sainsbury's, it cannot seriously be suggested that anyone was or might have been misled by those words into thinking that "*any jobs*" did not include the job he was doing when his employment ended.

116. In Mr Wiltshire's case, the documents Sainsbury's hold about him make their position completely untenable in any event. Sainsbury's corporately is aware of the contents of those documents; they are part of the knowledge of the hypothetical reasonable person who is trying to work out what Mr Wiltshire's claim form means. There is the usual lack of a section 4 [of the Employment Rights Act 1996] statement showing a change from the title he used – General Assistant – to the title that the respondents deem to be the correct one – CSA Café. But more significantly, Sainsbury's had a copy of his resignation letter, dated 29 May 2015 (so well after his job title had supposedly changed), and that begins, "*Please accept this letter as notice of my resignation from the position of general assistant in the department of Sainsbury's café.*" This shows, unequivocally, that he still thought of himself as a General Assistant when his employment ended, even though he was working in the café (something he has confirmed in his witness statement). It would lead anyone who thought about it at all to realise that when he referred to himself in his claim form as a General

[32] I am not criticising anyone's drafting here. And I am fairly sure the intention was not to limit the scope of this paragraph but merely to make clear the claimants were aware that they could not claim back in time beyond a break in the stable working relationship.

Assistant, he in all probability meant the role that he performed up to the end of his employment and not just the role he performed up to 3 May 2015.

117. In conclusion: Mr Wiltshire's claim form incorporated a claim in respect of the work he did up to his termination date; it does not matter that the respondent thought his job title was different from 3 May 2015 onwards; if he were to add CSA Café as a job title in the register, this would not constitute an amendment to his claim of any substance.

Mr J Whiteway

118. Mr Whiteway gave his job title as Customer Service Assistant (CSA) in his claim form, which was presented on 14 November 2016. The respondents allege that his job title changed with effect from 4 September 2016 to "Counter Assistant".

119. Mr Whiteway is in essentially the same position as Mr Wiltshire. Like Mr Wiltshire (and all the other lead claimants) his claim form, when presented, was a claim in relation to all job roles he carried out at Sainsbury's up to the date of presentation, and the fact that he and Sainsbury's may refer to those job roles by different names is irrelevant. He does not need permission to amend in order to add Counter Assistant as a job title in the register.

120. There are some differences between Mr Whiteway's and Mr Wiltshire's claims, but none of them make a significant difference:

120.1 Mr Whiteway's claim was made on a multiple claim form. This is something that – putting the documents to one side – arguably makes Mr Whiteway's case stronger than Mr Wiltshire's. This is because, like Mrs Vaughan's, Mr Wiltshire's claim form, read as a whole, includes a statement to the effect that – whatever the respondents might think – he thinks his job title was General Assistant from the start of his employment up to the date of presentation;

120.2 even if the respondents were right, there wouldn't be any basis for an argument that Mr Whiteway's claim for the period up to the change of job title on 4 September 2016 was out of time. However, points relating to time limits are only a very small part of the reasons why the respondents are wrong in relation to Mr Wiltshire (and Mrs Vaughan);

120.3 there is nothing in the paperwork relating to Mr Whiteway comparable to Mr Wiltshire's resignation letter. Yet again, though, Sainsbury's seem to have breached section 4 of the Employment Rights Act 1996 in relation to Mr Whiteway by failing to write to him with his 'correct' new job title within a month of 4 September 2016 (or at all) when – according to them – it changed.

Mr L Smyth

121. Mr Smyth has a single claim form like Mr Wiltshire's and although his case is factually a bit different from that of the other test claimants it is on all points of principle on all fours with Mr Wiltshire's.

122. In his claim form Mr Smyth gave his job title as "Dry Goods Team Leader". Both sides have come to agree that that was an acceptable job title for him from 21 December 2014 to 21 November 2015 and then from 25 September 2016 to 21

April 2017, when his employment ended. The issue the respondent has raised is that between 22 November 2015 and 24 September 2016, which was the period during which his claim form was presented, Mr Smyth was, officially, a Trainee Manager. Unlike in relation to other lead claimants' 'official' job titles, the respondents are on reasonably solid ground in relation to this, in that Mr Smyth signed a Trainee Manager contract on 22 November 2015 and his salary was raised accordingly.

123. The respondents' argument is the familiar one: that the claim in the claim form is limited to the period of time during which Mr Smyth officially had the job title used in his claim form. The reasons why that argument is misconceived are virtually the same as those given, above, in relation to Mr Wiltshire, the main one being that anyone who read Mr Smyth's claim form and thought that Mr Smyth might be meaning to limit his claim in this way, despite him not mentioning or hinting at doing so, would have their doubts dispelled by the statement in the Details of Claim that, "*In addition to the job titles provided* [etc.]".

124. The particular facts that strengthen Mr Smyth's case are that he continued to perform his Team Leader role while he was completing his management training, and he did not start that training until after his claim was presented. This means that when his claim form was presented, whatever his job title at the time, there was only one job role in respect of which he could make his claim – that of Team Leader.

125. With Mr Smyth, as with all of the claimants affected by the amendment issue, the correct question is not what their job title was when they presented their claim form but what job role or roles their claim form relates to; and – absent special circumstances that don't arise in relation to any of the test claimants – that is almost bound to include the job role they were performing when they presented their claim forms (or, in the case of a claimant whose employment had ended, the role they were performing when it ended), whatever their official job title at the time.

Mr N Scholes

126. Mr Scholes made his claim on a multiple claim form, presented on 18 August 2016, in which his job title was given as Team Leader and his dates of employment were given as 28 October 2012 to the "present". The respondents no longer object to that job title in relation to the period from 28 October 2012. The potential problem arises from the fact that Mr Scholes's employment with Sainsbury's in fact began on 4 October 2010, and that between then and 28 October 2012, he was doing a different job that I shall refer to as "Commercial / Backdoor", a title I understand to be acceptable to both sides, albeit the respondents' preferred title is different. The respondents' case is that Mr Scholes cannot add that job title to the register and pursue a claim in respect of the period before 28 October 2012 without making a substantive amendment to his claim.

127. The evidence before me is silent as to why incorrect dates of employment were given for Mr Scholes in his claim form. If I had to make a decision as to whether or not to give him permission to amend, that might be important. But what was going on in Mr Scholes's head is irrelevant to how his claim form should be construed.

128. The fact that Mr Scholes gave a single job title in his claim form and now wishes to add another one is not significant. I have already explained in connection with other lead claimants why I reject the respondents' submissions about changing job titles. What potentially puts Mr Scholes's case in a different category from that of the other lead claimants is the argument: that the claim set out in his claim form is made from 2012; that what he wants to do is make it from 2010. If that argument were correct, that might well constitute a substantial change for which permission to amend would be required.

129. Putting myself in Sainsbury's shoes at the time the claim form was presented, with its knowledge of Mr Scholes:

    129.1 I would note that he had got his employment dates wrong, and was therefore not saying, "I was employed from 2010 but make my claim only for the period from 28 October 2012". Certainly, I would not assume that that was what he was saying;

    129.2 one reason I would not assume that that was what he was saying is that my starting assumption with Mr Scholes would be that he would want to maximise his claim. As with the other lead claimants, why would Mr Scholes not want to make the fullest possible claim he could?;

    129.3 taking this into account, I would think (in the absence of evidence to the contrary) the most likely scenario to be that Mr Scholes was claiming for the full 6 year period and had just made a mistake with his dates;

    129.4 I would then note the part of the Details of Claim beginning "*In addition to the job titles provided …*". For reasons already given in relation to other lead claimants, this would turn that scenario from the most likely one to a highly probable one.

130. In fairness to the respondents, their arguments are not as weak in relation to Mr Scholes as to the other lead claimants. On the face of his claim form, the only place where a claim relating to work done before 28 October 2012 can be found is in the "*In addition to the job titles provided … that form part of a stable working relationship with the Respondent*" paragraph. It is conceivable that in his case, a reasonable person with Sainsbury's knowledge might genuinely need to double-check, just to make sure, that he [Mr Scholes]: had indeed made a mistake with his dates; did not accept there was a break in the stable working relationship on that date; was not meaning to cut off his claim.

131. Checking that kind of thing is, it seems to me, part of what the register is for. I have already mentioned that the register can be used to provide further particulars of claims and responses. The register process involves the provision of schedules of information, then counterschedules, then replies to the counterschedules, and so on. This can involve, and in Mr Scholes's case did involve, the respondents asking questions and the claimants giving answers, in the following way:

    131.1 the first iteration of the register after Mr Scholes's claim form was presented simply mirrored what was in his claim form, as one would expect. It took the case no further because one couldn't know whether the dates in it were given by mistake, duplicating a mistake in the claim form, or given wilfully;

131.2 when Sainsbury's replied to it, and first highlighted the fact that Mr Scholes was employed from 2010 and not 2012, they were effectively asking him a question along these lines, "Now you have been reminded that your employment started before 28 October 2012, can you confirm whether your claim goes back to the start of your employment or only goes back to that date?" or (a rather different question, but getting at the same thing) "Is your case that the job you held before 28 October 2012 "*formed part of a stable working relationship with the Respondent*" in accordance with the paragraph beginning "*In addition to the job titles*" in the Details of Claim?";

131.3 it is Mr Scholes's response to Sainsbury's reminding him that he was employed by them from 2010 that was critical. If that response, in the form of the next iteration of the register produced on his behalf, was to accept Sainsbury's dates of employment and, more importantly, to seek to take his claim back to 2010, then he had answered the questions posed and confirmed that (as would objectively – see above – have seemed highly probable), "*In addition to the job title*" Team Leader, his "*claim relates to*" the Commercial / Backdoor job that he "*held in the past 6 years*" and that, on his case, formed "*part of a stable working relationship with the Respondent*". This would not be Mr Scholes changing his claim but merely him confirming what the claim form means;

131.4 if, on the other hand, his response had been to adopt Sainsbury's dates of employment but to maintain a claim only from 28 October 2012, then he would have been telling Sainsbury's and the Tribunal that his claim form should be construed as only making a claim in respect of work done from that date. And having given such a response and limited his claim in that way, I don't think he would have been able subsequently to backtrack from the concession he had made without the Tribunal's permission.

132. Although I am not entirely sure of precisely what each relevant iteration of the register stated about Mr Scholes, despite the efforts of the parties' legal teams to explain this to me, my understanding is that as soon as Sainsbury's suggested dates of employment (and another job role) going back to 2010, Mr Scholes sought to adopt that suggestion and to make his claim from then.

133. In summary: Mr Scholes's claim form is properly to be construed as always having contained claims in respect of all jobs he held with Sainsbury's in the 6 years before he presented his claim form; by adding and/or changing job titles in the register in relation to that period he is not changing his claim and he does not need the Tribunal's permission to do it.

Other issues

134. During the hearing I said that my intention was to deal with all of the issues in the List of Issues come what may. The plan was to limit the need for remission in the event of a successful appeal against my decision. However, having decided that none of the lead claimants needs permission to amend, I have been unable to come up with a satisfactory basis for making a decision as to whether I would grant them permission to amend if I were wrong about them not needing it. The difficulty is that: to make a coherent decision as to whether to grant permission, I would have to be able to see and follow the path that might have led me to the conclusion that they needed permission; and I am, unfortunately, unable to do so.

AMENDMENT ISSUES: SUMMARY & CONCLUSIONS

135. The lead claimants' individual cases are dealt with as follows: Ms Froggatt – paragraphs 86 to 98 above; Ms Minter – paragraphs 99 to 101 above; Mrs Vaughan – paragraphs 102 to 111 above; Mr Wiltshire – paragraphs 112 to 117 above; Mr Whiteway – paragraphs 118 to 120 above; Mr Smyth – paragraphs 121 to 125 above; Mr Scholes – paragraphs 126 to 133 above.

136. None of the lead claimants, to each of whom one or more of issues 3.1.1, 3.1.2, and 3.1.3 in the List of Issues (see paragraphs 67 and 77 above) applies, needs permission to amend in the applicable scenario. They can make the relevant changes and additions to job titles in the register without amending anything of substance in their claim forms. It is job roles and not job titles that are important; and their claim forms have always incorporated claims relating to all of the periods of work in all of job roles they wish to claim about.

Signed by Employment Judge Camp 05/06/2020

TO THE PARTIES ON

.....08/06/2020.....

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FOR THE TRIBUNAL OFFICE