Neutral Citation Number: [2022] EAT 109

Case No: EA-2021-000032-OO

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 July 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

LEICESTER CITY COUNCIL **Appellant**

- and –

MS R PATEL **Respondent**

- -
- -

Alexander Line of Counsel (instructed by Leicester City Council, legal department) for the **Appellant**
Tara O'Halloran of Counsel (instructed by Thompsons, solicitors) for the **Respondent**

Hearing date: 21 June 2022
- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.

The date and time for hand-down is deemed to be 10:30 am on 14 July 2022

Summary

Practice and procedure -

The claimant was dismissed after some 31 years of employment and sought to pursue claims of unfair dismissal, discrimination and victimisation. The employment tribunal ("ET") initially rejected the claim under rule 12 **ET Rules**, because it had incorrectly named the respondent as Leicestershire City Council. The claimant applied for a reconsideration under rule 13(1)(a), contending that the original rejection had been wrong as, pursuant to rule 12(2A), a minor error had been made and it was not in the interests of justice to reject the claim. In reconsidering its rejection decision, however, the ET treated this as a case where that decision had been correct but the defect that had led to the rejection had been rectified; on that basis it accepted the claim from the date of the application for reconsideration, which meant that the claimant's claims were out of time ("the first reconsideration"). Some 12 weeks after the first reconsideration, the claimant applied for the ET to again reconsider the decision to reject the claim, alternatively to vary the first reconsideration. In the decision under appeal, the ET carried out a second reconsideration of the rejection decision, expressly proceeding under rule 13(1)(a) and ruled that there had been a minor error and it was not in the interests of justice to reject the claim, such that rule 12(2A) applied. The respondent appealed.

Held: *dismissing the appeal*

The ET had erred in the first reconsideration decision, having failed to determine the application on the basis on which it had been put by the claimant: it had treated this as a rectification case when there had been no rectification, the claimant had instead relied on rule 12(2A), saying this had been a minor error and it was not in the interests of justice for the claim to be rejected. A reconsideration decision under rule 13 could not be a judgment (see rule 1(3)(b)) and had to be treated as a case management order; as such, rule 29 permitted the ET to vary, suspend or set aside that decision if it was necessary in the interests of justice to do so. That test was to be determined through the prism of the principle of certainty and finality in litigation and of the integrity of judicial decisions and orders (**Serco Ltd**

v Wells [2016] ICR 768); it would not be open to the ET to revisit an earlier decision because it had had a change of heart or thought better of its earlier reasoning. That said, an ET could revisit an earlier case management decision where there had been a material change of circumstance, or where the order had been based on a material omission or mistreatment or there was some other substantive reason necessitating such interference (**E v X, L & Z; L v X, Z & E** UKEAT/0079/20 and UKEAT/0080/20). The error made by the ET in the first reconsideration decision amounted to such a material omission or mistreatment and it was entitled to revisit that decision given that the argument the claimant had advanced in her rule 13 application had not been considered (see **Hart v English Heritage** [2006] IRLR 915). The effect of the decision under appeal had been to set aside the first reconsideration decision and to carry out a reconsideration under rule 13(1)(a). So doing, the ET had been entitled to find there was no prejudice to the respondent, notwithstanding the delay in the claimant's application for further reconsideration, and had permissibly found that the original mistake on the claim form had been a minor error and that it had not been in the interests of justice for the claim to be rejected.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. The issues raised by this appeal concern the procedures that apply to the rejection of a claim, and the reconsideration of that rejection, under rules 12 and 13 Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237** ("the ET Rules"). In particular, the appeal raises the question whether an Employment Tribunal ("ET") can revisit a reconsideration decision reached under rule 13 **ET Rules** and, if so, as to the approach it is required to take.

2. In giving this Judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the respondent's appeal against the reconsideration Judgment of the Leicester ET (Employment Judge Ahmed, sitting alone on 17 December 2020, by cloud video platform ("CVP")), by which, for a second time, the ET reconsidered its earlier decision of 11 May 2020, revoking that decision and reaching a fresh decision to accept the claimant's claim. The respondent appeals against that Judgment.

The Relevant Background

3. The claimant was employed by the respondent for over 30 years. The effective date of termination of her employment was 10 December 2019. On 4 March 2020, in compliance with section 18A **Employment Tribunals Act 1996** ("ETA"), the claimant made contact with the Advisory, Conciliation and Arbitration Service ("Acas") and entered the early conciliation ("EC") process. On 2 April 2020, Acas issued an EC certificate. The certificate named the prospective respondent as "*Leicester City Council*".

4. On 1 May 2020, the claimant, acting through a firm of solicitors experienced in employment law, presented an ET1 claim form to the ET, making complaints of unfair dismissal, discrimination and victimisation. At box 2.3 of the ET1 form, the correct EC certificate number was provided but, in naming the respondent at box 2.1, the claimant had given the name "*Leicestershire City Council*", rather than "*Leicester City Council*". The correct address was given for the respondent and the attached "*Details of Claim*" correctly identified the respondent as "*Leicester City Council*".

5. By letter of 11 May 2020, the ET notified the claimant that her claim had been referred to EJ Ahmed, who had decided to reject it under rule 12(1)(f) **ET Rules** as:

> "… the name of the prospective respondent on the early conciliation certificate is not the same as the name of the respondent given in section 2.1 of the claim form."

6. On 21 May 2020, those acting for the claimant applied for reconsideration under rule 13 **ET Rules**. Relying on rule 12(2A), it was explained that a minor error had been made in the naming of the respondent, which was the fault of the claimant's solicitors and not the claimant, and it was urged that it would not be in the interests of justice for the claim to be rejected. No request was made for a hearing of the application.

7. By letter of 2 June 2020, the ET notified the claimant that, after reconsideration by EJ Ahmed, her "*whole claim*" was now accepted. It was explained:

> "Because the original decision to reject the claim was correct but the defect which led to the rejection has since been rectified, the claim form is to be treated as having been received on 21/05/2020."

8. On 30 June 2020, the respondent filed its form ET3 and grounds of resistance.

9. A case management preliminary hearing took place on 24 August 2020. This was conducted remotely, by CVP, before EJ Rachel Broughton sitting alone. Ms O'Halloran

represented the claimant and the respondent appeared by its solicitor. During the course of the hearing, it was identified that the primary time limit for the claimant's claims had been 2 May 2020. That being so, a time limit issue arose if the claim form was to be treated (pursuant to the ET's reconsideration decision of 2 June 2020) as having been received on 21 May 2020. Having thus identified the issue, the claimant's counsel applied for an extension of time to permit the claimant to make an application under rule 70 for reconsideration of the decision of 2 June 2020. As the respondent had not been given notice of this application and as the ET did not have the full file available at the hearing, EJ Rachel Broughton determined that this matter should be referred to EJ Ahmed.

10. By letter of 28 August 2020, those acting for the claimant made the following application:

> "… for: (a) Reconsideration of the Tribunal's decision to reject the claim dated 11 May 2020 (The Decision) pursuant to rule 5, 13 and/or 70 of the … [ET Rules]; or (b) Variation of the Tribunal's case management order dated 2 June 2020 (Decision 2) so as to treat the Decision as wrong and the claims as having been submitted on 1 May 2020 and therefore within primary limitation, pursuant to rule 29."

The claimant also asked that the ET exercise its discretion to extend time (pursuant to rule 5 ET **Rules**) for this application.

11. On 4 September 2020, the respondent provided submissions in response, resisting the application.

The ET's Decision and Reasoning

12. The claimant's applications were listed for hearing (again by CVP) before EJ Ahmed on 17 December 2020; both parties attended by counsel.

13. EJ Ahmed allowed the application to reconsider the decision of 11 May 2020 (to reject the claim), revoking that decision and making a fresh decision that the claim was accepted;

the date of acceptance of the claim was held to be 1 May 2020 and the claimant's claim of unfair dismissal was thus in time.

14. In reaching that decision, the ET noted that the respondent had not been prejudiced by the claimant's error (see paragraph 14 of the ET's reasoning). Having regard to the reasoning of the EAT in **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543, the ET concluded that the decision of 11 May 2020 had been in error:

> "15. … The Claimant's typographical mistake should have been categorised as a 'minor error' within the meaning of Rule 12(2A) and the claim form should have been accepted. It was in the interests of justice not to reject the claim because to do so would cause the Claimant considerable hardship in that she would potentially be shut out of an unfair dismissal claim."

15. In carrying out the reconsideration, the Employment Judge further explained:

> "17. I am satisfied insofar as it is necessary to say so that the proper provision for reconsideration of the decision is Rule 13(1)(a) and not Rule 70. Rule 13 is clearly intended to deal with Rule 12 rejections as is apparent from the plain and clear wording of Rule 13(1). There is also nothing in the Rules to say that a decision which was originally wrong under Rule 12 cannot be corrected later or taken a second time. Insofar as it is necessary I exercise the general power under Rule 5 to extend time to consider the present application."

The Law

16. The rules governing proceedings before ETs are contained within the schedules to the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**; for the purposes of this appeal, I am concerned with the rules of procedure at schedule 1 - the **ET Rules**.

17. In interpreting or exercising any power given to it under the **ET Rules**, an ET is required to seek to give effect to the overriding objective, as provided by rule 2:

> "Overriding objective
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.
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> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

18. By rule 5, the ET is afforded a general power to extend or shorten any time limit under the **ET Rules**:

> "The Tribunal may, on its own initiative or on the application of a party, extend or shorten any time limit specified in these Rules or in any decision"

19. An ET claim starts when a completed claim form is presented to the ET in the prescribed form, see rule 8 **ET Rules**.

20. Where a claim is not made using the prescribed form or fails to supply certain minimum information, it shall be rejected by the ET under rule 10. Where the prescribed form is used and the minimum information provided but the staff of the ET consider the claim has a defect, as listed at rule 12 **ET Rules**, the claim form shall be referred to an Employment Judge. In the present case, the claimant's ET1 was initially referred to EJ Ahmed under rule 12(1)(f); rule 12(1)(f) relates to circumstances in which:

> "… the claim, or part of it, may be –
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> …
>
> (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."

21. At the relevant time, it was then provided, by rule 12(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 … (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim."

Rule 12(2A) was amended by SI 2020/1003 regulations 1(2), 5 and 7(c) with effect from 8 October 2020; relevantly, the amendment removed the word "*minor*", leaving simply "*error*". For the purposes of this appeal, however, the relevant terminology is that of "*minor error*".

22. If a claim is thus rejected, it has been held that no valid proceedings before the ET will ever have been commenced, see **Secretary of State for Business, Energy and Industrial Strategy v Parry and anor** [2018] EWCA Civ 672, per Bean LJ at paragraphs 38-41.

23. As for the kind of error that might amount to a "*minor error*" for the purposes of rule 12(2A), in **Mist v Derby Community Health Service NHS Trust** [2016] ICR 543 EAT, at the EC stage, the claimant had named the prospective respondent as "*Royal Derby Hospital*" but had used its correct title, "*Derby Hospitals NHS Foundation Trust*", when completing the form ET1. By way of attempted cross-appeal before the EAT, the respondent objected that the claimant had thus failed to comply with EC requirements. That argument was rejected by the EAT, which took the view that, even if it were open to the respondent to take the point for the first time on appeal, the error had been "*plainly minor in nature*", the claimant's EC notification had not been rejected by Acas, and the ET had been entitled to treat the EC certificate as conclusive in terms of the claimant's compliance with her section 18A **ETA** obligations (see **Mist** paragraph 56).

24. More generally, in **Chard v Trowbridge Office Cleaning Services Ltd** UKEAT/254/16, Kerr J laid stress on the requirement that the **ET Rules** should be interpreted "*avoiding*

unnecessary formality and seeking flexibility in the proceedings" (overriding objective, at rule 2(c)), holding:

> "63. The need is to avoid the injustice that can result from undue formality and rigidity (absence of flexibility) in the proceedings. … the reference to avoiding formality and seeking flexibility does not just mean avoiding an intimidating formal atmosphere during hearings; it includes the need to avoid elevating form over substance in procedural matters, especially where parties are unrepresented."

25. Similarly, in the **Parry** case, Bean LJ observed:

> "31. … Employment Tribunals should do their best not to place artificial barriers in the way of genuine claims."

26. In **Stiopu v Loughran** EA-2019-00752, Clive Sheldon QC, sitting as a Deputy High Court Judge, characterised the approach to be adopted under rule 12(2A), as follows:

> "18. In my judgment, rule 12(2A) is a 'rescue provision' designed to prevent claims from being rejected for technical failures to use the correct name of the respondent (or the claimant) in the early conciliation certificate and the ET1. The wording of rule 12(2A) is that the claim shall be rejected if the judge considers that the claim is of a kind described in subparagraph (f): '… unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim.' In my judgment, this language requires the employment judge in every case to ask him or herself the question as to whether there is a 'minor error' in relation to a name or address and whether it would or would not 'be in the interests of justice to reject the claim'. These questions are part and parcel of the overall rule at 12(2A)
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> …
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> 20. Of course, if there was nothing in the materials before the employment judge to suggest or indicate that a minor error has been made, the exercise of consideration will be a short one. It is not for the employment judge to speculate on that matter or as to whether it is otherwise in the interests of justice to reject the claim. In some cases the materials before the employment judge will simply be the certificate and the ET1. In other cases the materials will also include submissions made and evidence provided as part of an application for reconsideration."

27. Whether or not there has been a "*minor error*" is a question of fact and judgement for the ET (see **GINY v SNA Transport Ltd** UKEAT/0317/16 at paragraph 35, and **Chard** at paragraph 62). Similarly, in **Stiopu**, although finding that the ET had erred by failing to engage with this question, the EAT declined to decide the point itself, holding that mis-naming a respondent *can* be a minor matter but is not necessarily so; that was a question for the ET (see **Stiopu** paragraph 29).

28. If a claim is rejected, the claim form is then returned to the claimant in accordance with rule 12(3), which provides:

> "If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

29. Where a claim form is rejected under either rule 10 or 12, rule 13(1) provides that:

> "A claimant … may apply for a reconsideration on the basis that either- (a) the decision to reject was wrong; or (b) the notified defect can be rectified".

30. Rule 13(2) explains the procedure that a claimant is to follow if they wish to apply for reconsideration under this provision:

> "The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application."

31. Upon the claimant making such an application, it is then provided, by rule 13(3) and (4):

> "(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.

> (4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

32. Rule 13 thus provides two different routes by which an Employment Judge is able to revisit an earlier rejection made (relevantly for present purposes) under rule 12(2A). First, where the application under rule 13(1) is made on the basis that the decision to reject was wrong (rule 13(1)(a)), the Employment Judge may decide that the claim should be accepted, acknowledging that an error was made in the original rejection (rule 13(2)). If this course is followed then there is no need for a hearing, even if that was requested in the reconsideration application. Secondly, where the application is made on the basis that the defect that had been the reason for the rejection can be rectified (rule 13(1)(b)), if satisfied that the defect that led to the original rejection has now been rectified, then (following a hearing, if that has been requested by the claimant) the Employment Judge can decide that the corrected claim should now be accepted (rule 13(4)). If this latter course is adopted, however, the date of presentation of the claim will not then be the date on which it was originally lodged with the ET but the date on which it was rectified. If that date means that the claim is out of time, rule 13(4) affords the ET no discretion and the claimant's only recourse would be to seek an extension of time under the provision relevant to her claim (see **Adams v British Telecommunications plc** [2017] ICR 382 EAT, paragraphs 10-11).

33. Rule 13 provides a reconsideration regime that is bespoke to rejection decisions under rules 10 and 12. The ET has a more general power to reconsider judgments, pursuant to rule 70 **ET Rules**, but that power expressly does not extend to a decision taken under rule 13 (or under rule 19, which is the equivalent provision relating to the response to an ET claim); that is made clear by rule 1 **ET Rules**, which addresses questions of interpretation and which relevantly provides:

> "(3) An order or other decision of the Tribunal is either—
> (a) a 'case management order', being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment;
> (b) a 'judgment', being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines- (i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); or (ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue); …"

34. In the **Income Data Sources Handbook, Volume 5, Employment Tribunal Practice and Procedure**, at paragraph 16.10, it is speculated that the exclusion of a decision made under rule 13 (or rule 19) from the ET's power of reconsideration:

> "… is no doubt intended to stop a claimant or respondent from applying for a 'reconsideration of a prior reconsideration'. In other words, if a party's application for a reconsideration of a tribunal's decision to reject a claim or counterclaim (under rule 13) or response (under rule 19) is unsuccessful, it cannot then seek reconsideration of that decision under rule 70. … In either of the situations mentioned above, the disappointed party's only option is to pursue an appeal to the EAT, assuming that an error of law can be identified and that the time limit for lodging an appeal has not expired."

35. In the same passage, the learned editors of the **IDS Handbook** consider more generally whether there can be a reconsideration of a reconsideration:

> "The question may arise of whether a party who is disappointed by a decision regarding a reconsideration — whether that be the refusal of an application for a reconsideration or the actual conclusion reached by the tribunal after conducting a reconsideration of a prior judgment — can apply for that decision itself to be reconsidered. In answering this, it has again to be borne in mind that only 'judgments' (and not mere 'decisions') are susceptible to reconsideration within the terms of rule 70. … [I]t would seem bizarre if, having undertaken a reconsideration of a judgment, a tribunal's conclusion confirming, varying or revoking that judgment were to be regarded as a 'judgment' so as to allow a party to apply for a further reconsideration under that rule. Such a potentially never-ending loop would stray into the world of Alice in Wonderland."

36. Returning to the rules governing the procedure relevant to the rejection of an ET claim, in **Parry**, the Court of Appeal accepted the Secretary of State's submission that a rejection under

rule 12 **ET Rules** was not a "*determination of proceedings*" but a "*judicial act of a different quality … a response to the fact that a claim has not properly been made*". Adopting that approach, the exclusion of a decision under rule 13 (or, similarly, under rule 19) from the definition of "*judgment*" under rule 1(3) might be seen to be providing clarification of the status of such a ruling, as something other than a final determination. The question then arises, however, as to how a decision under rule 13 is properly to be characterised. For the claimant, it is said that if such a decision is not a "*judgment*" it must be a "*case management order"*, as rule 1(3) provides that an order or decision of the ET must be either one or the other. Acknowledging the logic of that submission, the respondent argues, however, that a decision under rule 13 cannot be a "*case management order*" as it is not made "*in relation to the conduct of proceedings*" (as explained in **Parry**, if a claim is rejected under rule 12, no valid proceedings before the ET will ever have been commenced). The respondent submits that rule 13 is *sui generis*, which is why it was necessary for it to be expressly excluded from the definition of "*judgment*". I return to this issue, when considering the grounds of appeal, under the heading "*Discussion and Conclusions*", below.

37. More generally, rule 29 provides ETs with a power to make case management orders, and to vary, suspend or set aside such orders, as follows:

> "Case management orders
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> The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

38. In the present case, however the ET's first decision under rule 13 is to be characterised, the question arises as to whether the Employment Judge was able to carry out a further reconsideration, reaching a different decision, on the same facts. It is helpful, therefore, to

carry out a short review of the relevant case-law, where the ET's ability to revisit an earlier decision has been the subject of appellate consideration.

39. In **British Midlands Airways Ltd v Lewis** [1978] ICR 782, addressing the question where an error was said to have come to light shortly after the ET had determined the claim, the EAT considered that, on an application for reconsideration, it would be desirable for the ET to correct the matter even if that involved overturning the original decision; the EAT considered that was the convenient course given that the appeal process "*takes much longer and is much more expensive*" (see p 785D-F) (and see **Williams v Ferrosan Ltd** [2004] IRLR 608, EAT, to similar effect). In **Hart v English Heritage** [2006] IRLR 915, the EAT adopted an equally expansive approach to the ET's powers of reconsideration in respect of case management orders, holding that: "*In principle, tribunals ought to have power to reconsider all their decisions …*" (paragraph 30). In that case, the EAT concluded that the ET would have been entitled to revisit a decision on an application to amend, on the basis that the particular argument that the claimant had wished to advance had not been considered (see paragraph 39). Once a decision had been taken, however, that there should be no review of the original determination, then, whether or not that decision was correct, it would not be open to a differently constituted ET to purport to re-make that decision (see paragraph 41).

40. In **Serco Ltd v Wells** [2016] ICR 768, in considering whether an earlier case management order might be revoked and replaced by a subsequent decision of the ET under the current **ET Rules**, the EAT held that the requirement to consider if such revocation was "*necessary in the interests of justice*" (rule 29) had to be interpreted through the prism of the "*antique and far reaching*" principle of "*certainty and finality in litigation and of the integrity of judicial orders and decisions*" (see paragraphs 24 and 43), concluding that:

> "43 … (d) ... variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state a relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although … these will be 'rare' and 'out of the ordinary'."

41. In **Serco v Wells**, a case management order made by an Employment Judge had directed that there be a preliminary hearing on the question of the claimant's length of service. Subsequently, after the parties had agreed a lengthy list of issues, a different Employment Judge had revoked the earlier order on the basis that the list of issues was a "*material change of circumstances*" and it was "*necessary in the interests of justice*" to do so. The EAT disagreed, holding that the list of issues in the case did not constitute a material change of circumstances; alternatively, that the decision to revoke the initial order had been outside the scope of the permissible exercise of the ET's discretion.

42. Similarly, in **E v X, L & Z; L v X, Z & E** UKEAT/0079/20 and UKEAT/0080/20, the EAT set aside an order which had purported to revisit an earlier interlocutory decision made by another ET in the same proceedings. The EAT made clear that, if it had been considered that the first ET had misunderstood or misapplied the law, the proper course would have been to challenge the order by way of appeal: unless there had been a material change of circumstances, or the earlier order had been based on a material omission or mistreatment, or there was some other substantive reason necessitating interference, the interests of justice would not support the interference with the original order (see paragraph 63 4)-5)).

The Respondent's Appeal and the Parties' Submissions

43. While agreeing that it had not been open to the ET to reconsider its earlier decision under rule 70 (that being the effect of rule 70 read together with rule 1(3)), by its first ground of appeal, the respondent contends that the ET erred:

(1) By reconsidering its rule 12 decision for a second time under rule 13 **ET Rules** when there was no scope under rule 13 for it to do so (and rule 1(3) meant that the general power of reconsideration under rule 70 was not available). Once a reconsideration decision had been made, the original decision under rule 12 no longer stood, so there could be no further reconsideration in that regard, but, in any event, a second reconsideration of an issue previously determined should not be permitted, absent a material change in circumstances or other substantive reason necessitating such interference in the interests of justice (**E v X, L & Z**). The proper course would have been for the claimant to have sought to appeal. Had she done so, the respondent would have been likely to have contested the appeal.

(2) By extending time in order to do so. Rule 13(2) required any application to be made within 14 days and the ET had provided no reasons why time should be extended to permit an application to be made on 28 August 2020 in relation to a decision taken on 11 May 2020.

44. The respondent's second ground of challenge is put on the basis that the ET erred:

(1) In revoking and setting aside its decision to reject the claim of 11 May 2020, when rule 13 (in contrast to rule 70) provided no express power enabling the ET to adopt this course and the ET had already exercised the power afforded under rule 13(4). Nor could it be assumed that the ET was exercising its general case management powers under rule 29 **ET Rules**, which: (i) only applied to case management orders, which had to relate to the conduct of proceedings, when a decision under rule 12 was *prior* to the commencement of any proceedings (**Parry** paragraphs 38-41), (ii) did not contain any express power to revoke, and (iii) required the ET to consider the interests of justice, which it had not done.

(2) Further/alternatively, in making a fresh decision that the claim be accepted as of 1 May 2020 when the ET had left untouched its earlier decision of 2 June 2020, which had made the contradictory finding that the claim had been received on 21 May 2020.

45. By its third ground of challenge, the respondent further objects:

(1) That the ET erred in finding that the error on the ET1 was not a minor error.

(2) Further/alternatively, although the ET referred to the interests of justice, it had failed to consider any other factors relevant to this assessment other than hardship to the claimant. In particular, the ET had failed to consider the public interest in finality, the prejudice to the respondent, and/or the claimant's own contribution to the circumstances under consideration.

46. In seeking to resist the appeal, the claimant relies on the reasoning of the ET and argues as follows.

47. In relation to the first ground:

(1) There was no rule or provision within the **ET Rules** that prohibited an ET from reconsidering its decision to reject a claim for a second time. Applying the overriding objective, it was open to the ET to revisit an earlier decision, for example where there had been a change in circumstances, where there had been a mistake, or where there was some other substantial reason justifying such a course (**Hart v English Heritage**; **Serco v Wells**; **E v X, L & Z**) . Where the ET had made a mistake and realised its error shortly afterwards, it would be appropriate for the matter to be rectified by reconsideration rather than on appeal (**British Midlands Airways v Lewis**; **Williams v Ferrosan Ltd** [2004] IRLR 607).

(2) Moreover, the ET had been entitled to decide to extend time insofar as it was necessary and it could be discerned that the reasons for so doing related to the original error by the ET and the balance of prejudice to the parties.

48. Turning to the second ground of appeal, the claimant contends that it was implicit in rule 13 that an application for reconsideration of a decision to reject a claim may be granted and the claim allowed to proceed; rule 13(4) did not apply where a Judge had concluded that the decision to reject was wrong. Moreover, it followed from the second reconsideration decision that, the original decision to reject the claim having been revoked, the first reconsideration decision fell away.

49. As for the third ground of appeal, the parties did not come to the ET's decision as strangers and the reasons provided were adequate (**Derby Specialist Fabrication Ltd v Burton** [2001] IRLR 69); the ET had made clear that it was not in the interests of justice for the claim to have been rejected due to the hardship that would cause the claimant, observing that the claimant had only made a typing error and the respondent had not been prejudiced in any way.

Discussion and Conclusions

50. In presenting her claim to the ET, the claimant made an error in naming the respondent on the form ET1; instead of referring to Leicester City Council, she (or, more accurately, those acting for her) typed in "*Leicestershire City Council*". On its face, that was obviously an error: the claimant was either referring to Leicester City Council or to Leicestershire County Council. The address given made clear that the correct entity was indeed Leicester City Council, something that was also made apparent in the heading of the Details of Claim, which was attached to the ET1, and in the content of that document,

which referred solely to "*Leicester City Council*". As the name of the respondent given on the claim form differed, however, from the name of the prospective respondent on the EC certificate, the matter was referred to an Employment Judge for consideration.

51. Given the nature of the error made, it might have been thought that the Employment Judge would have seen this is a matter falling to be characterised as a "*minor error*" under rule 12(2A) (as then worded). Equally, given the claimant's long service and the potential prejudice to her if she was shut out from pursuing her claims, and having regard to the apparent lack of prejudice to the respondent, it might also have been thought that it would not be in the interests of justice to reject the claim. When this matter was initially put before the Employment Judge, however, he apparently did not take the view that it was appropriate to utilise the "*rescue provision*" (per Clive Sheldon QC in **Stiopu**) allowed under rule 12(2A) and the claim was rejected, as notified to the claimant by letter of 11 May 2020.

52. Within the 14-day period permitted by rule 13(2), the claimant's solicitors made the appropriate application for reconsideration, on the basis that the decision of 11 May 2020 had been wrong: this was a minor error and it would not be in the interests of justice for the claim to be rejected. The application was thus put on the basis provided at rule 13(1)(a) **ET Rules**. Instead of seeing this as a case where the initial decision had been wrong, however, on reconsidering the claimant's application under rule 13, the Employment Judge determined that his original decision had been correct but, as the defect had since been rectified, the claim would therefore be treated as having been received on 21 May 2020 (the date of the rule 13 application). The Employment Judge thus approached the application as if it had been made on the basis provided at rule 13(1)(b). That gave rise to an obvious error: the ET had determined the reconsideration application on a basis that

had never been relied on (there had been no rectification) and it had failed to consider the application on the basis on which it had been put.

53. It would appear, however, that the difficulties arising from the ET's decision of 2 June 2020 were not identified by those acting for the claimant until the subsequent case management hearing on 24 August 2020 and, on 28 August 2020, an application was made for either a reconsideration of the original decision to reject the claim or for a variation of what was described as the "*case management order dated 2 June 2020*". The respondent resisted that application but, after hearing argument on the point, the ET determined to undertake a second reconsideration of its decision of 11 May 2020, stating that it was doing so pursuant to rule 13(1)(a) **ET Rules**. The respondent says the ET thereby erred; it contends that neither course advocated by the claimant was properly open to the Employment Judge under the **ET Rules**. The respondent contends that the correct course by which to challenge the decision of 2 June 2020 would have been to appeal, but the claimant had failed to pursue that option within the relevant time-limit.

54. It is, of course, correct that the appropriate way to challenge an error of law on the part of an ET is by way of appeal to the Employment Appeal Tribunal. There are, however, some circumstances in which the ET is able to revisit a decision, either by way of reconsideration or, in relation to a case management order, pursuant to the powers afforded under rule 29 **ET Rules**. In the present case, the ET could not reconsider its decision of 2 June 2020 under rule 70 **ET Rules**: as rule 1(3) makes clear, that decision was not a "*judgment*" and, therefore, could not be the subject of a reconsideration under rule 70. Moreover, on the face of the decision, it might also seem that the ET had already exercised its rule 13 power to reconsider its earlier rule 12 rejection, and – whether or not its decision of 2 June 2020 was correct – it would not be open to the ET to purport to re-make that decision (see **Hart**

v English Heritage at paragraph 41). The problem in this case, however, was that the ET had failed to determine the rule 13 application for reconsideration that the claimant had made, purporting instead to reconsider the rule 12 rejection on the basis that the original defect had since been rectified, when that was not the case: the claimant had made clear that she considered the original rejection was wrong; she had not otherwise rectified the minor error made on the face of the ET1. The ET had thus failed to exercise its rule 13 power to reconsider the earlier rejection of the claim upon the application that had been made to it, under rule 13(1)(a).

55. The respondent objects that the ET could no longer reconsider its initial rule 12 rejection because the effect of the decision of 2 June 2020 was that the rejection no longer existed. The respondent points out that the ET did not expressly vary or set aside its decision of 2 June 2020, but, in any event, it further contends that it would have been unable to do so. In this regard, the respondent argues that, as a decision under rule 13 is concerned with a claim that has been rejected, it cannot be a "*case management order*": because ET proceedings can only start once a valid claim has been presented (see **Parry** at paragraphs 38-41), such a decision cannot be made "*in relation to the conduct of proceedings*". More generally, the respondent submits that the exclusion of a rule 13 decision from the definition of "*judgment*" must mean that it is to be treated as something other than either a judgment or a case management order.

56. Dealing with these arguments in reverse order, and thus starting with the last of the points made, it seems to me that the respondent's submission fails to engage both with the wording of rule 1(3) and with the effect of a decision under rule 13.

57. Taking first the definition of "*case management order*" under rule 1(3), it is notable that this covers decisions made "*in relation to the conduct of proceedings*" (emphasis added), which allows for something wider than might be the case if, for example, this was limited to decisions

made "*in the conduct of proceedings*". More obviously, however, rule 1(3) makes plain that "*an order or other decision*" of the ET is either a case management order or a judgment; there is no other option. A rule 13 decision expressly cannot be a judgment so, as the claimant submits, it must be a case management order. Moreover, I do not read the exclusion of a rule 13 decision from the definition of "*judgment*" to mean that it must also be something other than a case management order, as the respondent contends; after all, had the secretary of state wished to exclude a rule 13 decision from the definition of "*case management order*", a similar exclusion could have been made at rule 1(3)(a). Secondly, in any event, the effect of a reconsideration decision under rule 13 will mean that the claim is to be treated as having been validly presented for rule 8 purposes (although, if the reconsideration is under rule 13(4), that might be on a later date than the original presentation of the claim); it is, therefore, a decision made "*in relation to the conduct of proceedings"*.

58. As a case management order, pursuant to rule 29 **ET Rules**, it was therefore open to the ET to subsequently vary, suspend, or set aside its decision of 2 June 2020 if that was "*necessary in the interests of justice*" (for completeness, I observe that it could not be said that the claimant had not had a reasonable opportunity to make representations before that decision had been made (as rule 29 requires): representations had been made on her behalf in the written application of 21 May 2020 and it had been open to her to request an oral hearing but she had not done so). In making its subsequent decision to accept the claim under rule 13(1)(a), I am satisfied that the ET was thereby setting aside its decision of 2 June 2020. I acknowledge that it did not expressly state that this is what it was doing, but that was the effect of the ruling that is now challenged on appeal: having held that it was reconsidering its initial rejection of the claim under rule 13(1)(a), the ET's earlier decision that the original rejection had been correct (but the defect rectified) could no longer stand. Moreover, the ET was not prevented from carrying out a reconsideration under rule 13(1)(a) because the effect of its

decision of 2 June 2020 meant that the rule 12 rejection no longer existed. The decision of 2 June 2020 had confirmed that rejection, such that the decision of 11 May 2020 still stood, but had then held that the rectification of the original defect meant the claim could now be accepted (with effect from 21 May 2020); it was only when the ET subsequently undertook its rule 13(1)(a) reconsideration that it was to find that the claim should not have been rejected.

59. An ET should always be clear as to the particular power it is exercising under the **ET Rules**. That said, when addressing the error that had arisen in this case, the ET was bound to have regard to the overriding objective and to avoid unnecessary formality and seek flexibility in the proceedings; as Kerr J observed in **Chard**, the need to thus avoid elevating form over substance applies to procedural decisions just as much as to the conduct of hearings. While, therefore, it would have been better if the ruling under appeal had expressly addressed what this meant for the decision of 2 June 2020, I do not consider the ET erred in finding that, procedurally, it had the power to undertake a reconsideration under rule 13(1)(a).

60. The substantive question raised by the appeal is whether the ET ought then to have carried out this second reconsideration, thereby setting aside its decision of 2 June 2020: it might have had the power to do so, pursuant to rule 29 **ET Rules**, but was it "*necessary in the interests of justice*"? As was made clear in **Serco v Wells**, that is a question that must be determined through the prism of the principle of "*certainty and finality in litigation and of the integrity of judicial orders and decisions*". It is not open to an ET to revisit an earlier case management order simply because it has since had a change of heart or can now see a flaw in its earlier reasoning. As I have already stated, however, the difficulty with the ET's decision of 2 June 2020 was that it failed to engage with the basis of the claimant's application of 21 May 2020. Although the claimant's application had been clearly made under rule 13(1)(a), the ET's decision of 2 June 2020 gave no indication that it had considered whether the original error

had been "*minor*" and, if so, whether the interests of justice were such that it had been wrong to reject the claim. That, it seems to me, was a material omission or mistreatment (**E v X, L & Z**), an error akin to a misstatement of fact; it was the kind of mistake that would entitle the ET to revisit its decision and to correct its error (see **Hart v English Heritage** at paragraph 39).

61. Had the claimant identified the ET's error upon receipt of the decision of 2 June 2020 and immediately raised this point, asking that the Employment Judge carry out the rule 13 reconsideration on the basis of her application, I do not consider there could have been any real objection. This would be the kind of situation envisaged in **British Midlands Airways v Lewis** and **Williams v Ferrosan Ltd**. The ET had effectively failed to deal with the point it was required to determine – a material omission – and it would be in accordance with the overriding objective for the ET to make good its error, rather than requiring the claimant to pursue an appeal. As the respondent has further pointed out, however, the claimant's application for the ET to revisit its 2 June 2020 decision was made after what might be seen as a significant delay, over 12 weeks after that decision had been sent out to the claimant. At that stage, the claimant would have been out of time to lodge an appeal with the Employment Appeal Tribunal and, although she might have sought an extension of time for an appeal, the approach adopted when considering whether to exercise the power to extend time afforded under rule 37 **EAT Rules 1993** is notoriously strict (see the observations of Ward LJ at paragraph 27 **Woods v Suffolk Mental Health Partnership NHS Trust** [2007] EWCA Civ 1180). I was initially troubled by the fact that the claimant's application to the ET might thus have been motivated by the need to avoid the difficulties that she would otherwise have been likely to face had she sought to appeal out of time. Ultimately, however, it seems to me that is not a relevant consideration for the purposes of the current appeal. If the ET had no power to revisit its reconsideration decision under rule 13, then it would have erred in purporting to

do so whether or not this was within the 42-day time limit for any appeal. On the other hand, if the ET was able to set aside its earlier decision of 2 June 2020 (as I have held to be the case), and to carry out a reconsideration under rule 13(1)(a), then whether that was still within the time limit for an appeal to the Employment Appeal Tribunal could not be determinative.

62. Ultimately, the significance of the claimant's delay was a matter for the ET to consider when assessing the interests of justice in this case. In carrying out that task, it could not be said that the claimant had unduly delayed in making her application for reconsideration under rule 13: her application had been made within the 14 days provided by rule 13(2). The delay had arisen only subsequently, when the claimant failed to identify the error in the decision of 2 June 2020, when the ET undertook a reconsideration of the original rejection on a basis that had formed no part of the claimant's rule 13 application. There seems to have been no good explanation for that delay but, equally, there was no basis for considering that the respondent had thereby suffered any prejudice (indeed, it seems that the respondent had been unaware of the original rejection and of the decision of 2 June 2020 until the case management hearing of 24 August 2020; moreover, although the error at box 2.1 of the ET1 had never in fact been corrected, the respondent had raised no point regarding this when filing its ET3 and grounds of resistance).

63. The ET's reasoning makes plain that it had the question of comparative prejudice firmly in mind when determining that it should reconsider the original rejection decision under rule 13(1)(a). It was clear that the respondent was "*not taken by surprise or in any way prejudiced by the error*" (ET paragraph 14) and permissibly concluded that it was "*in the interests of justice not to reject the claim because to do so would cause the Claimant considerable hardship in that she would potentially be shut out of an unfair dismissal claim*" (ET paragraph 15). The respondent has identified no additional prejudice arising from the claimant's delay

in identifying the need for the ET to carry out a second reconsideration of its original decision to reject the claim and there is no basis on which this appellate tribunal could properly interfere with the ET's assessment of the comparative prejudice in this case.

64. More generally, however, the respondent objects that the ET failed to consider the public interest in finality in litigation and the need to respect the integrity of judicial decisions. As was made clear in **Serco v Wells**, those principles form an integral part of any assessment of what is necessary in the interests of justice. The difficulty in this case, however, was that the decision of 2 June 2020 had not provided a final determination of the claimant's rule 13 reconsideration application because the ET had failed to reach a decision on the application that had been made. Accepting that there had thus been a material omission or mistreatment, the ET was entitled to find that the interests of justice necessitated that it undertake a reconsideration under rule 13(1)(a) **ET Rules**, thereby setting aside the decision of 2 June 2020. As for the decision the ET then reached – that the defect on the face of the ET1 claim form had indeed been a minor error – that was plainly a conclusion that was open to the ET in this case, which permissibly found that it had not been in the interests of justice to reject the claim, which should, therefore, have been accepted.

65. This case has obviously had an unhappy procedural history. The errors made by those acting for the claimant and by the ET are to be regretted. Ultimately, however, the ET sought to address its own omission (its failure to determine the rule 13 application for reconsideration on the basis it had been made) by doing that which was necessary in the interests of justice. That seems to me to have been entirely in accordance with the overriding objective and with the need to seek to avoid placing artificial barriers in the way of genuine claims (see per Bean LJ at paragraph 31 of **Parry**). For all the reasons provided, I therefore dismiss the appeal.