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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109722/2021

Open Preliminary Hearing held in Dundee Employment Tribunal by  
Cloud Based Video Platform (CVP) on 19 May 2022

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Employment Judge Tinnion

**Claimant:** Mr. Alan Kettles – In person

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**Respondent:** Hermes Parcelnet Limited – Mr. Proffitt (Counsel)

### **RESERVED JUDGMENT**

1. The Claimant's first ET1 claim form presented to the Tribunal on 24 May 2021  
20 under Case No: 4109722/2021 was rightly rejected by the Tribunal under Rules  
12(1)(d) and 12(2) because it wrongly contained confirmation that the early  
conciliation exemptions applied when those exemptions did not apply.
2. The Claimant's second ET1 claim form presented to the Tribunal on 1 June 2021  
25 under Case No: 4109847/2021 was rightly rejected by the Tribunal under Rules  
12(1)(d) and 12(2) because it wrongly contained confirmation that the early  
conciliation exemptions applied when those exemptions did not apply.
3. The Claimant's third ET1 claim form sent to the Tribunal via email on 27 October  
2021 shall be rejected because:
  - a. It was started by sending an ET1 claim form to the Tribunal in Scotland  
30 via email, hence was not started in compliance with Rules 8(1) and 85(2)  
because it was not started by presenting a completed ET1 claim form in  
accordance with para. 5 of the Employment Tribunals (Scotland)  
Presidential Practice Direction – Presentation of Claims (2018), which

only permits claims to be started in Scotland via three prescribed methods of delivery (online using online form submission service provided by HMCTS, by post to ET Central Office Glasgow, by hand to ET office);

- 5 b. the third ET1 claim form is not a completed claim form under Rule 8(1) because it omits the ACAS early conciliation certificate number R143695/21/40;
- c. the third ET1 claim form wrongly contains confirmation that one of the ACAS early conciliation exemptions applies when no relevant early conciliation exemption applies, so must be rejected under Rules 12(1)(d) and 12(2).
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4. The Claimant's third ET1 claim form shall be returned to the Claimant.

### **REASONS**

#### **Background**

- 15 5. The Tribunal makes the following findings of fact on the balance of probabilities. References in square brackets are to the relevant page number(s) in the production bundle used at the 19 May 2022 Open Preliminary Hearing (**OPH**).
6. The Claimant is a former employee of the Respondent who it dismissed on 5 April 2021 [45]. In 2021, the Claimant relied on Jack Faulds, his USDAW trade union representative, to do the "leg work" and have all necessary communications with the Tribunal relating to the Claimant's intended Employment Tribunal claim against the Respondent arising out of his dismissal.
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7. On 24 May 2021, Mr. Faulds presented the Claimant's first ET1 (assigned Case No: 4109722/2021) [22-33] without first contacting ACAS. The first ET1 included claims for 'ordinary' unfair dismissal, a redundancy payment, and notice pay [27].
- 25 The first ET1 stated the Claimant did not have an ACAS early conciliation certificate number [23] and ticked the box stating the following reason for not having that number: "*My claim consist only of a complaint of unfair dismissal which contains an application for interim relief*".

8. By letter dated 27 May 2021, the Tribunal notified the Claimant that the Tribunal (EJ Robison) had decided that the Tribunal could not accept the Claimant's first ET1 because (i) the Claimant had not complied with the requirement to contact ACAS before instituting relevant proceedings (ii) the claim form was defective because the Claimant had indicated on it that he was exempt from ACAS early conciliation whereas none of the relevant exemptions applied.
9. On 1 June 2021, Mr. Faulds presented the Claimant's second ET1 (this time assigned Case No: 4109847/2021), again without first containing ACAS, which this time included claims for unfair dismissal and a redundancy payment, omitted a notice pay claim, and now included an unspecified claim for "*other payments*" [6-22]. The second ET1 again stated the Claimant did not have an ACAS early conciliation certificate number, and again ticked the box stating the following reason for not having that number: "*My claim consist only of a complaint of unfair dismissal which contains an application for interim relief*".
10. The Tribunal did not accept the Claimant's second ET1 either.
11. On 3 June 2021 Mr. Faulds duly contacted ACAS on the Claimant's behalf, and on 4 June 2021 ACAS issued an early conciliation certificate against prospective respondent "Hermes" under Reference No. R143695/21/40 [21].
12. It is unclear what action (if any) Mr. Faulds took between 4 June 2021 and 26 October 2021 to progress the Claimant's intended claim against the Respondent. It is important to note that having obtained an ACAS early conciliation certificate on 4 June 2021, in the period 4 June 2021 – 26 October 2021 Mr. Faulds did not seek to re-present the first ET1 or the second ET1 by one of the prescribed methods of presentation of an ET1 claim form in Scotland - online, by post, or by hand – confirming he had an ACAS early conciliation certificate giving its number.
13. On 27 October 2021, Mr. Faulds emailed the Glasgow Employment Tribunal a copy of the Claimant's second ET1 (which the Tribunal shall call the third ET1) and the 4 June 2021 ACAS early conciliation certificate. His cover email stated: "*Our member Alan Kettles contacted you yesterday as he has had no contact in respect of his Employment Tribunal. As requested, I attach a copy of his Early*

*Conciliation Certificate R143695/21/40 and I also attach a copy of his ET Claim form. I would be grateful if you could let me know the current status of his claim.”*

14. On 4 November 2021, Mr. Faulds emailed the Glasgow Employment Tribunal again, stating: “*Further to our earlier telephone conversation, it has come to my attention that the above claim [4109722/2021] has been rejected and correspondence was sent to me at our Aberdeen office. I can confirm that I never received the correspondence and I had put the delay down to a backlog in tribunal cases. I appreciate that we are now over timescale, however, I am looking to see if the case could be re-opened as I was unaware that the claim had been rejected.*”

15. Although not clear, it appears the Tribunal treated Mr. Fauld’s 4 November 2021 email as an application for it to reconsider its previous decision to reject the Claimant’s third ET1 submitted via email on 27 October 2021.

16. By letter dated 18 November 2021 [103], the Tribunal notified the Respondent that the Claimant’s claim in Case No: 4109722/2021 had been accepted.

17. By a further letter dated 18 November 2021 [4-5], the Tribunal notified the Respondent that a “*claim has been accepted against you. We have noted that the claim of 27<sup>th</sup> October 2021 appears to have been submitted outwith the period within which claims of this type should normally be brought*”. The letter stated the Respondent might wish to submit a limited skeleton response at this stage dealing only with the issue of time bar. It is clear from the above that the ET1 claim form which the Tribunal had accepted was the third ET1 claim form submitted via email on 27 October 2021, not the first ET1 or the second ET1.

18. In response, the Respondent duly submitted an ET3 [35-42] and paper apart [43-44] entitled “*Grounds of Resistance*” which (i) noted that the claim the Respondent was required to respond to was received by the Tribunal on 27 October 2021 (ii) stated that the Tribunal did not have jurisdiction to over the claim on the grounds that the last date to bring a timely claim was 12 July 2021.

19. An Open Preliminary Hearing was listed on 19 May 2022 (**OPH**) to hear the Respondent's application to strike out the Claimant's claim under Rule 37(1)(a) on jurisdiction/time-bar grounds.
20. On 19 May 2022, the parties attended the OPH. At some point in 2021, Mr. Faulds ceased acting for the Claimant. Neither Mr. Faulds nor any other USDAW representative appeared at the OPH.
21. It was not until the OPH got underway that the Respondent's legal representative became aware that the Claimant's third ET1 had been sent to the Tribunal on 27 October 2021 not via one of the three prescribed methods of presentation permitted in Scotland but via email.
22. At the OPH, the Respondent indicated its intention to apply to have the Claimant's 27 October 2021 ET1 rejected because it had not been presented in a manner permitted by the applicable rules of procedure.
23. The Claimant appeared in person at the OPH, and had no prior notice of this new application (he was expecting to deal with the time bar issue). In order to give him fair notice of the Respondent's new application and a reasonable opportunity to seek legal advice before stating his position, the Tribunal ordered the Respondent to submit its application in writing and gave the Claimant until 30 June 2022 to notify the Tribunal and Respondent of his position.
24. At the OPH, the Tribunal asked the parties whether they wished the Respondent's new application to be decided at a hearing or 'on paper' without a further hearing. Both parties stated they were content for it to be decided 'on paper' without a further hearing because of its technical/procedural nature.

### Submissions

25. Respondent. The Respondent made its application by way of a skeleton argument. Summarising, the Respondent's case is that (i) under Rule 8 and the Presidential Practice Direction dated 2 March 2020, a completed ET1 claim form can only be presented in one of three ways – online (using the online form submission service), by post (to the ET Central Office), or by hand (to an ET

office) (ii) the Claimant's 27 October 2021 ET1 was submitted to the Tribunal via email, not via one of the three permitted methods of presentation, hence has not been validly presented under Rule 8 in accordance with the Practice Direction and should be rejected by the Tribunal (iii) it is not open to the Tribunal to allow the Claimant to present an ET1 claim form by way of a "composite" approach in which a later email providing an ACAS early conciliation certificate supplements an earlier non-valid ET1 claim form presented in a prescribed manner (iv) the Tribunal was referred to the EAT's decisions in Pryce v Baxsterstorey Ltd. and E.On Control Solutions Ltd. v Caspall.

26. Claimant. By letter dated 10 June 2022, the Claimant asked the Tribunal to use its discretion in the matter of time limits affecting his case. The Claimant accepted his original ET1 claim form was flawed because his partner misunderstood the need to go to ACAS first before going to the Tribunal. A certificate from ACAS was issued. The actions of the Claimant's trade union became opaque, and they withdrew their representation citing a 'conflict of interests, which the Claimant infers relates to errors the union made in advancing his case and the possibility he might seek legal redress from it as a result. The Claimant contends it would be unjust for matters now simply to be abandoned.

#### Relevant case law

27. In Pryce v Baxterstorey Ltd [2022] EAT 61, a claimant issued sex and race discrimination claims before she obtained an ACAS early conciliation certificate. A few days later, the claimant emailed the Tribunal an ACAS certificate which she had now obtained from ACAS and invited the Tribunal to add the ACAS reference number to her ET1 claim form. The claimant's claims were initially allowed to proceed, but some time later they were dismissed by the Tribunal for lack of jurisdiction. The claimant appealed to the EAT, which dismissed her appeal. The EAT (HHJ Shanks) held that:

- a. the only way to rectify an error of starting Tribunal proceedings before there is an ACAS early conciliation certificate in existence is to start them again after the ACAS certificate has been obtained using the standard claim form (para. 14);

b. Rule 8 requires a claim to be presented by sending a completed ET1 claim form to the Tribunal – this requirement cannot be waived by either the Tribunal or the respondent (para. 15);

5 c. Rule 12 does not contain any suggestion that the error of putting in an ET1 claim form without a certificate having been obtained is one of the specific errors subject to the procedure under Rule 13.

28. In E.On Control Solutions Ltd. v. Caspall [2019] UKEAT/0003/19, a claimant lodged two relevant ET1 claim forms: the first gave an incorrect ACAS early conciliation number relating to a different claimant and a different claim; the  
10 second gave the number of an EC certificate that was invalid. Neither claim was rejected under Rule 10 (form not used, failure to supply minimum information). Neither claim was referred to an Employment Judge under Rule 12. At a preliminary hearing, the Claimant applied to amend his claims to correct the ACAS EC number. The ET allowed the application, seeing it as consistent with  
15 the overriding objective and the general principle of access to justice given this was a minor amendment to rectify a technical error. The respondent appealed to the EAT, which allowed the appeal. The EAT (HHJ Eady QC) held that:

a. both claims failed to include an accurate ACAS EC number, hence were of a kind described in Rule 12(1)(c) (claim form which institutes relevant  
20 proceedings made on a claim form which does not contain an ACAS early conciliation number);

b. pursuant to Rule 12(2), the Employment Judge was required to reject both claims and return them to the Claimant;

c. this means there is no longer a claim before the Tribunal;

25 d. because there is no longer a claim before the Tribunal, the Employment Judge had no power to allow the claimant to amend their claim – the correct procedure is that laid down in Rule 13;

e. applying Sterling v United Learning Trust [2015] UKEAT/0439/14 (Langstaff J presiding), Rule 12 does not allow an Employment Judge not

to reject a claim where there is an error in the ACAS early conciliation certificate number;

f. Rule 12 obliges the Tribunal to reject a claim form if it considers that sub-  
paras. (1)(a), 1(b), 1(c) or (1) of Rule 12 apply, and this is true regardless  
5 of what stage is reached in the judicial process;

g. on rejection of the claim form, there is no longer a claim before the  
Tribunal that can be amended by exercise of the case management  
powers provided for in Rule 29;

h. Rule 6 does not give the Tribunal any discretion when considering a failure  
10 to comply with Rule 12.

#### Decision/conclusions

29. There is no dispute that the Claimant's first ET1 claim form presented on 24 May  
2021 and second ET1 claim form presented on 1 June 2021 were both presented  
before the Claimant had contacted ACAS to undergo early conciliation in  
15 circumstances where he was required to do so (there was no relevant early  
conciliation exemption). By virtue of section 18A of the Employment Tribunals  
Act 1996, the Tribunal had no jurisdiction to consider the Claimant's claims in  
either ET1 claim form. The Tribunal was right not to accept them.

30. The only live issue is whether the Tribunal should also reject the Claimant's third  
20 ET1 claim form presented via email on 27 October 2021. On the grounds below,  
the Tribunal concludes that this ET1 claim form must be rejected as well.

31. First, it is not in dispute that the Claimant's third ET1 was presented on 27  
October 2021 via email (and only via email), hence was not validly presented in  
accordance with Rule 8(1), which provides that a claim shall be started by  
25 presenting a completed claim form in accordance with any practice direction  
made under regulation 11 which supplements Rule 8.

32. In Scotland, the relevant practice direction is the Employment Tribunals  
(Scotland) President Practice Direction – Presentation of Claims (2018) which  
has effect on/from 28 November 2018 (not the Employment Tribunals (England



and Wales) Presidential Practice Direction – Presentation of Claims (2020) dated 2 March 2020 which, as its title implies, only applies to claims started in England and Wales.

5 33. Under para. 5 of the relevant practice direction, a completed claim form may be presented to a Tribunal in Scotland (1) online by using the online form submission service provided by Her Majesty’s Courts and Tribunal Service (2) by post to Employment Tribunals Central Office (Scotland), PO Box 27105, Glasgow (3) by hand to a Tribunal office listed in the schedule to the direction.

10 34. It is not in dispute that the Claimant’s third ET1 claim form was not presented to the Tribunal in Scotland in one of these permitted manners of presentation. It follows that it was not validly presented in accordance with Rule 8.

15 35. Second, the Claimant’s third ET1 claim form is a re-presentation of the Claimant’s second ET1 claim form. Like the second ET1, the third ET1 omits the ACAS early conciliation certificate number and so is not a completed claim form under Rule 8(1).

20 36. Third, the Claimant’s third ET1 claim form wrongly contains confirmation that one of the early conciliation exemptions applies when no relevant early conciliation exemption applies. It therefore falls squarely within the terms of Rule 12(1)(d). Applying Rule 12(2), the Tribunal has no discretion in the matter – the claim form must be rejected.

37. Fourth, the Tribunal has no general case management power or discretion in the matter which it can exercise in the Claimant’s favour. E.On Control Solutions Ltd. v. Caspall paras. 41, 54 and 56 applied.

25 **Employment Judge:** **A Tinnion**  
**Date of Judgment:** **12 July 2022**  
**Date Sent to Parties:** **12 July 2022**

