EMPLOYMENT TRIBUNALS

Claimant: **Mr Derek Allen**

Respondent: **Ringway Infrastructure Services Limited**

RECONSIDERATION JUDGMENT

Upon the Claimant's application for reconsideration of the Tribunal's Judgment dated 20 April 2022, determined without a hearing

The Claimant's application for reconsideration of the Tribunal's Judgment dated 20 April 2022 (sent to the parties on the 27 April 2022) is not well founded and is refused. The original Judgment is confirmed.

REASONS

1. The factual background to this case can be found the Tribunal's Judgment and full written reasons which have been provided to the parties separately. I therefore do not repeat the factual history here.
2. In an email dated 5 May 2022, the Claimant sought reconsideration of the Judgment.
3. The grounds for reconsideration can be summarised as follows:
    i. The Judgment is wrong and should be reconsidered because the claim form did contain the ACAS Early Conciliation certificate number(s) within box 8.2. The fact that the number missed the two final characters was a genuine error, should not lead to the claim being rejected and would not ordinarily under the rules now in place. Whilst there was a contradiction in what was said in the claim form in that an exemption was claimed, the Claimant provided clarification to the Tribunal office on the 7 September 2021 by providing a copy of one of the ACAS certificates.
    ii. It was apparent by 7 September 2021 that the contradiction on the ET1 form was not a fatal error. The claim had not been rejected under Rule 10(1) or 12(2) because the ET1 form had not been returned to the Claimant with

a notice of rejection with information about how to apply for a reconsideration of the rejection as required under Rules 10(2) or 12(3) respectively. The Tribunal office accepted the Claimant's clarification and subsequently confirmed in writing to the Claimant that the claim had been accepted and the claim was duly served on the Respondent.

iii. The original inconsistency in the ET1 form and the error in not including the 3 characters from the ACAS certificates was not a fatal error and had been rectified by complying with the Tribunal's request for the certificate numbers. This should have been sufficient for the claim of unfair dismissal to progress.

iv. The Judgement issued on 26 April refers to the rejection of the claim under rules 12(1)(c) and 12(1)(d). However, Rule 12(1) relates to Tribunal staff referring a claim to a Judge under certain circumstances and does not mention the word rejection.

v. Rule 12(2) refers to the rejection of a claim under certain conditions (in 12(1)). Rule 12(2) requires that the Employment Judge 'consider'. The ordinary meaning of the word in rule 12(2) requires the exercise of judgement and not simply an obligation to act arbitrarily, which could be read from the word 'shall' if it were present in rule 12(2) in isolation. If it is determined that the Tribunal does not have jurisdiction to accept the claim by reference only to the word 'shall' and not the word 'consider' in 12(2) then the rule has been incorrectly applied.

vi. The Employment Judge should have assessed whether the Claim Form confirms clearly and unambiguously that 12(1)(d) applies when it did not. Had the Claimant completed 2.3 without providing ACAS Early Conciliation Certificate number(s) the conclusion that the Tribunal did not have jurisdiction would have been correct. However, the Claimant also entered unambiguous information that ACAS had been contacted and provided the ACAS numbers in compliance with the rules. Where this was followed by the provision of a full ACAS Early Conciliation certificate, and the Claimant's subsequent submissions confirming that box 2.3 was completed incorrectly, then the correct determination should have been that the ET1 form did not confirm that one of the early conciliation exemptions applied and the Tribunal did have jurisdiction to determine the Claimant's claim of unfair dismissal.

vii. If it is determined that the judgment was in accordance with Rule 12(2), then rejection should be dealt with under Rules 10(2) or 12(3) which states that 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. The Judgment made on 26 April in accordance with Rule 12(2) does not appear to comply with the following Rule 12(3) "…the form shall be returned …." as the form has not been returned to the Claimant in the prescribed manner.

viii. The Tribunal court has and retains full jurisdiction in particular under Rules 2, 5, 8, 10, 12, 13, 70 and 71.

ix. The overriding objective should be applied when undertaking the reconsideration request. This matter is not currently being dealt with on an even footing. The Claimant and representative are lay people who have never submitted such claims to an Employment Tribunal in the past and the Respondent is a large organisation with huge resources and has employed a firm of solicitors and counsel to represent them. In view of this, discretion should be exercised in favour of the Claimant and the important safeguards within Rules 10-14 for the Claimant (and 17 to 20 for the Respondent) should be used accordingly in this case.

x. The issue, in this case, is one of a contradiction on a form and a missing '/19' from a reference number that was rectified (at the request of the Tribunal) by the Claimant but the rectification was not accepted by the Respondent. The level of involvement in both time and resources spent on deciding whether the form had been corrected, or can now be corrected, does not appear proportionate to the issue under review. In the alternative, the original ET1 form was corrected on 7 September 2021 (by supplying ACAS certificate number) so that it does not need to be rejected.

4. The Claimant asserts that the claim form did contain the ACAS Early Conciliation certificate number(s). I found as a fact on the basis of the evidence before me that it did not contain any such Early Conciliation certificate numbers. Rather, I found that what it contained was ACAS reference numbers. This is not the same as the certificate number which must be the reference number taken from the ACAS certificate. It was perfectly clear from what was said by the Claimant and his representative at the hearing, and from other documentary evidence before me, that they did not have a copy of the first certificate at the point when the ET1 was completed and lodged with the Tribunal. As they did not have the certificate at that point, they could not have provided the reference number from the certificate.

5. This is therefore not a case in which the number on the ACAS Early Conciliation certificate was wrongly transcribed or a mistake made when copying the number from the certificate. If it had been, then the Tribunal would have had discretion under rule 12(2ZA) to not reject the claim. However, the substantive defect was as per rule 12(1)(c) and not rule 12(1)(da). Discretion under rule 12(2ZA) could therefore not be exercised in this case.

6. Had rule 12(1)(da) applied and the only defect in the claim form been that an exemption had been incorrectly claimed, then it would, possibly, have been arguable that a purposive interpretation to rule 12(1) was required. I say this because 12(1)(d) appears to me to have been included as a substantive defect in order to prevent or discourage the mischief of a potential claimant relying upon an exemption when they are not actually exempt. The rules do not provide for a situation where an Early Conciliation certificate number has been included in the claim form or can be treated as such applying rule 12(2ZA) (thus showing that the early conciliation process has been followed) and at the same time an exemption was claimed. However, I have not reached a conclusion whether or not such a purposive interpretation would be appropriate because rule 12(1)(da) does not apply in this case and so it cannot assist the Claimant in any event.

7. Rule 12(1)(c) applies and so the Tribunal was required to decide that the claim be rejected on that basis. That being so, there was also a substantive defect in the claim under rule 12(1)(d).

8. In terms of the Tribunal's interpretation of rule 12, rule 12(1) requires that if certain substantive defects are identified in a claim form that the case be referred to an Employment Judge. That is what happened in this case. Rule 12(1)(2) then specifies how the Employment Judge concerned should deal with any such referral. It states that the Judge 'shall' reject a claim to which sub-paragraphs 12(1)(a),(b), (c) or (d) applies. Conversely, in respect of sub-paragraphs 12(1)(da), (e) and (f) the Judge has discretion not reject the claim.

9. The reference to 'considers' does not alter the meaning of rule 12(2). What 12(2) actually says is that the claim shall be rejected if the Judge considers that the claim is of kind described in sub-paragraphs 12(1)(a),(b), (c) or (d). It requires that the Judge consider whether any of those sub paragraphs apply. It does not confer any discretion upon the Judge to decide that the claim shall not be rejected if any of those sub-paragraphs do apply as is so in this case.

10. Further, it has been established in a line of authorities that the word 'shall' in rule 12(1) and (2) denotes that the effect of the rule is mandatory. There is no discretion in its application. [as per *Ash v. ISS Facility Services Limited* UKEAT/0098/20/00].

11. In *E.ON Control Solutions Limited v Caspall* [2020] ICR 552, HHJ Eady held that rule 6 of the ET Rules of Procedure did not provide discretion to override a mandatory requirement to reject a claim when there was no express discretion within the terms of the rule concerned. For the same reasons, I do not consider that the terms of overriding objective (rule 2) can confer a discretion in circumstances where another rule, in this case rule 12, is mandatory.

12. In *Caspall*, HHJ Eady also held that if a case falls to be rejected under rule 10 or 12, that the Tribunal cannot instead exercise case management powers and allow an amendment of the claim form. The correct approach is that the claims should be rejected and then a rectified claim form submitted in reliance upon rule 13.

13. Therefore, even though the Claimant clarified the position with the Tribunal in September 2021, his original claim form still fell to be rejected under rule 12.

14. For those reasons, the claimant's application for reconsideration made under rules 70 and 71 of the Employment Tribunals Rules of Procedure is not well-founded and is refused. Acting in accordance with rule 72, I do not consider that the interests of justice require that the Judgment or its Reasons be varied or revoked. There is no reasonable prospect of such variation or revocation. The Judgment and its Reasons are confirmed.

Employment Judge Boyes

Date: 17 July 2022

Case Number: 3313723/2021

Sent to the parties on: 19 July 2022

For the Tribunal Office

Public access to Employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.