EMPLOYMENT TRIBUNALS

Claimant: Miss C Ritcher

Respondent: Bath Cricket Club

Heard at: Southampton (By CVP) **On:** 24 November 2021

Before: Employment Judge Self

Appearances

For the Claimant: Mr C Kelly - Counsel

For the Respondent: Ms E Misra - Counsel

RESERVED JUDGMENT

The Respondent's applications for this claim to be struck out pursuant to Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) and/or for this Claim to be rejected pursuant to either Rule10 ar Rule 12 are not well-founded and are dismissed.

WRITTEN REASONS

1. The Claimant was dismissed on 16 April 2020. Prior to commencing these proceedings, the Claimant had entered into Early Conciliation (hereafter EC) with Bath Cricket Club on 17 April 2020 and an EC Certificate was issued on 17 May 2020 numbered R139887/20/74 (hereafter "the First Certificate"). In addition, the Claimant entered into EC with Bath Cricket Club Limited on 20 April 2020 and the EC certificate was issued on 20 May 2020 numbered R140335/20/19 (hereafter "the Second Certificate").

2. By a Claim Form received at the Tribunal on 20 July 2020 the Claimant sought compensation from Bath Cricket Club Limited in respect of unfair dismissal, disability discrimination, sex discrimination including Equal Pay and unlawful deductions of wages. She confirmed the ACAS EC number as being that of the Second Certificate. That was indeed the correct ACAS EC relating to Bath Cricket Club Limited. From such straightforward facts does satellite litigation emerge, that is both costly and time consuming.

3. The factual background is unremarkable and from my experience a reasonably regular occurrence when Claimants are unsure as to the precise nomenclature of their employer.

4. There would have been no reason why the Claim Form would have been referred to an Employment Judge upon receipt as it would appear to anybody looking at the Claim Form that Bath Cricket Club Limited were the intended Respondent and there was a valid ACAS EC Certificate in the name of that entity.

5. A Response was received within the time limit permitted from Bath Cricket Club. The front page of the Response sets out the claim as it had been received and passed on i.e. ***"Miss C Ritcher v Bath Cricket Club Limited"*** (page 38) but when setting out the Respondent's details at section 2 of the Response Form the name of the individual company or organisation responding is "***Bath Cricket Club"***.

6. At section 3 under ACAS Early Conciliation details is written ***"The Claimant has stated the wrong Early Conciliation certificate number on her claim form. It should be R139887/20/74"*** Within the Response document at paragraph 2 the Respondent stated as follows:

   "The Claimant has not provided the correct Early Conciliation certificate number in her claim, therefore the claim is inaccurate and the Respondent respectfully contends that it should have been rejected by the Employment Tribunal under Rule 10 and or Rule 12 of the Employment Tribunals Rules of Procedure 2013 (sic) as amended".

   Although raised in the terms set out above within the body of the Response there was no specific application made by the Respondent in relation to the EC issue by way of a separate written application and the Tribunal itself did not respond to that specific issue when it considered the papers at the Rule 26 consideration stage.

7. As a matter of fact, the Claimant had not provided an incorrect EC Certificate number in her claim. She had intended to bring proceedings against Bath Cricket Club Limited and she had included the correct number for the Claim

against that entity. There was no procedural error in terms of the EC Certificate number at all.

8. What the Claimant had done was bring her Claim against the potential Respondent who it transpires was the wrong Respondent. Again, on a regular basis, Claimants will lodge claims against entities whose name is not quite right on the Claim Form and in particular claims are often brought against "X" when the correct name is "X Limited" or vice versa.

9. At the Rule 26 stage the matter was listed for a Closed Preliminary Hearing as the Claim contained a number of discrimination claims and the issues would need to be identified and agreed. At that hearing there would be discussion of whether or not there would need to be a separate Preliminary Hearing in respect of who the correct Respondent was or whether the same could be agreed. The Claimant had brought a claim against a Limited company but the Response had been filed by a non-corporate entity. Further if there were any ACAS EC issues to be resolved, consideration could also be given as to whether or not an Open Preliminary Hearing was required to resolve them.

10. That Closed Preliminary Hearing was listed for 27 May 2021 and in the course of that hearing EJ Salter ordered a final hearing to be listed for 25-29 April 2022.

11. In addition, so far as may be relevant:
    a) An order was made under a heading "Correction of the Respondent's Name" that the correct name for the Respondent was Bath Cricket Club (the Respondent) as opposed to Bath Cricket Club Limited and the Claim was amended so that it was against the correct legal entity;
    b) An Amended Response was ordered which was to include, inter alia, "the Respondent's position on the Claimant's compliance with ACAS Conciliation and the effect this has on the jurisdiction of the Tribunal".
    c) The issue for the Respondent was that it had "a different EC Certificate than the Tribunal" (the First Certificate).

12. There was no reasoning given within the Case Management Order for the change of name but whether of the Court's own initiative or by application of either one of the parties there was no objection to what had taken place and neither party took up the offer of correcting it given at paragraph 7 of the Order. As I said earlier it is a common occurrence for claims to be brought without designating the organisation as a Limited Company and vice versa. Such amendments are almost always made without objection or consequence.

13. The basis for substituting Respondents (or indeed any party) is derived from Rule 34 of the Employment Tribunal Rules of Procedure:

"The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal, which it is in the interests of justice to have determined in the proceedings; and may remove any party wrongly included".

14. Continuing with the chronology shortly after the Preliminary Hearing the Claimant wrote to the Tribunal as follows (4 June 2021):

"I am the claimant in the above matter.

Further to the Respondents solicitor's correspondence of the 3rd of June 2021 I would like to draw the tribunal's attention to the following error. In their letter of the 3 June 2021 they have requested to see the ACAS Early Conciliation certificate numbered 140135/20/19 which I believe is wrong as the ACAS Early Conciliation certificate number I originally quoted incorrectly on my ET1 was or 140335/20/19.

To clarify after I received the Grounds of Resistance on the 21st of October 2020 in which the Respondent's solicitor asked for the claim to be struck out because of my error, I contacted Bristol employment tribunal to inform them that I had used the wrong EC number on my ET1. I used are 140335/20/19 and I should have used R139887/20/74. I was of the understanding that this issue had already been resolved by the court and accepted by the Respondent's solicitor.
I hope the information provided here has now resolved this issue.
I confirm that I have copied in the Respondents legal representative to this correspondence."

15. I have not seen a copy of the 3 June email but I do not consider that anything relevant in this case turns on that document. With the greatest respect to the Claimant I am not sure that much clarification is brought by this email.

16. The Claimant responded to a request for Further Particulars but there was nothing within them that goes to the EC point. An amended Response was then filed and within that document the Respondent's position to the EC point was amplified as they had now seen both EC Certificates. Their position was set out at paragraphs 2 of the Amended document and reads as follows:

"The Claimant has not provided the correct Early Conciliation certificate number in her claim. There are two Early Conciliation certificates which were obtained by the claimant, the first of which: R139887/20/74 (issued on 17 May 2020) which identifies the correct respondent was not referred to on the Claim form. The second EC certificate: R140335/20/19

(issued on the 20 May 2020) was entered onto the Claim form and does not identify the correct Respondent, therefore the Claim Form is inaccurate and the Respondent respectively contends that it should have been rejected by the Employment Tribunal Under rule 10 and / or rule 12 of the Employment Tribunals Rules of Procedure 2013 (as amended) and in accordance with the case law which states that the earlier of the Early Conciliation certificates should stand as the valid certificate where there are multiple. As this earliest certificate was not referenced on the Claim Form the Respondent therefore submits that the Claim ought properly to be struck out. The Respondent avers that it was reasonably practicable for the claimant to have presented a correct Claim form as she was the beneficiary of legal advice at the time, she submitted her claim. If it was reasonably practicable the Respondent will contend that as the claim has not been resubmitted despite this point having been raised by the Respondent in its Grounds of Resistance the Claimant has not submitted a correct claim form within a reasonable further period. It is also not just and equitable to extend time in respect of the elements of the claim which derive from the Equality Act 2010."

17. This Amended Response was sent to the Tribunal and copied into the Claimant on 23 June 2021. In an accompanying letter there are a number of paragraphs headed "Application to Strike out the Claim" and they read as follows:

"In compliance with paragraph 13 of the Case Management Directions dated 1 June specifically we set out our response to the position of the Claimant's compliance with ACAS Early Conciliation and the effect this has on the jurisdiction of the tribunal…

The claimant failed to provide the correct Early Conciliation Certificate number in her claim. The claimant obtained 2 ACAS Early Conciliation certificates, the first of which, 139887/20/74 issued on the 17 May 2020 identifies the correct Respondent but this was not the certificate to which she referred to on the Claim form. The second EC certificate R140335/20/19 issued on the 20 May 2020 was added onto the Claim form and does not identify the correct Respondent. We attach copies of both certificates for ease of reference.

As the earliest certificate was not referenced on the Claim form the Respondent submits that the claim has not been validly instituted and respectfully submits that the Tribunal was required to reject it under Rule 10 and / or Rule 12 of the Employment Tribunals Rules of Procedure 2013 (as amended) (the "ET Rules") and in line with HM Revenue and Customs V Serra Garau UK EAT 0348/16. Accordingly, the Respondent makes an application under rule 37 (1) (c) of the ET rules to strike out the claim for failure to comply with the ET Rules.

The respondent notes that the amendments to the ET rules which came into force on the 8th of October 2020 are not applicable in this matter as they do not have retrospective effect.

If the tribunal agrees then it is bound to reject the claim then, applying the EAT decision in E-On Control Solutions Limited V Caspall UK EAT 0003/19, even if the error is corrected the claim would have been presented substantially out of time for the purposes of section 111 (2) (a) of the Employment Rights Act 1996".

18. On 2 July 2021 the Claimant wrote to the Tribunal to object to the application. The email is lengthy and so I summarise it here:

a) The Claimant contended that she had not submitted the wrong ACAS EC Certificate.

b) She explained that she entered EC against Bath Cricket Club on the day after she was dismissed identifying the correct address and at the end of that process, she got an EC Certificate against that entity R139887/20/74.

c) The Claimant indicated that the following day she started to fill out her ET1 and noted that on her payslip it stated Bath Cricket Club Limited which was different to what was on her contract of employment and so she thought the Limited company must be her employer. She states that she contacted ACAS about the mistake and on 20 May 2020 ACAS issued a replacement certificate numbered R140335/20/19. The Claimant then entered the Limited company and the Second EC Certificate number on her claim form.

d) The Claimant stated that she was not aware of any issue being raised about the EC certificate until contacting the Tribunal on 12 October. The Tribunal had not sent a copy of the Response out to her by that time and the Respondent had made a mistake on her email address and so had not copied the Claimant in when it had been submitted. She wryly pointed out ***"that simple mistakes can happen to the best of us"***.

e) The Claimant indicated that she spoke to a clerk by telephone and was told that as no application to strike out had been made no further action was required.

f) In all the circumstances the application was misconceived. She commented on a number of cases cited by the Claimant and then cited a number of authorities herself in support of her position.

g) She concluded by saying **"The correct Early Conciliation certificate was entered against the respondent on the ET1. ACAS was satisfied that the correct Respondent had been contacted and the Claimant had complied with her obligation. The natural effect of the Respondent's application would be to deprive any claimant acting reasonably and honestly of pursuing a claim due to a minor error in the name of the Respondent, an error that in this case has been predicated by the Respondent itself. This would result in many thousands of claims being excluded each year and this cannot be in the interests of justice. It is also a tremendous waste of the Tribunal's resources when they are clearly stretched at the moment.**"

19. The timings of the Claimant's account in her letter do not appear to be correct. The second certificate for the Limited Company refers to the EC period starting on 20 April 2020 and that must have been the date it was submitted originally and the Claimant thought that she was employed by the Limited company. It cannot have been applied for as suggested by the Claimant on or around 18 May 2020.

20. The Respondent sent a lengthy reply on 20 July 2021 and an Open Preliminary Hearing was set down to consider the respective points. I have had the benefit of extensive skeleton arguments from both counsel and I have also had the benefit of extensive oral argument which extended to the end of the time allotted so that a reserved decision was necessary to try and do justice to the efforts that both parties had put into the hearing. It was hoped to issue this Judgment before Christmas but unfortunately this was not possible for Covid reasons.

21. The Law

Section18A (1) of the ETA 1996 provides as follows:

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)."

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

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

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

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

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

10.— Rejection: form not used or failure to supply minimum information

(1) The Tribunal shall reject a claim if—
…
(c) it does not contain one of the following—
(i) an early conciliation number;
(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.— Rejection: substantive defects

(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;

(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;
…
(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 (a), (b), (c) or (d) of paragraph (1).
(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.
(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) or (f) of paragraph (1) 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.

26. Rule 12(1)(da) and rule 12(2ZA) were introduced into rule 12 by regulation 7 of the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 ('2020) Regulations').

27. Regulation 1(2) of the 2020 Regulations deals with their commencement as follows:

(2) Regulations 19, 20, 21 and 22(2) come into force on 1st December 2020 and the remainder of these Regulations come into force on 8th October 2020.

28. Regulation 22 of the 2020 Regulations provides for the following transitional provisions:
(1) Subject to paragraph (2), these Regulations apply in relation to all proceedings to which they relate.
(2) The amendments to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 made by these Regulations apply when the requirement for early conciliation is satisfied in accordance with rule 1 of the Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 on or after 1st December2020.

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

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

30. The Respondent's Position

The Respondent cited the authority of **HM Revenue and Customs Commissioners v Serra Garau [2017] ICR 1121** and in particular paragraphs 18 to 21 thereof per Kerr J, to the effect that there is only one mandatory process enacted by the statutory scheme and only one certificate is required for "proceedings relating to any matter" and therefore a second certificate in relation to the same matter is "not a certificate falling within s.18A(4)".

31. The Respondent contended that the EAT again held that once an EC certificate has been issued pursuant to s.18A(4) ETA there cannot be a valid second certificate in respect of the same matter**: E.ON Control Solutions Ltd v Caspall [2020] ICR 552** per Eady J at paragraphs 33 and 51.

32. Accordingly, the claim ought to have been rejected under rule 10(1)(c)(i) in the first place and fell to be rejected at the PH under rule 12(2) once the failure became apparent. Rule 6 provides no means of overriding the mandatory rejection and nor is the overriding objective of assistance per E.ON. The position that the ET was required to reject the claim under rule 10 or rule 12 of Schedule 1 to the "the Rules".

33. The reason that the Respondent has applied to strike out the Claimant's claim was because the Tribunal does not have jurisdiction to hear the Claim. The reason for that is that the Second Certificate is not recognised for the purpose of s.18A ETA and therefore there is no ET1 before the ET which bears the EC number of a valid EC certificate.

34. The Respondent contended that the First Certificate was a valid EC certificate. The Claimant had the First Certificate and could have used it at the time of presenting her ET1. That she has acted under a mistake or in error is simply irrelevant insofar as the ET's jurisdiction is concerned. The regime is a strict one and the claim pre-dates the modifications brought in with effect from 8 October 2020.

35. Even if the Respondent had not made its application to strike out, the ET would be obliged to reject the claim in any event, but by making this application now the Respondent has brought the matter to attention of the ET and therefore rule 12(2) now applies. As the Claim Form does not bear a valid EC certificate number it is not a validly instituted claim. The rejection of the claim now, is inevitable as a matter of jurisdiction (see paragraph 54 of EON) and will then trigger other procedural steps under the Rules.

36. The Respondent asserted that the "correction" of the name of the Respondent at the PH on 27 May 2021 is a nullity because the claim itself is a nullity. There is no application made by the Claimant for reconsideration of a decision to reject her claim under rule 10 or rule 12 because that has not yet happened

and it is then for the Claimant to apply for reconsideration or not as she sees fit.

37. **The Claimant's Position**
Unsurprisingly the Claimant took an alternative view. The Claimant stated that the Tribunal has a discretion under rule 12(2ZA) of the Employment Tribunals (Constitution and Rules of Procedure) Rules 2013 ('ET Rules') not to reject the Claimant's claim where "the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim." That discretion should be exercised in favour of the Claimant. The Respondent was wrong to claim that the Tribunal cannot now exercise this power, which was conferred by an amendment to the ET Rules with effect from 8th October 2020.

38. In the alternative, should the Tribunal consider that the Claimant's claim should be rejected the Tribunal was invited to immediately consider an application under rule 13(1)(b) for (i) reconsideration on the basis that "the notified defect can be rectified" and (ii) to accept the Claimant's claim.

39. The Claimant accepted the Respondent's contention that both early conciliation certificates relate to the same 'matter' for the purposes of section 18A ETA, and the consequence of this is that the second early conciliation certificate is not a 'certificate' for the purposes of section 18A(4) ETA: **HMRC v Serra Garau [2017] ICR 1121**. I expressed concerns as to whether that was correct and will return to that issue later in these Reasons.

40. The Claimant suggested that the Respondent's application was in form an application to strike out under rule 37 however, the application, and this preliminary hearing, are properly analysed as a judicial consideration of whether the claim form should be rejected pursuant to rule 12. As HHJ Eady QC (as she then was) observed in ***E.ON Control Solutions Ltd v Caspall [2020] ICR 552,*** at [57], where a claim has failed to comply with the requirements of rule 12, then there are no proceedings to which rule 6 (as was relevant in that case) might apply.

41. Similarly, rule 37 of the ET Rules begins ***"At any stage of the proceedings, …a Tribunal may strike out all or part of a claim…"***. On the Respondent's case, rule 12(1) has not been complied with, and there are therefore no 'proceedings.' Therefore, this hearing is to allow the Tribunal to determine whether it should reject the claim under rule 12 or not. It cannot be an application pursuant to rule 37. Rule 10 is not the relevant rule. As Simler J (as she then was) recognised in Adams v British Telecommunications plc [2017] ICR 382, at [5], where rule 10 applies "the tribunal has no option but to reject the claim unless that omission is capable of being excused by considering some other rule". Rule 12(2ZA) is such other rule.

42. The Claimant contended that the Claimant could benefit from the amendments to Rule 12 and that the Tribunal should apply the ET Rules as they now stand, and in particular rules 12(1)(da) and 12 (2ZA).

43. The Claimant stated that in the Respondent's application they had stated that the amendments did not apply to this case but suggested that this misunderstood the nature of Rule 12 as retrospectivity does not arise. Rule 12 confers a power which the Tribunal may choose to exercise now i.e. whether or not to reject the claim. Rule 12(2ZA) states ***"claim shall be rejected if the Judge considers…"***. Consideration is occurring at this preliminary hearing. Rule 12 does not artificially require the Tribunal to consider the claim on the date of presentation. Rule 12 does not impose any such requirement. Indeed, such a requirement would not sit consistently with the terms of rule 12, which contemplates consideration occurring following a referral to the judge by Tribunal staff. This will necessarily take place on a date later than the date of the presentation of the claim.

44. This much was recognised by HHJ Eady QC in E.ON at [42]:
"On its face, rule 12 of the Rules would seem to envisage that the input of the judge (under paragraph (2)) will arise after the claim form has been the subject of a reference under paragraph (1)".

45. Secondly, the transitional provisions contained in regulation 22 of the 2020 Regulations do not limit the effect of the amendment made by regulation 7 to insert rules 12(1)(da) and 12(2ZA) by reference to the date of the presentation of the claim. Rather, regulation 22(1) simply states that the amendments apply ***"in relation to all proceedings to which they relate".*** On the plain terms of those amendments, these are proceedings to which they relate, therefore Rule 12(1)(da) is applicable to the present case.

46. Thirdly, it is clear that Parliament has made a conscious choice not to limit the effect of the amendments made by the 2020 Regulations to the ET Rules by reference to the date of the presentation of claims. This can be seen by contrasting regulation 22(1) with other amending regulations.

47. Regulation 22(2) of the 2020 Regulations amends the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 but limits the effect of those amendments by reference to the date on which the requirement for early conciliation has been satisfied.

48. Regulation 8 of the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2014 ('2014 Regulations') amends rule 12 of the ET Rules to insert rules 12(1)(c)-(f). Regulation 11 of the 2014 Regulations provides that those amendments take effect only in relation to claims presented after particular dates.

49. Regulation 15 of the Employment Tribunals (Constitution and Rules of

Procedure) Regulations 2013 themselves provide for transitional provisions based on the dates of receipt of claim forms by respondents, or the presentation of certain classes of appeal.

50. Fourthly it is consistent with the statutory purpose of the amendments made by the 2020 Regulations that they would have effect in respect of all present claims, not just claims which were presented from 8th October 2020 onwards. The Explanatory Note to the 2020 Regulations describes their overall impact and purpose as follows: ***"The primary impact of these changes is to reduce unnecessary bureaucracy in providing access to justice through the employment tribunal system."***

51. This addresses precisely the concern identified by HHJ Eady QC in E.ON: ***"The rationale of the early conciliation scheme is to encourage the settlement of employment disputes at an early stage and so avoid the institution of employment tribunal proceedings: see the commentary in Harvey on Industrial Relations and Employment Law at PI [286.04]. That is a laudable aim but the requirements then imposed in relation to prospective employment tribunal proceedings (in particular, the mandatory provisions of rules 10 and 12 of the Employment Tribunals Rules of Procedure 2013) are giving rise to satellite disputes, with a number of such cases having reached the Employment Appeal Tribunal in recent years. It seems unlikely that this was Parliament's intention and it might be thought that the time had come for a review of employment tribunal procedures relating to Acas early conciliation. That, however, is plainly a matter for others; my role in deciding the issues raised by this appeal has to be to apply the law as it currently stands."***

52. The Claimant opined that it would be a strange frustration of the purpose of the amendments made by the 2020 Regulations if they preserve the "unnecessary bureaucracy" in respect of claims presented pre-8th October 2020 without any obvious or sensible reason to do so.

53. The Claimant asked the Tribunal to accept the explanation which the Claimant had provided for her error in her email of 2nd July 2021 i.e. that she mistakenly assumed that the correct name for her employer was "Bath Cricket Club Limited as that name was clearly printed on the top of her payslip. I have seen that pay slip and can confirm that is correct. I accept that it was this that led the Claimant to obtaining a second early conciliation certificate in a different organisation's name.

54. The Claimant stated that it would not be in the interest of justice to reject the claim. It was an entirely understandable error for a claimant to have made. The desire to correct this error by contacting ACAS is characteristic of a claimant who is diligent and concerned to comply with the relevant rules. It is regrettable

that the often-complex rules surrounding ACAS certificates lay traps for even conscientious claimants.

55. Further the decision to issue a second certificate was taken by ACAS and the Claimant has acted promptly and conscientiously once she was aware that the early conciliation certificates were an issue which the Respondent had raised. In summary, the Claimant had at all times acted as a conscientious and diligent litigant, attempting to comply with the Tribunal's rules and it would not be in the interests of justice to reject her claim.

56. Conclusions

Scope of this Hearing

I am satisfied that I am unable to take the scope of this hearing as far as the Claimant requested. I am able to deal with whether or not the Claimant has complied with what is required of her under the Early Conciliation legislation and I am also able to make a decision as to whether or not the Claim should be rejected pursuant to Section 18A of the Employment Tribunals Act and pursuant to Rules 10 and 12 of the Employment Tribunal Rules of Procedure. I do not consider it helpful to look at matters from a strike out perspective as it is not necessary to do so. I will look at it via the Rejection part of the Tribunal's Rules of Procedure.

57. If I reject the claim under either Rule 10 or Rule 12, then 10(2) and 12(4) mandate that the Form must be returned to the Claimant with a notice of rejection explaining why it has been rejected and the form shall contain information about how to apply for a reconsideration of that rejection. Under Rule 13 a reconsideration can be applied for on the basis that either the decision to reject was wrong or the notified defect can be rectified.

58. It seems to me that before any application for reconsideration can be made pursuant to Rule 13, a written application has to be made within 14 days of the date of the rejection setting out the grounds for the reconsideration. It seems obvious to me that my decision on the EC points raised today needs to be fully known before any meaningful application could be put forward by the Claimant in possession of all the facts of any rejection. This judgment will therefore be restricted to either accepting or rejecting the Claim. Any reconsideration application / time limit points would need to be addressed at a further Open Preliminary Hearing. I informed the parties that this would be my decision on the scope of the hearing and a further listing has been set aside for that if required.

59. **Has the Claimant complied with her Early Conciliation obligations / Are their grounds to Reject the Claim?**

As stated, above Section 18A (1) imposes a mandatory obligation to contact ACAS in the prescribed manner before instituting any proceedings unless one of the subsection 7 exemptions apply. None do in this case.

60. The Claimant complied with her statutory obligation in respect of matters against both Bath Cricket Club and Bath Cricket Club Limited. Whilst the subject matter of both Claims would be the same, the Claimant placed herself in the position of lifting the bar and opening the way to bring a Claim against either putative Respondent. As I have stated earlier Claimants will often do that and it is a common occurrence where there is more than one EC Certificate against different Respondents prior to the issue of the Claim.

61. I accept the Claimant's account of why there was some confusion, in that her payslip referred to the Limited Company and that she had perfectly good grounds to do what she did i.e. instigate Early Conciliation against two different Respondents.

62. She initially thought that her employer was Bath Cricket Club and so entered into Early Conciliation with that entity on 17 April 2020. Three days later doubt crept in as to the identity of her employer and so she entered into Early Conciliation with Bath Cricket Club Limited on 20 April 2020. Early Conciliation lasted a calendar month with both entities and EC Certificates were issued on 17 May 2020 and on 20 May 2020 respectively. The Bath Cricket Club EC Certificate was first in time.

63. On 20 July 2020 the Claimant issued her claim against Bath Cricket Club Limited with the correct EC number as against that entity. I can see no problem with that at all. Once she had decided that the correct Respondent was the Limited Company that was the only course which would be compliant with the Rules. If she had issued against the Limited Company and put in the number for the non-corporate entity the Claim would have been rejected. I am of the view that there is no reason for the Claim to be rejected. I come to that conclusion for the following reasons.

64. In this claim the Claimant elected to bring her Claim against Bath Cricket Club Limited and entered the correct EC number for that entity. If that EC number is on a valid certificate then that is compliant with the Early Conciliation legislation relating to what is required before bringing a claim. A valid claim against Bath Cricket Club Limited is in existence. There is no reason to reject that Claim. The fact that the Claimant could have brought a Claim against Bath Cricket Club citing the correct certificate number for them or issued against both Respondents citing the correct numbers is immaterial.

65. The Respondent responds to the Claim indicating that the wrong Respondent has been cited on the Claim Form and the actual Respondent is the non-incorporated Bath Cricket Club. That is not an issue that pertains to the EC number but as to the correct nomenclature of the Respondent. At that point the Claimant can stand her ground on the identity of the Respondent she has cited and there will be a determination of the matter or she can agree that there should be a substitution / amendment to the identity the Respondent has contended for. The issue of compliance with the EC provisions has passed

because the bar has been lifted and the necessary EC protocols have been followed.

66. On the basis of what the Respondent has pleaded it would appear that there were factual issues to be determined between Bath Cricket Club and the Claimant, as that was that entity she was an employee of. In those circumstances it was appropriate to remove from the Claim the Limited Company and to substitute the correct Respondent. That was seemingly done by agreement and must have been done pursuant to Rule 34 of the Tribunal Rules. The Claim from the 27 May 2021 is against Bath Cricket Club because that is the decision of EJ Salter.

67. Where a substitution such as this is permitted under the Rules there are no further obligations under the Early Conciliation procedure that needs to be taken. There is no obligation to amend the EC Certificate at that point.

68. In those circumstances I can see no issue with the validity of the Claim before me and the Claim will proceed to trial. Whilst an alternative means of achieving the same outcome would have been to issue against Bath Cricket Club at the outset citing the First Certificate Number, I can see no issue with the means by which the same result has been achieved.

69. This finding is at variance with the position of both sides but I did give the parties an opportunity to respond to my concerns about their view of the law and facts detailed above. Both counsel before me were in agreement that the Second Certificate was not valid and I have had cited to me at some length the authority of **The Commissioners of HM Customs and Excise v Serra Garau EAT 0348/16** which was determined in March 2017. I raised the point that it appeared that the case was distinguishable but neither counsel agreed. I have considered the authorities cited to me carefully and have concluded that the facts in that case are very different to this claim and I consider can therefore be distinguished.

70. In **Serra Garau** the Claimant was given notice on 1 October 2015 and the notice would expire on, and the Effective date of Termination would be, 30 December 2015. The Claimant contacted ACAS, and Early Conciliation lasted between 12 October 2015 and 4 November 2015 as against the Respondent. On 28 March 2016 the Claimant applied for a second ACAS EC Certificate against the Respondent and the second EC period lasted until 25 April 2016. The Claimant brought the claim to the Tribunal on 25 May 2016. Both EC Certificates were issued naming a single employer. There were two certificates against the same entity.

71. The issue for the Employment Judge in that case to sort out was whether or not the Claim had been brought in time which in turn brought in issues about the validity of the second certificate. As Kerr J put it at para 15:

"Against that background, the issue before me in this appeal is whether more than one certificate can be issued by ACAS under the statutory procedures and what effect, if any, a second such certificate has on the running of time for limitation purposes."

72. Kerr J preferred the arguments of the Respondent and dismissed the appeal. So far as is relevant the reasoning was as follows:

"18."Only one mandatory process in enacted by the statutory provisions. The effect of the provision is to prevent the bringing of a claim without first obtaining an early conciliation certificate. Once that has been done, the prohibition against bringing a claim enacted by section 18A(8) of the Employment Tribunals Act is lifted.

19. The quid pro quo for the prohibition against issuing a claim until a certificate is obtained, is that the limitation regime is modified so that the certification process does not prejudice the claimant. That is how section 207B of the Employment Rights Act and its counterpart section 140B of the Equality Act operate.

20. I agree with Mr Northall that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.

21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4). The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of procedure scheduled to the 2014 Regulations.

73. Kerr J then went on to deal with the impact of section 207B ERA and section 140B of the EqA in respect of the impact of EC upon time limits.

22. Section 207B then deals with the impact of the section 18A regime (and the 2014 Regulations) on unfair dismissal time limits. Section 140B of the Equality Act deals in the same way with discrimination claims, as is agreed. I can therefore confine myself to section207B.

23. That section modifies the limitation regime by defining "Day A" and "Day B" and discounting for limitation purposes periods falling between them, and giving the claimant a further month in which to claim after the end of Day B, where the primary period of limitation would expire during the period between one day after Day A and Day B. There is no provision requiring Day A or Day B to fall within a primary limitation period however; either or both may or may not do so.

24. I am satisfied that the definition of "Day A" in section 207B(2)(a) refers to a mandatory notification under section 18A(1). It does not refer to a purely voluntary second notification which is not a notification falling within section 18A(1). Similarly, I am satisfied that the definition of "Day B" in section 207B(2)(b) of the Employment Rights Act refers to a mandatory certificate obtained under section 18A(4) of the Employment Tribunals Act.
Section 207B(2)(b) says as much. It does not refer to a purely voluntary second certificate not falling within section 18A(4).

25. Therefore such a voluntary second certificate does not trigger the modified limitation regime in section 207B or its counterpart in the Equality Act section 140B. Such a second voluntary certificate is not required under the mandatory early conciliation provisions and does not generate the quid pro quo of a slightly relaxed limitation regime.

26. That does not mean, of course, that continuing voluntary conciliation under the auspices of ACAS is other than useful and to be encouraged. Voluntary conciliation through ACAS has been available for decades, since long before the mandatory element was introduced in 2014. Such voluntary conciliation does not, of itself, modify time limits; though it may influence tribunals which have to decide whether to allow amendments, grant extensions of time, or make other case management decisions.

74. I expressed at the hearing that I did not view that the authority cited above is authority that binds me in the instant case. Here there are two potential Respondents and the Claimant within a short space of time decides as a "belt and braces" approach to get an EC Certificate against each potential Respondent. To use the language of Kerr J the prohibition had been lifted for the Claimant to bring claims against either Bath Cricket Club or Bath Cricket Club Limited or both. I can see no reason why the Claimant could not have put both Respondents with their respective EC numbers on the Claim Form and the claims against both would have been valid. I can see nothing within the Tribunal Rules or primary legislation that prevents such a course.

75. It would be absurd for a Claimant who mistakenly enters into EC against a named Respondent to then have no remedy if she subsequently discovers she has been mistaken in naming the Respondent and gets a second EC Certificate in another entity's name. I consider that Serra Garau is clearly distinguishable upon its facts and in particular that the two EC Certificates were against the same Respondent in that case and against two different Respondents in this case.

76. The second case cited to me is **E.On Control Solutions v Caspall**. That case draws support from Serra Garau but again in that case (which is confusing on its facts) there was ultimately only one Respondent.

77. The facts of **E.On** are that the Claimant was employed by the Respondent, then known as Matrix Control Solutions Ltd ("MCS"), from August 2011 until his dismissal with effect from 15 March 2018. On 26 February 2018, while still employed by the Respondent, the Claimant contacted ACAS to commence EC. At that stage he named MCS as the prospective Respondent and MCS was named on the subsequently issued EC certificate ("the first certificate").

78. On 3 April 2018, MCS changed its registered name to E.ON Control Solutions Limited ("ECS"). On 5 June 2018, the Claimant contacted ACAS again commenced EC, naming ECS as the prospective Respondent. On 20 June 2018, ACAS issued a second EC certificate for the Claimant, now naming ECS as the Respondent ("the second certificate).

79. Between 6 June 2018 and 13 July 2018, the Claimant's solicitors submitted three actual Claims in his name. They were all identical claims of unfair dismissal and unauthorised deductions from wages, but with variations in the name of the Respondent (named as either MCS or ECS or as both MCS and ECS) and the EC certificate relied upon. Crucially and contrary to Mrs Ritcher's case it was subsequently agreed that the MCS and ECS were the same Respondent. The name had changed but it was the same entity. (para 14 of Judgment).

80. Mr Caspall's claims were ultimately rejected because on one claim the wrong ACAS EC number had been placed on the Claim Form. It was a number relating to a completely different Claimant who was also bringing claims via the same solicitors against the Respondent. That is wholly different to the Ritcher claim and one can readily see why that first Caspall claim was rejected either pursuant to Rule 10(1)(c)(i) or 12(1)(c) or (e). As for the other claim, the Respondent contended that it gave details of a second, invalid EC certificate and was out of time. The reason why it was invalid was because it was a second EC Form against what was in actuality the same Respondent. Again, that is distinguishable from the Ritcher case.

81. It seems to me that the ratio in the two cases cited above is that if a Claimant obtains more than one Early Conciliation certificate against a single Respondent then it is only the first certificate that is valid. I disagree with both counsel that there is anything in those cases which renders the certificate relating to either Bath Cricket Club or Bath Cricket Club Limited invalid.

82. The situation in this case is that the Claimant had provided the requisite information to ACAS and had gained the necessary certificates to issue her claim against either Bath Cricket Club or Bath Cricket Club Limited. In order for the Claim to be accepted or rather not rejected she had to comply with the relevant Employment Tribunal Rules i.e. to present her claim on the prescribed form and to include the correct EC number.

83. She did do that – she issued against Bath Cricket Club Limited on the prescribed form and provided the correct EC number for that Respondent. Contrary to what Mr Caspall did she did not give an inaccurate EC Certificate Number and nor was it a second certificate against the same Respondent.

84. It seems clear to me that there were no grounds to reject the claim pursuant to Rule 10 (1) (c) as it does contain the correct EC number for Bath Cricket Club Limited against whom the Claimant had elected to bring the Claim.

85. Should the Claim have been rejected pursuant to the unamended Rule 12? Again, the answer in my view is that it should not. A referral can be made to a Judge if the claim institutes relevant proceedings (which it does) and is made on a claim form that does not contain an early conciliation number (which has been taken to mean the correct EC number). If I consider that matter, I am satisfied that the Claim form does contain the correct EC number for a claim against Bath Cricket Club Limited. In those circumstances when I consider it under Rule 12 (2) I can see no basis for the Claim to be rejected. There are also no grounds to reject under Rules (f) because the names on the Certificate and the Claim Form are the same.

86. It follows that there was a valid claim against Bath Cricket Club Limited when the matter came before EJ Salter. He considered matters at that stage and permitted the substitution of the existing Respondent, Bath Cricket Club Limited by placing Bath Cricket Club in its place pursuant to Rule 34 of the Employment Tribunal Rules. There has been no challenge to that Order and I can see no basis for there being any prohibition on that order being made on EC grounds.

87. There is no obligation under the Rules for any substituted Respondent to have been the subject of any form of Early Conciliation.

88. I consider that both counsel were incorrect in their consideration of Serra Garrau and E.On and that there are no grounds for rejecting the claim.

89. **Statutory Amendments**
Although I have made the finding which would deal with the Respondent's application, I consider it appropriate to deal with the other major points which arose at this hearing for the sake of completeness.

90. From 8 October 2020 Rule 12 (1) (da) and Rule 12 2ZA came into force. I repeat them again here for ease of reference:

12.— Rejection: substantive defects

(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— ……..
(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;…..

(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

91. The purpose of these provisions is to try and avoid draconian consequences for minor administrative errors and to allow some form of flexibility in the event that an incorrect EC number is placed on the Claim Form. It is a commonsense provision which should have been included from the outset and would have saved much time at both first instance and appellate level. I have set out above why I do not consider that there was an error but, in the event, that I am wrong on that I will consider this point.

92. Compliance with Early Conciliation matters is a jurisdictional matter. If a Claimant has not complied then the Tribunal has no jurisdiction to hear the Claim whatever its merits and the point can be taken at any time. Whilst it is envisaged in the Rules that the consideration of this point will take place at the outset just after receipt of the Claim Form because the provisions at Rule 10 and Rule 12 are under the sub-heading "Presenting the Claim". Rule 8 describes how to present a claim and then Rules 10 and 12 provide grounds for rejecting the Claim.

93. Eady J as she now is commented at Para 42 of E.On that consideration of the issue was not limited to that stage however and arises to be considered at whatever point of the claim that it comes before a Judge.

94. The parties' positions have been detailed above but in simple terms the Claimant states that I am considering these issues following a hearing in November 2021 and so must apply the law as it stands and has stood since October 2020. The Respondent's view is that the matter needs to be viewed as it was when the Claim was issued as it was at that point that the issue crystallised.

95. In my view I have to consider the Regulations which are in place at the time that the point is being considered. I find that the transitional provisions contained in regulation 22 of the 2020 Regulations do not limit the effect of the amendment made by regulation 7 to insert rules 12(1)(da) and 12(2ZA) by reference to the date of the presentation of the claim but simply refer to "all proceedings to which they relate".

96. If there was a desire to limit the effects only to Claims that were lodged after 8 October 2020 then that could quite easily have been achieved by the statutory draftsman but it was not. That is consistent with the explanatory note to the 2020 Regulations that ***"The primary impact of these changes is to reduce unnecessary bureaucracy in providing access to justice through the employment tribunal system."*** and to address the multiple observations of appeal Judges lamenting the satellite litigation.

97. I agree with the Claimant's observation that it would be a strange frustration of the purpose of the amendments made by the 2020 Regulations if they preserve the "unnecessary bureaucracy" in respect of claims presented pre-8th October 2020 without any obvious or sensible reason to do so. I can see no sensible or obvious reason.

98. In those circumstances I will apply the law as it stands as of the date of this hearing which has been in place since 8 October 2020.

99. If Section 12 (1) (da) of the Tribunal rules applies i.e. that the Claim institutes relevant proceedings and the EC number on the Claim form is not the same as the number on the EC Certificate then I do consider that the Claimant did make an error in relation to the Early Conciliation on account of an understandable confusion about who her genuine employer was. I am quite satisfied that that error was minor in nature and that the Respondent will not be in the slightest bit inconvenienced by that error as is evident in their ability to respond substantively to the Claims which were set out there. I find no prejudice to the Respondent at all at what would be a purely technical breach and so consider that it would not be in the interests of justice to reject the claim.

100. I hope (and it may be a forlorn one) that matters can now proceed to a final hearing on the substantive matters before the Tribunal in April 2022 and the parties can focus upon them.

Employment Judge Self
Date: 31 December 2021

Amended Judgment sent to the parties: 31 October 2022

For the Tribunal Office