EMPLOYMENT TRIBUNALS

Claimant: **Christopher Baugh**

Respondent: **Work It Group Ltd**

UPON a reconsideration of the Notice of Rejection of Claim dated 10th February 2023 on the Claimant's application pursuant to Rule 71 of the Employment Tribunals Rules of Procedure 2013

CORRECTED DECISION

The Claimant's claim is allowed to proceed on the basis that the decision to reject was wrong in that there was a failure to apply 12(2ZA) of the Employment Tribunal Rules of Procedure 2013. Accordingly, applying that provision it is not in the interests of justice to reject the claims and they are allowed to proceed.

REASONS

The Law

1. A Claimant whose claim has been rejected under Rule 12 may apply for a reconsideration under Rule 13 on the basis that either a) the decision to reject was wrong or b) the notified defect can be rectified.

The Notice of Rejection

1. On 10th February 2023 I retrospectively rejected the Claimant's claim for unfair dismissal, a failure to provide a s.1 statement and unlawful deductions from wages under Rule 12(1)(f) of the Employment Tribunal Rules of Procedure 2013.

2. In the Notice I found that the number on the claim form did not relate to the early conciliation certificate that had been filed in respect of the First

Respondent, Work It Group Ltd, as it related to the Second Respondent, Charles Enstone Watts. I then concluded that the error as identified was an error of numbering (12(da)) as well as an error of name and address (12(f)). I then went on to apply Rule 12(2A) which was the escape clause which relates to names and addresses and found that it did not apply to the present case as it related to errors concerning names and addresses (paragraph 10). I relied on the authority of **E.On Control Solutions Ltd v Caspall UKEAT /0003/19/JOJ** – which was the applicable law at the time - and reminded myself that there were points of which I needed to take cognisance according to the dicta in that case:

2.1.1 The non-compliance cannot be remedied by any case management discretion exercisable under rule 6.

2.1.2 There can be no amendment under rule 29 as the rejection means that the claim falls away and therefore there is nothing to amend.

The Claimant's Application and Further Submissions

3. The Claimant applied for reconsideration on 22nd February 2022. The basis for the application was that I had erred in recognising the case as a 'numbering' error case but had failed to apply 12(2ZA) or had in fact misapplied 12(2A). I had fallen into error because I had failed to recognise the Claimant's first early conciliation certificate which had instituted proceedings against Work It,Group Ltd. The claim form had referred to the number on the second early conciliation certificate which was against the individual, Mr Watts. It was submitted that had I followed the correct approach, I would have found that there was a numbering error and it was in the interests of justice not to reject the claim. It had been implicit in my comments that I had 'sympathised' with the Claimant that this was a technical point and that I would have felt it was in any event in the interests of justice not to reject the claim had I applied the law correctly.

4. The Claimant provided further submissions on 17th April 2023. By that time the Court of Appeal had published its decision in **Sainsbury's Supermarkets Limited v Maria Clark and others [2023] EWCA Civ 386**, handed down on 6th April 2023. It was submitted that while Clark had primarily determined the case under Rule 10 the principle of the decision related to the 'fundamental reason relating to the structure and wording' of the rules. Paragraphs 35 to 43 of Lord Justice Bean's judgment were set out in the application. He also cited paragraph 51:

> "51. I return to Mr Milford's submissions about giving effect to the legislative purpose. The legislative purpose of s 18A of the 1996 Act was to require claimants to go to ACAS and to *have* an EC certificate from ACAS (unless exempt from doing so) before presenting a claim to an ET in order to be able to prove, if the issue arises, that they have done so. I do not accept that it is part of the legislative purpose to require that the existence of the certificate should be checked before proceedings can be issued, still less to lay down that if the certificate number was incorrectly entered or omitted the claim is doomed from the start. If the claim is

> rejected in its earliest stages under Rule 10 or 12 then the claimant may seek rectification or reconsideration. If it is not, then the time for rejection of the claim has passed. The respondent may instead apply to have the claim dismissed under rule 27 or struck out under rule 37, with the tribunal having the power to waive errors such as the one relied on in the present case under Rule 6."

5. The Claimant submitted that it was wrong for the Tribunal to have rejected the claim restrospectively once it had got through the filter to the case management stage. To the extent that the law in **EON Control Solutions v Caspall [2020] ICR 552** was that the obligation to reject a claim continues at the case management stage, this was overruled by Clark. It was also submitted that the Tribunal had not been required to receive further submissions from the Respondent as Rule 13(3) contemplated hearing any hearing to be attended only by the Claimant. It was submitted that it was proportionate and in accordance with the overriding objective for the matter to be dealt with by way of reconsideration and not on appeal.

6. To the extent that the further submissions were out of time, I allow them in as provision of further information. Indeed prior to the Claimant writing in I had drafted a direction which I had asked to be sent to the parties inviting their comments on **Clark** but the Claimant's further submissions arrived anyway and I instructed the administrative staff not to send my direction out.

The Respondent's Responses

7. Having requested the Respondent's response, I received submissions from the Respondent to the Claimant's application which were dated 31st March 2023. The Respondent also sought wasted costs against Sheridans' Solicitors under Rule 80(1) or in the alternative costs against the Claimant under Rule 75(1).

8. It was submitted that I had correctly identified that both Rules 12(1)(da) and 12(1)(f) applied at paragraph 7. The Claimant's application failed to grapple with the fact that Rule 12(1)(f) also applied. Because Rule 12(1)(f) applied the consequence provision in 12(2A) therefore also applied subject to the escape provision. Therefore whether or not the result would have been the same had 12(2ZA) applied was immaterial. The finding that there was no error relating to name and address was correct because the error was due to the Claimant's representatives using the same number twice. The Claimant's application would mean that the Claimant would have had to work backwards from the escape clauses in order to ascertain what category the rule fell under which was not the correct process.

9. In its response to the Claimant's further submissions dated 25th May 2023 the Respondent submitted that while it accepted that Clark overruled EON, legal certainty required that the Tribunal's ruling stood further to the decision of the Supreme Court in **Cadder v HM Advocate [2010] UKSC 43**. Alternatively, it was open to the Tribunal to strike out the Claimant's claim under Rule 37 for failure to comply with the applicable rules or as an abuse of process. The Claimant's further submissions amounted to a second reconsideration application presented out of time. In the absence of knowledge as to whether the Court of Appeal decision would be appealed it was submitted that the case be adjourned to a one-day hearing in October at which point the appellate future of **Clark** may be more certain. In the alternative, it was submitted that the Claimant had breached the rules and there was no adequate explanation for that breach. In addition the delay occasioned by the error on the certificate would result in the Respondent having to defend the claim two years' on. The Respondent would pray in aid its previous submissions in relation to any strike out application.

Decision

10. At paragraph 7 of the Notice I accepted that on the facts that the claim was one which instituted relevant proceedings and that the early conciliation number on the claim form was not the same as the one on the early conciliation certificate under 12(1)(da). I had also identified this case as one which instituted relevant proceedings and the name of the Respondent was not the same as the prospective Respondent on the early conciliation certificate (12(1)(f)). At paragraph 8 onwards I considered the matter under 12(2A) only and not 12(2ZA) as well. However I did expressly state at paragraph 10 that while both 12(1)(f) and 12(1)(d) applied to the category of claim, '*this case appears to be an error of numbering as opposed to an error of name or address'*. Having done so I ought to have considered whether the escape clause applied in 12(2ZA) applied primarily and I did not.

11. Accordingly I find that the Claimant made an error in relation to the early conciliation number in that the number on the claim form was not the same as the one on the relevant early conciliation certificate. I find that this was an error caused by his representatives. While the Respondent submits that the proper cause of action would be for the Claimant to bring a negligence claim against his representatives, I consider that it would not be in the interests of justice to reject the claim on the basis of this error alone. There were two early conciliation certificates that were presented in relation to both the First and the Second Respondent so substantively the early conciliation process had been followed by the Claimant prior to instituting proceedings. The prejudice in rejecting the claim for the Claimant would be significant because he would lose the opportunity to bring his claims whereas the fault was a technical numerical error. I have taken into account the Respondent's contention that the claim is now two years on but there is nothing before me to suggest that it is not possible to have a fair trial.

12. Accordingly the decision to reject was wrong and the Claimant's claims for unfair dismissal, failure to provide a s.1 statement and unlawful deductions from wages are reinstated.

13. I had regard to the Respondent's submissions on **Cadder** and do not accept that the decision was wrong because of the effect of **Clarke** as the authority in **EON** was binding at the time of the original decision. However I do not consider that it would be proportionate to delay this matter further by holding a hearing to consider the possibility of overturn of **Clarke.** This matter shall now proceed to case management.

14. If however, I am wrong on that point and the decision to reject was wrong because of the dicta in **Clarke**, if I were to consider whether to strike out the claim as an abuse of process I would not do so given that I have found that it was in the interests of justice not to have rejected the claim under 12(2ZA).

Wasted Costs

15. The Respondent has made an application for wasted costs against the Claimant's representatives who made the error in relation to numbering or alternatively, against the Claimant. Given that I have corrected the decision to reject, I am satisfied that there is no basis for such an application or any strike out application and it is therefore dismissed.

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Employment Judge A Frazer
Dated: 19th June 2023

DECISION SENT TO THE PARTIES ON

20 June 2023

GDJ
FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS