Neutral Citation Number: [2022] EAT 143

Case No: EA-2020-000620-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 September 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mrs M Clark & Others **Appellant**
- and -
1) Sainsburys Supermarkets Ltd
2) Lloyds Pharmacy Ltd

Respondents

- -
- -

Andrew Short KC and Saul Margo (instructed by Leigh Day) for the **Appellant**
Dale Martin KC (instructed by Womble Bond Dickinson (UK) LLP) for the **Respondents**

Hearing date: 14 July 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal erred in law in rejecting the claims of prospective claimants whose names did not appear on an EC Certificate the number of which was quoted on the claim form in these multiple claims. It was sufficient that the claim form contained for each respondent an early conciliation number of an EC Certificate on which the name of one of the prospective claimants making the joint claim appeared.

His Honour Judge James Tayler

Introduction

1. There are two issues in this appeal. The first is how Rule 10 of the **Employment Tribunal Rules 2013 ("ET Rules")** applies when claims are brought by a number of prospective claimants on the same claim form. Rules 10 and 12 of the **ET Rules** ensure that most claims in which a prospective claimant, who is not exempt, has failed to undertake ACAS Early Conciliation ("EC") are weeded out before service of the claim form on the respondent.

2. The second issue is by whom, and against whom, a cross-appeal can be brought.

Early conciliation

3. Litigation is to be avoided where possible. Reasonable settlement of claims is to be encouraged. Many litigants come to appreciate this with the benefit of hindsight. Even those who are successful are often not as successful as they wanted, may be subject to criticism, and can find that the costs of the litigation in terms of time, money and emotion makes the victory Pyrrhic. That said, litigation is sometimes unavoidable. Litigation may be necessary to establish individual rights and determine points of general legal principle. But litigation should be seen as a last resort, not a first port of call.

4. For a number of years, provisions have been in place to try and persuade parties to resolve their differences without recourse to litigation. That is the fundamental purpose of EC. The substantive EC scheme adopts a relatively light touch. Individuals are required to do little more than contact ACAS and obtain an EC certificate. They are not required to engage in conciliation at all if they do not wish to do so. They are taken to water, but not forced to drink.

5. By comparison, the gatekeeping procedural rules are, in places, a little heavy-handed. Individuals who have fully complied with the substantive requirements of EC can find that because of an error in completing the claim form the claim must be rejected, sometimes in circumstances in which any resubmitted claim is likely to be out of time. That is why the rules have been somewhat relaxed by amendment. Nonetheless, if unambiguous mandatory provisions of the procedural scheme

require rejection of the claim that outcome cannot be avoided, even if the application of the provisions may bring to an end a claim brought by a person who has complied with the substantive requirements of EC. However, in other cases, where the wording of the provisions permit, the courts will seek an interpretation that advances the purpose of the substantive EC scheme and does not place unnecessary obstacles in the way of prospective claimants obtaining access to justice.

6. So far as is relevant to this appeal, and in summary, the substantive elements of EC are as follows. Section 18A(1) **Employment Tribunals Act 1996 ("ETA")** requires that before a prospective claimant presents an application to the employment tribunal to institute relevant proceedings (i.e. proceedings that fall within the scope of the EC scheme) prescribed information must be provided to ACAS in a prescribed manner. Paragraphs 1 to 3 of the schedule to the **Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014** (the regulations will be referred to as the **EC Regs** and the rules set out in the schedule as the **EC Rules**) set out the prescribed information and prescribed manner in which it should be provided to ACAS. Section 18A(3) **ETA** provides that the appointed conciliation officer shall, during the prescribed period, endeavour to promote a settlement. The period during which the conciliation officer is required to endeavour to promote a settlement is prescribed by Rule 6 **EC Rules**. The manner in which the conciliation officer should endeavour to promote a settlement is set out in Rule 5 **EC Rules**. ACAS must make reasonable attempts to contact the prospective claimant but should only attempt to contact the prospective respondent if the prospective claimant consents. If the conciliation officer concludes during the prescribed period that a settlement is not possible, or the period ends without a settlement, the conciliation officer shall issue a certificate, in a prescribed manner, to the prospective claimant: Section 18A(4) **ETA**. The prescribed certificate is called the EC Certificate (Rule 7 **EC Rules**).

7. The information the EC Certificate is required to contain is set out in Rule 8 **EC Rules** (the name and address of the prospective claimant and respondent, the date conciliation commenced, the unique reference number given by ACAS to the EC Certificate, and the date of issue of the EC

Certificate).

8. Section 18A(7) **ETA** provides that a person can present relevant proceedings without complying with the requirement for EC in prescribed circumstances, that may include where "the requirement is complied with by another person instituting relevant proceedings relating to the same matter", where "proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are" and in circumstances in which "ACAS has been contacted by a person against whom relevant proceedings are being instituted".

9. Regulation 3 **EC Regs** provides that where another person has complied with the requirement for EC that a claim can be commenced without an EC Certificate where "another person ("B") has complied with that requirement in relation to the same dispute and A wishes to institute proceedings **on the same claim form** as B".

10. Regulation 3 of the **EC Regs** refers to "the same dispute" whereas the enabling provision, Section 18A(7) **ETA**, refers to "the same matter". More significantly, Regulation 3 **EC Regs** requires that the person who has not complied with EC "wishes to institute proceedings **on the same claim form**" [emphasis added] as the person who has complied with EC, which is not a necessary requirement of the enabling provision. Rule 9 **ET Rules** places significant limitations on the circumstances in which claims can be brought on the same claim form, that I will consider in more detail when analysing the appeal. It is to be noted that Regulation 3 **EC Regs** creates a link between a person being able to take advantage of another person having complied with EC and that person being able to bring a claim on the same claim form as the person who has undertaken EC.

11. As stated above, Rules 10 and 12 **ET Rules** are designed to weed out claims of prospective claimants who are required to comply with EC, but have not done so. I shall consider the provisions in detail when analysing the appeal.

The litigation

12. This appeal arises in long-running litigation in which employees of the respondents are claiming they are entitled to pay equal to employees in other roles. The claims commenced in 2015.

The claimants work in a number of different jobs and compare themselves with comparators in a range of different roles. In addition to claims brought by women seeking equal pay with men, there are claims brought by men who bring contingent claims which rely on women colleagues undertaking the same job establishing that they are entitled to pay parity with male comparators, after which the men who carry out the same role as the women contend that they will be entitled to pay parity with the women.

13. As is common in litigation of this nature, the claims have been brought on a number of multiple claim forms. All of the claimants have complied with EC. They have not sought to rely on the exemption to EC on the basis that other employees have complied with EC and they are bringing a claim in the same dispute on the same claim form.

14. At the time the claimants were undertaking EC, ACAS adopted a number of different approaches to EC certificates. In some multiple claims ACAS only issued a certificate with a single multiple EC number (an M number). In some cases ACAS provided a certificate with an M number and an individual EC number (an R number) for one of the prospective claimants, but no other R numbers for the other prospective claimants that appeared in a schedule attached to the EC Certificate. In other cases, ACAS issued an EC Certificate with one M number and an R number for each of the prospective claimants that appeared on the schedule to the EC Certificate.

15. The solicitors representing the claimants adopted a variety of approaches on different claim forms when setting out an EC Certificate number, or numbers. A claim form only has one box for each respondent in which an EC number can be entered (e.g. box 2.3 and 2.5). For electronic submission there is only one claim form. For submission by post form ET1 (for single claimants) and ET1A (for multiple claimants) only have one box for each respondent that specifically allows the insertion of an EC Number. Form ET1A has extra pages to add the names and addresses of additional claimants, but does not provide boxes for EC numbers for each of the additional claimants. That said, in all versions of the ET1 there is a box for additional information which can be used in multiple claims to enter the EC numbers for each individual claimant.

16. When the claim forms were presented it appears that the staff of the ET did not consider that an issue was raised under Rule 10 **ET Rules** and so did not refer the claim forms to employment judges for consideration under Rule 12 **ET Rules**. This is, perhaps, unsurprising, as an EC number was included in each claim form.

17. When the claims were served on the respondents they did not initially take a point about EC. The point was taken by the respondents some years after the claims had been served. It was considered at the fifth preliminary hearing in the combined claims together with a number of other issues (reading 28 February and 2 March, then hearing on 3, 5 & 10 March 2020).

The judgment

18. In a conspicuously thoughtful and careful judgment, Employment Judge Camp permitted all claims to proceed where there was an EC number, or EC numbers, on the claim form that appeared somewhere on an EC Certificate on which the name of the claimant also appeared. So, for example, if only an M number was given on the claim form, provided the claimant's name appeared in the schedule to the EC Certificate that had the M number on it somewhere, even if the claimant had also been given a separate R number, the claim was permitted to proceed. The one group of claims Employment Judge Camp held should be rejected were those of claimants whose names appeared on an EC certificate and no number appearing on that EC Certificate was included anywhere on the claim form. So, for example, there were claim forms in which the name of a lead claimant appeared at section 2, together with an EC number for an EC certificate on which that lead claimant’s name appeared, but there were claimants on the schedule attached to the claim form whose names did not appear anywhere on that EC Certificate, or on any EC Certificate a number for which was set out anywhere on the claim form.

The challenges to the judgment

19. The decision of Employment Judge Camp for this group of claimants was appealed. They were referred to as the Category 4 claimants. The appellants contend that it is sufficient if one EC Certificate number is given on the claim form for any claimant who brings a claim on the claim form.

20. The respondents seek to cross-appeal in respect of the refusal to reject the claims of other prospective claimants. They contend that it is necessary for each claimant that their name and an EC Certificate number specific to that claimant appears on the claim form. This gives rise to the question of whether the respondents can cross-appeal against claimants in a multiple claim who have not themselves appealed against the decision.

The cross-appeal

21. As I noted in the introduction it is common for even successful parties to be dissatisfied to some extent with a judgment because, for example, they have not succeeded in all of their claims. All parties to litigation may, to a greater or lesser extent, be dissatisfied with the outcome. Parties often conclude that despite some dissatisfaction, they are prepared to draw a line under the matter and do not seek to appeal. Bringing a conclusion to litigation is to be encouraged. There are very strictly enforced time limits for appeals to the EAT. Where an appeal is brought within time a respondent to the appeal may cross-appeal against any determination that was adverse to it. This is because while the respondent might have decided to let sleeping dogs lie if there was no appeal, if an appeal is brought they may wish to ensure that their dog is in the race.

22. The respondents seek to rely upon the decision of Langstaff J (P) in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** UKEAT/0397/14/RN:

> 13.In my view, in the absence of authority, I should have regard to three matters: first, to the ordinary normal meaning of the word "cross-appeal" taken in context; secondly, I should have regard to the way in which the expression has been understood so far. Though it may have been misunderstood and, if so, would require to be put right, it would be fortuitous if the decision I were to reach endorsed past practice rather than condemned it. Thirdly, I should have regard to any matters of policy which might suggest that the argument should move one way or the other.
>
> 14.As to the first, the word "cross-appeal" is appropriate, and appropriate only, to a challenge to a decision which is adverse to the party who wishes to cross-appeal. I see no reason in principle to restrict this to a matter which is intrinsically linked to the subject of the appeal itself or a matter which, in the absence of the appeal, would not itself give rise to any freestanding right of appeal. There is nothing in the language or context to suggest that that should be so. Since one cannot appeal an order or decision in one's favour, so it seems to me any cross-appeal will have to be in respect of an order or decision contrary to the Cross-Appellant's wishes.

> 15.The natural wording, "cross-appeal", suggests it is an appeal which arises in response to an appeal. I accept entirely the distinction drawn, as I read it, by Burton J between decisions made on one occasion and on another. It seems to me that the cross-appeal must arise out of a decision of, or one which arises in any proceedings before, an Employment Tribunal on the same date and on the same occasion as that in respect of which the appeal arises. I do not, for instance, consider that it is a true cross-appeal where there has been separate hearing in respect of liability and quantum where one party wishes to appeal liability and the other quantum. It may be within time but it seems to me that, if it is not within time as to quantum, then it is technically a separate and freestanding appeal and does not arise out of matters determined on the same occasion. This is entirely consistent, I should add, with the fee-charging regime as I understand it. In its natural meaning, therefore, and in context, I see that the words "cross-appeal" are capable of covering what applied in this particular case.

23. The respondents rely on the reference in paragraph 14 to a cross-appeal not being limited to a matter that is "intrinsically linked" to the subject of the appeal itself. However, I consider the key passage is in paragraph 15, where it is noted that the obvious meaning of the word cross-appeal, is an appeal which "arises in response to an appeal". I consider it is clear that a cross-appeal is brought by a respondent to an appeal against the appellant.

24. Rule 5 of the **Employment Appeal Tribunal Rules 1993** (as amended) provides that the respondents to an appeal shall be the parties, other than the appellant, to the proceedings before the employment tribunal. Accordingly, the individuals against whom the respondent seeks to cross-appeal are not appellants in this appeal, they did not bring an appeal themselves, they are respondents to the appeal.

25. I do not consider that there is any proper basis upon which a respondent to an appeal can bring a cross-appeal against another respondent. That conclusion flows from the natural meaning of the words "appeal" and "cross-appeal". It is consistent with the underlying approach that a party should decide, within the time allowed to bring an appeal, whether to accept the first instance outcome, even though it may not have been all that was wanted, or appeal. Where a party has taken the pragmatic approach of choosing not to appeal they should not find themselves deprived of the protection of the relatively short time limits for the opposing party to bring an appeal, because some other party has decided to appeal the decision made against them. Accordingly, I conclude that the respondent is not

able to cross-appeal against the determination in the case of the claimants who were permitted to proceed with their claims. When allowing permission for the cross-appeal to proceed HHJ Wayne Beard specifically did so, subject to the argument that this was not a valid cross-appeal, which I find to be the case.

The appeal

26. I will now go on to consider the substantive appeal. For reasons that will become apparent my conclusions mean that the cross-appeal would have failed in any event.

27. The key provision in this appeal is Rule 10 **ET Rules**[1]:

> 10.— Rejection: form not used or failure to supply minimum information
>
> (1) The Tribunal **shall reject** a claim if—
>
> (a) it is not made on a prescribed form;
>
> (b) it **does not contain all** of the following information—
>
> (i) **each** claimant's name;
>
> (ii) **each** claimant's address;
>
> (iii) **each** respondent's name;
>
> (iv) **each** respondent's address; or
>
> (c) **it does not contain <u>one</u>** of the following—
>
> (i) **<u>an</u> 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. **[emphasis added]**

28. The appellants' point is, at heart, very simple. A claim form shall be rejected if it does not contain **<u>each</u>** claimant's name and address and **<u>each</u>** respondent's name and address. In contrast, the

[1]It should be noted that in a commonly used compilation of employment statutes Rule 10(1)(c) is misquoted, in that it refers to the claim form not containing "all of the following" whereas the requirement is to contain "one of the following". I mention this as the incorrect formulation has been referred to in some appellate authorities. The error is easy to spot because it would be illogical to require the provision of all items referred to in Rule 10(1)(c) as they are disjunctive.

claim form is only required to contain, so far as is relevant, **an** EC number. The appellants contend that the wording of the provision simply requires that **one** EC number be provided. The respondents contend that for the scheme to work the provision must be read as requiring that an EC number be provided for each claimant and, at the very least, there must be an EC number on the claim form that appears on an EC Certificate on which the claimant's name also appears.

29. Rule 10 **ET Rules** works alongside Rule 12, which at the relevant time provided:

> 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; …
>
> (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). …
>
> (3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

30. The provision has subsequently been amended to allow for errors in quoting an EC Number on the claim form, permitting an employment judge to exercise a discretion not to reject a claim form even where "the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate" if "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": Rule 12(1)(da) and 2ZA.

31. In construing the phrase "an early conciliation number" in Rule 10 of the **ET Rules** the respondents seek to rely on the Interpretation Act 1978, pursuant to section 6 of which "words in the singular include the plural and words in the plural include the singular".

32. The employment judge favoured the respondents' approach, considering that it was consistent with the underlying purpose of the scheme to ensure that the employment tribunal could check in the

case of each claimant whether EC had been undertaken. The employment judge considered the matter at paragraphs 64 to 66:

> Category 4 claims
>
> 64. The last question of principle is: does rule 12(1)(c) require the claim form to contain an EC number "*on the EC certificate pertaining to*" [Caspall, paragraph 40] every claimant? I think it does.
>
> > 64.1 An EC certificate pertains to a claimant if they are named on it. I have already explained my decision is that any of the EC numbers that appears on such a certificate may be relied on by that claimant. Part of my reasoning for that decision was that the purpose of requiring claimants to give EC numbers is to act as a check on whether they have been through EC, and that any of the numbers on a certificate on which they are named serves that purpose equally well. If claimants may rely on numbers on certificates that do not pertain to them, no such check exists on all of the claimants on a claim form other than a check on what could potentially be the one and only claimant named on the certificate the number of which is contained in the claim form.
> >
> > 64.2 It is difficult to accept that the intention of those who made the Rules was that while every unexempt claimant in a single claim was to be required to prove they had been through EC by giving a relevant certificate number on their claim form (and have their claim rejected if they failed to do this), the majority of claimants in multiple claims were not. There is no obvious principled basis for making it easier to bring multiple claims than single claims, nor for requiring the same individual to give a certificate number pertaining to them if they are bringing their claim on a single claim form but not if they happen to be bringing the same claim on a multiple claim form.
> >
> > 64.3 Similarly, if the number of a certificate pertaining only to one claimant has to be given in multiple case, on what basis, other than arbitrarily, is that claimant to be selected? Mr Short QC's suggestion was that it should be the lead claimant, but the lead claimant is no more than the individual whose name is put first on the claim form.
> >
> > 64.4 The overriding objective is not well served by making it impracticable for a respondent and the Tribunal to check whether the majority of claimants have been through EC unless and until those claimants, voluntarily or by order of the Tribunal, disclose the numbers of the certificates pertaining to them or copies of the certificates themselves.
> >
> > 64.5 Although Caspall might in principle be distinguishable, because it concerns a single claim and not a multiple claim, the rationale of the decision would apply equally to multiple claims and there is no good reason for saying that it was not intended to apply, or should not apply, to them.
> >
> > 64.6 I think the reason rules 10 and 12 refer to "an" EC number but rule

10 refers to "*each claimant's*" name and address is simply because (as already mentioned several times) EC numbers are the numbers of certificates and not of claimants, so it would have been wrong to demand "*each claimant's*" EC number.

64.7 Following on from the previous point, the EAT in Caspall decided that "*an*" EC number in both rules 10 and 12 does not mean 'any old' EC number but instead means a number from the certificate pertaining to the claimant. In a single case, then, both rules should be read as if the phrase "*on a certificate pertaining to the claimant*" was written after the phrase "*an early conciliation number*". The peculiarity of the drafting of rule 10 when applied to multiple cases has already been commented on. In particular, the word "*claim*" ["*The Tribunal shall reject a claim if – it….*"] in rule 10(1) is used simultaneously to mean one individual's claim and the entire contents of the claim form, consisting of all claimants' claims. Rule 12 is more happily worded, in that it uses the phrase "*the claim, or part of it*". The whole of rule 12 can be applied without any adjustment to make singular nouns plural if, and only if, there is one claimant and one respondent. Where there are two respondents, some such adjustment is needed. Every day, in Tribunals up and down the country, where a claimant has been through EC with only the first out of two prospective respondents, the claim against the second is rejected, on the basis that in relation to that "*part of*" the claim, "*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 [given on the claim form] relates*", in accordance with rule 12(1)(f). I don't think I have ever heard it suggested – and it was not suggested by Mr Short QC in argument – that that rule should be read differently, so that it applies only to one out of two or more respondents.

64.8 For the sake of consistency, it seems to me that rules 12(1)(c) and (e) should be interpreted in a similar way to rule 12(1)(f), i.e. where there are multiple claimants, the claim of each of them is "part of" a claim and in relation to each part of the claim that consists of one claimant's claim:

> 64.8.1"*an*" EC number of a certificate pertaining to the claimant must be given;
>
> 64.8.2"*the name of the claimant on the claim form*" must be "*the same as the name of the prospective claimant on the early conciliation certificate to which [one of] the early conciliation number[s given on the claim form] relates*";

64.9 if rules 12(1)(c) and (e) did not apply to multiple claims so long as an EC number of a certificate pertaining to one of the claimants was given in the claim form, there would be no need for the following exemption from the requirement to go through EC: "*another person ("B") has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B*". …

66. The claims of all claimants who did not in their claim form give a number from a certificate on which they are named (category 4 claimants)

> must be rejected pursuant to rules 12(1)(c) and (e). Their claim forms do not "*contain … an early conciliation number*" (rule 12(1)(c) "*pertaining to"* (Caspall) them and their names are not *"the same as the name of [any] prospective claimant on the early conciliation certificate to which the early conciliation number* [given on the claim form] *relates*" (rule 12(1)(e)).

33. The respondents seek to rely on the decision of the EAT in **Sterling v United Learning Trust** UKEAT/0439/14/DM. Langstaff J (P) considered a situation in which, in a single claim, the claimant had inserted an EC number missing out 2 digits. He held that it was implicit in the scheme that an EC number must be an accurate number:

> Once it is accepted that the Tribunal was entitled to think that the form did have a couple of digits missing, the question is whether the Tribunal was then obliged to reject the form. The wording of Rule 10 was not significantly in issue before me. Where the rule requires an early conciliation number to be set out, it is implicit that that number is an accurate number. The Tribunal had found it was not. Once that appeared to be the case, the Tribunal was obliged to reject it, and that rejection would stand, subject only to reconsideration, which here was not asked for.

34. In **E.ON Control Solutions Ltd v Caspall** [2020] ICR 552 HHJ Eady QC considered a case in which a solicitor when completing a claim form, for an individual claimant, accidentally inserted the EC Certificate number from a different case. The parties agreed that the EC number must be the accurate number on the certificate pertaining to the claimant as opposed to a different certificate relating to an entirely different claimant:

> 40. In *Sterling v United Learning Trust* 18 February 2015 (Langstaff J presiding), it was held that, where the rule requires an early conciliation number to be set out, it is implicit that the number is an accurate number. Although the appeal tribunal in Sterling was expressly considering the wording of rule 10, it is common ground between the parties that the same must be true of the requirement at rule 12(1)(c). Moreover, as was also agreed by the parties before me, the requirement to include an early conciliation number must be the accurate number on the certificate pertaining to the claimant (as opposed to a different certificate relating to an entirely different claimant).

35. Because the point was subject of an agreement between the parties, the decision is not binding upon me: **FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd** [2019] EWCA Civ 1361, [2020] Ch 365 per Leggatt LJ giving the judgment of the Court of Appeal, at paragraph 136.

36. More significantly, I consider that there is a fundamental point of distinction in that **E.ON** and

Sterling were cases about the provision of an EC number in a claim form of a single claimant. In such cases there will only be one EC number in respect of each respondent. Therefore there is no problem in interpreting an EC number as being the single correct number obtained by the claimant.

37. The respondents contend that the natural reading of the provisions is so absurd that it is necessary in the case of multiple claimants to read words into them. In the case of Rule 10(1)(c) it could read as follows:

> (c) [in the case of any claimant] 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.

38. I do not accept that use of the **Interpretation Act 1978** resolves the problem. This is for two reasons. Firstly, singular can only be treated as plural where the context permits. In this case the rule adopts a different wording for Rule 10(1)(b) where it specifically refers to **each** claimant's name etc, and 10(1)(c) where it refers to **an** EC number. The context suggests that a distinction is being drawn and so the singular does not include the plural. Secondly, treating "early conciliation number" as meaning "early conciliation numbers" still requires the removal of the word "an" and does not necessarily resolve the problem because it still begs the question, where there are numerous EC numbers, which numbers should be inserted into the claim form? If there are 10 claimants is it sufficient to include 2 EC numbers? These problems are only resolved if words like those I have suggested above are read into the provision.

39. At heart, the respondents' contention is that Rule 10 would be a better way of weeding out any claims where prospective claimants have failed to comply with EC if it stated that "in respect of each claimant" an EC number should be provided. While that might make it a better gatekeeping provision, I do not consider that of itself would permit words to be read into a statutory instrument.

40. I also consider it is significant that these are gatekeeping provisions. The fundamental purpose of the underlying scheme is to ensure that those who are required to do so comply with EC. Should a

prospective claimant have been subject to a requirement to comply with EC and have failed to do so, but nonetheless be able to present a claim on the same claim form as another party that has entered an EC number (which for reasons I set out below is unlikely to have been possible at the time these claims were submitted) so that the claim is not dismissed under Rule 10, that would not prevent the respondents at a later stage raising the issue because it is a matter of substance. If a claimant who is required to comply with EC has not done so the proceedings will be a nullity as a matter of substance as there is a statutory prohibition on the person presenting the claim. The provision of an EC Certificate provides the proof that EC has been complied with.

41. There are various other situations in which a claimant might not be caught by the gatekeeping provisions, and have their claim served on the respondent, when there was a substantive failure to comply with EC. For example, should a prospective claimant incorrectly state on the claim form that the respondent has contacted ACAS and therefore there is no requirement to undertake EC, there would be no basis upon which the ET staff could know that the respondent had not contacted ACAS. Therefore the issue would not be picked up by application of Rule 10 or rejected by application of Rule 12. Nonetheless, the respondent could state in its response that it had not contacted ACAS. Were that the case, the claim would have been invalidly instituted and could be dismissed as a matter of substance.

42. In these appeals the respondents suggest that despite the claimants on a literal wording of the provision being able to rely on the fact that "an early conciliation number" has been provided, words should be read into the provisions that would result in their claims being rejected in circumstances in which they have, in fact, complied with the requirements of EC. Each claim form contains an EC Certificate of a colleague who has complied with EC. The EC number is a real number and is correctly transposed into the claim form. Each claimant has complied with EC. While there might be something to be said for the rules requiring a separate EC number to be provided for each claimant, I do not accept that I am required, or indeed permitted, to read words into the rules to achieve that result.

43. I consider that there is a significant difference between multiple and single claims. This issue

arises because a large number of claimants brought their claims on the same claim forms. As new claimants were added to the litigation further claim forms, with multiple claimants, were submitted. This requires consideration of the circumstances in which the claimants could submit their claims on the same claim form at the time these claims were submitted. Rule 9 **ET Rules** then provided:

> 9. Multiple claimants
>
> Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6.

44. Accordingly, to bring their claims on the same claim form they had to be based on the "same set of facts", although there was scope for an irregularity in that regard to be waived under Rule 6 **ET Rules**. The requirement that the claims be based on the same set of facts represented a very significant limitation on the claims that could properly be brought on the same claim forms: **Asda Stores Ltd v Brierley and others** [2019] EWCA Civ 8, [2019] ICR 910:

> 26 I agree with Mr Short that if two claimants, Ms A and Ms B, seek to present a multiple claim together, their factual situations do not have to be identical in every respect. Ms A may have longer hours of work than Ms B. She may have greater length of service than Ms B. I also agree with Mr Short that it is the work done by Ms A and Ms B, not their job titles, which is important, but I do not think it can be said that if Ms A is a bakery assistant and Ms B is a checkout operator their claims can be said to be based on the same set of facts, even if they are relying on the same male comparators.

45. Subsequently, the circumstances in which claims can be instituted on the same claim form have been expanded, but that cannot affect the interpretation of the relevant rules that were drafted before the expansion.

46. While the claimants in this appeal have not sought to rely on an exception to EC, at the time they submitted their claim forms, the significant limitation on the ability of parties to submit their claims on the same claim form meant that in the majority of cases where claimants submitted claims on the same claim form as another claimant who provided an EC number, the other claimants would have been entitled to rely on the exception from EC because they would be parties to the same dispute. Thus, there is nothing implausible in Rule 10 meaning what it says; that the name and address of each

claimant and respondent must be provided but that only "an" EC number is required. If an EC number was provided for one claimant it was very likely that other claimants who were able to submit a claim on the same claim form would not need separate EC numbers. Thus, the gatekeeping provisions would be effective in the majority of cases, and if a claim slipped through where a claimant who was required to comply with EC, but had failed to do so, that could be dealt with later as a matter of substance.

47. While I have concluded that there is no mandatory requirement to do so, I consider it is good practice to set out all the EC numbers for all claimants on a multiple claim form as it will assist the employment tribunal and minimises the risk of any issue about EC arising.

Outcome

48. Accordingly, the appeal is allowed and the claims that were rejected will be reinstated. The purported cross-appeal is dismissed as it is not a valid cross-appeal. In any event, my conclusion means that the cross-appeal would have been dismissed.