Neutral Citation Number: [2023] EWCA Civ 386

Case No: CA-2022-001965

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HHJ JAMES TAYLER
EA-2020-000620-JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2023

Before :

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE NUGEE

- -

Between :

SAINSBURY'S SUPERMARKETS LIMITED	**Appellant**
- and -	
MARIA CLARK AND OTHERS	**Respondents**

- -
- -

Julian Milford KC (instructed by **Womble Bond Dickinson LLP**) for the **Appellant company**
Andrew Short KC and Saul Margo (instructed by **Leigh Day**) for the **Respondent employees**

Hearing date: 28 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 09.00am on 06 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

Introduction

1. In 2015 and 2016 a large number of employees working in supermarkets brought equal pay claims against their employers, who included Sainsbury's, Asda, Tesco, and other well-known retailers. So far none of these has reached a trial on the merits. The claims have generally been brought on a multiple claim form, a type of document expressly permitted by rule 9 of the Employment Tribunals Rules of Procedure. The years since the claims were launched have been taken up with a number of preliminary issues, including at least three cases in this court all reported under the name *Asda Stores Ltd v Brierley*: [2016] EWCA Civ 566; [2019] EWCA Civ 8 and [2019] EWCA Civ 44.

2. In the preliminary issue which is the subject of this appeal Sainsbury's argue that the employment tribunal ("ET") should have rejected large numbers of these claims on the grounds that the claim forms did not contain the reference number of a certificate issued by the Advisory, Conciliation, and Arbitration Service ("ACAS") relating to early conciliation ("EC") of their claims. It was argued before Employment Judge Camp in the Birmingham Employment Tribunal in March 2020 that a total of 700 of the 865 claims before him should be struck out on this basis. He upheld the contention in respect of only some of these, referred to by him as the "category 4 claimants". Judge Tayler, sitting in the Employment Appeal Tribunal ("EAT") allowed the claimant's appeal and restored their claims. With permission granted by Lewison LJ Sainsbury's seek to restore the order of the ET.

3. Before plunging into the details of the relevant statutes and regulations I think it is worthwhile to stand back and look at the broad picture. Not even the considerable forensic skills of Julian Milford KC could disguise the fact that these are highly technical applications lacking any substantive merit. When industrial tribunals were established more than half a century ago the purpose of Parliament was to create a speedy and informal system free from technicalities. It has been repeatedly stated that employment tribunals should do their best not to place artificial barriers in the way of genuine claims. Nevertheless, if the Appellant is right, an artificial barrier has indeed been placed in the way of these claims. It should be emphasised that there is no suggestion that any of these Claimants failed to make the necessary reference to ACAS before the claim was issued, nor that any of them failed to obtain a certificate by ACAS demonstrating that such a reference had been made. The complaint is no more and no less than that the ET claim form did not give the appropriate certificate number.

The law on early conciliation (EC)

4. The requirements to go through EC, for ACAS to issue an EC certificate, and for a claimant who is not exempt to have a certificate before presenting a claim form, are contained in s 18A of the Employment Tribunals Act 1996, the relevant parts of which are as follows:

> "(1) 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). ….

> (3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.
>
> (4) If –
>
> > (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or
> >
> > (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant. …
>
> (7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.
>
> The cases that may be prescribed include (in particular) cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter; …….
>
> (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).
>
> (10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.
>
> (11) The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).
>
> (12) Employment tribunal procedure regulations may (in particular) make provision –
>
> > (a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4); …"

5. Regulations made under s 18A include the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 ("the 2014 Regulations"), the relevant parts of which are:

> "2. In these Regulations and in the Schedule – … "early conciliation certificate" means the certificate prescribed by the Secretary of State in accordance with regulation 4(b) [sic];

> 3. (1) A person ("A") may institute relevant proceedings without complying with the requirement for early conciliation where –
>
> > (a) 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;
>
> 4. (1) The Secretary of State may prescribe – …
>
> > (b) a certificate to be issued by ACAS if rule 7 of the Schedule applies. ….
>
> …….
>
> Schedule
>
> The Early Conciliation Rules of Procedure ….
>
> ……
>
> 7 (1) If at any point during the period for early conciliation, or during any extension of that period, the conciliation officer concludes that a settlement of a dispute, or part of it, is not possible, ACAS must issue an early conciliation certificate.
>
> (2) If the period for early conciliation, including any extension of that period, expires without a settlement having been reached, ACAS must issue an early conciliation certificate.
>
> 8. An early conciliation certificate must contain—
>
> > (a) the name and address of the prospective claimant; …
> >
> > (d) the unique reference number given by ACAS to the early conciliation certificate; …"

6. The Employment Tribunals Rules of Procedure, as they were in force at the time of issue of these proceedings, provided so far as relevant:

> "1. (1) In these Rules—
>
> "claim" means any proceedings before an Employment Tribunal making a complaint;
>
> "claimant" means the person bringing the claim;
>
> "complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal;
>
> "early conciliation certificate" means a certificate issued by ACAS in accordance with the Employment Tribunals (Early

Conciliation: Exemptions and Rules of Procedure) Regulations [2014];

"early conciliation exemption" means an exemption contained in regulation 3(1) of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014;

"early conciliation number" means the unique reference number which appears on an early conciliation certificate;

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.

…

6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the 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;

(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with rules 74 to 84.

...

10. (1) The Tribunal shall reject a claim if – …

(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 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. (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;
>
> (e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates;
>
> (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 … (c) or (d) of paragraph (1).

(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) … of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name … and it would not be in the interests of justice to reject the claim."

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the judge's reason for rejecting the claim, or part of it. The notice shall

> contain information about how to apply for a reconsideration of the rejection.
>
> ...
>
> 37. (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> > (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> >
> > (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> >
> > (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> >
> > (d) that it has not been actively pursued;
> >
> > (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

7. By amendments which came into force on 8 October 2020 new paragraphs 12(1)(da) and 12(2ZA) were inserted, and paragraph 12(2A) was amended. Paragraph 12(1)(da) inserted a new ground for the staff of the Tribunal office to refer a claim form, namely if they consider that the form may be "one which institutes proceedings and the early conciliation number is not the same as the early conciliation number on the early conciliation certificate". Subparagraph (2ZA) provided:-

> "The claim shall be rejected if the Judge considers that the claim is of a kind described in subparagraph (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."

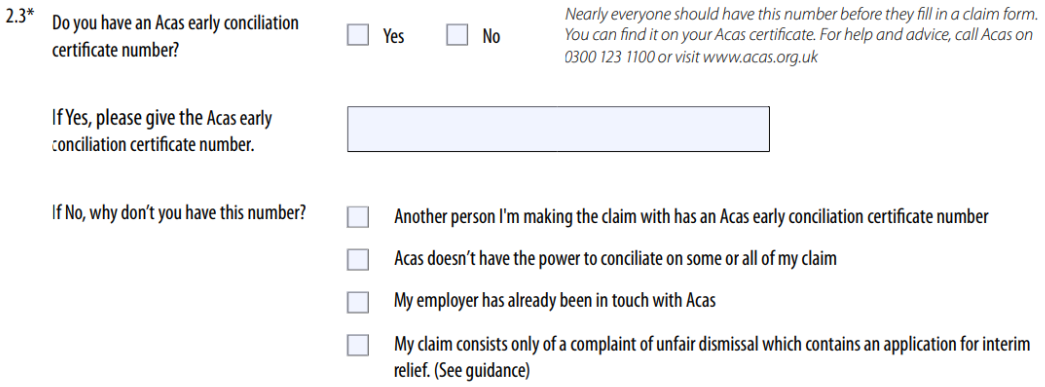
8. The amended paragraph 12 (2A) provided:-

> "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 subparagraph (e) or (f) of subparagraph (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."

These amendments do not affect the present appeal, but they appear to me to show a wish on the part of the rule-makers to ensure that the point before us should not be available in future cases.

The ET1 claim form

9. The standard form of an ET1 (agreed to be what is referred to in the Rules as the "prescribed form" although no one is aware of any statutory instrument prescribing it) begins with an instruction that "you must complete all questions marked with an [asterisk]". There are very few asterisked questions, namely 1.2 (first name), 1.3 (surname or family name), 1.5 (address of the Claimant), 2.1 (name of the Respondent), 2.2 (address of the Respondent), and 2.3 (which reads as follows):-


2.3* Do you have an Acas early conciliation certificate number? ☐ Yes ☐ No

Nearly everyone should have this number before they fill in a claim form. You can find it on your Acas certificate. For help and advice, call Acas on 0300 123 1100 or visit www.acas.org.uk

If Yes, please give the Acas early conciliation certificate number.

If No, why don't you have this number?

- ☐ Another person I'm making the claim with has an Acas early conciliation certificate number
- ☐ Acas doesn't have the power to conciliate on some or all of my claim
- ☐ My employer has already been in touch with Acas
- ☐ My claim consists only of a complaint of unfair dismissal which contains an application for interim relief. (See guidance)

10. Questions 8.1 and 8.2 are asterisked. They require the Claimant to set out "the type of claim you are making" and "the details of your claim". The "type of claim" question is answered by ticking one or more boxes, the relevant ones in the present cases indicating that the claim is of discrimination on the grounds of sex including equal pay. Question 8.2 was answered in the present cases (as it often is in significant ET litigation) with the words "see attached". The attachment consisted of a four page pleading headed "details of claim" and two schedules to that pleading, the first of which gave details of the Claimants. The details were given in columns which were respectively:-

First name

Last name

Job Title

Store

NI Number

Dates of employment: from:

To:

ACAS EC date

Gender

11. 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 forms 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. The term ET1 is commonly used to refer to claim forms of either type.

12. In all versions of the ET1 there is a box 15, headed "additional information", which states:

> "You can provide additional information about your claim in this section. If you're part of a group claim, give the Acas early conciliation certificate numbers for other people in your group. If they don't have numbers, tell us why."

13. Although in schedules to the claim forms with which we are now concerned the penultimate column contained the date of each ACAS early conciliation certificate (for example in Ms Clark's case 25 July 2016), there was no column in which to put the number of that certificate. Mr Milford frankly accepted that if the Schedule had contained a column with entries accurately recording the number of each Claimant's EC certificate the point in issue on this appeal would have been unarguable.

14. Although nothing turns on this, we were told that the involvement of ACAS in each of these cases was very brief. There was no prospect of ACAS being able to effect a settlement of any of these claims within the requisite period, and accordingly certificates were issued without further ado.

ACAS's early conciliation certificates

15. At the relevant time 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 R numbers for any of the other prospective Claimants whose names 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 listed in the schedule to the EC certificate.

16. The issue before us may be stated as follows: where an ET1 form is issued for a multiple claim, but the only R number given on the form is that of the lead Claimant, and that R number derives from an EC certificate which does not have the other Claimants' names on it, should the claims of all the other Claimants on that form have been rejected; and, if so, was the ET right to have struck them out on Sainsbury's application in the decision under appeal?

17. 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 of the Rules of Procedure and so did not refer the claim forms to employment judges for consideration under Rule 12. The point was

taken by the Respondents in their notices of appearance (ET3s). It was considered by EJ Camp at the fifth preliminary hearing in the combined claims together with a number of other issues at a hearing on 3, 5 & 10 March 2020.

The judgment of the Employment Tribunal

18. In what Judge Tayler in the EAT rightly described as a conspicuously thoughtful and careful judgment, EJ Camp permitted all claims to proceed where there was an EC number, or were EC numbers, on the claim form that appeared on an EC certificate on which the name of the relevant 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 which 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 EJ Camp held should be rejected was of Claimants whose names appeared on an EC certificate but no number appearing on *that* EC Certificate was included anywhere on or in the schedule to 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, nor on any EC certificate a number for which was set out anywhere on the claim form.

19. EJ Camp referred to the "Additional Information" section of form ET1. He said at [20]:-

> "The potential significance of what is written at the top of section 15 of the claim form is that it appears to show that those responsible for drafting the claim form – in practice, I believe, civil servants and senior Employment Judges – took the view that in a multiple case, all claimants have either to give an EC number or to say why they are exempt from having to do so. No one is suggesting that this means rules 10 and 12 have to be interpreted in a particular way, but, arguably, for reasons that will become obvious, it provides some support to the respondents' case."

20. The judge then went on to consider the decision of the EAT in *E.ON Control Solutions v Caspall* [2020] ICR 552, which was binding on him unless it could be distinguished. The basic facts of *Caspall*, taken from the EAT's summary, were that:-

> "The ET was concerned with two claims lodged by the Claimant. The first gave an incorrect ACAS early conciliation ("EC") number – relating to a different Claimant and a different claim; the second gave the number of an EC certificate that was invalid. Neither had been rejected by the ET under Rule 10 ET Rules, nor had the claims been referred to an Employment Judge under Rule 12. At a Preliminary Hearing before the ET, the Claimant applied to amend his claim to correct the ACAS EC number. The ET allowed the application, seeing this as consistent with the overriding objective and the general principle of access to justice given that this was a minor amendment to rectify a technical error. The Respondent appealed."

21. EJ Camp said that the following principles were to be derived from the EAT's decision in *Caspall*:-

> "23.1 …The language of Rule 12(2) obliges the ET to reject the claim if the Judge considers sub-paras (1)(a), (b), (c) or (d) to apply; the obligation is not stated to be limited to a particular stage in the process but is expressed in general terms, so as to arise at whatever stage the relevant judicial consideration is undertaken;
>
> 23.2 The requirement to include an EC number [in rules 10(1)(c) & 12(1)(c)] must be the accurate number on the EC certificate pertaining to the Claimant (as opposed to a different EC certificate relating to an entirely different Claimant);
>
> 23.3 It is not the case that Rule 6 … imports a discretion for the ET when considering failures to comply with Rules 10 and 12, nor that the overriding objective changes the position in this regard;
>
> 23.4 The Claimant's error [was not] something that could be remedied by way of amendment.
>
> 23.5 In conclusion (from the EAT's summary): "The Claimant's claims failed to include an accurate ACAS EC number and were thus of a kind described at Rule 12(1)(c) ET Rules. Pursuant to Rule 12(2), the Employment Judge was therefore required to reject the claims and return the claims to the Claimant."

22. The judge set out at paragraph 31 the four subcategories of claims before him potentially affected by the early conciliation issue:-

> "31.1 category 1 – cases where the only number given in the claim form was the M number;
>
> 31.2 category 2 – cases where there was a certificate giving an M number and which also specified R numbers for all prospective claimants, but the only number on the claim form was one claimant's – normally the lead claimant's – R number;
>
> 31.3 category 3 – cases where there was a certificate like Mr Abid's, with an M number and, as in category 2, all the claimants' details on it; but with only one R number, next to the name of the lead prospective claimant in the table immediately under the heading "Annex 1"; and in the claim form, only that R number was given;
>
> 31.4 category 4 is a bit different. The focus was not on the type of certificate. Instead, what was relevant was that only the lead claimant's R number was given in the claim form, and that that

number came from a certificate which did not have all the claimants' names on it."

23. At paragraphs 35-45 of his judgment EJ Camp said:-

"35. To construe rules 12(1)(c) & (e), it is helpful, first, to consider why they exist; what useful purpose they serve. I am conscious that there is, necessarily, some speculation involved in this. It is, though, informed, logical, and (I hope) appropriate speculation and I do not apologise for it.

36. The obligation to go through EC before presenting a claim form, unless an exemption applies, could have been enforced in a number of different ways, many of which would have been much simpler than what has been adopted. For example, that the claimant had not gone through EC could simply have been made a defence to a claim, like time limits; the Rules could have been left untouched; and EC certificates and certificate numbers need never have existed.

37. However, a decision seems to have been made that where an unexempt claimant had not gone through EC, not only should the respondent have a cast iron defence, but the claimant should, if possible, be blocked from even starting the claim. In my view, everything in the relevant legislation with which this hearing has been concerned, over and above the simple obligation to go through EC, wholly or partly stems from that decision.

38. The first of those things is the free-standing requirement in section 18A to have a certificate before bringing a claim. No doubt it is useful for there to be some kind of formal record of a prospective claimant having been through EC, and of the dates when they did so. But requiring claimants to have a certificate in order to present a claim form when they are already required to have been through EC must be to do with creating a means by which claimants can formally prove that they have been through EC, so that this can be checked at the outset of proceedings. Why else would this be required?

39. If the aim was not to have something that allowed for objective verification of whether a claimant had been through EC, all that would have been needed in the legislation was the requirement to go through EC and, possibly, provision for the claimant to tick a box on the claim form confirming that they had done so. Evidently, self-certification of this kind was deemed inadequate; although it is effectively all that is done to verify exemptions, presumably because no one could think of a better but still straightforward way of testing them.

40. Giving certificates numbers which could be quoted makes most sense to me as a mechanism for claimants to prove they

have certificates – certificates which, in turn, prove they have been through EC. Once again, this could have been done in a different way. For example, claimants could have been made to attach their EC certificates to their claim forms. But I can see why it was deemed better simply to have a number.

41. To work as such a mechanism, EC numbers have to attach to the right certificates, the right certificates being the ones that prove particular claimants went through EC before presenting their claims. For this to be done efficiently and effectively: only one certificate should be issued in relation to a particular instance of EC; the given number should be unique in the sense that it relates only to one certificate.

42. In other words, if someone is checking whether a claimant actually went through EC, they will want a number that leads them straight to a single certificate they can obtain and look at and which will show this one way or the other, and not to lots of certificates and/or to one or more irrelevant certificates.

43. However, EC certificates and numbers work equally well as a way for claimants to prove that they have gone through EC whether they – both the certificates and the numbers – relate to one individual or to many. If a dozen prospective claimants went through EC together between the same dates and against the same respondent, there is no inherent conceptual or practical difficulty I can think of in them having a single certificate shared between them, with a single number, or two or three or many numbers on it. So long as all of the claimants are named on that certificate, and so long as the number or numbers all relate only to that certificate:

> 43.1 any of those claimants can prove they went through EC by giving any of those numbers; and
>
> 43.2 anyone wanting to check whether a particular claimant has indeed gone through EC only needs to be told one of those numbers, as that number will take them straight to, and only to, a certificate with (or, if the claimant is lying, without) that claimant's name on it.

44. In conclusion, in relation to the purpose of rules 12(1)(c) and (e):

> 44.1 they exist because it is deemed necessary not only for prospective claimants to have gone through EC but for them to prove that they have done so, and to do so in a way that can be verified relatively easily;
>
> 44.2 given this, one would, logically, expect all prospective claimants to have to prove this in a similar way;

> 44.3 nothing connected with that purpose mandates every claimant in a multiple case having, or giving in their claim form, an EC number unique to them.
>
> 45. A further and related preliminary point is that what I am doing is interpreting the Rules and that I must seek to give effect to the overriding objective of dealing with cases justly and fairly when doing so. As just explained, rules 12(1)(c) and (e) are concerned with ensuring that claimants who are not exempt go through EC before bringing claims. All of the potentially affected claimants in this case went through EC and many of them were exempt. Given this, it would, all other things being equal, be unjust and unfair for me to direct that their claims should be rejected because of those rules. This is particularly so when rejection would result in many of them losing their claims altogether and the others losing years'- worth of arrears. If those rules can only properly be interpreted so as to give that result then so be it, but I have a duty to seek to interpret them in some other way."

24. At paragraphs 64 and 66 the judge gave his decision concerning the category 4 claimants:-

> "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" 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" 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."

25. At paragraphs 65 and 66 he concluded:

> "65. Using the four categories identified in paragraph 31 above, the claims of the following claimants do not fall foul of rules 12(1)(c) or (e) of the Rules for the following main reasons:
>
> 65.1 those in category 1, whose claim forms contain only the M number on the certificate on which they are named, because, for all of them, that number is "the unique reference number which appears on an early conciliation certificate" "pertaining to" them;
>
> 65.2 those in categories 2 and 3, being claimants whose claim forms contain an R number – any R number – on the certificate on which they are named. This is because:
>
> > 65.2.1 it is common ground between the parties that any R number which appears anywhere on any certificate

> constitutes an "early conciliation number" in accordance with the Rules;
>
> 65.2.2 given this, a claimant who gives in her claim form an R number from a certificate on which she is named gives one of the unique reference numbers appearing on an EC certificate pertaining to her.
>
> 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))."

The appeal to the EAT

26. The Claimants whose claims had been rejected by EJ Camp, referred to in his decision as the Category 4 Claimants, gave notice of appeal to the Employment Appeal Tribunal on two grounds:

    i) The Employment Judge erred in holding that the Appellants' claims were to be rejected under Rules 12(1)(c) and 12(1)(e) of the ET Rules because they did not provide an early conciliation number from an early conciliation certificate on which they are named.

    ii) The Employment Judge erred in holding that non-compliance with Rules 12(1)(c) or (e) meant that the claims had to be rejected under Rule 12(2) of the Employment Tribunal Rules of Procedure (and so without reference to any discretion under Rule 6) in circumstances where:-

        a) The staff of the tribunal had not referred the form to an employment judge under Rule 12(1); and

        b) such a construction would render the provisions for rectifying any defect under Rule 13 nugatory.

27. The appeal was listed for a preliminary hearing, at which His Honour Judge Beard allowed ground one of the appeal and a cross-appeal by Sainsbury's to proceed to a full hearing. He dismissed ground 2 of the appeal. The full hearing took place before His Honour Judge James Tayler on 14 July 2022. By a reserved judgment handed down on 21 September 2022 he allowed the Claimants' appeal and reinstated their claims. He dismissed the cross-appeal: the latter decision is not before us.

28. At paragraphs 33-36 of his judgment Judge Tayler considered the previous case law:-

> "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……

35. Because the point was subject of an agreement between the parties, the decision [in *Caspall*] 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."

29. Judge Tayler continued:-

> "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 that: "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…….
>
> 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."

The Appellant's submissions

30. The sole ground of appeal on which Sainsbury's sought and were granted permission to appeal to this court was that:-

> "The judge erred in law in interpreting rules 10 and 12 of the Employment Tribunals Rules of Procedure 2013 as having the

> meaning and effect that, where multiple claimants make employment tribunal claims on the same claim form and such claims are ones to which a requirement to engage in ACAS Early Conciliation applies, it is sufficient for the claim form to contain a single ACAS early conciliation number which need only relate to one of the claimants on the form."

31. Mr Milford submits in the Appellant's skeleton argument that the logical starting point for the exercise in statutory interpretation involved in this case should be to ask what is the purpose of what the EAT described as the "gatekeeping" provisions in Rule 10 of the ET Rules of Procedure. He adds that "to state the obvious, in construing any enactment the court should aim to give effect to the legislative purpose and to interpret the language so far as possible in a way which best gives effect to that purpose." I pause to say that no-one could disagree with that submission.

32. Mr Milford then cites the view of EJ Camp that it is necessary for all prospective claimants to have to prove that they have gone through EC and to do so in a similar way. There is, he argues, no obvious reason of principle for treating claimants who bring their claims on a multiple claim form from those who bring single claims. Managing multiple claimant litigation requires, if anything, "a more disciplined focus on good order, compliance with the rules and a clear understanding of the claims being advanced." He continues:

> "The purpose of the legislation would be wholly undermined if in the case of multiple claims it was only necessary to include one EC certificate number pertaining to one claimant on the claim form. It would mean that while it was necessary for any claimant making a single claim to show that they had engaged in early conciliation in order to avoid their claim being "weeded out", only one claimant in a multiple claim would need to show anything related to early conciliation at all."

33. The skeleton argument goes on to submit that the EAT's analysis of Rules 10 and 12 did not take what is described as "the obvious purpose of the legislative scheme" as its starting point. It is submitted that the wording of Rule 10 does not say that the tribunal must reject "a claim form" which does not contain the information set out in the Rule (including an EC number) but rather that the tribunal must reject "a claim" which does not contain the prescribed information. The natural meaning of that language is that *each* claim on a multiple claim should contain an early conciliation number, which must mean (as held by the EAT in *Sterling* and *Caspall*) an accurate EC number which related to the particular claim. If it had been the intention to provide a specific carve-out for multiple claims in Rule 10, stating that only one EC number relating to one claimant was required, this could have been done, but it was not. Furthermore, assistance on the meaning of the legislation can be derived from the meaning of the ET's claim form which expressly states in box 15 that "if you're part of a group claim, give the ACAS early conciliation certificate numbers for other people in your group".

The Respondent Claimants' submissions

34. Andrew Short KC and Saul Margo rely on the reasoning of the EAT. They emphasise the contrast in Rule 10(1) between subparagraph (b) (rejection because the form does not contain *each* claimant's name, *each* claimant's address, *each* respondent's name and *each* respondent's address), with subparagraph (c) which requires only that *an* early conciliation number should be on the form. They argue that if the intention had been to require an EC certificate number to be provided in respect of each claimant on a multiple claim form this could have been achieved without difficulty by Rule 10(1)(c) providing that a form should be rejected if:-

> "*in the case of any claimant* it does not contain one of the following
>
> (1) an early conciliation number..."

35. Mr Short and Mr Margo cite the observation of Langstaff P in *Software Box v Gannon* [2016] ICR 148 at paragraph 32 that "if the Rules are capable of being construed so as to provide that justice should prevail in individual cases, that construction is to be preferred to one which eliminates the possibility".

Discussion

36. I consider that Judge Tayler's construction of Rule 10 is the correct one. While a claim form must contain the name and address of *each* claimant and *each* respondent, it is sufficient for it to contain the number of *an* EC certificate on which the name of one of the prospective claimants appeared; and this construction satisfied the principle mentioned by Langstaff P in *Software Box v Gannon,* which I entirely endorse. But I would also uphold the EAT's decision in the Claimants' favour for a more fundamental reason relating to the structure and wording of the Rules of Procedure.

37. The Rules begin with a section headed "Introductory and general" which comprises rules 1-7. The next section, Rules 8-14, is headed "Starting a claim". This includes provision for the rejection of claims. The tribunal staff are directed to reject a claim under Rule 10 if the prescribed form is not used or certain information is not provided. Rule 11 provides for rejection if the claim is not accompanied by a tribunal fee or a remission application. Rule 12 requires the staff to refer a claim form to an employment judge if they consider that the claim or part of it may be one which the tribunal has no jurisdiction to consider or one which suffers from any of the substantive defects set out in subparagraph (1). Each of these three rules directs that if the claim is rejected, the form shall be returned to the claimant together with a notice of rejection explaining why it has been rejected and giving information about how to apply for reconsideration. If such an application is made reconsideration is dealt with under Rule 13.

38. Unless the claim is rejected, the next section of the Rules, headed "The response to the claim" and containing rules 15-22, comes into play. It includes provisions, with which we are not concerned in this case, for rejection of the response.

39. If neither the claim nor the response has been rejected, the case moves on to the stage of "Initial consideration of claim form and response" under Rules 26-28. Rule 26 requires that as soon as possible after the acceptance of the response an employment

judge shall consider all the documents held by the tribunal in relation to the claim, in order to confirm whether there are arguable complaints and defences within the jurisdiction of the tribunal. If the judge considers that the tribunal has no jurisdiction to consider the claim or part of it or that it has no reasonable prospect of success, the tribunal is to send a notice to the parties under Rule 27; and if no representations are received, the claim will be dismissed (not rejected) under Rule 27(2).

40. If any part of the claim is permitted to proceed however, the case moves on to the case management stage. Rules 29 to 40 are headed "Case management orders and other powers". The general power to make case management orders at any stage of the proceedings is in Rule 29. Rule 37 gives the tribunal the power, at any stage of the proceedings, to strike out a claim on any of a number of grounds which include non-compliance with any of the Rules or that the claim has no reasonable prospect of success.

41. The language of rejection, in contrast with that of dismissal or striking out, reflects the fact that rules 10-12 are all in the nature of a preliminary filter. Rule 10, in particular, is an administrative exercise which does not even involve a judge. If any of the filters under Rules 10, 11 or 12 is applied then (subject to any reconsideration under Rule 13), the claim is "rejected" without even being served on the respondent.

42. If the tribunal staff reject a claim under Rule 10 or an employment judge rejects it under Rule 12, the claimant may seek reconsideration on the basis that either the decision to reject was wrong or the notified defect can be rectified: see Rule 13(1). But if no such rejection occurs it is not in my view open to a respondent to argue at a later stage that the claim *should* have been rejected. The respondent's remedy is to raise any points about non-compliance with the Rules in their form ET3, or in appropriate cases at a later stage, and to seek dismissal of the claim under Rule 27 or apply for it to be struck out under Rule 37.

43. Where such an application is made then the waiver power under Rule 6 is applicable. I regard it as significant that this power is a very wide one. Apart from employer's contract claims with which we are not concerned, Rule 6 applies to any failure to comply with any provision of the Rules other than the requirement to use a prescribed form to present a claim or response. It would be most peculiar if an error about the EC certificate number leading to rejection under Rule 10 or Rule 12 were somehow impliedly excluded from the waiver provisions of Rule 6, even though Rule 6 contains no express exclusion of such errors. To say that any such error goes to jurisdiction is to beg the question.

44. It is instructive to compare three previous decisions of the EAT. In *Cranwell v Cullen* (EAT 20 March 2015, unreported) the claimant had not provided the prescribed information to ACAS before bringing her ET claim, and was not exempt from providing such information. Langstaff P, though expressing sympathy for the claimant, upheld the decision of an ET striking out the claim. I consider that he was right to do so. Since s 18A of the Employment Tribunals Act 1996 lays down that (unless an exemption applies) the claimant *must* provide the information before the claim is brought, the tribunal in Ms Cranwell's case had no jurisdiction.

45. In *Sterling v United Learning Trust* (EAT 18 February 2015, unreported) a single claimant had submitted a claim to an ET four days before time expired, it was returned

to her as rejected, mis-addressed by the omission of her house number, at a time when it was too late for it to be resubmitted. The reason why it had been rejected was that the claimant had omitted two digits from the ACAS EC certificate number when she had entered it on the application form. At paragraph 22 Langstaff P said:-

> "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."

46. At paragraph 26 he continued:-

> "I would say only this, that any court must be concerned with what might be thought to be the draconian effect of an error of relatively simple form namely an unintentional failure to record a number correctly. Though it may be part of the answer to suggest that Claimants should submit a form well within the period of three months, they are nonetheless entitled to submit a form at any stage within those three months. It may well be that the answer, where there is a simple error of this sort, is an application for reconsideration, as I have mentioned. It may be open to argument, as Mr Bloom mentioned, that Rule 6, which permits a Tribunal to excuse irregularities and non-compliance might have some applicability, but that too was not argued before the Judge, and he cannot be blamed for failing to consider it. "

47. It appears that Langstaff P's interpretation of Rule 10 was at least partly shaped by the way the case was argued and, as already noted, the decision has been reversed by the 2020 amendments to the Rules. Nevertheless, for the reasons I have given I would hold that it was wrongly decided. Parliament has not stated that a claimant who has in fact complied with the requirement to go to ACAS, and has obtained a certificate to prove it, should nevertheless be excluded from claiming because of the provision of a wrong number. This makes it unnecessary to consider whether Judge Tayler was right to say that *Sterling* can be distinguished as referring only to a single claim.

48. In *E.ON Control Solutions Ltd v Caspall* [2020] ICR 552 the claimant had likewise obtained an EC certificate, but the solicitor completing the ET1 inserted the number of a different certificate, and repeated the error when presenting a second and third claim. All three were rejected under Rule 12. There was then an attempt to present a fourth claim with a new certificate number, but that was out of time. Judge Eady QC (as she then was) reached a similar conclusion to that of Langstaff P in *Sterling* and applied it to Rule 12. She held at paragraph 54 that the consequence of a failure to include the correct early conciliation number is made clear under Rules 10 and 12: "the claim in question shall be rejected and the form returned to the would-be claimant". She did not

accept the suggestion floated by Langstaff P in *Sterling* that Rule 6 might import a discretion for the tribunal when considering failures to comply with Rules 10 and 12, when no such discretion exists under the mandatory terms of those Rules. She held that the overriding objective did not change that position and that ignoring mandatory requirements under the Rules could not be fair or just. Again, some critical aspects of *Caspall* appear to have been the subject of concessions or agreement, and like *Sterling* it was a case brought by a single claimant, but in my view it too was wrongly decided and should be overruled.

49. Mr Milford placed reliance on observations of mine in this court in *Trustees of the William Jones's Schools Foundation v Parry* [2018] EWCA Civ 672; [2018] ICR 1807. In that case an unfair dismissal claim had been issued attaching to it particulars of an entirely different case. The EAT had held that Rule 12(1)(b) was *ultra vires*, and Mathew Purchase of counsel was instructed for the Secretary of State as intervener to argue that it was not. In my judgment at paragraph 38 I said that:

> "Mr Purchase submits that a 'rejection' is not a disposal of existing proceedings. Rather, it is a recognition of the fact, or has the effect, that no valid proceedings have ever been commenced……Mr Purchase argues that a claim form cannot be said to have been 'completed' within the meaning of rule 8(1) if it is so defective or incomplete that it cannot be sensibly be responded to. Rule 12 is the means by which the ET identifies this and notifies the claimant that in such a case her claim has not got off the ground."

50. In accepting those submissions of Mr Purchase (with the agreement of Arden and Newey LJJ) I was not endorsing the argument that wherever there is any breach of Rule 12 it means that no valid proceedings have been commenced. The issue in *Parry* was whether the claim attaching the wrong particulars was in a form which could "sensibly be responded to". This court held that it was, since it was an unfair dismissal claim where the facts were well known to both sides and the employers could have put in a sensible holding response, but that in cases potentially involving more complex subject matter such as discrimination such a claim might well be properly rejected. *Parry* gives no support to the placing of artificial barriers in the way of genuine tribunal claims: on the contrary, see my observations to that effect at paragraph 31.

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.

Conclusion

52. For these reasons I would dismiss the appeal.

Lady Justice Asplin:

53. I agree.

Lord Justice Nugee

54. I also agree.