Neutral Citation Number: [2025] EAT 6

Case No: EA-2023-001334-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 January 2025

Before

THE HONOURABLE MR JUSTICE SWIFT

- -

Between

(1) ABEL ESTATE AGENT LTD
(2) ABEL LIVING LTD
(3) ABEL OF HERTFORD LTD
(4) AMI HAYWARD
(5) CHARLES COURT
(6) LUCINDA CASEY

Appellants/Respondents

-and-

ELIZABETH REYNOLDS

Respondent/Claimant

Gus Baker (instructed **Kilgannon and Partners**) for the **Appellants**
The Respondent was not represented and did not appear

Hearing date: 12 December 2024

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JUDGMENT

SUMMARY

Jurisdiction; Practice and Procedure.

Section 18A of the Employment Tribunals Act 1996. Early conciliation scheme. The claimant commenced a claim under section 48 of the Employment Rights Act 1996 ("section 48 claims") without first contacting ACAS or obtaining an early conciliation certificate. When the claim was presented, this error was not spotted by the Tribunal and the Tribunal did not reject the claim. Several months later, at a case management hearing, the Respondents contended that the claim should be rejected pursuant to section 18A(8) of the Employment Tribunals Act 1996. The Tribunal rejected the claim, but then permitted the claimant to amend her claim to re-commence identical section 48 claims.

On appeal by the Respondents, the Appeal Tribunal concluded: (1) the Employment Tribunal had erred in its decision to reject the claim - *Clark v Sainsbury's Supermarket Ltd* [2023] ICR 1169 applied; (2) the Employment Tribunal ought to have considered whether to dismiss the section 48 claim under rule 27 for want of jurisdiction, or strike the claim out under rule 37; but (3) on consideration of the Respondents' applications under rule 27 and rule 37, refusing the applications and dismissing the appeal, on a proper construction of section 18A of the Employment Tribunals Act 1996, the claimant's failure to comply with the early mediation requirements did not deprive the Employment Tribunal of jurisdiction to hear the section 48 claim - *Pryce v Baxterstorey Ltd* [2022] EAT 61 not followed. The Appeal Tribunal remitted the claimant's claims to the Employment Tribunal for consideration on their merits.

THE HONOURABLE MR JUSTICE SWIFT

A. Introduction

1. This appeal concerns the consequences of failure to comply with the requirement for early conciliation in section 18A of the Employment Tribunals Act 1996 ("the ETA 1996") when that failure is not identified at the time the claim was presented to an Employment Tribunal. In this judgment, I hope for sake of clarity, I will refer to the parties who are the Respondents to the proceedings in the Employment Tribunal as "the Respondents" notwithstanding that they are the Appellants in this appeal.

(1) The early conciliation scheme

2. So far as material for the purposes of this appeal, section 18A of the ETA 1996 provides as follows.

> "**18A Requirement to contact ACAS before instituting proceedings**
>
> (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).
>
> (2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.
>
> (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.

> …
>
> (6) In subsections (3) to (5) *"settlement"* means a settlement that avoids proceedings being instituted.
>
> (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)—
>
> > (a) cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;
> > (b) cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;
> > (c) cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.
>
> (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 regulations made by the Secretary of State.
>
> …"

"Relevant proceedings" is defined at section 18 of the ETA 1996. The definition is widely-cast, covering the overwhelming majority of types of claim that can be pursued before Employment Tribunals.

3. By section 18A, a prospective claimant must provide "prescribed information" to ACAS (the Advisory, Conciliation and Arbitration Service) "in the prescribed manner" about "the matter" that is the putative subject of proceedings before the Employment Tribunal. The substance of the obligation is articulated in the Schedule to the Employment Tribunals (Early Conciliation and Rules of Procedure) Regulations 2014 ("the 2014 Regulation"). The prospective claimant

must provide her name and address and the name and address of the prospective respondent to the claim to ACAS, either using the early conciliation form (or the equivalent online form on the ACAS website), or by telephone. What happens next is described at paragraph 5 of the Schedule: ACAS must make "reasonable attempts" to contact the prospective claimant; and if the prospective claimant consents, ACAS must make "reasonable attempts" to contact the respective respondent. ACAS must issue the certificate referred to in section 18A(4) and (8) ("an early conciliation certificate") either at the end of the early conciliation period (which is six weeks, see paragraph 6 of the Schedule) or sooner if "the conciliation officer concludes that a settlement of a dispute, or part of it is not possible" (see paragraph 7 of the Schedule).

4. In his judgment in *Drake International Systems Ltd v Blue Arrow Ltd* [2016] ICR 445, Langstaff P explained the purpose of the provisions in the ETA 1996 and the 2014 Regulations as being.

> "… to provide an opportunity for the parties to take advantage of ACAS conciliation, if they wish, led by the claimant in respect of what is broadly termed "a matter"."

Langstaff P also approved observations made by HHJ Eady QC in *Science Warehouse Ltd v Mills* [2016] ICR 252 that, save for the obligation to provide contact information to ACAS, the early conciliation process is entirely voluntary. If a claimant has no interest in participating in an early conciliation process, she is not obliged to do so. If, for example the prospective claimant does not consent to ACAS contacting the respective respondent, the early conciliation process will be at an end, the obligation under paragraph 7 of the

Schedule will arise and ACAS will be required to issue an early conciliation certificate. In her judgment in *Science Warehouse Ltd*, HHJ Eady QC put the point so.

> "30. … Early conciliation builds into the employment tribunal process a structured opportunity for parties to take advantage of Acas conciliation; albeit an opportunity that has to be formally acknowledged by the initial contact to be made with Acas and the issuing of an early conciliation certificate. The initial requirement placed upon a prospective claimant is, however, limited; it may even be by telephone. In any event, she is only required to provide her own name and address and that of the prospective respondent. She is not required to state the nature of the claim she might subsequently bring, still less to label it under the relevant statutory provisions …"

(2) The present case

5. Ms Reynolds presented her ET1 claim form to the Employment Tribunal on 12 April 2023. Until 6 April 2023 she had worked in an estate agency business. On 6 April 2023 she was dismissed and told the reason for dismissal was redundancy. Ms Reynolds did not believe that redundancy was the true reason for her dismissal. She believed she had been dismissed because she had made a protected disclosure within the definition at section 43B of the Employment Rights Act 1996 ("the ERA 1996").

6. The claim commenced on 12 April 2023 included a claim for unfair dismissal under section 111 of the ERA 1996. Ms Reynolds contended that the reason for dismissal was a protected disclosure so that the dismissal was, by reason of section 103A of the ERA 1996, automatically unfair. When making her claim for unfair dismissal, Ms Reynolds also made an application under section 128 of the ERA 1996 for interim relief. Applications for interim relief are addressed in sections 128 – 132 of the ERA 1996. Among other matters, those sections

provide that where an employee claims she has been unfairly dismissed and the reason for dismissal was the reason specified in section 103A of the ERA 1996, if the tribunal considers it likely that the reason for dismissal was such a reason, the Tribunal may order that the employee's contract of employment should continue pending determination of the unfair dismissal claim. Ms Reynolds' unfair dismissal claim was brought against three respondents: Abel Estate Agent Ltd, Abel Living Ltd, and Abel of Hertford Ltd (the First, Second and Third Respondents, respectively and collectively, the "company Respondents"). These are all associated companies. Ms Reynolds was unsure which had been her employer.

7. In addition to the unfair dismissal claim, Ms Reynolds also presented a claim under section 48 of the ERA 1996. It is likely, though from the pleaded case not certain, that the section 48 claim is made against the three further respondents: Ami Hayward, Charles Court, and Lucinda Casey (the Fourth, Fifth and Sixth Respondents, respectively and collectively, the "individual Respondents"). The Fourth Respondent was a director of the First Respondent and Second Respondent and had at some time, also been a director of the Third Respondent. The Fifth Respondent was a director of the Second Respondent. The Sixth Respondent was a director of the Third Respondent. Each of the First, Second, and Third, Respondents acted through (variously) the Fourth, Fifth and Sixth Respondents. Ms Reynolds' claim under section 48 ERA 1996 (which I shall refer to as "the section 48 claim") rests on a contention that steps taken by the individual Respondents that resulted in the termination of Ms Reynolds' employment were contrary to section 47B(1A) of the ERA 1996.

8. Ms Reynolds did not seek early conciliation before presenting her claims to the Employment Tribunal. She did not obtain an early conciliation certificate. So far as concerns the unfair dismissal claim, presenting that claim without an early conciliation certificate did not entail any breach of any requirement in section 18A of the ETA 1996. Claims for interim relief under section 128 of the ERA 1996 must be presented within 7 days of the effective date of termination. Where an unfair dismissal claim is made together with an application for interim relief, the proceedings are exempt from the early conciliation procedure: see section 18A(7) of the ETA 1996 and regulation 3(1)(d) of the 2014 regulations. The claim under section 48 of the ERA 1996 was not exempt from the early conciliation procedure. So far as concerns that claim, Ms Reynolds should have taken the steps required in section 18A of the ETA 1996 and the Schedule to the 2014 regulations and should have obtained an early conciliation certificate.

9. Provision to enforce the early conciliation requirement is made in the Employment Tribunal Rules (at Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013). At the time of the events material to this appeal, the Employment Tribunal Rules were in the form in force prior to 6 January 2025. The references to rules and rule numbers in this judgment are references to that version of the Employment Tribunal Rules. Claims are commenced in the Employment Tribunal when presented in accordance with rule 8. Rules 10 – 12 require the Tribunal to reject a claim in certain circumstances, including where an early conciliation certificate number is not provided, where an exemption from early conciliation has been incorrectly claimed, or when the parties to the claim are not the same as the prospective claimant and prospective respondent identified in an early conciliation

certificate. If the number of the early conciliation certificate is mis-stated on the Form ET1, the Tribunal has a discretion to reject the claim. So far as material, the rules 10 and 12 provide as follows.

> "**10. Rejection: form not used or failure to supply minimum information**
>
> (1) The Tribunal shall reject a claim if—
> …
>
> (c) it does not contain one of the following—
>
> (i) an early conciliation number;
> (ii) confirmation that the claim does not institute any relevant proceedings; or
> (iii) confirmation that one of the early conciliation exemptions applies.
>
> (2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.
>
> …
>
> **12. Rejection: substantive defects**
>
> (1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—
>
> (a) one which the Tribunal has no jurisdiction to consider;
> (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;
> (c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
> (d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;
> (da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;
> (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; or

> (f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.
>
> (2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).
>
> (2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.
>
> (2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made [an][7] error in relation to a name or address 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 reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

The parts of rules 10 and 12 that address failure to comply with the early conciliation requirement in section 18A of the ETA 1996 and the 2014 Regulations were added to the Employment Tribunal Rules (by the Employment Tribunals Constitution and Rules of Procedure) (Amendment) Regulations 2014 ("the 2014 Rules Amendment Regulations").

10. If a claim is rejected, the Form ET1 is not sent to the respondent. Effectively, a decision to reject is equivalent to a decision of a court not to issue a claim that has been filed. If a claim is rejected, the claimant may request reconsideration of the decision to reject, either on the basis of the decision was wrong or on the basis the that the defect can be rectified (see rule 13), or the claimant may simply

choose to re-present the claim having addressed such defect in compliance with section 18A of the ETA 1996 as may have occurred.

11. In the present case, Ms Reynolds' section 48 claim was not rejected. The failure to comply with section 18A of the ETA 1996 was not spotted by the Tribunal.

12. The application for interim relief was heard on 30 May 2023. By this time, none of the Respondents had responded to the application for interim relief, and none of them attended the hearing. The Tribunal made orders continuing contracts made respectively, between Ms Reynolds and the First Respondent and Ms Reynolds and the Second Respondent and made consequential orders in respect of arrears of pay. On 5 July 2023 the Tribunal gave judgment in default of defence under rule 21 of the Employment Tribunal Rules. A remedy hearing was listed to take place over three days starting on 9 August 2023. On 4 July 2023 solicitors acting for the Respondents wrote to the Tribunal requesting an extension of time to present the Respondents' defences to Ms Reynolds' claims. On 17 July 2023 the Respondents' solicitors wrote again to the Tribunal, this time requesting an order setting aside or varying the decision the Tribunal had made on the interim relief application, and reconsideration of the default judgments that had been entered on 5 July 2023. On 7 August 2023 the Tribunal adjourned the remedy hearing and directed a new hearing date be set to hear the Respondents' applications. The matter came back before the Tribunal on 20 September 2023. The Tribunal's judgment a ("Case Management Summary") was sent to the parties on 13 November 2023. This is the judgment under challenge in this appeal.

13. By its judgment the Tribunal: (a) allowed the Respondents an extension of time to present their defences to Ms Reynolds' claims; (b) set aside the decisions on the interim relief application; (c) decided under rule 12, to reject Ms Reynolds' grounds of claim in so far as they concerned her section 48 claim against the Respondents; and (d) allowed an application by Ms Reynolds to amend her claim to add a claim under section 48 of the ERA 1996 against each of the individual Respondents. A notice of rejection was sent to Ms Reynolds on 26 September 2023. However, the effect of the decision to issue that notice was in practice, cancelled out by the decision allowing the application to amend.

(3) The appeal

14. The Respondents appeal against the decision allowing Ms Reynolds to amend her claim. The Respondents contend: *first*, that the decision allowing the amendment to add the section 48 claim was wrong in law because so far as concerns that claim, the requirement for early conciliation had not been met (Ground 1A in the Notice of Appeal); *second*, that when allowing the amendment, the Judge failed properly to consider the relevance of the time limited for bringing a section 48 claim by failing to consider whether it would have been reasonably practicable to obtain an early conciliation certificate before presenting the claim (Ground 1B in the Notice of Appeal); and *third* that rather than rejecting section 48 claim under Rule 12 and then permitting an identical claim to be raised by amendment, the Judge ought to have struck out the section 48 claim for want of jurisdiction (Ground 2 in the Notice of Appeal).

15. The Respondents' third ground of appeal requires a little explanation. At the hearing on 20 September 2023 the Judge's attention was not drawn to the

judgment of the Court of Appeal in *Clark v Sainsbury's Supermarket Ltd* [2023] ICR 1169 which had been handed down on 6 April 2023. Nor does it appear that the Judge's attention was drawn to the judgment in *Clark* at any time before 13 November 2023 when his judgment was sent to the parties.

16. In his judgment in *Clark*, Bean LJ considered the approach to be taken by a Tribunal when a claim that was presented without compliance with the requirements in section 18A of the ETA 1996 was not rejected by the Tribunal.

> 36 … But I would also uphold the appeal tribunal'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 sub-paragraph (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 29–40 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 employers' 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."

17. Rule 27 appears under the heading "Initial Consideration of Claim Form and Response". Paragraphs (1) – (3) of rule 27 are material.

> "**27. Dismissal of claim (or part)**
>
> (1) If the Tribunal considers either that it has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—
>
> > (a) setting out the Tribunal's view and the reasons for it; and
> > (b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.
>
> (2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).
>
> (3) If representations are received within the specified time they shall be considered by the Tribunal, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing."

Rule 37 is in the section of the rules headed "Case Management Orders and other Powers". Rule 37(1) provides.

> "**37. Striking out**
>
> (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)."

The Respondents' third ground of appeal invites me to follow the procedural path set out by Bean LJ and consider whether Ms Reynolds' section 48 claim should be struck out or be dismissed for want of jurisdiction.

18. From the time she presented the claims to the Employment Tribunal in May 2023, Ms Reynolds has acted in person. Ms Reynolds has not made submissions in opposition to the appeal and did not attend the hearing. However, she does not consent to the appeal being allowed. In this appeal the Respondents have appeared by counsel, Mr Gus Baker (who did not appear before the Employment Tribunal). I have been greatly assisted by his submissions.

B. Decision

19. It is regrettable that the Judge's attention was not drawn to the Court of Appeal's judgment in *Clark.* Had the Judge had the opportunity to consider that judgment he would not have made the decision to reject the section 48 claim, and he would not have needed to consider any application to amend to add the section 48 claim back into the proceedings. Instead, he would have considered a single issue; whether, since it had been commenced without compliance with the early conciliation requirement, the section 48 claim should be struck out, either for want of jurisdiction under rule 27 or under rule 37.

20. The approach that should be followed is set out very clearly in Bean LJ's judgment. In this case, that approach renders the first and second grounds of appeal academic. There is little purpose in considering whether the Judge's exercise of his discretion to permit claims to be amended and parties to be joined was correct in law when the need to exercise such powers at all rested on a false premise – i.e. that Ms Reynolds' section 48 claim should be rejected under rule 12.

21. At the hearing I put this point to Mr Baker. He agreed that I should approach this appeal on the premise that the Judge's rule 12 decision should be set aside. On that premise the decision to re-instate the section 48 claim by amendment falls away. Mr Baker agreed that this being so, the first and second grounds of appeal also fall away.

22. I will, therefore, focus on the third ground of appeal on the premise that the Judge should have considered whether to dismiss the section 48 claim either under rule 27 or under rule 38. This is the course proposed at paragraph 27 of the Notice of Appeal dated 8 December 2023. Since the Judge did not purport to exercise either of these powers it would be entirely artificial for me to scrutinise his reasoning as if he had. However, by section 35 of the ETA 1996, the powers of this Appeal Tribunal permit consideration and exercise of "any of the powers of the body … from whom the appeal was brought". In this case, the considerations relevant to exercise of the rule 27 and 37 powers do not need to be the subject of any or any further evidence. The primary consideration will be the significance attaching to the failure to go through the early conciliation procedure before presenting the section 48 claim. The submission for the Respondents is that a

failure to comply with the early conciliation procedure goes to the jurisdiction of the Employment Tribunal. Beyond this, the application of rule 37 may require consideration of the circumstances in which the early conciliation requirement was not met and the significance of that failure in the circumstances of this case with a view to deciding whether, consistent with the overriding objective at rule 2, the section 48 claim should be struck out. These matters are either ones that have already figured in the Judge's reasoning in the decision under appeal (albeit for different purposes, in a different context), or are matters that could not be disputed, for example the steps taken by the parties in the litigation to date. Drawing these points together, I am satisfied there is no need to remit this case to the Judge to consider the exercise of the rule 27 and 37 powers. I can decide those matters for myself.

23. The submission for the Respondents is that the section 48 claim should be dismissed under rule 27 or struck out under rule 37 because the Employment Tribunal lacks jurisdiction to hear the claim. This submission relies on the judgment of HHJ Shanks in *Pryce v Baxterstorey Ltd* [2022] EAT 61. In that case the claimant had presented discrimination claims but had not complied with the early conciliation procedure. Very shortly after presenting the claims the claimant did comply with the early conciliation request and obtained an early conciliation certificate. She wrote to the Employment Tribunal asking for the certificate number to be added to her Form ET1. The Tribunal did not reject the claim. Some six months later, at a preliminary hearing, the Employment Judge noticed there was no certificate number on the Form ET1. He dismissed the claim on the premise that, by reason of the failure to comply with the section 18A of the ETA 1996, the Employment Tribunal had no jurisdiction to hear the

claim. On appeal that decision was upheld. HHJ Shanks said this at paragraph 10 of this judgment.

> "10. Mr Colm Kelly has represented the respondent on this appeal and has made helpful submissions on both those grounds for appeal. He is clearly right to submit that section 18A(8) is in the nature of a jurisdictional requirement which is laid down by an Act of Parliament. It specifically says:
>
> > (8) A person who is subject to the requirement in subsection (1) [to make contact with ACAS and provide them with information] may not present an application to institute relevant proceedings without a certificate under subsection (4) [the kind of certificate that was obtained by Ms Pryce on 27 August 2019].
>
> It follows that when Ms Pryce presented her claim on 23 August 2019 without a certificate, there was indeed no jurisdiction to consider it and that what she sent to the tribunal was in effect a nullity and should have been rejected immediately."

24. Mr Baker supports this conclusion by reference to the language to section 18A of the ETA 1996. By subsection (1) prospective claimants are required to provide information to ACAS (i.e., the information specified in paragraph 2 of the Schedule to the 2014 Regulations). That contact starts the process by which ACAS issues the early conciliation certificate referred to in subsection (4). Subsection (8) then states that those subject to the subsection (1) obligation "may not present an application to institute relevant proceedings" unless they have an early conciliation certificate. Mr Baker draws attention to the words "may not present". He contrasts this language with language in the provisions in the ERA 1996 and the Trade Union and Labour Relations (Amendment) Act 1992 that identify many of the types of claims that may be made to Employment Tribunals. These provisions are framed in terms of complaints being "presented". For example, section 111 of the ERA 1996 concerns claims for unfair dismissal.

> "**111. Complaints to employment tribunal.**
>
> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer."

Thus, submits Mr Baker, it is the presentation of a claim that gives an Employment Tribunal jurisdiction to hear the claim. When, by section 18A(8) a prospective claimant is prohibited from presenting a claim without a certificate, that prohibition goes to the Employment Tribunal's jurisdiction. It follows, he submits, that in this case that because Ms Reynolds had not contacted ACAS and had no early conciliation certificate, the Tribunal had no jurisdiction to consider her section 48 claim. The claim should therefore be dismissed under rule 27 or struck out under rule 37.

25. Mr Baker further submits that although the matter was not within the *ratio* of Bean LJ's judgment in *Clark*, this conclusion is supported by Bean LJ's judgment. In *Clark*, many employees of the respondent started claims under the Equal Pay Act 1970. Multiple claims were commenced on claim forms as is permitted under rule 9 of the Employment Tribunal Rules. Each Form ET1 contained an early conciliation certificate number. However, in some cases, although a claimant's name appeared on the Form ET1, the certificate number on the form did not correspond to the certificate that related to that claimant. In those cases, the Employment Tribunal rejected the claim in exercise of the power under rule 12 of the Employment Tribunal Rules. The rejection decisions were not made immediately or even soon after the claims presentation to the Employment Tribunal. Rather, the point about the early conciliation certificate numbers was raised by the employer in its defence and considered by the

Tribunal at a preliminary hearing that took place some 5 years after the claims had been commenced. The rejection decisions were reversed on appeal to the Employment Appeal Tribunal. The employer appealed to the Court of Appeal. At paragraph 3 of his judgment, Bean LJ said this.

> "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 employer's appeal was dismissed by the Court of Appeal. The *ratio* of the decision is a paragraph 36 of Bean LJ's judgment.

> "36. I consider that Judge James 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 J (President) in *Software Box Ltd v Gannon*, which I entirely endorse. …"

However, Bean LJ then continued.

> "But I would also uphold the appeal tribunal's decision in the claimants' favour for a more fundamentally reason relating to the structure and wording of the [Employment Tribunal Rules]."

The "more fundamental reason" is explained in the passage of Bean LJ's judgment set out above at paragraph 16. In short, by the time the employer had put in its defence to the claim the opportunity to exercise the rule 12 power had passed. If the employer wished to raise the matter it would have to do so by way of an application to dismiss the claims under rule 27 or rule 37. Bean LJ stated that on such an application it would be open to the Employment Tribunal to waive any irregularity in exercise of its power under rule 6 of the Employment Tribunal Rules. Bean LJ clearly anticipated that the power under rule 6 to waive irregularity could be used in respect of "an error about the EC certificate number". So far as concerns such errors, Bean LJ stated, "to say that such an error goes to jurisdiction is to beg the question". See, per Bean LJ at paragraphs 42 and 43. It is apparent that Bean LJ did not consider such errors went to the Employment Tribunal's jurisdiction to hear the substantive claims. See, for example, at paragraph 51 of his judgment.

26. The circumstances in the present case are different. Ms Reynolds' error was not that she failed to record an early conciliation certificate number on her Form ET1. Her error was that she had not obtained an early conciliation certificate at all. The question now arising is whether the Bean LJ's reasoning provides authority for the proposition that errors of this sort mean the Employment Tribunal must not consider the substantive merits of a claim. Mr Baker's submission focuses on paragraphs 44 – 50 of Bean LJ's judgment.

27. In those paragraphs Bean LJ considered the judgments in *Cranwell v Cullen* (UKEAT/46/14, judgment 20 March 2015), *Sterling v United Learning Trust* (UKEAT/439/14, judgment 18 February 2015]), *E.ON Control Solutions Ltd v*

Caspall [2020] ICR 552, and *Trustees of William Jones' School Foundation v Parry* [2018] ICR 1807. Bean LJ stated that both *Sterling* and *Caspall* had been wrongly decided. In these cases, the Employment Tribunal had dismissed claims for being brought out of time in circumstances where a Form ET1 containing an incorrect early conciliation certificate number had been presented within time but the Form ET1 with the correct number had been sent to the Employment Tribunal only after the time limit to present the claim had expired. As I see it, Bean LJ considered these cases to have been wrongly decided because the Form ET1s containing the incorrect certificate number ought to have been regarded as effective claims. As such there had been no time limit issue in either case. The scenario in *Parry* was different, but the principle was the same. Bean LJ stated at paragraph 50.

> "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 para 31."

Mr Baker's submission relies on the contrast between Bean LJ's analysis of these 3 cases and his analysis of the position in *Cranwell v Cullen*. At paragraph 44 of his judgment Bean LJ stated as follows.

> "44. It is instructive to compare three previous decisions of the appeal tribunal. In *Cranwell v Cullen* (unreported) 20 March 2015, the claimant had not provided the prescribed information to Acas before bringing her ET claim and was not exempt from providing such

> information. Langstaff J (President), 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 section 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."

Mr Baker submits this supports his contention that where there is no early conciliation certificate (i.e., the circumstances posited by section 18A(8)) if a claim is nonetheless presented, the Employment Tribunal has no jurisdiction to hear it. Thus, he submits in this case, Ms Reynolds' 48 claim must be dismissed under rule 27 or alternatively struck out under rule 37. Since the issue is jurisdictional no question of any discretion can arise, nor is there any scope to waive the failure through application of rule 6 of the Employment Tribunal Rules.

28. Notwithstanding Mr Baker's skilful submission I do not consider the fact that Ms Reynolds presented her section 48 claim to the tribunal in breach of the prohibition at section 18A(8) of the ETA 1996 means the Employment Tribunal has no jurisdiction to hear the claim.

29. The word "jurisdiction" can refer to different concepts depending on context. For present purposes the word is synonymous with having competence to hear certain types of claim. This is consistent with section 2 of the ETA 1996 which states.

> "Employment Tribunals shall exercise the jurisdiction conferred on them by or by virtue of this Act or any other Act, whether passed before or after this Act."

Provisions such as section 111 of the ERA 1996 are not framed in terms of jurisdiction. They permit complaints to be "presented" to an Employment Tribunal. From this the inference drawn is that the Employment Tribunal is where the claim concerned should be ventilated, and the Employment Tribunal is the judicial body possessing the competence to decide the claim.

30. The Employment Tribunal is, as often said, a creature of statute. Its competence to hear claims is set in legislation. The extent of the Tribunal's competence depends on the proper construction of those statutory provisions rather than any abstract concept of jurisdiction. What the Employment Tribunal may do depends on the correct construction of those statutory provisions. Sometimes this point is obscured by shorthand language. One example concerns time limits. It is frequently said in the context of Employment Tribunal claims that the parties to those claims cannot waive (i.e. agree to ignore) the time limit for starting a claim because the time limit "goes to the jurisdiction of the Tribunal". This phrase can give the wrong impression. Taking unfair dismissal claims as the example, section 111(1) of the ERA 1996 permits complaints of unfair dismissal to be "presented" to an Employment Tribunal. Subsection (2) then provides:

> "(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a) before the end of the period of three months beginning with the effective date of termination, or
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

The reason the application of subsection (2) may not be agreed by the parties but must be a matter decided by the Tribunal is not the result of a free-standing notion of jurisdiction but because, correctly construed, that is what subsection (2) requires. Likewise, whether or not section 18A(8) of the ETA 1996 provides an absolute bar to an Employment Tribunal considering a claim depends on what is the proper meaning and effect of the provision. Any similarity between the language used in section 18A(8) and provision such as section 111 of the ERA 1996 is not significant for its own sake, but only to the extent that it is what section 18A requires, construed by reference to the words enacted in the section and the purpose the section pursues.

31. Properly construed, section 18A does not provide any such absolute bar. The relevant provisions are section 18A(1) and (8). Subsection (1) imposes an obligation on the prospective claimant to provide information to ACAS. The nature of that obligation, taken together with the provisions in the Schedule to the 2014 Regulations is as described by Langstaff in *Drake International* and HHJ Eady QC in Science Warehouse: see above at paragraph 4. It is, at its highest, an obligation on a prospective claimant to consider whether to take advantage of ACAS conciliation. This, in the words of Langstaff P is a matter "led by the wishes of the prospective claimant". It is inherently improbable that non-compliance with an obligation of this nature should affect the competence of the Employment Tribunal to hear a claim that, in all other respects, has been properly presented to it.

32. Consideration of subsection (8) does not alter the position. There is nothing on the face of this subsection that requires the conclusion that it is intended to affect

the Employment Tribunal's competence to determine a claim. The prohibition against presenting a claim is directed to the prospective claimant. Subsection (8) says nothing as to the Employment Tribunal's competence to act if a claim is received.

33. This conclusion is consistent with the scheme put in place by the 2014 Rules Amendment Regulations to give effect to the early conciliation requirement – i.e., the material parts of rules 10 and 12 of the Employment Tribunal Rules. These rules provide for a claim that has been presented without evidence of compliance with the section 18A early conciliation requirement to be rejected. The requirement to reject a claim comes to no more than saying that claims filed without required information should not be issued by the Employment Tribunal. It does not follow from rejection that the claim is outside the competence of the Employment Tribunal. In his judgment in *Drake International*, Langstaff P noted the distinction within rule 12 between rule 12(1)(a) which refers to claims being rejected if the claim is "one which the Tribunal has no jurisdiction to consider" and Rule12(1)(c) – (f) all of which concern errors relating to the early conciliation requirement and none of which is expressed as going to jurisdiction: see Langstaff P at paragraph 20.

34. These rules are the means by which the prohibition in section 18A(8) is to be enforced. When the rules work as intended claims are rejected promptly so that the claimant can engage with ACAS in the manner and to the extent required in the Schedule to the 2014 Regulations. This is consistent with the purpose pursued by section 18A of the ETA 1996. This makes perfect sense given the purpose of early conciliation since conciliation will often have the greatest

chance of success if it happens before the parties have commenced legal proceedings. Once a claim has been started the parties' positions may become more entrenched and compromise less likely. Early rejection of claims where the possibility of early conciliation has not been considered permits the claimant the option of benefiting from ACAS's services at the point when those services may be most likely to work. Taking the provisions of the early conciliation scheme in the round (including the material parts of rules 10 and 12), their purpose is to encourage a claimant to take advantage of ACAS's services before a claim is commenced. None of this, however, suggests anything going to the competence of the Employment Tribunal.

35. I do not consider the analysis ought to change in a case such as this one where failure to comply with the early conciliation requirement comes to light later in the proceedings. The purpose of the early conciliation provisions remains the same. However, by the time the error is raised the possibility for early conciliation will have passed – the parties will have already embarked on litigation. Once that moment has passed, once the Form ET1 has been sent to the respondent, or when the respondent has filed its defence, it makes much less sense, if any sense at all, to construe the effect of subsection (8) as removing the competence of the Employment Tribunal to decide the substantive claim. It is not obvious at all that the purposed by section 18A of the ETA 1996 and the 2014 Regulations would be served by a conclusion that proceedings should be treated as a nullity, requiring a claimant who wished to pursue the claim to start again after having gone through early conciliation, now facing the additional hurdle that the second claim would, like as not, having been commenced out of time (a point that would, no doubt, also be obvious to the respondent and would

make the respondent less willing to engage with any form of conciliation). The only effect of an approach that required the Employment Tribunal to dismiss or strike out a claim as a matter of course would be punitive. The early conciliation procedures as enacted in section 18A and the schedule to the 2014 Regulations are not of that nature, and I do not consider such a conclusion is required by the language of section 18A(8). The statutory provisions as enacted, and the purpose that lies behind them, are better served by an approach that in such circumstances, allows the Employment Tribunal to consider whether to exercise its powers under rule 37 and/or rule 6 taking account all relevant circumstances.

36. For these reasons I do not consider that Ms Reynolds' failure to comply with the early conciliation requirement removes the Employment Tribunal's competence (jurisdiction) to consider the merits of the section 48 claim.

37. My conclusion is the opposite of the conclusion reached by HHJ Shanks in *Pryce* referred to above in paragraph 23. Mr Baker referred me to paragraph 75 of the judgment of Singh J in *British Gas Trading Ltd v Lock* [2016] ICR 503. I consider the present situation is within the limited range of circumstances which permit me to depart with an earlier decision of a judge of the Appeal Tribunal. I am satisfied that HHJ Shanks' decision that failure to comply with the earlier conciliation scheme affected the jurisdiction of the Employment Tribunal to be manifestly incorrect.

38. I have carefully considered paragraph 44 of Bean LJ's judgment in *Clark.* The issue now before me was not the one before the Court of Appeal in *Clark.* In *Clark* the error (if there was error at all) did not arise from a failure to obtain an

early conciliation certificate. On consideration of the judgment in *Cranwell v Cullen* it is apparent that the appeal was against a decision taken by the Employment Tribunal under rule 12, in circumstances where that rule had been applied at the time intended. It was not an appeal against a decision taken at a later stage to strike out the claim. Langstaff P's reasoning was to the effect that rule 12 could not be read either as including any operative discretion or as subject the power at rule 6 to waive errors. Langstaff P did not consider any issue of jurisdiction of Employment Tribunal. I do not consider Bean LJ's remarks at paragraph 44 form part of the *ratio* of his judgment: the *ratio* is reflected in paragraphs 36 and 51. Not without hesitation, I have decided not to follow the *dictum* in the final sentence of paragraph 44 of Bean LJ's judgment.

39. Mr Baker accepted that if I was against him on his submission on jurisdiction, he could not otherwise succeed on an application to strike out the section 48 claim. He was right to take this course. Although Ms Reynolds was at fault in not following the early conciliation procedure in respect of the 48 claim, the operative cause of the situation before the Judge at the hearing on 20 September 2023 and before me now, was the Tribunal's failure when the section 48 claim was presented to identify that the claim had not been the subject of early conciliation and to address that matter by a notice of rejection either under rule 10 or under rule 12. Had that mistake not happened, had the error been brought to Ms Reynolds' attention, there is no reason to think that the required certificate would not have been obtained.

40. Further, in the circumstances of this case, Ms Reynolds' failure to follow the early conciliation procedure is explicable even if not entirely excusable. Since

her unfair dismissal claim was accompanied by an application for interim relief it had to be presented to the Employment Tribunal within 7 days of the effective date of termination. Following the early conciliation procedure in respect of the section 48 claim, which rested on facts entirely connected to the unfair dismissal claim, would have required her to present two separate claims as it is unlikely that the early conciliation procedure could have been completed and the certificate issued within 7 days. Turning to the other side of the balance, the fact that the section 48 claim did continue is not a cause of prejudice to the Respondents. There is no forensic disadvantage to them such as can arise when a claim is started late. The Respondents suffered no prejudice by reason of Ms Reynolds' failure to follow the earlier conciliation procedure. Even if Ms Reynolds had permitted ACAS to contact Respondents, their conduct in the early stages of the proceedings as evaluated by the Judge at paragraphs 6 and 7 of his judgment, provides a very strong indication that the Respondents would not have responded to ACAS. I do not need to set out the detail of the Judge's conclusions on the facts. Suffice it to say he was satisfied that the Respondents did have notice of the proceedings when they were commenced in April 2023 but had taken no steps in respect of the claim until they instructed solicitors to contact the Tribunal, which was not until early July 2023. The Judge's conclusions on the evidence given by the Fourth and Fifth Respondent in support of the application for an extension of time were scathing. This is telling, and is a clear indication that, absent any jurisdiction issue, any submission the Respondents might now make that the section 48 claim be struck out for want of compliance with the early conciliation procedure would be opportunistic. This, no doubt, was the reason why Mr Baker made no such submission.

C. Disposal

41. For the reasons set out above, the appeal is dismissed. The route which I have taken requires me to set aside the Employment Tribunal's decision under rule 12 of the Employment Tribunal Rules to reject the section 48 claim, and to set aside the Tribunal's decisions granting permission to amend to add section 48 claims against the individual Respondents. By reference to the judgment of Court of Appeal in *Clark*, the rule 12 decision was wrongly made. Since that decision falls, the decision on the application to amend must fall with it.

42. On further consideration of the case, I refuse the Respondents' applications under rule 27 and rule 37 of the Employment Tribunal Rules to dismiss the section 48 claim as being outside the jurisdiction of the Employment Tribunal.

43. The consequence is that the Employment Tribunal should now proceed to consider both the unfair dismissal claim and the section 48 claim on their merits.