An end to technical early conciliation arguments which lack substantive merit?

By Daniel Brown
3PB Barristers

Sainsbury's Supermarkets Limited v Clark & Others [2023] EWCA (Civ) 386
[ ] paragraph number of the Court of Appeal's judgment

Introduction

In this judgment the Court of Appeal considered whether the ET should have rejected a large number of equal pay claims against Sainsbury's on the ground that the relevant claim forms did not contain an early conciliation ('EC') certificate number for each claimant [2]. Schedules to the relevant claim forms contained the date of each EC certificate but not the number of each EC certificate. During the appeal, Sainsbury's accepted that if the schedules had contained a column with entries accurately recording the number of each claimant's EC certificate, the issue in the appeal would have been unarguable [13].

Background

At an ET hearing in March 2020, Sainsbury's was successful in having 'the claims of all claimants who did not in their claim form give a number from a certificate on which they are named' rejected [25]. But the Employment Appeal Tribunal allowed the claimants' appeal and restored the claims.

In giving judgment on this matter, Bean LJ described the argument pursued by Sainsbury's as 'highly technical' and 'lacking any substantive merit' [3]. There was no suggestion that any of the claimants had failed to make the necessary reference to ACAS before proceedings were started or that any of them had failed to obtain an EC certificate. Sainsbury's 'complaint is no more and no less than that the ET claim form did not give the appropriate certificate number' [3].

ACAS adopted a number of different approaches when issuing EC certificates to the relevant claimants. 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.

When the claims were presented, the ET did not raise any issue in relation to compliance with EC requirements or the ET Rules of Procedure. The point was raised instead by the respondent in its ET3 responses.

The issue on appeal

The narrow issue for the Court of Appeal to determine was: '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?' [16]

The Outcome

In short, the Court of Appeal dismissed Sainsbury's appeal, but its judgment has implications beyond its impact on the equal pay claims being pursed against Sainsbury's and indeed wider than the application of EC related rules in multiple claims.

The Court of Appeal's reasoning

Experienced employment lawyers are by now familiar with the EC process and Rules 10 and 12 of the ET Rules of Procedure. Further, several judgments of the EAT deal with various scenarios in which claims have been rejected or struck out on technical EC related grounds. For example:

A) in *Sterling v United Learning Trust,* a single claimant submitted her claim in time but it was rejected by the ET because the claimant had omitted two digits from the EC certificate when entering the number on her ET1. The reasoning of the EAT in *Sterling* was that where the rule requires an early conciliation certificate number to be set out, it is implicit that that number is an accurate number. The EAT held that where an inaccurate EC certificate number is given, the ET is obliged to reject the claim [45].
B) In *E.ON Control Solutions Ltd v Caspall* [2020] ICR 552, the Claimant's solicitor, when completing the ET1, incorrectly inserted the wrong EC certificate number and repeated the error when presenting two further complaints. A fourth ET1 was presented with the

correct EC certificate number but it was out of time. Judge Eady QC (as she then was) held that the consequence of a failure to include the correct EC certificate number is that a claim must be rejected. And, that even if a claim is not initially rejected by the ET when it is received, it must be rejected at a later stage if the error comes to light/the point is taken by the respondent. It was held that the ET had no discretion in the matter.

The Court of Appeal dealt with the specific issue under appeal quite shortly: while Rule 10 of the ET Rules of Procedure requires a claim form to set out the name and address of 'each' claimant and 'each' respondent, a claim form need only be rejected if it does not provide 'an early conciliation number' (Rule 10(1)(c)(i)). It is enough for a claim form to contain an EC certificate number on which the name of one prospective claimant appears [36].

More fundamentally however, the Court of Appeal held that *Sterling v United Learning Trust* and *E.ON Control Solutions Ltd v Caspall* were wrongly decided: Rules 8 to 14 of the ET Rules of Procedure are headed 'Starting a claim'. These rules are in the nature of a 'preliminary filter' [41]. Rule 10 does not even involve a judge. If any of the filters under Rules 10, 11 or 12 are applied, the claim is rejected without even being served on the respondent [41].

In light of the above, Bean LJ held that if a claim is not rejected by the ET:

> 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 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. [42]
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> 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. [43]
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> …

> 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. [51]

Effect of the judgment

The broad effect of this judgment is to require respondents to pursue any arguments about non-compliance with Rules 10 to 12 under the initial consideration provisions (Rules 26 to 28) or via a strike out application (Rule 37).

Experience demonstrates that, even where EC related arguments are raised by respondents in ET3s, they are often not addressed by the ET until a later stage of the proceedings, for example, at a preliminary hearing (as in *E.ON Control Solutions Ltd v Caspall*).

More fundamentally, when faced with any argument that a claim should be dismissed or struck out due to non-compliance with Rules 10 or 12, the ET will have a broad power to waive non-compliance (Rule 6). Given the comments of Bean LJ, it is likely that many of the EC related arguments that have previously resulted in claims being rejected will be viewed by Judges as lacking substantive merit. In most cases, respondents will not be able to point to any tangible prejudice flowing from a claimant's non-compliance with Rules 10 to 12.

For the reasons above, in future few claims will be rejected, dismissed or struck out, provided the claimant has made the necessary reference to ACAS and obtained an EC certificate before commencing proceedings. NB: nothing in the judgment suggests that a claim may proceed if a claimant fails to go through the EC process before commencing proceedings; the ET has no power to waive that requirement.

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Daniel Brown

Barrister
3PB Barristers

0330 332 2633
Daniel.brown@3pb.co.uk

3pb.co.uk