

Failure to obtain mandatory ACAS certificate pre-issue results in dismissal of claim

By [Grace Nicholls](#)
3PB Barristers

Pryce v Baxterstorey Limited, EAT, EA-2020-000323-BA

Introduction

1. This is an EAT decision handed down by HHJ Shanks following an appeal in 2021 concerning the procedure in respect of ACAS EC certificates.

The Employment Tribunal

2. The Claimant, Miss Pryce, issued a claim for sex and race discrimination before she had obtained an ACAS early conciliation certificate. She commenced employment with the Respondent as a vending operative in October 2018 and she was dismissed in August 2019.
3. In her ET1, she ticked “no” to the question of whether she had obtained an ACAS Early Conciliation certificate number and also ticked to confirm ACAS did not have the power to conciliate (which ACAS, in fact, did). She brought the claim on the day she was dismissed, 23 August 2019.
4. On that same day, 23 August 2019, the Claimant did actually notify ACAS after she had presented her claim to the Tribunal. She was told by ACAS that her ET1 would need the early conciliation certificate number included. An ACAS Early Conciliation certificate was issued on 27 August 2019. On that day, 4 days post presenting her claim, she contacted the tribunal by email to ask if her ACAS EC certificate number could be added to her 23 August 2019 ET1.

5. On 12 September 2019 the file was referred to an Employment Judge (without the email communication of 27 August 2019). A note was included from Tribunal staff saying “No EC Certificate, shall we reject?”. The Judge confirmed the claim should be rejected. The file was then referred back to a Judge on 19 September 2019 with a note from the tribunal staff saying “we now have ECC. Shall we accept and serve?”. The Judge confirmed yes to acceptance and service.
6. The Respondents did not plead to lack of jurisdiction within their ET3.
7. On 3 February 2020 an Employment Judge conducting a Preliminary Hearing identified the issue in respect of a lack of EC certificate. Having adjourned for written submissions on the issue, the Claimant accepted that she did not contact ACAS before submitting her claim form.
8. On 18 February 2020 the Claimant’s claim was dismissed as the Tribunal did not have jurisdiction to consider it in accordance with s18A(8) Employment Tribunals Act 1996. At paragraph 14 of his judgment, the Judge said as follows:

“This is a jurisdictional matter and I do not have any discretion under it. This Claim was lodged prior to an EC Certificate being issued in circumstances where having one is a mandatory prerequisite to bringing a Claim ... Accordingly, these claims must be dismissed. It is a matter for the Claimant as to whether she brings these claims again. If she does so then consideration will be given as to whether the Tribunal has jurisdiction to consider them taking into account time limits and the relevant statutory provisions for extending the same.”

The EAT

9. The Claimant appealed to the EAT and her appeal was permitted to proceed by HHJ Auerbach at a Rule 3(10) hearing in July 2021. Permission to proceed was permitted on two grounds:

Ground 1: The Tribunal erred in confining its future consideration of the issue identified to whether the claim should be dismissed on the basis that:

(a) it had been presented on 23 August 2019 when the claimant had not yet obtained an ACAS EC certificate and

(b) no exemption from that requirement applied, and in not considering or allowing for the alternative possibility that the claimant should have been treated by her letter of 27 August 2019 enclosing a copy of the certificate of that date, as having re-presented her claim in a compliant manner¹

Ground 2: Alternatively, the Tribunal erred by not considering the possibility that the requirement to re-present her claim once she had obtained the certificate should have been treated as having been waived by the Tribunal and/or the Respondent. ²

10. HHJ Shanks determined the appeal as follows:

Ground 1

- The ET1 should have been rejected for want of jurisdiction on the grounds of nullity and should have been rejected immediately
- On the issue of whether her email of 27 August 2019 was a “re-presentation”, Rule 8(1) of the ET Rules is clear that a claim shall be started by presenting a completed claim form submitted by post, online submission or in person
- The Claimant’s email of 27 August 2019 was not a claim form (and was emailed, so not submitted in one of the three prescribed ways) and there was no power to waive the irregularities under Rule 8

Ground 2

- This ground could only succeed, the EAT determined, if there was some power on the part of the Tribunal to waive the requirement to re-present
- As there is an express statutory requirement to obtain a certificate before a claim can be started, there was no power of the tribunal, nor less the Respondent, to waive it
- The only way to rectify the error was to start proceedings again using an ET1 with the EC certificate number included

11. The appeal was, therefore, dismissed on both grounds.

12. HHJ Shanks took the time to set out his sympathy for the Claimant at paragraphs 16-17 of the Judgment. He remarked that the Claimant had done everything she understood she was meant to do and had acted very quickly when she realised that she had omitted a

¹ Paragraph 9, EAT judgment

² Paragraph 9, EAT judgment

mandatory requirement on submission. He noted that because of an error by the Tribunal, she had been given the impression that her claim would succeed.

Comment

13. This case is a clear and unequivocal warning to Claimants to obtain the necessary documentation in advance of submission of an ET1. The EAT, whilst expressing sympathy for the Claimant and remarking that this sort of case “gives the law a bad name”³, was clear that the constraints of s18A(8) ETA 1996 and Rules 8 and 12 ET Rules left the Employment Tribunal with no choice but to dismiss the Claimant’s claims.

28 May 2022

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team.



Grace Nicholls

Barrister
3PB Barristers

0330 332 2633
grace.nicholls@3pb.co.uk

3pb.co.uk

³ Paragraph 1, EAT judgment