EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR R CHILTON	**AND**	**SUNDEALA LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 27TH JULY 2020

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **WRITTEN SUBMISSIONS**

FOR THE RESPONDENT:- **WRITTEN SUBMISSIONS**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim form is rejected as failing to comply with requirements of Rule 10(1) (c) (i) and/or 12 (2) (Schedule 1) of the Employment Tribunals (Constitution and Rules of Procedure Regulations 2013.

Reasons

1. At a TCMPH held on 24th April 2020 I identified a number of preliminary issues. Both parties agreed that one, the jurisdictional issues in relation to the ACAS EC certificate

could be determined on the papers as it was a pure point of law requiring no oral evidence.

2. By a claim form dated 16th July 2019 the claimant brings claims of disability discrimination against the respondent. The claim was accepted and served on the respondent. In its response the respondent submits that the claim form should have been rejected pursuant to rule 10(1) (c) and/or Rule 12 (2).

3. The basis for that is that there are two early conciliation certificates. The first relating to the period 15th November 2018 and 15th December 2018 is dated 15th December 2018 and numbered R343969/18/37. The second, covering the period 4th June to 18th June 2019 was issued on 18th June 2019 and numbered R504106/19/27. The number given in the ET1 was that of the second certificate. The respondent contends that this is impermissible and that the claim should have been rejected. They rely on three authorities:-

   i) Cranwell v Cullen UKEAT/0046/14;
   ii) Sterling v United Learning Trust UKEAT/0439/14;
   iii) HMRC v Serra Garau UKEAT/0384/16.

4. *Cranwell* holds that the rules are prescriptive and that rule 6 does not provide the ET with any discretion to waive or vary the requirements of them; *Sterling* that as Rule 10 (1) (c) requires that an EC certificate be provided "..*it is implicit that that number is an accurate number*" (para 22); and Serra Garau that a second certificate is not a certificate within the meaning of section 18(4). The respondent submits that the combined effect of this is that if the second certificate is not a certificate within the meaning of s18 (4) (*Serra Garau*), that the claimant has not supplied an accurate certificate number as the number must be that of the relevant certificate accurately transcribed into the ET1 (*Sterling*) and that if this is correct there is no discretion to accept the claim form (*Cranwell*). Thus, the tribunal was bound to reject the claim form.

5. In addition, although not specifically referred to by the respondent the case of *EON Control Solutions Ltd v Caspall [2019] UKEAT* is authority for the proposition that where at any stage in proceedings the tribunal forms the conclusion that the claim form should have been rejected initially even if in fact it was not, it is obliged to give effect to that and reject the claim.

6. The following is extract from the decision of Eady J in EON Control:

51. In the present case, the Claimant had provided the requisite information to ACAS for the purpose of the EC process and had obtained an EC certificate pursuant to section 18A(4) **Employment Tribunals Act 1996**. That should have enabled him to launch his ET claim against the Respondent but, in order to be able to do so, he still needed to comply with the relevant employment tribunal procedure

regulations. Specifically, the Claimant needed to present his claim on the prescribed form and to include the accurate EC certificate number. Whether he sought to rely on the first or the fourth claim (or, indeed, either of the other claims also before the ET at the Preliminary Hearing), he had failed to do so. The first claim gave an inaccurate EC certificate number, which related to a different Claimant and a different claim; the fourth claim gave a number for an EC certificate that was simply invalid (the second certificate having no validity for section 18A purposes, see **Serra Garau**).

52. Having set out the relevant legal framework, however, it is apparent what should then have happened: in each instance, the ET was bound to reject the Claimant's claim and to return the claim form to him with a notice explaining why it had been rejected and providing him with information about how to apply for a reconsideration. The obligation to reject the claim could have arisen under Rule 10(1)(c)(i) or under Rule 12(1)(c) **ET Rules**. If rejected under Rule 12, the decision would have been taken by a Judge under Rule 12(2).

53. It is apparent, however, that, in both instances, the ET neither rejected the claim under Rule 10 nor did any staff member refer the claim to an Employment Judge under Rule 12(1). It was left to the Respondent to take up this point and object that both claims should have been rejected by the ET. This was the point that was thus before the ET at the Preliminary Hearing on 19 September 2018. Although the matter had not been referred to him under Rule 12(1) **ET Rules**, I cannot see that the obligation arising under Rule 12(2) had ceased to apply: at that stage the Employment Judge ought properly to have considered that both claims were of a kind described in Rule 12(1)(c) - both claim forms failed to contain an accurate EC number.

54. The consequence of a failure to include the correct EC 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. That being so, when it became apparent to the Employment Judge that the Claimant's claim forms were of a kind described by Rule 12(1)(c), he was mandated by Rule 12(2) to reject the claims and return the forms to the Claimant. Having complied with that obligation, there would no longer have been any claim before the ET that could have been amended by exercise of the Employment Judge's case management powers under Rule 29, although it would have been open to the Claimant to re-submit a rectified claim form, now including the correct EC number from the first certificate. Had the Claimant adopted this course, the Employment Judge would have been required to treat the claim as thus validly presented on the date that the defect was rectified (Rule 13(4) **ET Rules**). The claim would have been lodged out of time but it would then have been for the ET to determine whether it had not been reasonably practicable to present the claim in time. In this regard, the ET might have seen it as relevant that the Claimant had

not been given a notice of rejection and advised of the means by which he might apply for a reconsideration at an earlier stage (and see the discussion of the interplay between errors under Rules 10 and 12 and the "reasonable practicability" test in **Adams v British Telecommunications Plc** [2017] ICR 382 and **North East London NHS Foundation Trust v Zhou** UKEAT/0066/18, [2018] UKEAT 0066_18_0507), although no doubt the Respondent would have countered this suggestion by pointing out that it had raised the issue some time before the Preliminary Hearing and the Claimant (who was legally represented throughout) had taken no steps to rectify the error earlier. In any event, the ET did not adopt this course but, instead, purported to allow an amendment to a claim that it ought to have rejected and returned to the Claimant. I understand the Employment Judge's desire to adopt this course but I consider that, by doing so, he erred in law. *(My underlining)*

7. In my judgement the position of the claimant in this case is identical with that of the claimant in Eon Control in relation to the fourth claim (as underlined above) and that inevitably I am bound by the decision of the EAT to treat this claim exactly as Eady J held that the fourth claim in that case should have been treated. I am in effect obliged to reject the claim form.

8. The effect of this is exactly as if the claim form had been rejected at the outset. The claimant will be notified that the claim form has been rejected and the steps he may take going forward.

EMPLOYMENT JUDGE CADNEY
Dated: 5th October 2020

JUDGMENT SENT TO PARTIES ON
13th October 2020
By Mr J McCormick

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