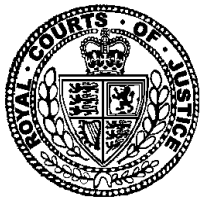

Neutral Citation Number: [2025] EWCA Civ 1357

Case No: CA-2025-000379

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE SWIFT
[2025] EAT 6

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2025

Before :

LORD JUSTICE SNOWDEN
LADY JUSTICE FALK
and
SIR NICHOLAS UNDERHILL

- -

Between :

ELIZABETH REYNOLDS	**Claimant/ Respondent**
- and -	
(1) ABEL ESTATE AGENT LTD **(2) ABEL LIVING LTD** **(3) ABEL OF HERTFORD LTD** **(4) AMI HAYWARD** **(5) CHARLES COURT** **(6) LUCINDA CASEY**	**Respondents/ Appellants**

- -
- -

Gus Baker and **Jessica Franklin** (instructed by **Kilgannon & Partners LLP**) for the **Appellants**
William Young and **Chevan Ilangaratne** (instructed through **Advocate**) for the **Respondent**

Hearing date: 12 June 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 27th October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Nicholas Underhill:

INTRODUCTION

1. This appeal raises an issue about the rules requiring would-be claimants in the Employment Tribunal ("the ET") to notify the Advisory, Conciliation and Arbitration Service ("ACAS") prior to commencing proceedings so that it has the opportunity to try to resolve the dispute by conciliation. The provisions in question appear in section 18A of the Employment Tribunals Act 1996 ("the ETA"), the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 ("the Early Conciliation Regulations"), and the Employment Tribunals Procedure Rules ("the Procedure Rules") – together, "the early conciliation provisions". I will set the relevant provisions out in full later, but for introductory purposes I need only say that they require the claimant, in most but not all cases, to include in the claim form an "early conciliation number" ("ECN") supplied by ACAS, which shows that they have invoked the early conciliation process; and if that is not done the complaint will be rejected by the ET at the outset.

PROCEDURAL HISTORY

2. *The Claimant's dismissal.* From December 2019 the Claimant, who is the Respondent in this appeal, worked for an estate agency and property management business in Hertford. There appear to be (at least) three companies connected with that business – Abel of Hertford Ltd, Abel Estate Agent Ltd and Abel Living Ltd – together, "the Abel companies". The Claimant was dismissed on 6 April 2023, ostensibly for redundancy.

3. *The complaint.* On 12 April 2023 – that is, six days after her dismissal – the Claimant commenced proceedings in the ET claiming:

   (a) that the principal reason for her dismissal was that she had made protected disclosures – in other words, that she was a whistleblower – and that it was accordingly automatically unfair by virtue of section 103A of the Employment Rights Act 1996 ("the ERA"); and

   (b) that her dismissal had also constituted a detriment to which she had been subjected because of those disclosures, contrary to section 47B of the ERA.

   I refer to those as "the unfair dismissal claim" and "the detriment claim" respectively.

4. *The respondents to the complaint.* Because she was uncertain about which of the Abel companies was her employer, the Claimant named all three as respondents in respect of both claims. She also named three individuals, Ami Hayward, Charles Court and Lucinda Casey, who were all involved in the management of Abel. Those individuals could not be liable for the unfair dismissal claim because such a claim can only be brought against an employer; but if they had participated in the decision to dismiss they could be liable under section 47B (1A) of the ERA for subjecting her to the detriment of dismissal (see *Timis v Osipov* [2018] EWCA Civ 2321, [2019] ICR 655). I will refer to the six respondents as "the Appellants", as they are before us: the Abel companies are the First to Third Appellants and the individuals the Fourth to Sixth.

5. *The interim relief application.* Section 128 of the ERA entitles a claimant bringing a claim of unfair dismissal under section 103A to make an application for interim relief. The application must be made within seven days of the effective date of termination of their employment. The Claimant included an application for interim relief on her claim form. The application was heard by Employment Judge Crosfill on 30 May 2023. None of the Appellants attended and the application was granted. (At the case management hearing referred to below the order was set aside, but that is immaterial for our purposes.) A claimant making an application for interim relief is exempt from the requirement to supply an ECN in respect of their unfair dismissal claim ("the interim relief exemption"). The reason for the exemption evidently is that the time limit for seeking interim relief would not allow time for a conciliation process to occur.

6. *The ECN objection.* The case then proceeded as normal, and a case management hearing was held before Judge Crosfill at the East London Hearing Centre on 20 September 2023. The Claimant was unrepresented and the Appellants were represented by Mr Gerard Airey of Kilgannon & Partners (who remain their solicitors on this appeal). Mr Airey objected that the Claimant had not given an ECN on her claim form: so far as the unfair dismissal claim was concerned, she was covered by the interim relief exemption, but that did not apply to the detriment claim, which he submitted should accordingly be rejected.

7. *The ET decision.* The Judge accepted Mr Airey's submission that the detriment claim should have been rejected because of the omission of the ECN, and a belated notice of rejection was issued on the day of the hearing. However, he granted the Claimant permission to amend the claim form so as to add the individual Appellants as respondents, which had the effect of curing her failure to engage in the early conciliation process in relation to the detriment claim. His reasons (which had also to deal with a number of other issues) are contained in a clear and careful Case Management Summary promulgated on 10 November 2023.

8. *The decision of the EAT.* The Appellants appealed to the EAT. The appeal was heard by Swift J, sitting alone, on 12 December 2024. The Appellants were represented by Mr Gus Baker of counsel. The Claimant was not represented and did not appear. Swift J nevertheless perceived that the case raised difficult issues and reserved his decision. By a judgment handed down on 20 January 2025 he dismissed the appeal, but on the basis of different reasoning from the ET. In short, he held that it was too late for the detriment claim to be rejected: it could in principle be struck out as a matter of case management for non-compliance with the Rules, but that was not justified in the circumstances of the case.

9. *The appeal.* The Appellants appeal against the order of the EAT, with the permission of Swift J himself, who recognised that his decision was contrary to other EAT authority and a *dictum* of this Court (I give details below). Although the Claimant argues that Swift J's decision was correct for the reasons that he gave, we gave her permission to file a Respondent's Notice out of time seeking to rely in the alternative on the ET's original reasoning.

10. *The hearing before us.* Before us the Appellants have again been represented by Mr Baker, together with Ms Jessica Franklin. The Claimant has benefited from *pro bono* representation by Mr William Young and Mr Chevan Ilangaratne. The Court is grateful both to them and to Advocate who acted promptly to secure their services at short

notice. The appeal raises points of law of some difficulty on which it was of real assistance to the Court to have submissions of high quality.

THE RELEVANT LEGISLATION

THE ET's JURISDICTION TO DETERMINE THE CLAIMS

11. Section 2 of the ETA defines the overall jurisdiction of the ET as follows:

> "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."

In accordance with that provision, statutes creating rights in the employment field contain provisions conferring jurisdiction to determine claims of the kind in question.

12. The detriment claim in this case is brought under section 47B of the ERA, which reads (so far as material) as follows:

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ('W') has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) …
>
> on the ground that W has made a protected disclosure.
>
> (1C)-(3) …"

It will be seen that subsection (1) provides for the liability of the employer (in this case whichever of the Abel companies turns out to have been the Claimant's employer); and subsection (1A) provides for the liability of an individual co-worker (in this case the three individual Appellants).

13. Jurisdiction to determine claims under section 47B (1) and (1A) is conferred on the ET by section 48 (read in combination with section 2 of the ETA, as explained above). Subsection (1A) reads:

> "A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B."

14. I should also note, for reasons which will appear, that section 48 (3) prescribes the limitation period for complaints under section 48 (1A). It reads:

> "An employment tribunal shall not consider a complaint under this section unless it is presented [within the prescribed period]".

15. The same drafting structure and language is used to confer jurisdiction to determine complaints of breaches of most of the other rights conferred by the ERA. For example, jurisdiction to determine complaints of unfair dismissal (including under section 103A) is conferred by section 111 (1), which reads:

> "A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer."

Subsection (2) contains a limitation provision in the same terms as section 48 (3).

THE EARLY CONCILIATION PROVISIONS

16. The broad framework of the early conciliation provisions is set out in primary legislation, being sections 18-19A of the ETA, which are headed "Conciliation". The scheme is then fleshed out in secondary legislation. I take the two in turn.

The Statutory Provisions

17. The relevant provision for our purposes is section 18A, which was inserted by the Enterprise and Regulatory Reform Act 2013. (It has been amended in minor respects by the Judicial Review and Courts Act 2022 with effect from 25 April 2024, but we are concerned with its original form.) It is headed "Requirement to contact ACAS before instituting proceedings". The parts which are relevant for our purposes read 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).[1]
>
> (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.
>
> (5)-(6) …

[1] This unusual lay-out appears in the statute itself.

> (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;
> >
> > cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;
> >
> > 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).
>
> (9) …
>
> (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) …"

Since I will be referring to this section very frequently in this judgment I will do so simply as "section 18A" without specifying the statute.

18. The term "relevant proceedings" in subsection (1) is defined in section 18 (1) of the ETA as meaning ET proceedings "under" specified provisions of no fewer than thirty different statutes and statutory instruments. The provisions in question are generally those which confer jurisdiction on the ET to determine claims of a particular kind, though in the case of detriment claims the reference is simply to "[proceedings] under Part 5 of [the ERA]", being the part which covers both section 47B and section 48. I should note, for reasons that will become apparent, that not all of those provisions confer jurisdiction on the ET by use of the formula that a person "may present a complaint" which appears in section 48 (3). Most do, but I am aware of at least three exceptions[2], and there may be others.

19. The key provisions of section 18A for our purposes are subsections (1) and (8). The two are complementary. Subsection (1) imposes a requirement on the prospective claimant to provide ACAS with the specified information: I will as a shorthand refer to this as the claimant "invoking" the process (although, as appears below, they are in fact

[2] These are: section 11 of the ERA, which provides for disputes about employment particulars to be "referred to and determined by" the ET; article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, which provides that "[p]roceedings may be brought before an employment tribunal in respect of a claim"; and section 120 of the Equality Act 2010, which uses the formula "[a]n employment tribunal has … jurisdiction to determine a complaint".

under no obligation to engage in it). Subsection (8) prohibits him or her from commencing proceedings "without a certificate under subsection (4)" (an "ECC"): the ECC is evidence not only that the requirement in subsection (1) has been complied with but also that the process has run its course, either by the expiry of the prescribed period or because ACAS has decided that settlement is not possible.

The Early Conciliation Regulations

20. The Early Conciliation Regulations are the primary regulations made by the Secretary of State pursuant to section 18A (11). So far as relevant for our purposes, they do two things.

21. First, regulation 3 provides for certain exemptions in accordance with section 18A (7). The interim relief exemption appears in paragraph (1) (d).

22. Second, Schedule 1, given effect by regulation 5, contains the "Early Conciliation Rules of Procedure". These put flesh on the bones of the process required by section 18A (1)-(3). The only material provisions for our purposes are paragraphs 7-9, which, pursuant to section 18A (4), require ACAS, if a settlement of the dispute does not result within six weeks, or earlier if it concludes that settlement is impossible, to issue and send the claimant an ECC. Importantly, paragraph 8 (d) provides that the ECC must include a "unique reference number", being the ECN referred to above.

The Employment Tribunals Rules of Procedure

23. At the date that the Claimant presented her claim, the Procedure Rules were contained in Schedule 1 to the Employment Tribunals Rules of Procedure (Constitution and Rules of Procedure) Regulations 2013. They have since been superseded by the Employment Tribunal Procedure Rules 2024, but our attention was not drawn to any differences that would affect the issues in this appeal.

24. The rules with which we are principally concerned were inserted into the Procedure Rules by the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2014 in order to give effect to the requirements of section 18A (8) and paragraphs 7-9 of the Early Conciliation Rules of Procedure. They occur in the section headed "Starting a Claim", which comprises rules 8-14: these are gateway provisions, in the sense that they prescribe requirements which a claimant has to satisfy before the claim form is accepted by the ET and sent to the respondent.

25. Rule 8 (1) provides that a claim shall be started by presenting a completed claim form, using a prescribed form. The prescribed form contains a section (2.8) in which the claimant is asked to indicate by ticking a box whether they have an "Acas early conciliation certificate number", i.e. an ECN. If they have, they are required to give it. If they have not, they are required to tick one of four further boxes identifying circumstances in which a claimant is not required to invoke the early conciliation process: the fourth is "my claim consists *only* [my italics] of a complaint of unfair dismissal which contains an application for interim relief". At the risk of spelling out the obvious, the purpose of requiring an ECN is that it establishes that an ECC has been issued, as required by section 18A (8).

26. Rules 10-12 provide for a claim in specified circumstances to be "rejected" by the ET itself at the gateway stage. The grounds for rejection are that the claimant has not used the required form or provided the required minimum information (rule 10); that the claim is not accompanied by any required fee (or remission application) (rule 11); or that the claim has one of a number of "substantive defects" (rule 12). Rule 13 provides for a claimant whose claim has been rejected to apply for it to be accepted "on the basis that either (a) the decision to reject was wrong or (b) the notified defect can be rectified".

27. In the present case we are primarily concerned with rule 10 (1), which reads (so far as material):

> "(1) The Tribunal shall reject a claim if —
>
> (a) …
>
> (b) …
>
> (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."

The decision to reject under rule 10 is taken by tribunal staff, without reference to a Judge. That reflects the fact that the grounds for rejection depend simply on the way in which the form has been completed.

28. It is important to appreciate that rule 10 (1) (c) can apply in either of two situations –

(1) where the claimant has an ECC but has failed to supply the ECN which evidences that that is the case ("evidential non-compliance") and

(2) where no ECC has been issued, typically because the claimant has not invoked the process in accordance with section 18A (1)[3] ("substantive non-compliance").

In both cases the claim form is non-compliant with the rules, but only in the second case has the claimant failed to comply with the statute.

29. Although in the present case the rule with which Claimant failed to comply is rule 10, I should note that some of the "substantive defects" specified in rule 12 (1) also relate to the early conciliation provisions, namely where the claim, or part of it, is –

> "(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or

[3] There could be cases where the claimant has complied with section 18A (1) but does not have an ECC because the prescribed period has not expired and ACAS has not concluded that settlement is not possible. But that is not very likely because a claimant can in practice compel ACAS to issue a certificate by telling it that they are not interested in conciliation.

> 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."

In the case of rule 12 the defect, or suspected defect, is referred to an Employment Judge for decision as to whether it should be rejected.

30. I need to refer also to three other rules which are not specific to the early conciliation process but which are relevant to the issue on this appeal.

31. First, rule 6 is headed "Irregularities and non-compliance". It reads (so far as material)

> "A failure to comply with any provision of these Rules … 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."

32. Second, rule 27 is part of the section of the Rules dealing with the Employment Judge's initial consideration of the claim following receipt of the respondent's response. It provides, in part, that where the Judge considers that the tribunal "has no jurisdiction to consider the claim, or part of it" the claimant must be given the opportunity to make representations on that question, and that if such representations are not made the claim will be dismissed; if representations are made, the rule provides for a procedure for the determination of the question.

33. Third, rule 37 is headed "Striking out". I need only set out paragraph (1), which reads (so far as material):

> "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) …
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d)-(e) …"

THE EXTENT OF THE EARLY CONCILIATION OBLIGATIONS

34. I should emphasise, because it is relevant to the submissions before us, that the requirements imposed on the parties to an employment dispute by the early conciliation provisions are extremely limited. The point is made by Swift J at para. 4 of his judgment as follows:

> "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 ....'"

Thus an ECC may be issued almost immediately after the prospective claimant's notification to ACAS because they have made it clear that they are not interested in conciliation.

THE 2002 ACT

35. Finally, I should mention, because I will be referring to it later, that Part 3 of the Employment Act 2002 introduced a statutory dispute resolution regime which was designed, like the early conciliation provisions, to give an opportunity for disputes to be resolved without resort to the ET. The details are immaterial, but the essence was that employees wishing to bring ET proceedings were required first to go through a statutorily-prescribed internal grievance procedure. The regime was not a success, and Part 3 was repealed by the Employment Act 2008.

THE ISSUES

36. In order to identify the issues raised by the appeal it is necessary to take rather a long run-up.

37. The starting-point is that the Claimant did not prior to presenting the claim form invoke the early conciliation process at all, with the consequence that no ECC was ever issued: this is thus a case of substantive non-compliance. In the claim form she answered the question whether she had an ECN by ticking the "no" box. She did not tick any of the boxes giving an explanation; but even if she had done so her only valid explanation – namely that she fell within the interim relief exemption – only applied to the unfair dismissal claim.

38. The failure to give an ECN meant, as Judge Crosfill correctly held, that the detriment claim should have been rejected under rule 10 (1) (c). That did not occur. We do not know why. The most likely explanation would seem to be that the member of the tribunal staff checking the claim form saw that it included an application for interim relief but failed to appreciate that the interim relief exemption did not apply to the detriment claim. But that is speculation; all that can be said with certainty is that there was an error by the tribunal staff. In any event Judge Crosfill believed that the correct course was to remedy that failure by himself rejecting the detriment claim under rule 12 (the precise head under paragraph (1) was not specified, but the relevant one would appear to be (c)).

39. A similar, but not identical, situation arose in *Sainsbury's Supermarkets Ltd v Clark* [2023] EWCA Civ 386, [2023] ICR 1169. In that case the claim forms in related equal pay proceedings each covered multiple claimants. Unlike in the present case, ECCs had in fact been issued in respect of all the claimants, but the forms omitted some of the relevant ECNs and offered no explanation for the omissions: thus, applying the distinction at para. 28 (1) above, this was a case of evidential and not substantive non-compliance. That non-compliance was overlooked by the tribunal staff, and the relevant claims were accordingly not rejected at the gateway stage. When the omission was subsequently raised by the respondent at a case management hearing, the ET, as in the present case, purported belatedly to reject the claim. The EAT allowed the

claimants' appeal. This Court upheld its decision (though for a different reason). The leading judgment was given by Bean LJ, with whom Asplin and Nugee LJJ agreed. In short, he held that once a claim has passed through the initial gateway presented by rules 8-13 it must be treated as a formally valid claim and cannot be retrospectively rejected; any consequences of the non-compliance would fall to be dealt with under the case management powers identified at paras. 31-33 above. His full reasoning appears at paras. 36-43 of his judgment, but I need only quote para. 42, which reads:

> "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* [my italics, Bean LJ's underlining]. 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."

(The point which I have italicised is made again in para. 51 of the judgment.) I should add that no application under rule 27 or rule 37 was before the Court in *Clark* and the question whether it would have succeeded was not directly in issue: however, there are clear indications that Bean LJ thought that an error of the kind that had occurred in that case could be waived.

40. Unfortunately Judge Crosfill was not referred to *Clark* (which, it is fair to say, had only very recently been decided): if he had been it would have been clear that it was not open to him to take the course that he did. However its potential relevance was identified by HH Judge Auerbach in his reasons for allowing the appeal to proceed to a full hearing in the EAT.

41. At the hearing of the appeal Swift J, relying on *Clark*, set aside the ET's notice of rejection; and, as he made clear in his eventual judgment (see para. 41), he regarded himself as bound also to set aside the grant of permission to amend which he regarded as dependent on it[4]. However, in reliance on the final sentence of para. 42 of Bean LJ's judgment, he allowed the Appellants to apply for the claim to be dismissed under rule 27 or struck out under rule 37. He said that he would determine that application himself in the exercise of his power under section 35 of the ETA (which permits the EAT to make any order that the ET could have made).

42. In support of that application Mr Baker argued that the effect of section 18A (1) and (8) was that the Claimant's failure to invoke the early conciliation procedure deprived the ET of jurisdiction to consider the claim, with the result that it was bound to dismiss it.

43. Swift J rejected that argument and dismissed the Appellants' application. It followed that the detriment claim remained live. That outcome was recorded in the EAT's formal Order simply as the dismissal of the Appellants' appeal: it does not purport to set aside the ET's order giving permission for joinder and amendment. It is doubtful whether that accurately reflects the different route followed by Swift J. Nothing of substance

[4] However, the formal Order contains no provision to this effect: see para. 43 below.

turns on that, but it has a formal effect on the nature of the Respondent's Notice: see para. 46 below.

44. There is a single ground of appeal against the EAT's decision, which reads:

> "Swift J was wrong to conclude that the Claimant's failure to comply with section 18A (1) of the Employment Tribunals Act 1996 did not deprive the Employment Tribunal of jurisdiction to hear the Claimant's claims brought under section 48 of the Employment Rights Act 1996."

That refers only to subsection (1) of section 18A, but before us Mr Baker without objection relied also on subsection (8) (as he had below): where it is unnecessary to distinguish between the two subsections, I will refer simply to "section 18A".

45. The upshot of all that is that the only issue raised by the appeal is whether the effect of section 18A is that the Claimant's failure to invoke the early conciliation process, and thus her failure to give an ECN in her claim form, meant that the ET (or, strictly, the EAT exercising the powers of the ET) was obliged to dismiss the detriment claims for want of jurisdiction.

46. As already noted, the Claimant by her Respondents' Notice seeks in the alternative to rely on the ET's original reasons, so that if the detriment claim falls to be dismissed or struck out it can be reinstated by amendment. In substance, though not in form because of the way that the EAT's formal Order is drafted (see para. 43 above), this raises a cross-appeal, because it seeks to challenge Swift J's decision to set aside the grant of permission to amend, and I will so describe it.

THE APPEAL: JURISDICTION

INTRODUCTION

47. I should say at the outset that I would allow the appeal. I confess that I have not found the point entirely easy, but in the end I have concluded that the requirements imposed by section 18A do indeed go to jurisdiction and that the detriment claim should have been dismissed or struck out because of the Claimant's failure to comply with them. It is most convenient to give my reasons for that conclusion by reference to the relevant paragraphs of Swift J's judgment (paras. 29-40). His reasons are, if I may say so, clear and well-structured, and I believe it will make most sense to take the various elements in them in turn.

PARAS 29-30: "JURISDICTION"

48. Swift J starts by considering the meaning of the term "jurisdiction". Para. 29 of his judgment begins:

> "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."

He goes on to support that conclusion by reference to section 2 of the ETA and (by way of illustration) section 111 (1) of the ERA. At para. 30 he notes that the term can be used in a different sense, which can, he says, "give the wrong impression". He gives

as an example the limitation provisions applying to the various kinds of claim over which the ET is given jurisdiction. He refers to section 111 (1) and (2) of the ERA[5], and says:

> "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, he says, "whether or not [section 18A] provides an absolute bar to an employment tribunal considering a claim depends on what is the proper meaning and effect of the provision". His point, as I understand it, is that it is unhelpful for this purpose to use the language of jurisdiction, which is concerned only with "competence".

49. I agree with Swift J that the term "jurisdiction" can be used in different senses and can accordingly sometimes be a source of confusion. But I do not think that there is any real difficulty about the relevant meaning in this case. The ET plainly had what is sometimes called "subject-matter competence" as regards the detriment claim by virtue of section 48 (1A) of the ERA (read with section 2 of the ETA). But we are concerned with particular statutory limits on the tribunal's power to exercise that jurisdiction. In this case the limits take the form of a step which the claimant is required to take before invoking the jurisdiction, but there are other examples of such limits, most obviously limitation provisions of the kind found in the ERA[6]. Such limits are themselves commonly referred to as jurisdictional in nature – or "going to jurisdiction" – because where they apply the tribunal is precluded by statute, irrespective of the wishes of the parties, from exercising the jurisdiction which it would otherwise enjoy to determine a dispute of the relevant kind; and I see nothing inapt or confusing in using that label.

50. I am not sure that that entirely corresponds with Swift J's analysis. However, we come out at the same place, namely that what has to be decided is whether, applying ordinary principles of construction, the requirements of section 18A are of such a character that if they are not satisfied the tribunal has no power to determine the claim.

PARAS 31-32: CORE CONSTRUCTION

51. Paras. 31-32 contain what I understand to be Swift J's core reasons for his construction of section 18A. They read:

> "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

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5 These are not in fact the relevant provisions in our case, but, as explained above, subsections (1A) and (3) of section 48 use the identical formulas.

6 I say "of the kind found in the ERA" because it is well-established that the provisions of the Limitation Act 1980 do not go to jurisdiction. (That contrast is explicitly acknowledged by the reference to "mere limitation" in the final sentence of the passage on the judgment of Elias LJ in *Radakovits* quoted at para. 52 below.)

> as described by Langstaff P in *Drake International* and HHJ Eady QC in *Science Warehouse*: see above at paragraph 4 [quoted at para. 34 above]. 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."

There are two elements in that reasoning, which I take in turn.

52. The first element focuses on the operative words of the statute. Swift J's point is that both subsection (1) and subsection (8) impose obligations on the (prospective) *claimant* as a condition of bringing proceedings: they say nothing about *the powers of the tribunal*. Mr Young made the same point, but he developed it by drawing attention to the fact that the relevant limitation provision, section 48 (3) of the ERA, uses precisely the kind of express prohibition directed to the tribunal which section 18A eschews – "the tribunal shall not consider". He pointed out that it is well-established that the effect of that formula is to create a jurisdictional bar. He referred us to para. 16 of the judgment of Elias LJ in *Radakovits v Abbey National plc* [2009] EWCA Civ 1346, [2010] IRLR 307, which reads:

> "There is plenty of authority which confirms that time limits in the context of unfair dismissal claims go to jurisdiction, and that jurisdiction cannot be conferred on a tribunal by agreement or waiver: see ... *Dedman v British Building & Engineering Appliances* [1973] IRLR 379. ... In *Dedman*, Lord Denning pointed out that even if an employer actively wishes to have the case heard by a tribunal, the tribunal still cannot hear it if it does not have jurisdiction. The reason is that the language of section 111(2) of the Employment Rights Act (as with its statutory predecessors) provides in terms that a tribunal 'shall not consider' a claim of unfair dismissal unless it is lodged in time. That is what makes these issues jurisdictional rather than mere limitation issues."

He submitted that if it had been intended that section 18A should impose a jurisdictional bar, that is the formula that would have been used.

53. I am unpersuaded by this. In my view Swift J's focus on the fact that subsections (1) and (8) only explicitly place obligations on the claimant is over-literal. I believe that if the statute prohibits the claimant from presenting a claim the natural consequence is that the tribunal is likewise precluded from entertaining it: the one is the corollary of the other. There is not much that I can say by way of amplification of that view, but I

draw support from the fact it reflects the understanding also of the judges in the various authorities to which I refer below. Mr Baker advanced a supporting argument that the phrase "may not present" in subsection (8) must be intended to correspond with the phrase "may present" which is used in the ERA (read with section 2 of the ETA) to confer jurisdiction. There is force in that point, but I cannot attach decisive weight to it because not all the provisions listed in the definition of "relevant proceedings" in section 18 (1) of the ETA use the "may present" formula: see para. 18 above.

54. Mr Young's point based on the contrast between the language of section 18A and section 48 (3) of the ERA has given me some pause. But I do not think that it can outweigh what I believe to be the natural meaning of the words used in section 18A. I do not believe that drafting practice in this field is sufficiently consistent to place real weight on comparing and contrasting the language of different provisions. I have already referred to the fact that the early conciliation provisions apply to a much wider range of jurisdictions than those arising under the ERA. But, even confining ourselves to a comparison with the ERA, limitation and early conciliation are different kinds of statutory condition, with different drafting histories: the ERA consolidates provisions going back to the early days of the employment legislation, whereas the early conciliation provisions represent a distinct statutory scheme introduced for the first time by the 2013 Act.

55. The second element is what is said to be the improbability of Parliament intending that non-compliance with obligations of the very limited character imposed by section 18A should have the consequence of depriving the tribunal of jurisdiction (or, in Swift J's preferred terminology, "competence") altogether. As Mr Young put it, the expected consequence of non-compliance with a personal obligation or prohibition of this kind would be a case management sanction appropriate to the circumstances of the particular case.

56. I am not persuaded by that point either. The early conciliation provisions were introduced by the 2013 Act because Parliament believed that it was important that ET proceedings should not be commenced unnecessarily – more specifically, until there had been an opportunity for ACAS conciliation. It is not only consistent with, but positively conducive to, that purpose that the tribunal should not be empowered to entertain a claim unless and until that opportunity has been afforded. The fact that there is no obligation on the parties to take advantage of the opportunity is irrelevant: what is important is that the horse is brought to water, even if it cannot be made to drink.

PARAS. 33-34: CONSISTENCY WITH THE SCHEME OF THE RULES

57. At paras. 33-34 Swift J says that his conclusion in the previous paragraphs is "consistent with" the scheme of the Procedure Rules because rules 10 and 12 explicitly require the rejection of non-compliant claims and it is accordingly unnecessary to resort to a jurisdictional analysis in order to achieve the result which is the evident purpose of section 18A.

58. Mr Baker submitted that that point amounted to using secondary legislation as an aid to the construction of a statutory provision in the absence of the special circumstances in which that is permissible: he referred to *Hanlon v Law Society* [1981] AC 124 and *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594. However, I do not believe that it is necessary to decide that question, because even if

Swift J's point is admissible it does not advance the argument. It makes equal sense for the Rules to provide for the rejection of a claim which does not comply with the requirements of section 18A whether the bar is jurisdictional or not.

PARA. 35: LATE-DISCOVERED NON-COMPLIANCE

59. At para. 35 Swift J considers the position where, as here, the non-compliance has only been detected once the claim has passed the gateway and substantive tribunal proceedings have begun. He says:

> "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 [*sic*] 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, have 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."

60. My primary response to this paragraph is that even if the consequences of treating the requirements of section 18A as going to jurisdiction were as stated that would not be inconsistent with the statutory purpose. That purpose is, as I have said, to reduce unnecessary resort to the ET by providing an opportunity for ACAS conciliation before proceedings are commenced; and, as I have also said, it is positively conducive to that purpose to enact that the ET shall not have jurisdiction to entertain any claim where that opportunity has not been provided. Swift J's point is that that purpose is very unlikely to be achieved in some particular circumstances. But in the case of any general rule it is likely to be the case that not every instance of its application will serve the statutory purpose: that does not mean that the rule overall is inconsistent with that purpose.

61. However, that may not address the substance of Swift J's point. I accept that if the position were that the rule would only create a realistic opportunity for conciliation in a few cases it might be hard to accept that Parliament intended it to create an absolute bar. But that is not the case here. Swift J's concern relates only to cases like the present where the fact that a claim is non-compliant is only picked up after it has passed the gateway stage. Such cases will necessarily be exceptional. And even where they occur

it will not necessarily be futile, from the point of view of achieving early conciliation, for the claimant to be required to re-present their claim. They would have had to do so if the claim had been rejected at the gateway stage, and there is no reason to suppose that the prospects of their, or the respondent, being interested in conciliation would be affected by the passage of time between the (erroneous) acceptance of the claim and the point at which the error is detected (which may only be a matter of days or weeks later).

62. Swift J makes the separate point that the longer the interval before the non-compliance is detected the greater the risk that the claim will be out of time. It is impossible to assess the extent of that risk. The limitation provisions applicable to the "relevant proceedings" to which section 18A applies are not all the same and vary not only in the length of the limitation period but in the scope for discretionary extension. But even if some cases of non-compliance will indeed not be detected until it is too late to start fresh proceedings I do not believe that that consequence justifies adopting what I believe is an unnatural construction of the section. I repeat that such cases will be few, because non-compliance will normally be picked up at the gateway stage. It is also important to remember that we are concerned with cases of substantive non-compliance, where the conciliation process has not been invoked at all: where the non-compliance consists only of the accidental omission or inaccurate recording of the ECN (as in *Clark*) there is no jurisdictional bar and the matter will be dealt with as a matter of case management. No doubt there will be cases where the claimant's failure is venial, and the operation of an absolute bar will accordingly be harsh; but the fact remains that it is the result of a failure by the claimant to invoke a process which Parliament regarded as mandatory. None of those consequences are of a kind that could justify the conclusion that it cannot have been intended that the requirements of section 18A should go to jurisdiction.

PARAS. 37-38: THE AUTHORITIES

63. At paras. 37-38 Swift J acknowledges that his conclusion is contrary to the earlier decision of the EAT in *Pryce v Baxterstorey Ltd* [2022] EAT 61 and to what he considers to be an *obiter dictum* in a later passage in Bean LJ's judgment in *Clark* approving the decision of the EAT in *Cranwell v Cullen* UKEATPAS/0046/14, but he observes that they are not binding and respectfully declines to follow them. On the assumption (which I consider below) that Bean LJ's endorsement of *Cranwell* was indeed *obiter*, we are not bound by them either, but before considering whether they nevertheless have persuasive authority I should summarise what they say.

64. In *Pryce* a claimant had issued proceedings without having obtained an ECC, but she did so a few days later and sent it to the ET asking for the ECN to be added to the claim form. On that basis the claim was not rejected, but it emerged subsequently that she had had no ECC at the date of presentation of the complaint (so that this was a case of substantive non-compliance) and the claim was dismissed "for lack of jurisdiction": it is not clear, but does not matter for present purposes, which (if any) rule was relied on. Her appeal to the EAT was (regretfully) dismissed by HH Judge Shanks. The detailed issues in the appeal do not concern us but the starting-point of the Judge's analysis was that he accepted the submission of counsel for the respondent that "section 18A (8) is in the nature of a jurisdictional requirement which is laid down by an Act of Parliament" and that it followed that her original claim should have been rejected: see para. 10 of

his judgment. It is fair to say that the claimant was unrepresented and it appears that there was no argument on the point.

65. In *Cranwell* the claimant had commenced proceedings to which the early conciliation provisions applied but had not invoked them. In her claim form she ticked the box stating that an exemption applied, but in fact it did not: that constituted a "substantive defect" under rule 12, and the claim was accordingly rejected. She appealed to the EAT. Her appeal was dismissed. Again, the particular issues are not material for our purposes, but the premise of Langstaff P's reasoning throughout was that section 18A imposed a jurisdictional bar.

66. *Clark* was, as I have said, a case of evidential non-compliance: the claimants had ECCs at the date they presented their complaints and thus did not fall foul of section 18A (8). I have set out at para. 39 above Bean LJ's reasons for holding that a non-compliant claim could not be belatedly rejected. Immediately following that passage, at para. 44 of his judgment, he says that it is "instructive to compare" three earlier EAT decisions. The first is *Cranwell*, as to which he says:

> "In *Cranwell v Cullen* 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."

The reference to the "striking out" of the claim in *Cranwell* is strictly inaccurate because it was in fact rejected under rule 12. But what matters is Bean LJ's endorsement of the proposition that non-compliance with section 18A deprives the tribunal of jurisdiction.

67. Mr Young submitted that Swift J was right to find that Bean LJ's endorsement of *Cranwell* was *obiter* because it did not form any part of the reasoning supporting the determination of the appeal: it was no more than an observation on a question which did not arise in *Clark*, and it was unclear whether there had been any argument on it. I think that must be correct, and it follows that none of these three authorities is binding on us. Nevertheless I believe that all three constitute persuasive authority in support of the Appellants' case in as much as Judge Shanks, Langstaff P and Bean LJ all regarded it as natural to read the requirements imposed by section 18A as going to jurisdiction.

68. I should also mention the decision of this Court in *Abercrombie v AGA Rangemaster Ltd* [2013] EWCA Civ 1148, [2014] ICR 209. This was concerned with the dispute resolution regime under the 2002 Act referred to at para. 35 above. The primary provisions establishing that regime are in section 32 of the Act. For our purposes the key provisions can be summarised as follows:

    (1) Subsection (2) provided that an employee "shall not present a complaint [of a specified kind] to an [ET]" if they had not first complied with the requirements of the prescribed grievance procedure.

(2) Subsection (6) provides that "[a]n employment tribunal shall be prevented from considering a complaint presented in breach of subsections (2) to (4), but only if" (in short) either the breach is apparent to the ET from information supplied by the claimant itself or it is pleaded by the respondent.

One of the issues was whether the result of those provisions was that a claim in respect of which the requirements identified in section 32 (2) had not been complied with was, as it had been described in the EAT, a nullity. At para. 54 of my judgment (with which Sir Terence Etherton C and Kitchin LJ agreed) I accepted that the effect of those provisions was "to deprive the employment tribunal … of 'jurisdiction'[7]", though for reasons specific to the provisions of section 32 (6) I concluded that that was not their effect in the circumstances of the case. I do not regard that statement as authoritative as regards the effect of section 18A, partly because I am not sure that my observation was *ratio* but also because section 32 (6) is differently worded from section 18A (8). But it does lend some support to the position that where potential claimants are required to go through a pre-hearing process with the aim of trying to avoid litigation it is natural to treat that requirement as going to jurisdiction.

PARAS. 39-40: DISMISSAL/STRIKING-OUT AS CASE MANAGEMENT

69. Having thus rejected the argument that he was absolutely obliged to strike out the detriment claim for want of jurisdiction, at paras. 39-40 Swift J considers whether he should nevertheless strike it out for non-compliance. He begins by saying that Mr Baker accepted that if he did not succeed on the jurisdiction issue he could not succeed on any other basis. But he goes on to explain why he believed that that concession was rightly made. His reasons can be summarised as follows:

(1) The operative cause of the situation in which the ET (and thus also the EAT) now found themselves was the ET's failure to reject the claim. As he puts it in para. 39:

> "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."

(2) The Claimant's original error in not invoking the early conciliation process was "explicable if not entirely excusable". In order to apply for interim relief, she had to present her claim within seven days of her dismissal; the facts of the unfair dismissal and detriment claims were "entirely connected"; and in order to meet the seven-day time limit for the one and obtain an ECC for the other pre-presentation she would have had to present two separate complaints.

(3) There was no real prejudice to the Appellants.

(4) The conduct of Ms Hayward and Mr Court in relation to the interim relief application had been found by Judge Crosfill to be reprehensible.

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[7] The inverted commas reflect a caution about the potential ambiguity of the term – cf. para. 49 above.

70. This part of Swift J's judgment is not relevant to the issues on the appeal, which are concerned only with the question whether section 18A goes to jurisdiction. But I have summarised it because there is some parallel with the similar exercise undertaken by Judge Crosfill in the ET which is the subject of the cross-appeal.

CONCLUSION ON THE APPEAL

71. For the reasons given above, I would allow the appeal and hold that the ET had no jurisdiction to entertain the detriment claim as presented.

72. A question then arises as to the rule under which we should give effect to that conclusion. As we have seen, Swift J treated the application which he permitted to be made before him as being under rule 27 or rule 37: both had been referred to in *Clark*. Rule 37 does not explicitly refer to lack of jurisdiction as a ground for striking-out, though it could if necessary, albeit slightly clumsily, be accommodated within the language of either paragraph (1) (a) (since a claim which the ET has no jurisdiction to determine can have no prospect of success) or paragraph (1) (c) (since the Claimant did not comply with the Rules). By contrast, rule 27 does refer in terms to dismissal for lack of jurisdiction, but the difficulty is that it does not purport to give a general power to dismiss on that basis and is only concerned with prescribing the particular procedure summarised at para. 32 above. In the end, the question is not of fundamental importance, since it is axiomatic that the ET must by one means or another decline to entertain a claim in respect of which it has no jurisdiction. But I believe that rule 27 is the more natural vehicle: although the issue has not arisen in precisely the way there contemplated, the essence of its procedural requirements have been followed and any departures can be treated as waived under rule 6.

THE CROSS-APPEAL: AMENDMENT

INTRODUCTION

73. By the cross-appeal the Claimant seeks to restore the ET's order giving her permission to amend the claim form so as to enable the rejected claims to proceed. That does not involve arguing that the ET's reasoning was right in every respect, since it is common ground in the light of *Clark* that it was wrong belatedly to reject the detriment claim under rule 12. Rather, it is the Claimant's case that the amendment route which the ET took is equally available where the claim falls to be dismissed for lack of jurisdiction under rule 27.

THE ET's DECISION

74. The relevant part of the ET's order reads:

> "Joinder and Amendment
>
> 4. The Fourth, Fifth and Sixth Respondents are joined as parties to the claim pursuant to Rule 34 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
>
> 5. The Claimant is given permission to treat her ET1 presented to the Tribunal on 12 April 2023 as her amended ET1.

> 6. The Respondents' ET3s shall stand as their response to the Claimant's claims."

(Rule 34 of the Procedure Rules, referred to in para. 4, gives the ET the power to "add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings".)

75. The intended effect of that Order, as confirmed by para. 44 of Judge Crosfill's decision, is that the Claimant should be enabled to pursue the selfsame detriment claim against the Appellants that she had sought to make in her original complaint. It comprises both an order for joinder and a grant of permission to amend. An order for joinder was required as regards the individual Appellants, because the rejection of the detriment claim meant that they ceased to be parties to the complaint at all, but it was not required as regards the Abel companies because they were respondents to the unfair dismissal claim which was unaffected by the rejection. In the case of all the Appellants, amendment was also required in order to reinstate (in identical terms) the rejected detriment claim. In what follows, I will sometimes for convenience refer to both aspects of the order simply as the exercise of the power to amend.

76. Mr Airey argued that it was wrong for the ET to exercise its power to amend in order to reinstate a claim which had been rejected for failure to comply with the early conciliation requirements. Judge Crosfill did not accept that submission. He relied in particular on the decisions of the EAT in *Science Warehouse Ltd v Mills* [2015] UKEAT 224/15, [2016] ICR 252 and *Drake International Systems Ltd v Blue Arrow Ltd* [2016] UKEAT 282/15, [2016] ICR 445. These are central to the argument, and I should summarise them in a little detail.

77. In *Science Warehouse* the claimant had presented a complaint to the ET raising a claim of pregnancy discrimination. She had complied with section 18A and had given the ECN in her claim form. She subsequently applied to amend the complaint to add a complaint of victimisation which had arisen since the commencement of the proceedings and which could not therefore have been part of the "matter" about which ACAS had been informed. The respondent resisted the application on the basis that she had not invoked the early conciliation process in respect of that claim. The ET allowed the application and the EAT (HH Judge Eady QC sitting alone) upheld that decision. At paras. 24-27 of her judgment Judge Eady considered the scope of the word "matter" and held that it was not to be defined by reference to a particular claim. But at para. 28 she made the distinct point that section 18A (1) did not cover the case of an amendment. She said:

> "Furthermore, section 18A does not purport to address the case of an *existing* Claimant, merely that of the *prospective* Claimant [italics in original]. For those who are existing Claimants, who seek to add additional claims to existing proceedings, this will be a matter for the ET, exercising its case management powers under Rule 29 of the ET Rules 2013 and applying the well known guidance laid down in cases such as *Selkent v Moore*."

She continued, at paras. 29-31, to consider the relevance on such an application of the fact that amendment would avoid what would otherwise have been an obligation to invoke the early conciliation process. She said:

> "29. Does this approach undermine the objective of the early conciliation procedure, as [counsel for the respondent] suggests? Would it permit (using his example) an accrual of new claims simply by way of amendment of existing proceedings and thus avoiding early conciliation? [Counsel's] fears in this regard fail to take account of the fact that such amendments would only be permissible if allowed by the ET, properly exercising its judicial discretion. An ET is not bound to permit such an application. The fact that it concerns a matter that is entirely new, having arisen only after the ET1 was lodged, may well be a relevant factor weighing against allowing an amendment. If such an application to amend were not permitted, it may be that the Claimant becomes a *prospective* Claimant in respect of that matter, and there may then be an obligation to invoke the early conciliation procedure unless one of the section 18A(7) exceptions apply. If the amendment is permitted, however, I cannot see that the early conciliation process arises. It is simply a matter of case management.
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> 30. It seems to me that the most the Respondent can really say is that an ET considering whether or not to allow an amendment might consider the potential avoidance of early conciliation to be a relevant factor. I do not see, however, that it can be determinative. The rationale of the early conciliation scheme is to encourage the settlement of employment disputes before litigation has commenced and positions have become entrenched. Apart from the initial obligation to contact ACAS, however, the process is entirely voluntary. If the Claimant has no interest in participating in a conciliation process, she is not obliged to do so; the same is true of the Respondent. Early conciliation builds into the ET 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. That information might emerge during the conciliation process, but there is no requirement that it does so, and normally the ensuing discussions will remain confidential in any event.
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> 31. Given, then, the limited nature of the requirement and the way in which early conciliation operates as an opportunity rather than a more stringent obligation, was the ET bound to decline to allow an amendment to add an additional claim where that could not have been a subject of the original early conciliation process? I do not consider that it was. Had the subsequent claim been entirely unrelated to the

> existing proceedings - and I am not going to speculate on what that might have been - the ET might have declined to permit the amendment, but that decision would be informed by a variety of factors, not merely the fact that no early conciliation process could have been engaged in."

78. In *Drake* the claimant presented a complaint under regulation 12 of the Transfer of Employment (Protection of Employment) Regulations 2006 naming the parent company of a group of wholly-owned subsidiaries as the respondent: he had obtained an ECC naming the parent company and had given the ECN from that certificate in his claim form. It subsequently emerged that the proper respondent was not the parent but one of the subsidiaries. The claimant applied for permission under rule 34 to substitute the subsidiary as a respondent. The respondent resisted the application on the basis that the claimant had not invoked the early conciliation process as against that company. The ET granted permission, and the EAT (Langstaff P sitting alone) upheld that decision. Langstaff P's reasoning appears at paras. 17-34 of his judgment. He endorsed the approach of Judge Eady in *Science Warehouse* and held that it applied equally to the case of an application under rule 34. I should quote para. 26 of his judgment, which reads:

> "Further and separately, the Act and Early Conciliation Regulations speak of a 'prospective Claimant' in relation to proceedings which have not yet been instituted. It makes no sense to talk of a 'prospective' Claimant once relevant proceedings have been instituted. Insofar as applications to substitute fresh Respondents to an existing claim is concerned, then if permission is refused, the applicant will be a prospective Claimant in relation to those Respondents: but at the time the application is made, that person is not, since 'the matter' is then subject to existing proceedings and will, subject only to the grant or refusal of amendment, either remain the subject of existing proceedings, or become the subject of proceedings yet to be instituted."

79. At paras. 50-51 of his decision Judge Crosfill notes that in both *Science Warehouse* and *Drake* the claimant had in fact obtained an ECC whereas in the present case the Claimant had not invoked the early conciliation process at all; but he concludes that that is not a basis for distinguishing them.

80. At para. 52 of his decision Judge Crosfill considers the decision of the EAT decision in *Webster v Rotala Ltd* UKEAT/0015/20 (Upper Tribunal Judge Keith sitting alone). In that case the claimant had presented a complaint comprising (a) an unfair dismissal claim under section 103A of the ERA, including a claim for interim relief, and (b) another claim, which appears (though this is not quite clear) to have been a victimisation claim. He had not invoked the early conciliation process in respect of either claim and accordingly did not give an ECN on the claim form (or tick any of the boxes providing a reason). The ET rejected the entire claim. The EAT allowed his appeal on the basis that the interim relief exemption applied to the unfair dismissal claim so that only the non-exempt claim fell to be rejected. Judge Crosfill noted that Judge Keith had referred at one point in his judgment to the ET having being obliged to "dismiss" the other claim, which might have implied that the claim should have got through the gateway and then been the subject of a case management order; but he said that that was clearly just a loose paraphrase for "reject".

81. Having reached that conclusion, Judge Crosfill considered whether as a matter of discretion he should make the order. He gave his reasons for doing so at paras. 63-73 of his decision. Paras. 63-66 read as follows:

> "63. Had the Employment Tribunal done what it ought to have done then the Claimant would have been sent a notice rejecting her claim and informing her of the reasons why parts of the claim could not be accepted. She would have been notified of her right to seek a reconsideration and/or told that she might represent her claim with the identified defects rectified. The claim would have been treated as having been presented at the date it was presented with the defects cured.
>
> 64. The Claimant has acted for herself. She is intelligent and has done a very good job of identifying her claims in her original ET1. However, she would be at a considerable disadvantage in not being informed that only part of her claim should have been accepted. The point does not appear to have occurred to the Judge who vetted the claim form before indicating that it should be accepted. The point did not occur to me, and I did not recheck whether the claims should have been accepted in their entirety. Whilst Mr Airey must get credit for spotting the point he too did not do so at the early stages of the claim doing so only before me. If two judges failed to spot the point it is unsurprising that a litigant in person did not realise of her own volition that there were defects in her claim.
>
> 65. Adding a claim under Sections 47B/48 to the claims of unfair dismissal is not in my view a significant amendment. The claims are more advantageous for the Claimant but arise out of or are closely connected to the facts already said to support the unfair dismissal claims. The Respondents have known that the Claimant wished to advance such claims from the point that they received her ET1. They have set out their responses in their ET3s."

I need not set out the remaining paragraphs, which address the relevance of the fact that any fresh claim would have been out of time at the date of the hearing and whether allowing the clams to proceed would unfairly prejudice the Appellants.

THE APPELLANTS' CHALLENGE

82. The Appellants' case on this issue was developed in a supplementary skeleton argument and in oral submissions. Mr Baker's submissions fell essentially into two parts:

(1) He submits that section 18A (1) on its true construction applies to the raising of new claims by way of amendment to existing proceedings as well as to the commencement of new proceedings. If that is right, the conclusion reached in relation to the appeal – that is, that the ET had no jurisdiction to entertain the claim because the Claimant did not have an ECC – applies equally to the proposed amendment.

(2) He submits that even if section 18A (1) does not apply as such to claims sought to be introduced by amendment it is nevertheless wrong in principle to allow such an amendment because it would be contrary to the purpose of the early conciliation provisions.

83. I will consider those submissions in turn. Mr Baker did not explicitly challenge Judge Crosfill's exercise of his discretion to grant permission to amend in the present case, as summarised at para. 81 above: his case was that for the reasons given above he should not have embarked on that exercise in the first place. I will, however, briefly consider that question also.

(1) Does section 18A (1) apply to permission to amend?

84. Mr Baker's case on this aspect turned on the fact that section 18A does not use the phrase "present a complaint" or any other formula which unequivocally refers to the initiation of proceedings. Instead the words used are "presents an application to institute relevant proceedings relating to any matter". He focused both on the word "application" and on the phrase "relevant proceedings". As to the former, he submitted that it was apt to cover any kind of invocation of the tribunal's processes to initiate a claim, whether in the form of the initial presentation of a complaint or by way of an application to amend. As to the latter, he pointed out that the definition in section 18 (1) of the ETA does not refer to the presentation of a claim form or any particular process: it simply identifies the statutory provision under which the claim is brought or, as he put it, the statutory cause of action. Thus, he submitted, an application to amend to introduce a fresh cause of action is properly to be regarded as the institution of such proceedings.

85. If that were correct, it would follow that both Judge Eady in *Science Warehouse* and Langstaff P in *Drake* were wrong to hold that section 18A only applied to the original initiation of proceedings: see paras. 29 and 26 of their respective judgments. However, we are not bound by either decision, and I therefore need to consider whether they were correct. I believe that they were. My reasons are essentially twofold.

86. First, I do not believe that Mr Baker's construction of the phrase "presents an application to institute relevant proceedings" corresponds to its natural meaning. The key words in the phrase are in my view "institute … proceedings". "Proceedings" may be a somewhat protean term, the precise meaning of which may be affected by its context; but in ordinary legal parlance reference to the "institution" of proceedings would normally connote the initiation of a distinct process defined by a claim form and the responses to it: an application to amend those proceedings, including by the joinder of a new party, would not typically be described as the institution of proceedings. (Indeed the terms "amendment" and "joinder" positively acknowledge that proceedings are already in place.) That was clearly the understanding of Langstaff P in the passage quoted above, and I respectfully agree with it. That construction is reinforced, as Judge Eady in particular emphasises, by the reference in section 18A (1) to a "prospective" claimant: in the case of an application to amend the claimant is not prospective but existing. The fact that the definition of "relevant proceedings" is framed by reference to particular kinds of claim does not seem to me to advance the argument: that does no more than identify the kinds of proceedings the institution, or prospective institution, of which is covered by section 18A.

87. I do not believe that that construction is affected by the introductory words "presents an application to". I note that that phrase is not in fact used in section 18A (7), which begins "[a] person may institute relevant proceedings" *tout court*, and it seems to me essentially secondary. It is not entirely clear why the draftsman resorted to this rather circumlocutory formula, but the likely explanation is that the jurisdiction-conferring provisions of the various kinds of relevant proceeding do not all use the language of "may present a complaint" – see para. 18 above – and it was therefore necessary to find a phrase that covered all the labels used for the institution of proceedings.

88. Second, that construction is in accordance with the statutory purpose. It is one thing to require that an opportunity be created for early conciliation before there has been any resort to the tribunal, but the situation is different once proceedings have started. There will at that point have been an opportunity for early conciliation, which *ex hypothesi* will not have borne fruit. Applications to introduce fresh claims, or join new parties, may be made at any stage of the ensuing proceedings, and in a complex case possibly on many occasions. It is extremely unlikely that Parliament will have intended that on each such occasion the claimant will have to go through the almost certainly futile process of invoking the early conciliation procedure, and impose on ACAS the burden of confirming whether both parties are interested in conciliation[8]. (I appreciate that this point may appear to echo Swift J's argument which I reject at paras. 60-62 above, but the question there was whether the likely futility of conciliation in the exceptional case where non-compliance is not picked up at the gateway stage justified a conclusion that section 18A did not go to jurisdiction at all: that is quite different from the question whether it applies to applications to amend.)

89. I should say that Mr Baker sought to distinguish *Science Warehouse* and *Drake* on the basis that in those cases the claimant had in fact obtained an ECC (albeit in the one case relating to a different claim and in the other to a different respondent), whereas here the Claimant had not invoked the early conciliation process at all. But I do not see how that distinction can affect the question of construction raised by his submission.

(2) Was permission to amend wrong in principle?

90. Once it is concluded that the purpose of section 18A is limited to requiring an opportunity for conciliation prior to the institution of proceedings (in the sense that I have held) I do not see how it can be wrong *in principle* to permit the introduction of a fresh claim or party by amendment. I respectfully agree with the reasoning of Judge Eady at paras. 29-31 of her judgment in *Science Warehouse* (endorsed in *Drake*). As she says at para. 30, the fact that the amendment avoids the requirement to invoke the early conciliation process may be a relevant factor in the exercise of the tribunal's discretion but it cannot be determinative.

91. Mr Baker's essential response was that if the Claimant's argument were correct any claimant whose complaint included more than one claim, and who had had one of those claims rejected for non-compliance with section 18A, could avoid the need to go back and invoke the early conciliation process by instead applying for permission to amend: he referred to the facts of *Webster* by way of illustration. But that concern is

[8] Admittedly the burden would not be very heavy if, as would no doubt usually be the case, the claimant makes clear from the start they are not interested in conciliation; but ACAS would still have to process the information and issue an ECC.

convincingly addressed by Judge Eady in para. 29 of her judgment in *Science Warehouse*: the tribunal would not be obliged to grant permission to amend and would only do so if it believed that it was a proper exercise of its discretion to do so.

Judge Crosfill's exercise of his discretion

92. Although, as I have said, Mr Baker did not seek to challenge Judge Crosfill's exercise of his discretion (otherwise than by the point of principle considered above) I should say that I cannot see anything wrong with the assessment that he made: I note indeed that in fact it has much in common with Swift J's exercise of the discretion that he believed he enjoyed in determining the application before him (see para. 69 above). The exercise is specific to the facts of the present case and cannot be taken as an indication of the likely outcome of other applications in other circumstances. Both judges understandably put weight on the venial nature of the Claimant's failure, given the very tight timetable to which she had to work, and the fact that the detriment claim was intimately connected with the unfair dismissal claim.

93. Although Mr Baker did not seek to deploy it in this context, it may be that his submission that the facts of the present case could be distinguished from those of *Science Warehouse* and *Drake* (see para. 89 above) really belongs at this stage of the argument. But if so I do not believe that it has any force. Although it is true that in those cases the early conciliation procedure had been invoked as regards the original complaint, that is not of central importance. The reason why in our case the procedure was not invoked in relation to the unfair dismissal claim is that it did not have to be.

94. I should add that there is nothing outlandish in the proposition that a jurisdictional bar may not apply to claims added to existing proceedings by amendment. It is well-recognised that permission may be granted to add a claim or join another respondent in ET proceedings, notwithstanding that the claim would have been out of time (so that the tribunal had no jurisdiction – see *Radakowits*, cited at para. 52 above) if presented in fresh proceedings. At para. 50 of my judgment in *Abercrombie* I said:

> "Mummery J says in his guidance in *Selkent* that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded … justice does not require the same approach: NB that in High Court proceedings amendments to introduce 'new claims' out of time are permissible where 'the new cause of action arises out of the same facts or substantially the same facts as are already in issue' (Limitation Act 1980, section 35 (5))."

That was in relation to limitation. In fact the outcome in *Abercrombie* also involved the claimants being entitled to amend by substituting a claim to which the 2002 Act did not apply for one which fell to be dismissed because of the claimants' failure to comply

with its requirements. That is not binding authority as regards the present case, because the issues were not the same; but it may nevertheless be of interest as demonstrating that there is no absolute bar to jurisdictional problems being circumvented by amendment.

CONCLUSION ON THE CROSS-APPEAL

95. I would for those reasons uphold the order of the ET granting the Claimant permission to amend the claim form in the manner identified.

OVERALL CONCLUSION

96. The result of those conclusions is that I would hold that the EAT was wrong to find that the ET had jurisdiction to entertain the detriment claim as advanced in the original claim form, but that the ET nevertheless had jurisdiction to grant permission to amend to allow the Claimant to pursue the identical claim, and that in the particular circumstances of this case it was entitled to do so. The Claimant is thus entitled to pursue the detriment claim.

97. Because the EAT's order was framed simply as dismissing the appeal from the ET, that result can straightforwardly be expressed as a dismissal of this appeal.

Snowden LJ:

98. I agree.

Falk LJ:

99. I also agree.