Abel: EAT concludes that previous EAT decision to be "manifestly incorrect" in new Early Conciliation case

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Overview

This is a case summary following the EAT decision in the case of ***Abel Estate Agent Limited and ors v Reynolds* [2025] EAT 6**. The EAT held as follows:

(a) that the Employment Tribunal had erred in its decision to reject the claim, applying *Clark v Sainsbury's Supermarket Limited* [2023] ICR 1169

(b) that the Employment Tribunal ought to have considered whether to dismiss the whistleblowing detriment claim under Rule 27[1] (for want of jurisdiction) or Rule 37[2] (strike out) but

(c) that the Claimant's failure to comply with the ACAS EC procedure did not deprive the Employment Tribunal of the ability to hear the whistleblowing detriment claim.

In so doing, the EAT did not follow the case of *Pryce v Baxterstorey Limited* [2022] EAT 61. The EAT remitted the claims to the Employment Tribunal.

This case provides an important reminder on how parties and the Tribunals must deal with proceedings in light of the *Clark* decision and how Tribunals may tackle failures to enter ACAS EC going forwards (although it is worthwhile bearing in mind the potential for this appeal to be taken to the Court of Appeal to resolve the tension between *Abel* and *Pryce*).

[1] Now Rule 28
[2] Now Rule 38

The facts

The facts of the underlying claim are as follows:

1. The Claimant, Ms Reynolds, was employed until 6 April 2023, within an estate agency. She was told on that date that her employment would be terminated by reason of redundancy. She did not accept that was the true reason for her dismissal, and instead contended it was due to her having made a qualifying protected disclosure.

2. The Claimant brought a claim within the Employment Tribunal on 12 April 2023. Her claim for unfair dismissal contrary to s103A ERA 1996 was accompanied by an application for Interim Relief. She also brought a claim for whistleblowing detriments contrary to s48 ERA 1996.

3. The Claimant brought her claim against a number of Respondents (three associated companies, Abel Estate Agent Ltd, Abel Living Ltd, and Abel of Hertford Ltd) and three individuals.

4. The Claimant did not go through ACAS Early Conciliation before presenting her claims to the Employment Tribunal. In terms of the s103A ERA 1996 claim, where an unfair dismissal claim is made together with an application for interim relief, the proceedings are exempt for the ACAS Early Conciliation procedure. However, her claims under s48 ERA 1996 were not exempt from the same procedure. The Claimant should have obtained an ACAS Early Conciliation certificate. The Claimant's case was not rejected under Rules 10 or 12 and the failure to comply with s18A ETA 1996 was not identified by the Tribunal at the outset.

5. On 30 May 2023 the Claimant's application for Interim Relief was heard. The Respondents neither responded to nor attended the Interim Relief hearing. Interim Relief was granted at that hearing.

6. On 5 July 2023 the Tribunal gave a Rule 21 judgment and a remedy hearing was listed to take place for 3 days commencing on 9 August 2023.

7. During July 2023 solicitors appointed to act for the Respondents wrote to the Tribunal seeking an extension of time to present the ET3/Grounds of Resistance and a request to set aside or vary the decision to grant Interim Relief and reconsideration of the Rule 21 judgment.

8. The Remedy Hearing due to start on 9 August 2023 was adjourned and a new hearing to hear the Respondents'' applications was set for 20 September 2023. It is from that decision which the appeal to the EAT flowed from.

9. The Employment Tribunal held as follows:

    (a) The Respondents were permitted an extension of time to present their ET3/Grounds of Resistance

    (b) The decision on Interim Relief was set aside

    (c) Under Rule 12, the Claimant's claim under s48 was rejected

    (d) An application to amend her claim to add a claim under s48 against each of the individual Respondents was permitted

10. The Respondents appealed to the EAT on the following Grounds:

    (1) That the decision to allow the Claimant to amend to add a s48 claim was wrong in law as the Claimant had failed to comply with s18A ETA 1996

    (2) That in allowing the application to amend, the Tribunal had failed to properly consider the relevance of time limits

    (3) That, rather than rejecting the s48 claim under Rule 12 and then allowing an amendment to add the s48 claim, the Tribunal should have struck the s48 claim out.

11. The EAT began by outlining that it was regrettable that the Tribunal below had not been taken to the Court of Appeal judgment in *Clark v Sainsbury's Supermarket Limited* [2023] ICR 1169. In that case, the Court of Appeal stressed that if a claim hadn't been rejected by the Tribunal itself, it was not open to the Respondent to later argue that it should have been rejected. Instead, the route for a Respondent would be to seek dismissal of the claim under Rule 27 (now Rule 28) or under Rule 37 (now Rule 38).

12. The EAT said as follows:

    The approach that should be followed is set out very clearly in Bean LJ's

    Judgment [in the Clark case]. In this case, that approach renders the first and second grounds of appeal academic. There is little purpose in considering whether the Judge's

exercise of his discretion to permit claims to be amended and parties to be joined was correct in law when the need to exercise such powers at all rested on a false premise – i.e. that Ms Reynolds' section 48 claim should be rejected under rule

At the hearing I put this point to Mr Baker. He agreed that I should approach this appeal on the premise that the Judge's rule 12 decision should be set aside.

On that premise the decision to re-instate the section 48 claim by amendment falls away. Mr Baker agreed that this being so, the first and second grounds of appeal also fall away.[3]

13. The EAT therefore went on to consider, in some detail, the Third Ground of appeal, namely whether the Tribunal should have considered whether to dismiss the s48 claim under Rule 27 (now Rule 28) or under Rule 37 (now Rule 38). For the Respondents, it was submitted that the failure to comply with the EC procedure goes to the jurisdiction of the Employment Tribunal. The Respondents relied heavily on the judgment handed down by HHJ Shanks in *Pryce v Baxterstorey Ltd* [2022] EAT 61. In that case, the Claimant presented a claim without an ACAS EC certificate and there was no jurisdiction to consider the claim.

14. The EAT held that Ms Reynolds presentation of her s48 claim did not mean the Tribunal had no jurisdiction to hear the claim.

The purpose of the early conciliation provisions remains the same. However, by the time the error is raised the possibility for early conciliation will have passed – the parties will have already embarked on litigation. Once that moment has passed, once the Form ET1 has been sent to the respondent, or when the respondent has filed its defence, it makes much less sense, if any sense at all, to construe the effect of subsection (8) as removing the competence of the Employment Tribunal to decide the substantive claim. It is not obvious at all that the purposed by section 18A of the ETA 1996 and the 2014 Regulations would be served by a conclusion that proceedings should be treated as a nullity, requiring a claimant who wished to pursue the claim to start again after having gone through early conciliation, now facing the additional hurdle that the second claim would, like as not, having been commenced out of time (a point that would, no doubt, also be obvious to the respondent and would make the respondent less willing to engage with any form of conciliation). The only effect of an approach that required the Employment Tribunal to dismiss or strike out a claim as a matter of course would be

[3] Paragraph 20 and 21 EAT judgment

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.[4]

15. The EAT went on to say that it was satisfied that HHJ Shanks' decision that failure to comply with the earlier EC procedure impacted on the Tribunal's jurisdiction was manifestly incorrect.[5]

16. The case was remitted to the Tribunal below to consider the s103A and s48 claim on their merits.

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[4] Paragraph 35, EAT judgment
[5] Paragraph 37, EAT judgment