Neutral Citation Number: [2025] EAT 12

Case No: EA-2021-000241-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 January 2025

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MR A SMIRNOV

Appellant

- and –

RAMBOLL UK LIMITED

RAMBOLL DANMARK A/S

Respondents

- -
- -

Jesse Crozier and **Hitesh Dhorajiwala** (instructed by Advocate) for the **Appellant**
Katherine Anderson (instructed by Warner Goodman LLP) for the **Respondents**

Hearing date: 14 January 2025

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant began working in Denmark for Ramboll Danmark A/S in 2015. In 2018 he moved to the UK. In 2019 his employment was terminated. He presented a claim form to which the respondent was Ramboll UK Ltd. He contended that he had become employed by that company. It contended that he had remained employed by Ramboll Danmark A/S. The claimant then presented a second claim raising further complaints, naming both those companies (and a third company) as respondents. At a case management hearing the tribunal noted that there was an issue as to the identity of the claimant's employer, as well time-limits and jurisdiction issues. It listed an open preliminary hearing. It directed the respondent to table its applications and for the claimant to respond, prior to that hearing. It directed relevant documents to be disclosed. It gave no direction as to preparation or exchange of witness statements.

At the start of the preliminary hearing the tribunal raised the fact that case management had been conducted on the assumption that there would be no witness evidence. It recorded that both parties wanted to proceed on that basis. However, it erred in proceeding in that way in circumstances where the claimant was a litigant in person, there were disputes of fact relating to the issue, which turned upon witness evidence, and the tribunal at the case-management discussion had failed to direct exchange of witness statements.

Prior to the presentation of the claims the claimant had obtained ACAS EC certificates naming "Ramboll" and "Ramboll UK Ltd". He did not obtain a certificate naming Ramboll Danmark A/S prior to presenting the second claim, although he began conciliation in relation to it two days before doing so, and obtained a certificate naming it the day after. The tribunal decided that the claims against it "are not rejected on the basis of any failure to comply with ACAS Conciliation procedures". In light of **Sainsbury's Supermarkets Ltd v Clark** [2023] EWCA Civ 386; [2023] ICR 1169 it did not err in so deciding.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the claimant in the employment tribunal as such, and to the first and second respondents as, respectively, the UK company and the Danish company. The following factual context of this appeal and cross-appeal is not in dispute.

2. In 2015, when the claimant was living in Denmark, he entered into a written contract with the Danish company pursuant to which he became its employee. In 2018, on a date that has not been precisely ascertained, but seems to have been around September, the claimant moved to London to begin working for the UK company. In November he entered into a written contract described as an International Assignment Contract (IAC). The parties were identified as being the Danish company and the claimant, although it was signed by, or on behalf of, the claimant, the Danish company and the UK company. The IAC's terms provided for the claimant to be employed as a Project Manager based at the London office of the UK company for the period 1 October to 31 December 2018.

3. The claimant continued to live and work in the UK beyond the end of 2018. In March 2019 the Danish company sent him a document signed on behalf of both companies containing a provision extending the period of the IAC to 31 March 2019. The claimant, however, did not sign that document. On 28 May 2019, the claimant was sent a letter, signed on behalf of the Danish company, which began: "Ramboll hereby terminate your employment with 4 months' notice for you to retire on 30 September 2019."

4. The claimant presented a claim to the employment tribunal on 29 July 2019 naming the UK company as the sole respondent. He was a litigant in person. His claim was that there had been a failure to provide him with various written statements, to which he was entitled, relating to his terms, and the reasons for his dismissal; and for breach of contract. His claim form set out his case that, although originally employed by the Danish company, he had, at some point, become employed by the UK company. In its response, entered by solicitors, the UK company denied that it had ever

employed the claimant and asserted that he had at all times been employed by the Danish company.

5. The claimant thereafter began a second claim, on 29 December 2019, to which the respondents were the UK company, the Danish company and a third company in their group. This raised various complaints relating to his dismissal and events leading up to it, including unfair dismissal, complaints under the **Equality Act 2010** and of whistleblowing (protected disclosure) detriment and dismissal. It appears that the claim against the third respondent was rejected, and it does not materially feature thereafter in the proceedings before the tribunal or this appeal.

6. There was a case-management preliminary hearing before Employment Judge Wright on 25 June 2020. The minute records that this had originally been envisaged as a case-management discussion in respect of the second claim, then converted into a one-day preliminary hearing; but then, on account of the prevailing President's Guidance at the time of the Covid-19 pandemic, it was converted into a telephone case-management discussion.

7. The case-management summary recorded that a full merits hearing was listed for July and August 2021. A preliminary hearing was also listed to take place by CVP on 24 September 2020, to determine "the respondents' applications in respect of the claimant's employer, time limits and jurisdiction." The minute did not expand on what the issues were in relation to those aspects. However, I note that there plainly was an issue as to whether, at the time relevant to his claims, the claimant had been employed by the Danish company or the UK company. As to time limits, in their response to the second claim the respondents contended that the effective date of termination was precisely four months after 28 May 2019 and that the whole of that claim was out of time. As to "jurisdiction" the respondents had raised an issue under rule 8 **Employment Tribunals Rules of Procedure 2013**. The minute also noted the dates on which the claim forms had been presented, and that there was "an issue with the ACAS early conciliation certificate in respect of R2 and that will be addressed at the preliminary hearing." Again, the minute did not expand on what that issue was.

8. The minute did not set out the terms of any applications. Rather, in the section listing the orders, under the heading: "Preparations for the preliminary hearing", it provided as follows:

> **"3.1 The respondent is to set out in writing the application it intends to make at the preliminary hearing and to send a copy, along with any relevant documents, to the claimant by the 30/7/2020.**
>
> **3.2 The claimant is to set out in writing his response and to send the same to the respondent, along with any relevant documents by the 3/9/2020. For the avoidance of doubt, the claimant is not at this stage directed to provide his medical records to the respondent.**
>
> **3.3 Both parties are to send their case management agendas and list of issues to the Tribunal in advance of the preliminary hearing by the 17/9/2020. The respondent is also to send to the Tribunal its application and the claimant's response and a bundle of relevant documents, also by the 17/9/2020."**

9. No other directions were given in respect of preparations for that preliminary hearing.

10. On 13 August 2020 the claimant emailed the tribunal, copied to the respondent's solicitors. He referred to the respondents' "failure to submit an application it was due to make 14 days ago". He made an "application for documents" which he said "relate to the preliminary hearing issue of my employment status with Ramboll UK Limited". He identified the particular documents sought.

11. The respondents tabled a document dated 14 August 2020 described as their application for the PH on 24 September 2020. This began by summarising the pleadings in the first claim. It went on to set out the respondents' case, as to limitation (time limits), dismissal by the Danish company, and why there was no contractual relationship between the claimant and the UK company. It went on to give their account of the factual background. It then summarised the pleadings in the second claim and set out their case as to limitation and as to jurisdiction against the second respondent (and the third respondent). Finally it indicated that if any part of the claims were deemed within limitation or susceptible to the jurisdiction of the tribunal then the respondents sought a deposit order within the terms of rule 39. I observe that, apart from in relation to a deposit order, this document did not set out the actual terms of any application or order sought. It also made no reference to the issue relating to ACAS Early Conciliation. This document was accompanied by a bundle of documents on which the respondents intended to rely at the preliminary hearing.

12. The claimant replied with a long document of his own. This set out his case in some detail, factually as to the history, and legally, including in relation to jurisdiction, time limits, ACAS Early Conciliation and as to which company had been his employer at the relevant time.

13. In the event the preliminary hearing was put back to 25 November 2020, when it came before Employment Judge Nash, sitting in Croydon, conducted by CVP. The claimant was in person and the respondents were represented by Ms Anderson of counsel. The judge gave various decisions during the hearing and subsequently produced a written judgement, and later written reasons.

14. The first three paragraphs of the judgement read:

> **"1. The claims against the second respondent are not rejected on the basis of any failure to comply with the ACAS Early Conciliation procedures.**
>
> **2. The second respondent was at all times the employer of the claimant.**
>
> **3. The first respondent was at no times the employer of the claimant."**

The Appeal and Cross-Appeal

15. The claimant appeals against paragraph 2 of the judgment. The Danish company cross-appeals in respect of paragraph 1.

16. The claimant presented his appeal as a litigant in person. He drafted his own notice of appeal. Considering it on paper, Choudhury P considered it desirable to have a preliminary hearing. There was then a PH before HHJ James Tayler at which the claimant appeared in person without the assistance of any representative. HHJ James Tayler permitted certain grounds to proceed to a full hearing. Others were not pursued and were dismissed. He indicated in his reasons that he was "concerned about how and why the claimant's employment status came to be determined without witness evidence at the preliminary hearing and whether the employment tribunal had the material before it necessary to determine the issue." He recorded that he had encouraged the claimant to get legal advice, which the claimant had said he proposed to do. The judge indicated that once such advice had been obtained he should consider seeking permission to clarify the grounds of appeal.

17. There was a second preliminary hearing before HH James Tayler in December 2023. I have been told by Ms Anderson that in the interim there was correspondence from the respondents' solicitors seeking clarification, particularly as to whether any procedural irregularity was being alleged. At the second preliminary hearing the claimant was represented by Mr Isaacs of counsel under the ELAAS scheme and Ms Anderson appeared on behalf of the respondents. The judge directed amended grounds of appeal to proceed to the full appeal hearing, along with the cross-appeal. In his order the judge noted that it was accepted at that hearing that the claimant "did not raise issues of disclosure at the PH before the judge (although previous requests and an application dated 13 August 2020 for disclosure had been made)" and that the claimant "did not specifically say that he was not prepared to proceed on the basis of the documents and oral submissions."

18. At the hearing of this appeal and cross-appeal there was able and helpful representation by Mr Crozier and Mr Dhorajiwala for the claimant and Ms Anderson for the respondents. I had the benefit of written skeletons as well as oral argument.

The Appeal

19. There is considerable overlap between the grounds of appeal. Mr Crozier, who opened the submissions for the claimant, helpfully distilled them into three themes of challenge.

20. The first them is that the judge erred by failing to consider all the circumstances of the case and by proceeding to hear the respondents' application to determine the claimant's employment status in circumstances where no witness evidence had been given. There is a subsidiary additional point to the effect that the judge also so erred in circumstances where no directions had been given for the parties to provide disclosure on that issue.

21. The second theme is that although the judge recognised that the claimant was advancing an **Autoclenz**-type argument (**Autoclenz v Belcher** [2011] UKSC 41; [2011] ICR 1157), she erred in law in various ways in the approach that she took in her substantive reasons to the determination of

that issue. As to that, I observe that this was not a case where there was a dispute about whether the claimant's relationship with his putative employer was one of employment, a worker relationship, or neither. But it was a case in which there was a dispute as to whether there had been a change in the identity of the employer, and in which, at the broadest level, it was said by the claimant that the written contract relied upon by the respondents (being the IAC in its original form, and/or as extended) did not reflect the true intentions of the parties as to which of these two companies his employer actually was. In that sense he was advancing an **Autoclenz**-type argument.

22. It is also apparent from the particulars of claim in the two cases that it was the claimant's case that there were a number of facts and circumstances that supported his contention that the true intention of the parties was different from that conveyed by the written contract. The judge referred to some features of his case in this regard in her reasons, in a section where she set out what she described as a brief précis of facts. This included at [10]:

> **"The claimant's case was that the second respondent told him that he would be an employee of the first respondent once he developed a pipeline of projects to justify the move. The first respondent would employ him in London initially on a three-month contract on the basis that he worked on the Belgrade project. He would then be moved to a permanent contract with the first respondent. The respondents' case was that the claimant was assigned to London as an employee of the second respondent and no assurances were given as to future employment by the first respondent."**

23. It was the claimant's factual case that there were other features of how events unfolded when he was working in London, such as who he reported to and what work he did, which had a bearing on this issue. At [17] the judge recorded another feature of the claimant's factual case, as follows: "After February, the claimant said that he had no project contact with Denmark."

24. I observe that, whilst this section of the reasons does précis facts which the judge found and which were not in dispute, these passages within it also advert to factual assertions or disputes that the judge did not resolve in her decision. Then, in the course of the final section of the decision, referring to the IAC contract, the judge stated at [39] that the tribunal "could not find enough evidence to indicate that this contract did not reflect the intentions of the parties." She went on to discuss

various factual features and submissions said to support the claimant's or the respondents' submissions on this issue, ultimately concluding at [45] that the "weight of the evidence" pointed to the Danish company as the claimant's employer.

25. This second theme of the appeal is to the effect that the judge had made a number of errors of approach in carrying out that exercise, having regard to the decisions of the Supreme Court in **Autoclenz** and in **Uber BV v Aslam** [2021] UKSC 5; [2021] ICR 657 and the further guidance given by the EAT in **Ter-Berg v Simply Smile Manor House Limited** [2023] EAT 2. In particular, it is said that the judge had accorded undue primacy to the evidence of the written contract and/or had unduly placed the burden on the claimant to point to circumstances contradicting the contract, rather than looking at all of the circumstances in the round without giving particular primacy to the contract.

26. The third theme of the appeal is that the judge had erred by not considering whether there might have been a change in the identity of the employer at each of a number of different potentially significant points in time, as events unfolded. It was said that the claimant's case at its highest, was that he had become an employee of the UK company when he started work in London, which was before the first IAC contract was signed; alternatively, that he became its employee when that contract was signed; alternatively, that he became its employee after that contract, as extended, expired, and he thereafter worked on without any written contract being in place.

27. Taking the first strand of that challenge first, Ms Anderson relied upon paragraph [32] of the written reasons, which reads:

> **"The second issue was the identity of the claimant's employment [*sic*]. The tribunal discussed with the parties how to proceed. The tribunal explained that the case had been case managed on the assumption that no evidence would be led at this hearing and both parties wanted to proceed on this basis. Accordingly, the tribunal heard no evidence and proceeded on a submissions only basis."**

28. Ms Anderson submitted that there is no rule of law that an issue of this sort can only ever be properly or fairly determined if there is evidence from witnesses. She also submitted that it is up to a party to decide whether they are content to proceed on the basis of such evidence as has been

prepared or is available, be that documentary or witness evidence. A party might, as sometimes occurs, decide to proceed with some witnesses, but not others who are not available. The fact that an absent witness might have given relevant evidence which strengthened the party's case or helped them to undermine their opponent's case did not mean that it was not open to them to elect to proceed without that witness. In this case it was a matter for the claimant, as indeed it was for the respondents, to take a view as to whether they were content to proceed on the basis only of the documentary evidence that had been prepared for that hearing, which included not only the written agreements, but also various other emails and documentary materials, and without witness evidence.

29. Ms Anderson also noted that it had been acknowledged at the second PH in the EAT, that at the hearing before EJ Nash, the claimant did not specifically say that he was not prepared to proceed on the basis of the documents and oral submissions alone. In her skeleton argument Ms Anderson also noted that, in the discussion at the hearing before EJ Nash, she, Ms Anderson, had "objected to C being permitted to give witness evidence at the hearing because this would have been unfair to the respondents and put the parties on an unequal footing, but did not object to the PH being adjourned for witness statements to be exchanged." The claimant did not wish to adjourn, so the hearing proceeded on the basis that, by agreement, no witness evidence would be led.

30. Ms Anderson submitted that the tribunal had therefore acted properly in proceeding in this way, because the claimant had agreed to this course and the tribunal was not under a duty proactively to encourage the claimant to consider taking a different approach, nor to invite him to elaborate or expand upon the basis of his case and what evidence might be required to make it good.

31. I do not, however, consider that the matter is as straightforward as that. I take that view for the following reasons.

32. Firstly, the starting point is that the context was that the claimant was advancing a case that things had factually happened, which he contended supported a different conclusion as to the intention

of the parties, than could be discerned, or appeared, from the documents alone. I have already indicated the flavour of his case in that regard, including, it would appear, at least one factually disputed conversation, and other features of his case about how he contends events unfolded on the ground and in practice, once he was working in London.

33. That being so, one would have expected that a judge directing a preliminary hearing at which the tribunal was to consider evidence, make findings of fact and apply the law to those facts, to resolve that dispute would, routinely, in the directions given for preparations for that hearing, have included a direction for exchange of witness statements as well as disclosure of relevant documents and compilation of a bundle. It would also not be unusual, where one party is a litigant in person representing himself, and who is also to be his own witness, for the judge to give them some guidance as to the need for their witness statement to cover all the factual issues, and as to the difference between acting as one's own advocate or representative and acting as one's own witness.

34. However, at the June 2020 case management hearing, EJ Wright did not give any direction for witness statements. There was no explanation in the minute of that hearing as to why this was not done or whether it was the result of any discussion. This is compounded by the fact that there was no discussion in the minute of any of the features of the factual dispute about the identity of the employer (or, indeed the issues in relation to time limits or jurisdiction).

35. There was also no identification in that minute of the basis on which this issue (or other issues) was to be considered at the further preliminary hearing – in particular whether as a preliminary issue, or by way of an application to strike out the claims against the second respondent. The applications were directed to be set out *after* the hearing before EJ Wright. Further, the respondents' application document, when it came, set out its *case* on this issue, and other aspects, but, not in any clear and express way that I can see, the terms of the actual applications; and there was no further consideration of the position, or any further directions, by the tribunal thereafter, prior to the next hearing.

36. This is not an appeal against the decision of EJ Wright; and I appreciate that, in the difficult circumstances of the pandemic, the hearing before him had ended up being a telephone hearing. Nevertheless this was the position in which EJ Nash found herself at the start of her hearing. She was being asked to determine a substantive preliminary issue, for which she might have expected to find that there were witness statements, and that she could expect to hear from witnesses attending for both sides; but that was not the case. This is plainly, it appears to me, what provoked a discussion about what to do about that, as recorded at [32]. EJ Nash properly raised the matter and there was a discussion about what to do; and, as I have noted (which is not disputed) Ms Anderson properly, and helpfully, raised the option of postponing, so that witness statements could be prepared for witnesses for both parties, a course to which she indicated that her clients would not object. Nevertheless, that the discussion took place at all was a reflection of the fact that things were not as they should be.

37. In the course of oral argument before me Mr Crozier made the point that, whilst it was agreed that Ms Anderson had indicated that her clients would not object to the hearing being postponed so that both sides could present witness evidence, and it was recorded in the reasons that both parties wanted to proceed on the basis that no witness evidence would be called, the reasons went no further than that. I asked whether, on his case, there were any circumstances in which it would have been fair to proceed. Mr Crozier responded that, as the claimant was a litigant in person, who was relying on some factual allegations that could only have been proved by witness evidence, the judge would have needed to make very sure that the claimant understood that if he proceeded without giving evidence, he would not be able to rely on the parts of his factual case that depended on witness evidence, nor able to make submissions about those aspects of his case, and have such submissions treated as evidence. But there was no record, or suggestion, that that had occurred in this case.

38. Ms Anderson objected that this argument did not feature in the grounds of appeal and submitted that this amounted to an additional ground of appeal. I explored with her whether it might be contended by the respondents that the judge *had* engaged in an exercise of that sort, and/or, whether

I was being asked to allow time for her and/or her clients to investigate their records, or for questions to be asked of the judge about that. However, after some discussion and then a break, Ms Anderson indicated that she was not arguing that, but simply that the claimant should not be permitted to advance this argument or to rely upon it. She contended that it amounted to a distinct ground of appeal which could and should have been raised earlier, at least in the amended grounds that were put forward by the ELAAS representative at the second preliminary hearing before Judge Tayler.

39. However, I consider this argument to be within the four walls of the appeal. Mr Crozier was simply developing the contention that the discussion that *did* occur was not sufficient to enable the tribunal fairly to proceed without hearing witness evidence, so that it erred by doing so. If the respondents had been concerned that the reasons were an inadequate record of the ground that was in fact materially covered in the discussion before EJ Nash, they could have applied, following permission for this ground to proceed being granted, for a transcript or judge's notes to be sought. But that was not, in the event, their case. It was not being contended that there was any further material discussion before EJ Nash than was reflected in the reasons, and Ms Anderson's skeleton.

40. Ms Anderson was also able to, and did, make submissions to me about this aspect. In her skeleton argument, while maintaining that the grounds of appeal did not argue that there was such a duty, she contended that there was no duty on the tribunal of its own initiative to make enquiries in relation to any applications the claimant might want to make, nor to adjourn the hearing in relation to witness evidence (or for further disclosure), citing **Mensah v East Hertfordshire NHS Trust** [1998] EWCA Civ 954; [1998] IRLR 531. In oral argument she developed her submissions by reference to **Muschett v HM Prison Service** [2010] EWCA 25; [2010] IRLR 451 and **Drysdale v Department of Transport** [2014] EWCA Civ 1083.

41. I am of the view that this part of the challenge mounted by this appeal is made out. That is for the following reasons.

42. Firstly, as I have said, EJ Nash found herself in a difficult situation, because at the previous case-management hearing there had been no direction for exchange of witness statements and no explanation recorded for why such a direction was not given. Confronted with this, EJ Nash did very properly raise the matter with the parties and canvassed with them what should be done. No doubt neither the parties nor the judge would have wanted to put off the hearing if that could be avoided. It is not disputed that Ms Anderson nevertheless said that the respondents would not object to the hearing being put off to enable witness evidence to be prepared and witnesses to be brought. I also recognise that the claimant did not specifically say that he was not prepared to proceed on the basis of the documents and submissions alone, and in some way signified his agreement to so proceeding.

43. Given that EJ Nash did raise the matter, and the discussion which ensued, and how it concluded, that has given me some pause and reflection as to whether that was sufficient. The claimant did signify that he was prepared to proceed. However, this is not a case like **Mensah**, in which a party did not put forward evidence or argument on a strand of their original case, at a hearing when they could have done so; nor like **Muschett**, in which the Court rejected the suggestion that the judge was under a duty to engage in an inquisitorial exercise to ascertain whether there might be further evidence that, if brought, would assist the litigant to advance his case; nor like **Drysdale**, in which the lay litigant's spouse withdrew a claim during the course of a hearing, and the tribunal was not wrong to have failed to take further steps to ensure that this was a properly-considered decision.

44. Ms Anderson stressed the guidance in **Drysdale** that the determination of the appropriate level of assistance or intervention was properly a matter for the judgment of the tribunal hearing the case, which would have the "feel" for what was fair in all the circumstances. However, what distinguishes the present case is that, as I have said, the claimant was a litigant in person, who (as well as the respondents and the tribunal) found himself in a situation which should not have arisen at all, and having to make a choice between options, which he should not have found himself having to make.

45. I have concluded that in all these circumstances it was wrong for the judge to proceed to

adjudicate this issue in the absence of witness evidence.

46. That is sufficient to lead to the conclusion that the appeal must be allowed; and I therefore do not need to address the other strands of the argument, or to do so in any detail. However, I will say, briefly, that I did not find the criticism of the judge's general approach to the **Autoclenz** exercise to be persuasive. As I said in **Ter-Berg**, what matters is not the order in which evidence regarding the written contract and other features of the case is considered, but whether in the course of the decision all the relevant features relied upon have been considered and weighed up. She did, in the course of her conclusions, consider all the factual features about which she *did* have evidence, and I am not persuaded that she attached disproportionate weight, as such, to the evidence of the written contract.

47. This second strand challenge is really parasitic on the first strand of the challenge, which has succeeded. That is because the real difficulty is that, if witness evidence had been given about the factual matters which the judge identified *were* in dispute, including about what assurances, if any, the claimant had been given about which company he would be or become employed by when he moved, then factual findings could have been made about those matters and then taken into account by the judge in carrying out the **Autoclenz** assessment of the parties' true intentions.

48. The third strand, contending that the judge erred in her approach to the relevant time frame, again appears to me really to be parasitic on the first and main ground of challenge that I have allowed. That is because, if there had been witness evidence addressing all of the factual contentions on which the claimant relied upon in support of his case, then the judge would have been in a position to address and determine whether the parties had truly intended that the identify of his employer should change when he first moved to London or, alternatively, at any later stage.

49. For completeness, I note that there was a further strand to the effect that there had been insufficient disclosure, but I would not have allowed the appeal on that ground alone, in circumstances where the parties had been directed by EJ Wright to disclose "relevant" documents and where the

claimant does not appear to have raised at the hearing the fact that he had made an application for specific disclosure some time before the hearing. I do not think that a judge presiding at a hearing can be expected to trawl back through all the correspondence to check if there are any outstanding prior applications, though they have not been raised at the hearing by the party concerned.

The Cross-Appeal

50. The cross-appeal relates to paragraph 1 of the judgment: “The claims against the second respondent are not rejected on the basis of any failure to comply with ACAS early conciliation procedures.” As I have noted, there was never any written application by the second respondent in relation to this aspect, but at [6] of the reasons the judge recorded that, following discussion with the parties, it was agreed that the tribunal would, on this point, determine the following question: “Was the claim against the respondent correctly accepted by the tribunal considering the requirements of the ACAS early conciliation scheme?”

51. The relevant background, taking matters in strict chronological order, is this. The first ACAS EC certificate that the claimant obtained was dated 30 May 2019. It named the prospective respondent as “Ramboll”, and gave as its address, the London address of the UK company. The second ACAS EC certificate obtained was dated 14 July 2019 and named Ramboll UK Ltd as the prospective respondent. In the first claim form, presented on 29 July 2019, the claimant gave the number of that second certificate. That claim form gave precisely the same name for the respondent to the claim; so there was never any issue about that.

52. The second claim was begun on 29 December 2019 and was against three respondents. In that form, for all three respondents the claimant gave the same ACAS EC certificate number, being the number of the first certificate he had obtained in point of time, relating to “Ramboll”. In his particulars of claim, he wrote:

> **“I used the ACAS certificate from my first claim against Ramboll. This is a really challenging area of law and I wish Parliament drafted the laws clearer. It is possible that I need another ACAS certificate, but there is a big risk that seeking a second set of certificates won’t stop the clock for my claim and I will not be able to submit on**

time (under certain definitions the deadline to submit may be tonight). To be safe, I am seeking the second set of certificates, which should come next week."

53. I observe that the claimant was clearly proceeding on the basis that his employment had purportedly terminated with effect on 30 September 2019 and that he was submitting this claim on the last day by reference to that effective date of termination.

54. The claimant had indeed begun a further ACAS early conciliation process, on 27 December 2019, very recently prior to beginning this claim. He obtained further ACAS EC certificates naming Ramboll UK Ltd and Ramboll Denmark A/S, on 30 December 2019, the day after he presented it. But those certificates were not relied upon by him before EJ Nash or by his counsel at the hearing of this appeal. When I gave my oral decision on this appeal I observed that they "came too late" to support this claim form. I had in mind **Pryce v Baxterstorey Limited** [2022] EAT 61, to which I make further reference in the postscript at the end of this written decision.

55. In her reasons, the judge stated that when he presented the second claim form on 29 December 2019 he did not have an ACAS certificate in the name of the second respondent. She cited section 18A **Employment Tribunals Act 1996** and paragraph 4 of the schedule to the **Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014**. These indicate that, where the requirement to contact ACAS before instituting proceedings applies, a person may not present a claim without a certificate in respect of each respondent.

56. The tribunal went on to refer to: **Drake International Systems Ltd v Blue Arrow Ltd** [2016] ICR 445; **De Mota v ADR Network**, UKEAT/0305/16, **Mist v Derby Community Health Service NHS Trust** [2016] ICR 543; **Compass Group UK & Ireland Ltd v Morgan** [2017] ICR 73; **Akhigbe v St Edward Homes Ltd**, UKEAT/0110/18 and **Science Warehouse Ltd v Mills** [2016] ICR 252. The tribunal referred to *dicta* in those authorities supporting a purposive non-technical approach to the requirements of the legislation and regulations, and indicating that it was no part of the purpose of these provisions to encourage satellite litigation. The tribunal noted that **Drake** and

other authorities indicate that it is possible to amend a claim to add a new respondent without having an ACAS EC certificate in respect of that respondent, and **Akhigbe** indicates that it is a question of fact and degree whether a second tribunal claim relates to the same "matter" as the first claim.

57. The tribunal went on to say:

> **"28. The tribunal sought to follow the guidance from the EAT that tribunals should seek to avoid satellite litigation on technical issues under the early conciliation scheme, in contrast to the complex satellite litigation caused by the now defunct Statutory Dispute Resolution Procedures. If the claimant had sought to add the second respondent by means of an amendment, following Drake, there would be no obvious reason to refuse the amendment. The sole reason the claimant presented his claim against the second respondent, was the position of the first respondent. Accordingly, the tribunal could not see a valid distinction between a claimant who seeks to add a second respondent in these circumstances by way of amendment, and a claimant who seeks to do the same by way of a new claim and consolidation.**
>
> **29. The tribunal also bore in mind that the claimant was unrepresented. The tribunal had seen fit to consolidate the two claims at the first preliminary hearing. The tribunal found there was a sufficient analogy between a tribunal exercising its case management power to amend a claim to add a respondent, and a tribunal exercising its case management power to consolidate claims, which have effectively the same result.**
>
> **30. Accordingly, the tribunal determined that the claim against the second respondent was correctly accepted."**

58. In reply to the cross-appeal and in argument, the claimant, and Mr Crozier, contend that whilst a range of points are advanced in the cross-appeal, they have all been swept away by the Court of Appeal's decision in **Sainsbury's Supermarkets Ltd v Clark** [2023] EWCA Civ 386; [2023] ICR 1169. That was because, once the tribunal had not rejected the claim upon initial presentation, under rule 12 **Employment Tribunals Rules of Procedure 2013**, it was not thereafter possible for the possibility of rejection under rule 12 to be revisited at the later PH before EJ Nash. Nor had rule 27 (dismissal of claim upon initial consideration) been invoked or applied. Nor had the second respondent made an application to strike out the claim against it under rule 37.

59. Accordingly, Mr Crozier's position was that the tribunal at this PH had therefore correctly decided in the judgment that the claim against the Danish company was "not rejected", albeit that it should have done so simply on the basis that rejection under rule 12 was no longer an option that

could be considered at all; and it had not in fact been necessary for the tribunal to rely on the proposition that the claim could, in any event, have been amended to add the second respondent.

60. **Clark** had been decided after the cross-appeal was advanced. Ms Anderson, in her skeleton argument, indicated that she withdrew those strands of the grounds of cross-appeal that sought to rely on the contention that EJ Nash should have revisited the failure to reject the claim against the Danish company under rule 12 upon initial presentation, and herself rejected it under that rule. But Ms Anderson argued that the tribunal still had to grapple with the fact that the claimant had not complied with the requirements of section 18A of the **1996 Act**. She contended that it was not a sufficient answer to say that he could have got round the problem by way of amendment. She contended that the tribunal had erred by elevating *dicta* in the authorities about the need to avoid satellite litigation in this area to the proposition that the statutory requirements did not have to be respected at all.

61. Ms Anderson accepted that a tribunal may permit the addition of a new respondent to a claim in respect of which there is no ACAS EC Certificate. But she maintained (as per further strands of the grounds of cross-appeal) that it was wrong in this case for the tribunal to have relied upon that possibility, when it had not been canvassed at the hearing, the reasons did not properly apply *Selkent* principles, and it could not be assumed that such an application would have been bound to succeed. It was also contended that it was plainly apparent to the claimant from the outset that it was the position of the respondents that he had never been employed by the UK company; that was asserted in terms in the response to the first claim; and he could, at that point, have chosen to apply amend the first claim, but instead had decided to issue the second claim, even on his case at the last minute.

62. The difficulty with all of these lines of argument, however, is that it appears to me that there was no specific application by the second respondent to strike out the claim against it under rule 37. As I have noted, there was no written application prior to the hearing, and at the hearing itself the issue was agreed as being as I have noted above, relating to the power to reject under rule 12, as is also reflected in the framing of the judgment. Nor had the tribunal contemplated, or the second

respondent sought, dismissal of the claim against it at the initial consideration stage under rule 27.

63. Given that the preliminary hearing happened in point of time prior to the decision in **Clark**, which also overturned some previous decisions of the EAT, that might explain why it was agreed at the preliminary hearing that the issue to be considered related to rejection, and there was no application to strike out under rule 37. Nevertheless, I consider that **Clark** does provide a complete answer to the cross-appeal, and in light of it, the judgment on this point was not wrong.

64. I will say for completeness that, had I not been of that view, I would have accepted that there was force in Ms Anderson's submission that the tribunal was wrong to deal with the matter on the basis of amendment without there being an application by the claimant to amend, or the tribunal at least raising the possibility that it could deal with the matter on its own initiative by way of permitting an amendment, so that there was an opportunity for submissions to be made. I also consider that it is not clear that the tribunal actually decided that (if amendment be required) it allowed an amendment, as opposed to expressing the view that there would be no obvious reason to refuse. Nor can I go so far as to say that, had permission to amend been required, it would have been bound to be granted.

65. But, for the reasons I have given, the cross-appeal is allowed.

Outcome

66. This outcome to the appeal, as well as the cross-appeal, means that, regrettably for all parties, this matter, which has now been running for some years, will have to be remitted to the employment tribunal for it to give further and fresh consideration to the issue about the identity of the claimant's employer. Depending on the outcome of the fresh adjudication of that question, there will then be other issues relating to the various claims that will potentially then need to be considered.

67. The starting place should be for the tribunal to hold a case-management hearing in relation to the issue of employment status, so that there can be as much clarity as possible, in particular as to how the respective cases are put, and the factual aspects or allegations that are either agreed or

disputed; and so that directions can be given for preparation and tabling of all relevant evidence, prior to any further hearing at which that issue is substantively determined.

Postscript

68. This appeal was heard on 14 January 2025 and I gave an oral decision at the conclusion of the hearing. On 20 January 2025 Swift J handed down his reserved decision in **Abel Estate Agent Ltd v Reynolds** [2025] EAT 6. I draw attention to it now, because it contains a further discussion by the EAT of the ACAS EC scheme, the relevant rules of procedure, the proper construction and significance of section 18A **Employment Tribunals Act 1996**, and the decisions in **Sainsbury's Supermarkets Ltd v Clark** and **Pryce v Baxterstorey Ltd**.