Neutral Citation Number: [2018] EWCA Civ 672

Case No: A2/20163489/EATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MRS JUSTICE ELISABETH LAING
UKEAT/0088/16/JOJ & UKEAT/0089/16/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 March 2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE BEAN
and
LORD JUSTICE NEWEY

- -

Between :

THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Appellant**
- and -	
(1) MS RHYAN PARRY **(2) THE TRUSTEES OF THE WILLIAM JONES'S SCHOOL FOUNDATION**	**Respondents**

- -

Mathew Purchase (instructed by the **Government Legal Service**) for the **Secretary of State**
Nicola Newbegin and Madeline Stanley (instructed by the **instructed by the National Education Union (Association of Teachers & Lecturers Section**)) for **Ms Parry**
Douglas Leach (instructed by **Veale Wasbrough Vizards LLP**) for the **Trustees of the William Jones's School Foundation**

Hearing date: 22 February 2018

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Approved Judgment

Lord Justice Bean :

1. The Claimant Rhyan Parry presented a claim form to an employment tribunal ("the ET1") on 25 January 2016 against the Respondent school, then known as Haberdashers' Monmouth College. She claimed unfair dismissal and arrears of wages. Time for bringing her unfair dismissal claim expired on 26 January 2016. With one exception, the relevant boxes on the ET1 were completed. In section 5, the box for the date when the employment ended is not filled in, but the box "Is your employment continuing?" is ticked. (The explanation, not given on the ET1, was that the Claimant had been dismissed and immediately re-engaged on less favourable terms: the case was thus potentially of a type exemplified by *Hogg v Dover College* [1990] ICR 39.) Section 6 (about earnings and benefits) is blank. Section 8 is headed "Type and details of claim". The box "I was unfairly dismissed" is ticked, as are the boxes "I am owed" and "arrears of pay".

2. Box 8.2 is headed:

> "Please set out the background and details of your claim in the space below. The details of your claim should include the date(s) when the event(s) you are complaining about happened. Please use the blank sheet at the end of the form if needed."

The text which is typed in that box consists of just three words: "Please see attached". Her solicitors did indeed submit a separate document with the ET1; unfortunately it gave the particulars of a different case entirely.

3. On 27 January 2016 the tribunal staff referred the ET1 to Employment Judge Cadney. On 28 January 2016 he decided not to reject the claim.

4. On 29 January 2016 the employment tribunal ("ET") sent out notice of a claim. This said the ET had accepted a claim but did not indicate that any judicial decision to

accept the claim had been made. The Respondent employers ("the school") received the Claimant's ET1 on 3 February 2016 without the enclosed particulars. On 4 February 2016 the school rang the ET. The ET said that it had no particulars of the claim. The school's solicitors wrote to the ET on the same day, asking the ET to reject the claim pursuant to rule 12 of the Employment Tribunals Rules of Procedure 2013 ("the 2013 Rules"). They argued that since the claim did not "meet the minimum requirements of a valid claim", it should be referred to an Employment Judge ("EJ") as being in a form "which cannot sensibly be responded to", and should be rejected.

5. Also on 4 February 2016, the Claimant's solicitors, having been contacted by the ET, sent details of her claim – the intended enclosure referred to in box 8.2 - to the ET. They resisted the school's application. There were further exchanges between the parties and the ET. On 2 March 2016 the Claimant's solicitors wrote to the ET to say that they would be applying at a preliminary hearing listed for 8 March to amend her claim, by reference to the details of the claim that were sent to the ET on 4 February 2016. This amounted, as Elisabeth Laing J later observed in the Employment Appeal Tribunal ("EAT"), to a tacit acceptance that the correct details had not been submitted with the ET1 on 26 January 2016.

6. The school's solicitor's notes of the hearing of 8 March before Employment Judge Harper indicate that the judge observed that the ET1 had been referred on 28 January to Employment Judge Cadney, who had made a judicial decision to accept the claim. Counsel for the school argued that the letter of 4 February was an application on behalf of the school to reconsider that decision, and asked Employment Judge Harper to accept it as such. Employment Judge Harper held that under rule 13 of the 2013

Rules an application for reconsideration was only available to a Claimant (if the ET1 was rejected), not to a Respondent. Counsel for the school also argued that rules 70-73, dealing with reconsideration of judgments, applied: Employment Judge Harper said that they only applied to judgments, and the decision was not a judgment.

7. Employment Judge Harper held that Employment Judge Cadney's decision was not a "judgment" as defined in rule 1(3)(b) of the 2013 Rules. He said: "The decision to accept was not a judgment because it did not finally determine the claim. Quite the reverse. It enabled the claim to proceed." Employment Judge Harper held that he had no power to reconsider the decision to accept the claim.

8. The school's solicitors also wrote to the tribunal applying for Employment Judge Cadney's reasons for not rejecting the ET1. On 30 March the ET replied that the judge had directed them to write on his behalf:

> "I have no specific recollection of the decision made over two months ago. However my note reads: "Accept. It may be a *Hogg v Dover College* type of dismissal. Ask C to provide full details of the claim.""

The Employment Tribunals Rules of Procedure 2013

9. Rule 8(1) of the 2013 Rules provides:

> "8(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule."

10. Among other things, the prescribed claim form requires the claimant to set out details of the claimant(s) and respondent(s), an ACAS early conciliation certificate number (or a legitimate reason for not having such a number), 'details of your claim', and details of what remedy the claimant is seeking. The *Presidential Practice Direction* –

Presentation of Claims (2013) sets out the methods by which such claims must be presented, but adds no further requirements about their content.

11. Rules 10 to 12 of the 2013 Rules make provision for the 'rejection' of a claim form by the ET in certain circumstances. Rule 10 provides:-

> "(1) The Tribunal shall reject a claim if-
>
> a) It is not made on a prescribed form;
>
> b) It does not contain all of the following information –
>
> i) Each claimant's name;
>
> ii) Each claimant's address;
>
> iii) Each respondent's name;
>
> iv) Each respondent's address; or
>
> c) It does not contain all of the following information –
>
> 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.
>
> (2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection."

[Rule 11 provides for rejection on the grounds of failure to accompany the form with a tribunal fee or a remission application. It was introduced before the decision of the Supreme Court in *R(UNISON) v Lord Chancellor* [2017] 3 WLR 409.]

12. For present purposes, the key rule is rule 12, which provides:

"Rejection: substantive defects

(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be –

(a) one which the Tribunal has no jurisdiction to consider;
(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;
(c) one which institutes relevant proceedings [i.e. proceedings to which the early conciliation regime applies] and is made on a claim form that does not contain either an early conciliation number or 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;
(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.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).

(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.'

13. Rule 13 provides for the reconsideration of any such rejections, and makes provision for a hearing if the claimant wants one:

> **"**Reconsideration of rejection
>
> (1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either –
>
> (a) the decision to reject was wrong; or
> (b) the notified defect can be rectified.
>
> (2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.
>
> (3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.
>
> (4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

14. Rejection of a claim to an employment tribunal was a term first used in the 2013 Rules, but it is very similar to what was described in the 2004 Employment Tribunals Rules of Procedure as a decision not to accept a claim. Rule 3(2)-(3) of the 2004 Rules provided that:

> "(2) The Secretary shall not accept the claim (or a relevant part of one) if it is clear to him that one or more of the following circumstances applies —
>
> (a) the claim does not include all the relevant required information;
>
> (b) the tribunal does not have power to consider the claim (or that relevant part of it); ……
>
> (3) If the Secretary decides not to accept a claim or part of one for any of the reasons in paragraph (2), he shall refer the claim together with a statement of his reasons for not accepting it to a chairman. The chairman shall decide in accordance with the criteria in paragraph (2)

> whether the claim or part of it should be accepted and allowed to proceed."

15. The 2004 Rules used the term "not accepted" rather than "rejected", but both wordings connote the same idea – the claim form is being returned to the sender without the proceedings ever properly starting.

16. The 2013 Regulations, including the Rules of Procedure as Schedule 1, were made under powers conferred on the Secretary of State by the Employment Tribunals Act 1996 ("the 1996 Act"). It is convenient to refer at this stage to sections 7 and 41 of the 1996 Act, as amended.

The Employment Tribunals Act 1996

17. Section 7, so far as material, provides:

> "7(1) The Secretary of State may by regulations ("employment tribunal procedure regulations") make such provision as appears to him to be necessary or expedient with respect to proceedings before employment tribunals.
>
> (2) Proceedings before employment tribunals shall be instituted in accordance with employment tribunal procedure regulations.
>
> (3) Employment tribunal procedure regulations may, in particular, include provision –
>
> …
>
> (f) for prescribing the procedure to be followed in any proceedings before an employment tribunal, including [examples follow]
>
> …
>
> (3ZA) Employment tribunal procedure regulations may –
>
> (a) authorise the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of instituting, or entering an appearance to, proceedings before employment tribunals'

…

(3A) Employment tribunal procedure regulations may authorise the determination of proceedings without any hearing in such circumstances as the regulations may prescribe.

(3AA) Employment tribunal procedure regulations under subsection (3A) may only authorise the determination of proceedings without a hearing in circumstances where –

(a) all the parties to the proceedings consent in writing to the determination without a hearing, or

(b) the person (or, where more than one, each of the persons) against whom the proceedings are brought –

(i) has presented no response in the proceedings, or

(ii) does not contest the case.

(3AB) For the purposes of subsection (3AA)(b), a person does not present a response in the proceedings if he presents a response but, in accordance with provision made by the regulations, it is not accepted.

(3B) Employment tribunal procedure regulations may authorise the determination of proceedings without hearing anyone other than the person or persons by whom the proceedings are brought (or his or her representatives) where –

(a) the person (or, where more than one, each of the persons) against whom the proceedings are brought has done nothing to contest the case, or

(b) it appears from the application made by the person (or, where more than one, each of the persons) bringing the proceedings that he is not (or they are not) seeking any relief which an employment tribunal has power to give or that he is not (or they are not) entitled to any such relief.

(3C) Employment tribunal procedure regulations may authorise the determination of proceedings without hearing anyone other than the person or persons by whom, and the person or persons against whom, the proceedings are brought (or his or their representatives) where –

(a) an employment tribunal is on undisputed facts bound by the decision of a court in another case to dismiss the case of the person or persons by whom, or of the person or persons against whom, the proceedings are brought, or

(b) the proceedings relate only to a preliminary issue which may be heard and determined in accordance with regulations under section 9(4).

……"

18. Section 41 of the 1996 Act states that the power to make such regulations is exercisable by statutory instrument and subject to the negative resolution procedure. Section 41(4) provides that:-

> "Any power conferred by this Act which is exercisable by statutory instrument includes power to make such incidental, supplementary or transitional provision as appears to the Minister exercising the power to be necessary or expedient."

The appeal to the EAT

19. The school appealed to the EAT against both the decision of Employment Judge Cadney on 28 January 2016 not to reject the ET1 and the decision of Employment Judge Harper at the preliminary hearing of 8 March 2016 not to reconsider Employment Judge Cadney's decision. The appeals were listed together and came on before Elisabeth Laing J sitting alone on 21 July 2016. By a reserved judgment handed down on 2 August 2016 she dismissed the school's appeal against Employment Judge Cadney's decision. (This rendered the appeal against Employment Judge Harper's decision academic since there could be no purpose in requiring the ET to reconsider a decision which was, in Elisabeth Laing J's words, "uncontestably right".) But her reasons for dismissing the appeal and thus allowing the ET1 to stand were wholly different from those of the ET.

20. Elisabeth Laing J took a different view from Employment Judge Cadney as to whether the ET1 presented on 25 January 2016 (the day before expiry of the time limit) was in a form to which the school could sensibly respond. She held:

"29. The question under Rule 12(1)(b) of the 2013 Rules is whether the EJ was entitled to conclude that the ET1 was in a form which could sensibly be responded to or was not otherwise an abuse of process. I have already described the ET1 which was presented. As I have said, the "attached" rider which the Claimant's solicitor sent to the ET, but which the ET did not send to the Respondent, related to a different case. Rule 12(1)(b) does not refer to the Respondent's subjective knowledge about the underlying facts. This is sensible, as the EJ to whom a claim form is referred will, obviously, have no means of knowing anything about the claim apart from what he can gather from the ET1. The test in Rule 12(1)(b) is an objective one. It is whether the claim is expressed in such a way as to enable the Respondent sensibly, or reasonably, to respond, or to plead, to it.

30. The necessary inference from EJ1's refusal to reject of the claim is that he considered that the ET1 could "sensibly be responded to". Mr Leach rightly accepts that on an appeal on a point of law, he can only challenge that refusal if it was "perverse" (in the technical sense). I accept Ms Newbegin's submission that an EJ should only reject a claim if he is sure that it cannot be sensibly responded to. If he is in any doubt, he must accept it.

31. An EJ looking at this ET1 could only have concluded that a Respondent faced with this ET1 would have had no idea of the basis on which the Claimant was making either of her claims, and that there was no way in which the Respondent in this case could sensibly respond, other than to say "I deny/accept that the Claimant was unfairly dismissed and is owed arrears of pay". Mr Leach relies on the tentative observations of Slade J in *Fairbank v Care Management Group* UKEAT/0139/12/JOJ at paragraph 13 as explaining what sort of details should be in an ET1. I accept, as Ms Newbegin submitted, they were made in the different context of a claim alleging discrimination on grounds of race. I reject her submission that that difference of context makes these observations irrelevant. They are of some analogical help. I have no hesitation in holding that no reasonable EJ properly directing himself in law could have concluded that an ET1 in this form could sensibly be responded to.

32. Before I leave this aspect of the argument, I must deal with various submissions made by Ms Newbegin, based on earlier authorities (for example *Burns International Security v Butt* [1983] IRLR 438), and on earlier iterations of the procedure Rules, about the basic minimum which an ET1 should contain, and the consequences of a failure to comply with any minimum requirements. The extent to which those authorities can help me is much limited by two factors. First, they concern the construction of different words in different procedure Rules. Second, and more importantly, they are based on the misapprehension that a failure to comply with a prescriptive procedure Rule made in delegated legislation cannot take away a right to make a claim which is conferred by primary legislation. At any rate since the

> EPCA, the primary legislation has provided that claims must be "made", or "instituted" in accordance with procedure regulations. These provisions provide statutory authority for Rules which derogate from the statutory right to bring a claim if that claim is not "made" or "instituted", as the case may be, in accordance with procedure Rules. The cases on which she relied do not refer to section 128 of the EPCA or to section 7(2) of the ETA, as the case may be. I accept Mr Leach's submission that section 7(2) is highly significant."

21. If the judge had stopped there she would have allowed the appeal and the case before us would only be about the proper construction of Rule 12(1)(b). But that was not what happened. Two days before the date of the hearing in the EAT her clerk had emailed both counsel as follows:-

> "The Judge has asked me contact you about this case. She has been doing some preparatory reading. She would be grateful if you could please consider the question whether rule 12(1)(b) of the 2013 Rules of Procedure is authorised by section 7, and, in particular, by section 7(3B), of the Employment Tribunals Act 1996. She would be grateful for any submissions you would be able to make on this point at the hearing."

22. It is a serious step to declare a statutory instrument such as a court or tribunal rule invalid (especially when neither party is arguing that it is) without requiring notice to be given to the Attorney General or the appropriate Secretary of State through the Government Legal Service, so that the relevant department has the opportunity to apply to intervene, or at least to make written submissions, in defence of the validity of the statutory instrument. If the judge had had the advantage of hearing the submissions which Mr Purchase deployed before us, I doubt whether she would have reached the conclusion which she did about the *vires* issue.

23. However, as often happens when judges raise points themselves, Elisabeth Laing J found the *vires* point to be decisive. She held:-

> "36. Section 7(1) confers a wide power on Secretary of State to make procedure regulations. Section 7(2) requires proceedings before ETs to be instituted in accordance with procedure regulations. I have

explained above why I accept the submission that this provision cuts across and restricts the right of access to the ET, conferred by various statutes, to bring proceedings before the ET to vindicate different statutory rights. The institution of such proceedings must conform with the material provisions of the procedure regulations (provided that those provisions are, themselves, authorised by the primary legislation).

37. Section 7(3) authorises certain general types of provision. I do not consider that it is necessarily an exhaustive statement of the regulations which the Secretary of State may make under the wide power conferred by section 7(1). The regulations which the Secretary of State has power to make can authorise him to prescribe requirements in relation to any form "which is used for the purpose of instituting … proceedings in" the ET for any form to be used as a claim form or notice of appearance (section 7(3ZA)). I accept Mr Leach's submission that section 7(3ZA) is authority for the requirements which are imposed by Regulation 12(1).

38. The scheme of section 7 is, however, to confer on the Secretary of State express powers to make procedure regulations which interfere in an unusual way with rights of access to the ET, and, in particular, those which interfere with the right to have a hearing. Thus section 7(3ZB) expressly authorises the Secretary of State to make regulations which limit the number of postponements which a party may have. Section 7(3A) read with section 7(3AA) authorises the Secretary of State to make regulations which provide for the ET to make a determination in proceedings without any hearing (in very limited circumstances only). Similarly, section 7(3B) authorises the Secretary of State to make procedure regulations which enable the ET to determine a claim without hearing from anyone other than the Claimant or his representatives. The relevant circumstance, provided for in section 7(3B)(b), is very narrow; it is where it appears from the application that the Claimant is not seeking any relief which the ET has power to give, or is not entitled to any such relief.

39. I do not consider that the wide power conferred by section 7(1) authorises the Secretary of State to make procedure regulations which provide for a claim to be determined without any hearing in circumstances other than those described in section 7(3AA). The correct approach in my judgment is that that wide power is constrained by section 7(3A) and (3AA). They are an exhaustive statement of the circumstances in which the Secretary of State is authorised to make procedure regulations which make the unusual provision that a claim may be determined without any hearing. Similar reasoning applies, in my judgment, to section 7(3B). It is an exhaustive statement of the circumstances in which the Secretary of State is authorised to make procedure regulations which enable an ET to determine a case having heard only from the Claimant.

40. I have considered what weight I should give to the fact that word "only" is present in subsection (3AA) and absent from subsection (3B). I have decided that this is not significant, for two reasons. First, its presence in subsection (3AA) reflects the legislative history. Subsection (3AA) was inserted later than subsection (3A) in order to cut down the wide power originally conferred by subsection (3A). Second, since subsection (3B) has been expressly inserted to authorise regulations restricting the right to a hearing, I consider that the maxim *expressio unius exclusio alterius* applies. In other words, the express provision Parliament has made excludes the implication of additional provision of a similar character.

41. Rule 12(1)(b) was in the 2013 Regulations as first promulgated. It restricts access to justice and is an unusual provision in at least three ways. First, it enables a claim to be rejected *in limine*, without the ET hearing from any party at all. If that stood alone it is doubtful whether it would be authorised by section 7; see section 7(3A) read with section 7(3AA). The ET will only hear from one party, the Claimant, if the Claimant exercises the right, conferred by Rule 13, to ask for the rejection to be reconsidered. So the second unusual feature, which is authorised by section 7, is that a final determination will potentially be made after hearing from only one party. The third is that this Rule restricts access to justice by purporting to authorise the ET to reject a claim if "it cannot sensibly be responded to or is otherwise an abuse of process". The parties agreed that the draftsman has assumed that presenting a claim in such a form is an abuse of process, and that the Rule requires an EJ to reject such a claim and any other claim which is "otherwise an abuse of process".

42. As I have indicated, Rule 12(1) makes requirements about the contents of the ET1. To the extent that it does that, it is authorised by section 7(3ZA). I reject Miss Newbegin's submission that section 7(3ZA) only authorises requirements "relating to the form itself" and does not authorise stipulations about what information should be in, or with, the form. I do not consider that the explanatory note on which she relies supports this submission; it is to a contrary effect.

43. But Rule 12(1)(b) does more than to prescribe requirements. It also prescribes a procedure for enforcing those requirements. That procedure, except and in so far as it coincides with subsection 3(B), is not authorised by the primary legislation. Mr Leach submitted that the procedure was authorised, because a power to make requirements implied a power to provide for sanctions if the requirements are not complied with. He relied on a broad statement in the judgment of Lord Selborne LC in *Attorney General v Great Eastern Railway Company* LR 7 HL 653 that the ultra vires rule is to be applied reasonably. The actual decision in that case was that the impugned transaction was expressly authorised by the legislation. In any event, Rule 27 provides a mechanism for enforcing these requirements. Mr Leach's submission is not an answer to this point. The drafting of section 7

> shows in my judgment that Parliament appreciated that provisions curtailing the right to a hearing are unusual and wished to provide specific (but limited) authority for such procedures in the ET.
>
> 44. There is an overlap between a claim "which the Tribunal has no jurisdiction to consider" (in Rule 12(1)(a)) and the test in section 7(3B) ("it appears from the application … that the [Claimant] is not seeking any relief which an [ET] has power to give … or that he is not … entitled to it"). The difficulty for the Respondent is that it is clear from the ET1 that the Claimant is seeking relief which the ET has power to give, and there is nothing to indicate that she is not entitled to it. It is also clear that her claims are claims over which the ET has jurisdiction. I bear in mind Ms Newbegin's correct submission that an EJ should not reject a claim unless he is sure that the applicable test is met. I consider that an EJ applying the test which is authorised by statute would have been bound to conclude that the claim should not be rejected.
>
> 45. Although I have held that, applying Rule 12(1)(b), the EJ was bound to reject the ET1, for the reasons I have given, I consider that the test in Rule 12(1)(b) is not authorised, in the context of the procedure provided for by Rule 12, by any of the provisions of section 7, or by the general power conferred by section 41(4). Such a drastic interference with the right to bring a claim cannot be characterised as "incidental, supplementary or transitional provision". The application of that test, however, is not problematic in the context of the Rule 27 procedure, and, that, it seems to me, is the correct procedure for enforcing compliance with the requirements imposed by Rule 12.
>
> 46. Thus the EJ erred in concluding that the claim could sensibly be responded to. So he erred in applying that test incorrectly to the facts. However, the only provision in Rule 12 which is authorised by section 7 is Rule 12(1)(a). The claims were indisputably claims which the ET had jurisdiction to consider, as they were claims for unfair dismissal and for arrears of pay. So his error is an immaterial error.
>
> 47. Ms Newbegin made some submissions about Article 6. Because of the view I have taken on the effect of section 7(3B) I do not need to decide them. I would have been minded to reject them, by analogy with the reasoning in *Anderton v Clywd County Council* [2002] EWCA Civ 933, [2002] 1 WLR 3174, a case on the relationship between the Civil Procedure Rules and Article 6, which Mr Leach relied on.
>
> 48. It follows that I must dismiss the appeal against the Decision not to reject the claim."

24. The formal order of the EAT was simply that the appeal be dismissed; but the judgment plainly included by implication a declaration that rule 12(1)(b) was *ultra vires*.

The appeal to this court

25. When it came to the attention of the Department for Business, Energy and Industrial Strategy that the EAT had held rule 12(1)(b) to be *ultra vires*, this naturally caused concern; augmented, no doubt, by the fact that the school were not seeking permission to appeal to this court. So on 31 August 2016 the Secretary of State lodged an Appellant's Notice in this court seeking permission to appeal. It is unusual for a non-party to be granted permission to appeal against a decision, but the jurisdiction plainly exists: see for example *George Wimpey UK Ltd v Tewkesbury Borough Council* [2008] 1 WLR 1649, CA.

26. On 31 May 2017, after considering the application on the papers, Longmore LJ granted the Secretary of State permission "to appeal the reasons given by Laing J for rejecting the school's appeal against the decision of the ET not to reject Ms Parry's claim for unfair dismissal and arrears of wages. The permission is (a) conditional on the Secretary of State not seeking to recover any part of his costs against either Respondent and (b) without prejudice to any submission which either Respondent might make as to the jurisdiction of this court to entertain the appeal. But any such submission will have to explain why no steps were taken to join the Secretary of State to the proceedings in the EAT when the *ultra vires* point was first raised."

27. On 31 July 2017 Underhill LJ gave the school permission to appeal against the order of the EAT, on terms that neither the Claimant nor the school would be entitled to recover costs from each other.

28. In her Respondent's Notice on behalf of Ms Parry, Ms Newbegin contended that this court had no jurisdiction to hear the appeal by the Secretary of State. She argued that the order of the EAT should be upheld because rule 12(1)(b) is *ultra vires* and also on

the basis that the ET1 was neither in a form which could not sensibly be responded to nor an abuse of process. In their Respondent's Notice drafted by Mr Leach the school supported and relied on the grounds of appeal advanced by the Secretary of State on the *ultra vires* issue while supporting the finding by Elisabeth Laing J ("the judge") that the ET1, for the reasons she gave, was not in a form to which the school could sensibly respond.

29. After some initial skirmishing the objections to the Secretary of State bringing an appeal to this court have not been pursued. We were therefore able to deal with the issues on their merits. These were:-

i) Whether the form ET1 in this case was (as Employment Judge Cadney held) in a form which could sensibly be responded to. Mr Leach argued that it was not; Ms Newbegin and Ms Stanley argued that it was. Mr Purchase, for the Secretary of State, did not seek to address us on this issue.

ii) Whether rule 12(1)(b) is (as Elisabeth Laing J held) *ultra vires.* Mr Purchase, supported by Mr Leach, argued that it was not. Ms Newbegin and Ms Stanley argued that it was.

Was the ET1 in this case in a form which could sensibly be responded to?

30. The judge, as already noted, held that an EJ looking at this ET1 could only have concluded that the Respondent school "would have had no idea of the basis on which the Claimant was making either of her claims". With respect, I entirely disagree. The school knew perfectly well that, as the ET1 states, she had been employed by them as Director of Dance from 1 September 1996 onwards. They also knew, although the ET1 did not state this, that her employment in that capacity had been terminated on 31

August 2015 and that she had been re-engaged as Head of Dance the next day. Their case was that the dismissal was a genuine redundancy. Her case was that it was not. (No separate argument was advanced before us relating to the claim for arrears of wages.)

31. The school could and in my view should have filed an ET3 stating something on these lines: "The Claimant was dismissed on 31 August 2015 on the grounds of redundancy, which in the circumstances the Respondent acted reasonably in treating as a sufficient reason for dismissal." Either side could then have been directed to give further details of their case. But at least proceedings would have been properly launched. Employment tribunals should do their best not to place artificial barriers in the way of genuine claims.

32. I should add that in holding that a sensible response could have been given to this claim I am not laying down a general rule that the respondent to a claim in an employment tribunal must always be treated, for the purposes of rule 12(1)(b), as having detailed knowledge of everything that has occurred between the parties. If, for example, a claimant brings a claim for sex or race or disability discrimination without giving any particulars at all, or attaching the particulars from someone else's case, that ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected under rule 12(1)(b). But in many unfair dismissal cases there will be a single determinative issue well known to both parties, so that even if particulars are omitted from the ET1 the employer can sensibly respond, for example: (a) "the Claimant was not dismissed; she resigned on [date X]"; or (b) "the Claimant was dismissed on [date X] on the grounds of gross misconduct, which in the

circumstances the Respondent acted reasonably in treating as a sufficient reason for dismissal".

33. The judge was, therefore, right to dismiss the appeal from the decisions of Employment Judge Cadney and Employment Judge Harper. But it is now necessary to deal with the Secretary of State's appeal from the implied declaration that rule 12(1)(b) is *ultra vires.*

Is rule 12(1)(b) ultra vires?

34. For the Claimant Ms Newbegin submits that a tribunal claim is instituted simply by being presented, and that any provision in secondary legislation such as rule 12 which provides for the summary rejection of a claim, particularly without any hearing, is objectionable on the grounds that it curtails the right of access to the tribunal.

35. It is common ground between Ms Newbegin and Mr Purchase and was accepted by Elisabeth Laing J that a claimant is entitled to the benefit of the doubt: an employment judge should only reject a claim if he is sure that it cannot be sensibly responded to. I agree that rule 12(1)(b) should be interpreted, and its validity considered, on that basis. Any other approach would be, both at common law and under Article 6 of the ECHR, a disproportionate interference with the right of access to the tribunal.

36. With that interpretation accepted, the basic answer to the constitutional argument about access to the tribunal is that the right can be curtailed or made subject to conditions, but only insofar as primary legislation so authorises.

The Secretary of State's grounds of appeal

37. The Secretary of State (supported on this issue by the school) contends that the EAT erred in holding that rule 12(1)(b) was *ultra vires* for the following reasons:-

> "(1):A 'rejection' is not a 'determination of proceedings'
>
> The EAT erred in treating a 'rejection' of a claim under rule 12(1)(b) as a 'determination of proceedings' to which section 7(3AA) and/or section 7(3B) of the 1996 Act apply. Any restrictions set out in section 7 on the power to make provision for such determinations do not apply to a 'rejection', which is a qualitatively different sort of judicial act.
>
> (2): Section 7(3B) does not prohibit rule 12(1)(b) read with rule 13
>
> The EAT correctly considered rule 12(1)(b) together with rule 13, which makes provision for a claimant to have a hearing upon making an application for a reconsideration of a rejection of a claim form. However, the EAT erred in treating section 7(3B) of the 1996 Act as setting out exhaustively the circumstances in which the 2013 Rules can provide for the determination of proceedings upon hearing only the claimant. Further or alternatively, rule 12(1)(b) falls within the scope of section 7(3B) in any event. Accordingly, there is no material restriction on the general powers set out in sections 7(1), 7(2), 9(1) and/or 41(4) of the 1996 Act, which authorise rule 12(1)(b).
>
> (3): Section 7(3AA) does not prohibit rule 12(1)(b).
>
> Insofar as rule 12(1)(b) is to be considered in isolation from rule 13, and is to be treated as providing for a determination of proceedings without a hearing, section 7(3AA) of the 1996 Act permits such a determination where the respondent to a claim 'has presented no response to the proceedings'. Since rule 12(1)(b) applies before the respondent would or could have represented a response, it is accordingly authorised by rule 7(3A) and 7(3AA) of the 1996 Act. Further or alternatively, there is accordingly no material restriction on the general powers set out in sections 7(1), 7(2), 9(1) and/or 41(4) of the 2013 Rules, which authorise rule 12(1)(b) of the 2013 Rules."

Was the rejection of the ET1 in this case a "determination of proceedings"?

38. Mr Purchase submits that that a 'rejection' is not a disposal of existing 'proceedings'. Rather, it is a recognition of the fact, or has the effect, that no valid proceedings have

ever been commenced. Rule 12 of the 2013 Rules has to be read with rule 8, the two rules being essentially two sides of the same coin concerned with the institution of proceedings. Rule 8(1) provides that a claim is only started when a 'completed claim form (using a prescribed form)' is presented. The prescribed form requires the details of the claim to be set out. Mr Purchase argues that a claim form cannot be said to have been 'completed' within the meaning of rule 8(1) if the material in it is so defective or incomplete that it cannot sensibly be responded to. Rule 12 is the means by which the ET identifies this and notifies the claimant that, in such a case, her claim has not got off the ground.

39. This is consistent with the language used in rule 12: the claim is 'rejected', rather than (for example) 'dismissed' or 'determined'. It is also consistent with rule 13(4), which *deems* the claim form to have been presented on the date on which the defect was rectified: that only makes sense if the claim form would not otherwise have been treated as presented at all. It is true that, in *Burns International Security Services v Butt* [1983] ICR 547, the EAT held that most of the requirements of rule 1(1) of the then Employment Tribunals Rules of Procedure were 'not imperative but directory', such that a failure to give particulars of a claim as required by rule 1(1)(c) did not render the claim a 'nullity'. However, Mr Purchase argues that rule 12 of the 2013 Rules is, at least to some extent, a reversal of that decision.

40. Mr Purchase further argues that a 'rejection' under rule 12 is not a 'determination' within the meaning of section 7 of the 1996 Act. Rather, it is a judicial act of a different quality. In particular, it is submitted that: a rejection does not go to the substance of the claim or involve a resolution of issues; it is a response to the fact that a claim has not properly been made. It is clear that rule 12(2) rejections are not

intended to give rise to cause of action or issue estoppels. As Langstaff P observed in *Software Box Limited v Gannon* [2016] ICR 148, EAT, at [41], "the fact that a complaint was made within time and then rejected does not, and should not, as a matter of principle, preclude the consideration of whether a second claim traversing the same ground is one in which the tribunal should have jurisdiction".

41. I accept these submissions by Mr Purchase. I conclude that an employment tribunal's rejection of a claim pursuant to rule 12 is not a 'determination of proceedings'. Accordingly there is nothing in section 7(3A)-(3C) of the 1996 Act which renders any of rule 12(1)-(2) *ultra vires*. The Secretary of State's appeal from the implied declaration by the judge that rule 12(1)(b)-(f) was *ultra vires*, or her reasoning to that effect, must therefore be allowed.

42. This is sufficient to dispose of the Secretary of State's appeal, but I will consider Mr Purchase's alternative grounds of appeal briefly.

If the rejection of the ET1 was a determination of proceedings, did it require a hearing?

43. Section 7(3A) (which dates from 1998 and was amended to its current form in 2004) allows regulations to be made which "authorise the determination of proceedings without any hearing in such circumstances as the regulations may prescribe". This general power was, however, restricted in 2008 by the insertion of Section 7(3AA). As already noted, this provides so far as material that "regulations under subsection (3A) may only authorise the determination of proceedings without any hearing in circumstances where ……the person…… against whom the proceedings are brought – (i) has presented no response in the proceedings; or (ii) does not contest the case".

44. Mr Purchase submits, in effect, that this provision means exactly what it says. When the employment judge is deciding whether or not to reject a claim under rule 12, the respondent will by definition have presented no response in the proceedings, because the proceedings have not yet been served. The case can therefore be rejected without a hearing if the terms of the rule are satisfied.

45. In view of my conclusion on the "determination of proceedings" issue it is strictly unnecessary to resolve this point. But I would (if it were necessary) accept Mr Purchase's submissions on this, his third ground of appeal. I see no reason why Parliament should have intended to allow a claim to be determined without any hearing where the respondent has been served with a claim but has not (or not yet) presented a response, but to prohibit such a procedure at the earlier stage where the respondent has not yet been served.

Can rule 12(2) be read together with rule 13 and thus be validated by section 7(3B)?

46. I can deal even more briefly with the second ground of appeal on behalf of the Secretary of State. That relies on the power under section 7(3B) to make regulations to authorise the determination of proceedings without hearing anyone other than the claimant. The rule 12(2) power provides for rejection of the claim without any hearing at all. It is true that rule 13 allows the claimant to apply for reconsideration of that decision, but I do not agree that rejection of a claim under rule 12(2) coupled with an opportunity for the claimant to apply for reconsideration under rule 13 could amount (if a rejection were indeed a determination of proceedings) to a determination at a hearing attended by the claimant so as to satisfy section 7(3B).

Time limits and the effect of rule 13(4)

47. None of these procedural niceties would matter much were it not for the three month time limit for the presentation of unfair dismissal claims; the stringent nature of the "not reasonably practicable" escape clause set out by Parliament (Employment Rights Act 1996, s 111(2)(b)); and rule 13(4) of the 2013 Rules, which states that, on reconsideration of a rejection under rule 12, "if the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified". Human nature being what it is, many employment tribunal claims are presented only shortly – sometimes very shortly – before the expiry of the time limit. By the time any defect has been rectified it may be too late. Although it does not affect the present case, I wish to record my view that the *vires* of rule 13(4) may at least arguably be open to question.

Conclusion

48. I would dismiss the school's appeal from the formal order of the EAT, though for entirely different reasons from those of the judge. I would allow the Secretary of State's appeal from the implied declaration that rule 12(1)(b)-(f) of the 2013 Rules is *ultra vires.*

Lord Justice Newey:

49. I would myself prefer not to express any view on the Secretary of State's third ground of appeal (viz. that a hearing was not required even if the rejection of the ET1 was a "determination of proceedings") or on whether rule 13(4) of the 2013 Rules could be *ultra vires*. On the other issues, however, I entirely agree with Bean LJ's conclusions. Like him, therefore, I consider that the Secretary of State's appeal should be allowed, but that the order of Laing J should be upheld on different grounds.

Lady Justice Arden:

50. I agree with the order proposed by Bean LJ for the reasons he gives, but likewise express no view on the third ground of appeal (paragraph 45 above), which may require further discussion in the light of the facts of a particular case, or on the vires of Rule 13(4) (paragraph 47 above), which was not argued on this appeal.