Neutral Citation Number: [2019] EWCA 8 (Civ)

Case Nos: A2/2017/1913, 1914 & 1915/EATRF & A2/2017/2005/EATRF

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL**
**THE HONOURABLE MR JUSTICE LEWIS**
**UKEAT/0059/16**
**UKEAT/0227/16**
**UKEAT/0009/16**
**UKEAT/0289/15**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2019

**Before :**

**LORD JUSTICE LONGMORE**
**LORD JUSTICE BEAN**
and
**SIR COLIN RIMER**

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**Between :**

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| **MS S BRIERLEY & OTHERS** | **Appellants** |
| **- and -** | |
| **ASDA STORES LIMITED** | **Respondent** |
| | |
| **MRS A AHMED AND OTHERS** | **Appellants** |
| **-and** | |
| **SAINSBURY'S SUPERMARKETS LIMITED** | **Respondents** |
| **LLOYDS PHARMACY LIMITED** | |
| | |
| **MR A FENTON & OTHERS** | **Appellants** |
| **- and –** | |
| **ASDA STORES LIMITED** | **Respondent** |

**Andrew Short QC**, **Naomi Cunningham** and **Keira Gore** (instructed by **Leigh Day**) for the **Claimants**
**Christopher Jeans QC** and **Patrick Halliday** (instructed by **Gibson, Dunn and Crutcher LLP)** for **Asda Stores Ltd**
**Naomi Ellenbogen QC** and **Dale Martin** (instructed by **Womble Bond Dickinson LLP Newcastle)** for **Sainsbury's Supermarkets Ltd**

Hearing dates : 23-24 October 2018

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# Approved Judgment

**Lord Justice Bean :**

1. These are appeals from a decision of Lewis J in the Employment Appeal Tribunal ("EAT") (reported under the name *Farmah v Birmingham City Council* [2018] ICR 921, although the appeals concerning Birmingham City Council were compromised before the hearing in this court) concern claims for equal pay. The cases argued before us involve claims brought by (for the most part) female employees carrying out different jobs in supermarkets who say they are being paid less than men carrying out work of equal value in other roles in warehouses or distribution centres operated by the same supermarket chain. A number of claimants included their claims within a single claim form ET1. The number of claimants on each ET1 varied from 5 to no less than 1569. The case of *Brierley v Asda* involved 22 multiple claims presented in respect of 5497 claimants. The number of differing job roles performed by the various claimants within a single form ET1 varied from 8 to 175.

2. In 2013 fees were introduced for the issue of claims in the employment tribunals. The fees for issuing an ET1 involving multiple claimants were much lower, particularly with large numbers involved, than the fees that would have been payable if each claimant issued an individual form. The decision of the Supreme Court in *R* (*UNISON) v Lord Chancellor* given on 26 July 2017 ([2017] UKSC 51) held the fees regime to be unlawful, but this occurred after the decisions under appeal.

3. Rule 9 of the Employment Tribunals Rules of Procedure 2013 provides that two or more claimants "may make their claims on the same claim form if their claims are based on the same set of facts". The employers contend that claimants who are doing different jobs are not basing their claims on the same set of facts and therefore cannot join their claims in a single claim form.

4. The claimants dispute this but argue that insofar as the joinder in the same claim form of claimants doing different jobs was irregular, the employment tribunal ("ET") was right to exercise (or should have exercised) its discretion under Rule 6 to waive the irregularity.

5. In *Brierley v Asda Stores Ltd* Regional Employment Judge ("REJ") Robertson held that the issue of the multiple claims was irregular but waived the irregularity. In respect of the much smaller group of claimants in *Fenton v Asda Stores Ltd* he held that the presentation of the claims was irregular, refused to waive the irregularity and struck the claims out. In *Ahmed v Sainsburys Supermarkets Ltd* EJ (as he then was: now REJ) Pirani held that there was no irregularity and accordingly allowed the claims to proceed: the question of waiver under Rule 6 accordingly did not arise.

6. In the EAT Lewis J held that claims presented on a single form by claimants performing different jobs were not based on the same set of facts for the purposes of Rule 9 and were therefore to be treated as an irregularity; and that the approach to waiver taken by the tribunal in *Brierley v Asda* had been flawed. He ordered the *Brierley v Asda* and *Ahmed v Sainsburys* cases to be remitted to the respective tribunals and upheld the striking out order in *Fenton v Asda*. Permission to appeal to this court was refused by the judge but granted by Underhill LJ on 10 October 2017.

*The Employment Tribunal Rules*

7. Rule 2 of the Rules sets out the overriding objective of the Rules in the following terms:

> "**Overriding objective**
>
> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

8. Rule 6 of the Rules deals with irregularities and non-compliance with the Rules and with orders of the tribunal and provides:

> "**Irregularities and non-compliance**
>
> 6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23, or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following –
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> (a) waiving or varying the requirement;
>
> (b) striking out the claim or response, in whole or in part, in accordance with rule 37;
>
> (c) barring or restricting a party's participation in proceedings;
>
> (d) awarding costs in accordance with rules 74 to 84."

9. The Rules contain provisions setting out how a person may start, or respond, to a claim. Rule 8 provides, so far as material:

> "**Presenting the Claim**

> 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. Rule 9 provides:

> "**Multiple Claimants**
>
> 9. Two or more claimants may make their claims on the same claim form if their claims are based on the same set of facts. Where two or more claimants wrongly include claims on the same claim form, this shall be treated as an irregularity falling under rule 6."

11. Unless the claim is rejected, a copy is sent to each respondent together with a prescribed response form explaining, among other things, how to submit a response to a claim: see Rule 15. Rule 16 provides:

> "16. **Response**
>
> (1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.
>
> (2) A response form may include the response of more than one respondent if they are responding to a single claim and either they all resist the claim on the same grounds or they do not resist the claim.
>
> (3) A response form may include the response to more than one claim if the claims are based on the same set of facts and either the respondent resists all of the claims on the same grounds or the respondent does not resist the claims."

12. Rules 29 to 40 deal with specific aspects of case management orders and other powers. Material rules for present purposes provide:

> "29. **Case Management Orders**
>
> The Tribunal may at any stage of the proceedings, on its own initiative or on application make a case management order. … [T]he particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.
>
> ...
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> 36. **Lead cases**

> (1) Where a Tribunal considers that two or more claims give rise to common or related issues of fact or law, the Tribunal or the President may make an order specifying one or more of those claims as a lead case and staying, or in Scotland sisting, the other claims ("the related cases").
>
> …
>
> 37. **Striking out**
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

*The history of Rule 9*

13. Until 2001 each claimant in an ET was required to present a separate form for what was then called an originating application. In 2001, Rule 1(2) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (SI 2001/11/71) provided:

> "Two or more originating applications may be presented in a single document by applicants who claim relief in respect of or arising out of the same set of facts."

14. There was a minor change in 2004: Rule 1(7) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI/2004/18/61) provided:

> "Two or more claimants may present their claims in the same document if their claims arise out of the same set of facts."

15. In 2012 the President of the EAT, Underhill J (as he then was), was asked to undertake a review of the 2004 Rules. The terms of reference noted that the overriding objective of the ET system included ensuring the need to manage cases proportionately and to save expense, and that rules should be expressed simply. In a letter accompanying the draft of the new rules sent to the relevant Minister in June 2012, Underhill J said that the aim had been to use language which was as simple as possible but that changes in style were not intended to bring about a change of substance. Draft Rule 9 in the proposed new rules, replacing Rule 1(7) of the 2004 Rules, read:

> "Two or more claimants can make their claims on the same claim form if their claims are based on the same set of facts, or if it is otherwise reasonable for their claims to be made on a single claim form."

16. The Department for Business, Innovation and Skills consulted on proposed changes to the 2004 Rules. There was no specific reference to the proposed Rule 9. The Departmental response to the Underhill review did not expressly refer to that rule either. However, when the regulations containing what became the 2013 Rules were made and laid before Parliament, the wording of Rule 9 proved to be different from what Underhill J had recommended: the words "or if it is otherwise reasonable for their claims to be made on a single claim form" had been omitted. An explanatory memorandum prepared by the Department said nothing specific about Rule 9.

*The practice before this litigation*

17. In *Ahmed* EJ Pirani noted:

> "90. In the Charging Fees in ETs and the EAT, Consultation Paper CP22/2011 produced December 2011 it was noted at paragraph 83 that in 2010/11 there were around 60,000 single claims and 157,500 people who brought proceedings as part of multiple claims. The paragraph goes on to say that "most of these were made by two more people making a claim against the same respondent or group of respondents."
>
> 91. The practice of many Employment Tribunals was that the larger equal pay claims would involve claim forms containing claims by several (and sometimes several hundred) claimants, male and female, doing a variety of jobs and comparing themselves to a variety of comparators. Because of the nature of equal pay claims rarely, if ever, would individual comparators be named in the claim form. Rather, the claims were drafted in terms of generic job groups.
>
> 92. One of the complaints the respondent makes in the batched cases is they refer to a generic comparator job title which encompasses a variety of substantively different roles. This position contrasts with the flexible and pragmatic approach Employment Tribunals have adopted towards equal pay litigation. In Prest itself [*Prest v Mouchel Business Services*

> [2011] ICR 1345], Underhill P said he saw no logical reason for the practice of requiring the naming of an individual comparator in all cases, and specifically in "collective cases". Significantly, in his view it was sufficient to plead "I claim to be paid the same as the widget-makers, who are all men".
>
> 93. Until these recent disputes about the interpretation of Rule 9 the parties are unaware of any complaint being made to the effect that what occurred in relation to many thousands of equal pay claims, litigated both at first instance and at appellate level, was an abuse of Rule 1(7) of the 2004 Rules or its successor Rule 9."

*The Rule 9 issue*

18. In the *Brierley* case REJ Robertson held:

> "84. With some reluctance, I have concluded that the presentation of these equal pay claims has not accorded with rule 9. I do not consider they can be said to be based on the same set of facts so as to entitle the claimants to present the claims in the same claim forms.
>
> 85. If rule 9 was expressed in terms of whether it was "otherwise reasonable" or "convenient" to present these claims by way of multiple claim forms, or even if the entitlement was based on a situation where "two or more claims give rise to common or related issues of fact or law", I would have no doubt that it was practically and administratively appropriate to do what these claimants have done. There are strong factual and legal connections between the claims, as Mr Short identified and as I have recorded at paragraph 76 above.
>
> 86. I accept that I must interpret rule 9 in accordance with the overriding objective in rule 2. That, however, does not entitle me to ignore the straightforward wording of rule 9. If they are to be presented in a single claim form, the claims must be based on the same set of facts.
>
> 87. The difficulty, to my mind, with Mr Short's case lies with his assertion that these proceedings are not about individual jobs. It is clear to me that, in the equal pay context, they must be. Although the *Bainbridge* line of authorities relates to the identification of causes of action, and does not concern rule 9 or its predecessor, I find the cases of assistance in identifying the essential factual basis for an equal value claim. In such a claim, the irreducible minimum set of facts on which the claim is based consists of the work done by the claimant which is said to be equal to her comparator's. The claimant must establish (1) the work which she did, (2) the work which her comparator(s) did, and (3) that the work was of equal value. I agree with Mr Jeans that a Checkout Operator, seeking to establish that her work is of equal value to a Warehouse Operative, cannot be said to base her claim on the same facts as, say, a Bakery Assistant in terms

> of the essential factual inquiry as to what work she did. It is not enough that the claims are thematically linked and essentially assert the same broad contentions. In the context of the particular characteristics of an equal value claim, the facts on which the claims are based are not the same.
>
> 88. I agree with Mr Jeans that claimants might properly group themselves together as multiple claimants within rule 9 if they in practice undertook the same work because they were, for example, Checkout Operators, but what cannot be done is to bring together in a single claim form equal value claimants whose jobs are different and who rely on different sets of facts as to the work which they do. This is even more so in the case of the male contingent claimants whose claims proceed on the wholly different basis that they do like work as their female colleagues on whom they "piggy-back".
>
> 89. I do not agree that this interpretation of rule 9 will render multiple equal value claims impossible. It will not. It will require careful consideration by claimants and those advising them, before presentation of their claims, as to what work they do and whether they rely on the same factual assertions about that work. I do not accept that the incidence of fees is material to the meaning of rule 9. The result may be unfortunate (and expensive) but that flows from what rule 9 requires.
>
> 90. For these reasons, I have concluded that the way in which the relevant claimants have presented their claims to the Tribunal is irregular in terms of rule 9."

19. Later, at paragraph 112, he summarised his ruling on the requirements of Rule 9 by saying that it:

> "… does not require the presentation of individual claim forms, but allows multiple claims where job roles and work done are the same or so similar that the claims can properly be said to be based on the same set of facts."

20. By contrast, in *Ahmed* EJ Pirani held:

> "108. Although not determinative, the broader interpretation of Rule 9 is also in accordance with the overriding objective. The cause of action, or micro based interpretation of Rule 9, would result in a huge increase in the administrative burden upon the parties and the Tribunal. Such an approach would result in what may turn out to be complex fact finding exercises to determine whether claimants on the same claim form actually did the same jobs prior to any substantive case management.
>
> 109. I remind myself that the purpose of the Review of the Rules was repeatedly said to be to increase the efficiency, and reduce the cost, of Tribunal proceedings. …

> 110. If the purpose of the new Rules is to increase efficiency and reduce cost, then this would be frustrated by the interpretation of Rule 9 urged on me by the respondents. That is not, however, to say that such an interpretation does not have its benefits. It would, of course, lead to a huge increase in fees revenue, In addition, it would, in accordance with part of the purpose of the fees regime, disincentivise the pursuance of weak and unreasonable claims.
>
> 111. In his letter to Norman Lamb MP [the relevant minister] dated 29 June 2012, Underhill P noted that it was important to use simple language and for the Rules to be as accessible as possible to lay people. In my judgment, the most likely explanation for the changes in wording to Rule 9 was in accordance with the desire to use simple language rather than to bring about a substantive change in the law.
>
> 112. Taking all this into account I conclude that;
>
> > i. it was not felt that the proposals for the 2013 Rules had any impact on the plans for charging for multiple claims, or vice versa;
> >
> > ii. there is no basis for the assertion that Rule 9 is intended to impose a new, strict standard for joining claims on a single claim form;
> >
> > iii. I am satisfied that the claims are based on the same facts as articulated by Mr Short, set out above.
>
> 113. Accordingly in my judgment there has been no irregular presentation of claims contrary to Rule 9 in these cases."

21. On the appeal to the EAT, Lewis J outlined his view on the proper construction of Rule 9:

> "88. In the context of a claim for a breach of an equality clause introduced by section 66 of the 2010 Act, the set of facts on which the complaint is based is that a person of one gender is undertaking work which is equal work to that done by a person of a different gender. The set of facts on which the complaint is based must include the work that the claimant is doing, the work which the comparator is doing and the fact that the claimant and the comparator have different genders. If the claimants are undertaking different work from each other, that is, they are doing different jobs, their complaints will not be based on the same set of facts. If some female claimants are seeking to compare their work with the work done by some men and other claimants with the work done by other men, or if claimants are seeking to compare their work with men on different bases (for example, one claimant is claiming her work is of equal value to a man's but another claimant is contending that her work is rated as equivalent to a man's) their claims will not be based on the same set of facts. If a man wishes to make a contingent claim, that is he wishes to compare his work with that of a female claimant if she succeeds in her equal pay claim against a man, his claim is not based on the same set of facts as the female

> claimant. The set of facts on which her claim is based involves a comparison of her work and the comparator; the set of facts on which his claim is based involves a comparison between his job and the job of the female claimant.
>
> 89. The claimants are therefore not correct in their submission that claims will be based on the same set of facts for the purposes of Rule 9 of the rules if the facts are sufficiently similar to make it sensible for the cases to be dealt with together or if there are common facts in their claims. Nor is it sufficient that the disparities of pay may have grown out of assumptions made about the value of certain types of work (for example, retail staff and warehouse workers, or administrative staff and drivers and gardeners). That may provide the factual context within which the claims arise: they are not the set of facts upon which the claims are based."

22. On behalf of Sainsbury's Ms Ellenbogen submitted that the only EAT authority on Rule 9's predecessor, Rule 1(7), applied a restrictive meaning even to what she says was the looser wording of "arise out of the same set of facts". In *Hamilton v NHS Grampian* (UKEATS/0067/10/BI, unreported) the EAT held that claims by Mr Hamilton and Mr Girling both for breach of contract against the same employer, where one was concerned with overtime pay and the other with overtime work, did not arise out of the same facts within the meaning of Rule 1(7). The same cause of action by the two claimants in this case was not enough to bring the claims within the ambit of the wording of Rule 1(7). Reference was made by Lady Smith to the "factual basis" at paragraph 59 which was said to be different for each claimant.

23. I agree with EJ Pirani's observations on *Hamilton*:

> "104. … Irrespective of the jurisdictional problems relating to breach of contract claims brought by current employees, it is not surprising that Lady Smith concluded that the claims did not "arise out of the same set of facts". One claim was about the opportunity to earn overtime whereas the others were about an entitlement to payment of certain money irrespective of whether it was linked to work or not. The claimants did not accuse their employer of the same wrong."

*Hamilton* turned on its facts and I did not find it of any real assistance for present purposes.

24. For the claimants, Mr Short submitted that it is not a natural, or inevitable, use of language to say that the claims here were not "based on the same set of facts." The language, he suggested, was not being used as a form of art, more as a guide and the language was broad enough in Rule 9 to encompass different circumstances. The more natural reading of "based on the same set of facts" was that, in his words, "so long as your claim arises from the same set, it does not matter if you are missing a few things from the set". The facts of each claim, therefore, do not have to be the same but can be similar.

25. Mr Short argued that it was very unlikely that a change in the meaning of the 2004 Rule was intended when the 2013 Rules were introduced. Further, he suggested that, since one of the purposes of the new Rules was to reduce costs, it did not make sense to interpret Rule 9 in the narrow way suggested by the respondents: there were no case

management benefits to doing this and it would thus be out of step with the overriding objective.

26. I agree with Mr Short that if two claimants, Ms A and Ms B, seek to present a multiple claim together, their factual situations do not have to be identical in every respect. Ms A may have longer hours of work than Ms B. She may have greater length of service than Ms B. I also agree with Mr Short that it is the work done by Ms A and Ms B, not their job titles, which is important, but I do not think it can be said that if Ms A is a bakery assistant and Ms B is a checkout operator their claims can be said to be based on the same set of facts, even if they are relying on the same male comparators.

27. I therefore conclude that REJ Robertson's formulation is the correct one. Multiple claims are allowed under Rule 9 where (whatever the titles attached) it is asserted by the claimants that their roles and the work they do are either the same, or so similar to one another that the claims can properly be said to be based on the same set of facts. It would be advisable in future for claimants' solicitors to err on the side of caution and issue multiple claims which comply with this interpretation of Rule 9, applying if appropriate at the stage of case management for more than one multiple claim to be heard together.

28. A few of the multiple claimants are men bringing what are usually called "contingent" or "piggy-back" claims (see *McAvoy v South Tyneside BC* [2009] 1CR 1426). For example: a group of female checkout operators claim that their work is of equal value with that of a male warehouse stacker. A male checkout operator could not make an equal pay claim in his own right using the male comparator, but if his female colleagues succeed in their claim he will reap the fruits of their success by claiming equal pay with them. I agree with REJ Robertson that such a claim is not "based on the same set of facts" as that of the women and its inclusion in their claim form, even if there are no other complications, is irregular, though I do not accept the argument that the whole claim form is vitiated as a result.

29. The next point argued by Mr Jeans for Asda was that each claimant on a single form must rely on exactly the same comparators as those relied upon by other claimants on that form. I do not see why this should be the case. A single claimant, Ms A, can seek a comparison with Mr X, alternatively, Mr Y, alternatively Mr Z, who carry out three different jobs, provided only that X, Y and Z are all working at the same establishment as Ms A or are all employed on common terms and conditions with Ms A (see *Leverton v Clwyd County Council* [1989] AC 706). I see no reason why multiple claimants, provided that *their* jobs are the same as or so similar to each other's as to comply with Rule 9, should not do likewise, or choose some but not all of X, Y and Z as comparators.

30. Like REJ Robertson I reach my conclusion on the main Rule 9 issue with a measure of regret, but neither the overriding objective under Rule 2, nor the desirability of avoiding technicality in ET proceedings can override the plain meaning of the words in Rule 9. Similarly a widespread (or even a settled) practice in use before this litigation cannot do so. But all of these factors – the overriding objective, the avoidance of technicality and the previous practice – are highly relevant to the exercise of discretion to waive the irregularity under Rule 6, to which I now turn.

*The Rule 6 discretion to waive irregularities*

*Introduction*

31. It was realistically accepted before REJ Robertson and before us by Mr Jeans that on its face Rule 6 gives a wide discretion for the ET to follow a range of courses from doing nothing to striking out the claims. The employers submitted that the breaches of Rule 9 were "serious in every way" and that the claims should be struck out accordingly.

32. I have already noted the second sentence of Rule 9 stating that where two or more claimants wrongly include claims on the same claim form, this should be treated as an irregularity falling within Rule 6. If that second sentence had not been included this might have pointed an ET towards the use of the strike out power; even more so if there had been an explicit reference to Rule 37. But on the wording of Rule 9 taken as a whole I do not consider that there is any presumption that a multiple claim brought irregularly, in the sense that it is in breach of Rule 9, should be struck out.

*Tribunal fees*

33. It should be noted that at the time of the hearings of each of these cases before the ETs and before Lewis J in the EAT, the 2013 Fees Order had introduced fees for issuing claims in ETs. Lewis J held at paragraph 104:

> "… If claimants include their claims in one claim form, they will obtain the benefit of lower fees. If that is irregular, then the claimants will have obtained the benefit of the reduction in fees when they were not eligible for the reduction and in circumstances which run counter to the purpose underlying the Fees Order. In those circumstances, in my judgment, the legal representatives of claimants are obliged to consider whether the claimants could include their claims within one claim form and to demonstrate how they consider that the requirements of the Rule are met. If they cannot do so, and there is no justifiable explanation for that failure, that is a factor which favours striking out the claim rather than waiving the irregularity. If, by contrast, there are reasons why claimants' claims were included in one claim form and, subsequently, it transpires that they were not eligible for inclusion (for example, a change in the understanding of the law relating to the set of facts upon which claims are based, or a realisation that the facts are different from those understood to be the case) that may be a factor which may indicate, depending on all the circumstances, that waiver of the irregularity rather than striking out the claims may be appropriate."

34. In *Brierley* REJ Robertson held:

> "107. I have concluded that in accordance with rule 6(a), I should waive the requirement that the claims presented within the multiple claim forms should be based on the same set of facts, so as to regularise the matter. I refuse to strike out the claims.
>
> 108. I agree with Mr Jeans that on any showing, the irregularity has resulted, in terms of issue fees, and will result, in respect of hearing fees, in a substantial underpayment of fees. I do not

agree with him that this means that I have no discretion. I do not agree that the decisions in *Cranwell* and *Deangate* are comparable. Those cases concerned a mandatory step which the Tribunal was required to take in the event of default, and which it could not waive. In these cases, rule 6(a) specifically confers on me the power to waive the requirement imposed by rule 9. If it had been intended that the requirement could not be waived if an underpayment of fees resulted, rule 6 would have said so. It does not.

109. In my judgment rule 6 gives me a broad discretion what to do. I must exercise my discretion judicially, balancing up the hardship and prejudice to each side. I must have regard to the overriding objective to deal with cases fairly and justly. In my view, the underpayment of fees is a factor which I should take into account in exercising my discretion.

110. The relevant factors seem to me to be as follows:

110.1. If I strike out the claims, the claimants will be faced with the exercise of re-presenting the identical claims, but organised in accordance with rule 9. Once that has happened, the Tribunal and the parties will effectively be exactly where they are now, in that the claims will be combined, organised and dealt with within the case management framework which has already been established. In seeking to apply the overriding objective, I simply do not see any sufficient utility in requiring the claimants to undertake such an exercise;

110.2. Further such an exercise will result in significant delay in the proceedings and the additional cost of further issue fees;

110.3. The respondent has suffered no prejudice in the way the claims have been presented. Mr Jeans has not suggested that there has been any prejudice;

110.4. On the other hand, it seems to me that there is a risk of prejudice to at least some claimants. It may be that some claimants will be out of time to present their claims and will be required to proceed, if at all, in the High Court. Further, some claimants will forsake part of their claims, by virtue of the six year period over which arrears may be awarded if the claims succeed;

110.5. I appreciate that if I waive the requirement, the claimants will secure a very substantial windfall in fees. The choice, however, is between waiving the requirement, and striking out the claims. I have no intermediate course available to me. In the exercise of my discretion, I consider that the factors which I have identified above significantly outweigh the loss of fees;

> 110.6. If there was evidence that the claimants had deliberately presented the claims knowing that it was not permitted by rule 9, in order to avoid the payment of the very large fees involved, I might have taken a different view. But there is no evidence to that effect. Although Mr Jeans faintly suggested that the claimants' conduct was cynical in this way, he adduced nothing to support the contention, and I have no basis to reach that conclusion.
>
> 111. I conclude, therefore, that I should not strike out the claims, and I should waive the requirement under rule 6(a). The claims will proceed."

*The "cynical ploy" argument*

35. In my judgment the rejection by REJ Robertson of the suggestion that the claimants, through their solicitors, had been guilty of cynical conduct in that they had "deliberately presented the claims knowing that it was not permitted by Rule 9, in order to avoid the payment of the very large fees involved" is an important finding of fact which is unassailable on appeal. Given that finding, the explanation, which Mr Jeans called for, of the course adopted by the claimants' solicitors seems obvious. There was a settled or at least widespread practice, recorded by EJ Pirani in *Ahmed,* of multiple claims of the kind now under consideration (though not usually on quite such a large scale) being presented to and accepted by ETs. Such multiple claims had not been held in any reported case to have been irregularly presented, let alone struck out on that ground. Presenting the claims in this way achieved a very significant reduction in the fees payable because of the sliding scale which the Fees Order applied to multiple claimants. For the reasons I have given the practice was irregular, but until the decision of REJ Robertson in *Brierley* that would not have been apparent to the claimants' solicitors.

36. If REJ Robertson had accepted the argument that the presentation of the multiple claims had been a cynical ploy to avoid payment of fees, we would have had to resolve the difficult question of whether the rationale of such a finding was now undermined by the judgment of the Supreme Court in *UNISON,* holding that the ET fees regime introduced in 2013 was an unlawful barrier to access to justice. But on the findings of REJ Robertson that issue does not arise.

*Limitation and accrual of claims*

37. The other important aspect of Mr Jeans' argument under Rule 6, which is not linked to the fees regime nor to any allegations of cynical conduct by the claimants or their solicitors, is that the respondents to these claims will suffer prejudice by being deprived of a limitation defence. Mr Jeans submitted that many of the individual claims here would have been time-barred had they not been brought on the same claim form. He estimated that originally there were about 416 out of time claims, and by the date of the EAT decision in this case the figure was around 1300. He argued that waiving the Rule 9 irregularity would thus cause substantial prejudice to the respondents, and submitted that the proper approach would be in line with section 35 of the Limitation Act 1980 which treats the loss of a limitation defence as a form of prejudice.

38. The argument in the present appeals is not really about limitation in the strict sense of the word. This is because of the curious fact that as the law stands an equal pay claim may be brought either in an ET or in a county court and the limitation periods are very

different in the two forums. There is, in practice, no time limit for an equal pay claim in an employment tribunal so long as the claimant remains employed in the relevant employment. If the claimant has ceased working for the employer, she must, in general, bring a tribunal claim within six months of ceasing to be employed: section 129(2) of the Equality Act 2010. But, as an alternative, an equal pay claim may be brought in the county court, where the limitation period for a claim based on breach of contract is six years from the date of the breach. In *Abdulla v Birmingham City Council* [2013] IRLR 38; [2012] UKSC 47 the Supreme Court held that, unless the case is for other reasons an abuse of process, it is open to a claimant to take advantage of the six year time limit and issue her claim in the county court.

39. So even if all the present claims were struck out it would be open to claimants who were still employed by Asda at the time of the strike-out, or who had been so employed within the previous six months, to issue fresh claims in the ET. It was common ground before us that such claims would not be barred by issue estoppel: see the decision of this court in *Nayif v High Commissioner of Brunei Darussalam* [2015] IRLR 134; [2014] EWCA Civ 1521. Even claimants who had ceased to be so employed more than six months before the issue of proceedings could begin new claims in the county court. The real issue is the period in respect of which they could bring such a claim.

40. We have, as a sample of a multiple claim against Asda, one in the name of *Acharya and others* issued on 27 January 2015. Not all the claimants will have served for so long, but in principle anyone who has could make a claim in respect of the period going back to 28 January 2009. If the result of this litigation were to be that this claim is struck out for failure to comply with Rule 9 a new claim could only be in respect of the period of six years up to the date of issue of that new claim. It is for that reason that, particularly since the *UNISON* decision, many of the claims have been re-issued already, although these new proceedings are currently stayed.

41. REJ Robertson held in the *Brierley* case that the respondents would suffer no real prejudice if the irregularity in the issue of multiple claims was waived under Rule 6 and I agree with him. Of course, in a sense, the respondents would sustain prejudice because they would remain exposed to the possibility of having to meet claims for the years beginning in 2008 or 2009, which they would not have to pay if the claimants were required to start again. But that seems to me more of a windfall gain than an example of true prejudice.

42. The principal reason, though not the only one, for the imposition by statute of time limits for bringing claims is that memories fade and that it is extremely unsatisfactory for witnesses to be asked to recall disputed events which occurred many years earlier. Even though employment cases, unlike personal injury claims, rarely turn on the recollection of an event which occurred in a matter of minutes, or even seconds, there are nonetheless employment cases where vital witnesses have moved on, records have been lost and so forth. It is not suggested that any of these factors apply in the present litigation.

43. If and insofar as the claimants have no case on the merits it does not matter whether the accrual period begins in 2008 or later. If and insofar as they do have a claim on the merits it would seem to me unjust and disproportionate for them to be deprived of the opportunity to take advantage of the six year period laid down by Parliament simply because their lawyers misguidedly included too many disparate claims on the same claim form.

*Conclusion: Brierley v Asda*

44. I would therefore allow the claimants' appeal in *Brierley v Asda,* set aside the order of the EAT and remit the cases to the ET to proceed on the merits. The irregular inclusion of claimants doing different jobs (or of male contingent claimants) can be dealt with as necessary by case management orders.

*Fenton v Asda*

45. This is a small group of claims brought against Asda after the decision of REJ Robertson in *Brierley.* Mr Short accepted that if we found in favour of the employers on the Rule 9 issue this appeal could not succeed. Where the ET has already held in a published decision that a multiple claim of this type was irregularly presented there could, he accepted, be no viable argument for waiving the irregularity. I would dismiss the claimants' appeal in *Fenton v Asda.*

*Ahmed v Sainsbury's*

46. As will be apparent from the judgment so far, I consider that EJ Pirani was wrong to reject the employer's argument that the claims were irregularly presented. I would remit the claims against Sainsbury's to the ET for any remaining dispute about Rule 9 irregularity and the Rule 6 waiver issue to be determined (if practicable by Judge Pirani) in accordance with this judgment.

**Sir Colin Rimer:**

47. I agree with both judgments.

**Lord Justice Longmore:**

48. I agree with my Lord and Lewis J that the multiple claim forms with which this case is concerned did not comply with Rule 9. I add a few words on the exercise of discretion pursuant to Rule 6 since I disagree with Lewis J's criticisms of the way in which REJ Robertson exercised his discretion in the *Brierley v Asda* case.

49. REJ Robertson took into account in favour of Asda that the tribunal fees had been underpaid. That is now an irrelevant consideration since the Supreme Court has declared the fees scheme to be unlawful. But Asda can scarcely complain that the judge took it into account since it was a matter that went in their favour. The other factors he took into account were:-

1) if the claims were struck out, the claims would have to be re-presented and organised in accordance with Rule 9. The parties would then effectively be in exactly the same position as they were in at the time he made his order. There was no utility in requiring that re-presentation;

2) there would be extra delay and cost;

3) the wrong presentation of the claims did not cause Asda any prejudice;

4) it would be prejudicial to some claimants if they were out of time and lost some of the benefit of their arrears claims; and

5) there was no evidence that the claimants had cynically or deliberately presented their claims in a way that was not permitted by Rule 9 in order to avoid the payment of the very large fees that would be required for individual claims.

50. The first, second, fourth and fifth matters were matters which the judge was entitled to take into account. Mr Jeans submitted that the judge was wrong about factor (3) because Asda were prejudiced in the sense that a few claimants would be time-barred if they were required to start again and many (if not all) claimants would be entitled to smaller sums by way of arrears. He presented Asda's inability to take those points as prejudice to Asda.

51. I disagree. It would be a windfall to Asda if they were able to take these points as a result of the claimants' misconstruction or misunderstandings of Rule 9. The loss of that windfall is not, in my view, a genuine prejudice. Lewis J agreed with that view saying (para 106):

> "In my judgment, this is not, on analysis, a matter of prejudice to the Respondent arising from the irregular inclusion of claims by Claimants within a claim form. The claims have been brought. They are irregular but not void (see Rule 6 of the Rules). The Respondent therefore knows that it faces valid claims from the date that the claims were lodged. If they do not succeed in persuading the Tribunal to strike out the claims, and if the Tribunal instead waives the requirement, the proper analysis is that the Respondent is unable to obtain a benefit that it wishes to obtain by applying to strike out. It is not prejudiced by the "loss" of any thing as a result of a refusal to strike out. They remain exposed to the potential liability by reason of a valid (albeit irregular) claim having been presented."

I would, therefore, like my Lord, reject Mr Jeans' submission on prejudice to Asda.

52. The reason why Lewis J said (para 108) that REJ Robertson had erred in the exercise of his discretion under Rule 6 is that he had concentrated on the question whether the way the claims were presented was a deliberate decision made to avoid the payment of fees and did not address the question whether there was any justifiable reason for the claimants' solicitors, Leigh Day, to have acted in the way in which they did. If the inclusion of a number of claimants was not excusable or justifiable, that would be a factor in favour of striking out the claim. Lewis J accordingly remitted the case to REJ Robertson for him to consider that question.

53. There are two difficulties about that. The first is that the parties could not know whether their method of presentation was justifiable until REJ Robertson (and indeed any appellate court invited to consider the matter) had so decided. The second is that once the judge had decided that Leigh Day had not cynically or deliberately presented their claims in a way that was not permitted by Rule 9 in order to avoid a properly due payment of fees, one is just left in the position that the parties were bona fide disputing the true meaning of Rule 9. I cannot see that arguing a point of construction of the rules is inexcusable. Of course, the claimants' construction has turned out to be wrong, but it cannot be inexcusable or unjustifiable to argue for a construction of the rule with which a court ultimately disagrees.

54. I would therefore say that REJ Robertson in the *Brierley* case did not err in exercising his discretion by waiving the requirement for Rule 9 in the circumstances of this case and I would therefore set aside the EAT's decision to remit the matter to him. Like my Lord, I would:

(a) remit the *Brierley* cases to the ET to proceed on the merits;

(b) remit the *Ahmed* cases to the ET to consider any remaining dispute about irregularity and the Rule 6 waiver issue in accordance with this judgment; and

(c ) dismiss the appeal in the *Fenton* cases.