Case Number: 2300412/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr R Stone	and	Canterbury Christ Church University

Held at Ashford on 8 May 2017

Representation	**Claimant:**	In person
	Respondent:	Mr P Glencross, solicitor

Employment Judge Wallis

JUDGMENT

1. The correct name for the Respondent is shown above and the title to the proceedings is amended accordingly;

2. The claims were presented outside the time limit and there are no grounds for extending the time limit;

3. Accordingly, the Tribunal has no jurisdiction to hear the claims and they are dismissed.

REASONS

Oral reasons were given at the end of the hearing, together with the usual explanation that the parties could request written reasons at that stage or within 14 days of the Judgment being sent to them. Neither party made a request at that time. The Claimant requested written reasons by an email of 9 May 2017.

ISSUES

1. By a claim form presented on 26 January 2017 the Claimant claimed unfair dismissal, sex discrimination and a contractual redundancy payment. He accepted that he had received a statutory redundancy payment.

2. The Respondent contended that the claim had been presented outside the time limit. This preliminary hearing was arranged to consider the arguments put forward in the Response, strike out and a deposit order.

3. There was no dispute about the relevant chronology:-
    a) notice of termination on the grounds of redundancy given to the Claimant on 26 April 2016;
    b) Claimant's appeal 13 May 2016;
    c) Appeal outcome, upholding dismissal decision, on 26 May 2016;
    d) Claimant lodged grievance on 10 June 2016;
    e) Day A of first EC certificate 29 June 2016;
    f) Respondent's response to grievance on 22 July 2016;
    g) Claimant's grievance appeal 28 July 2016;
    h) Day B first EC certificate 12 August 2016;
    i) Claimant's employment terminated 31 August 2016;
    j) Respondent's decision on grievance appeal 19 October 2016;
    k) Day A second EC 14 November 2016;
    l) Day B second EC 28 December 2016.

4. I heard evidence from the Claimant Mr Robert Stone in respect of the circumstances that had caused the delay in presenting the claim.

5. We began by clarifying the nature of the claims in the claim form, which was not entirely clear. The Claimant told me that he had taken some advice and considered that his claim of sex discrimination was made under sections 13 and 26 of the Equality Act 2010. It related to events in 2003, 2006 and the grievance in 2016. I noted that the complaint in general terms was that the Respondent had ignored earlier complaints but had finally considered his grievance in 2016, but did not decide in his favour. The unfair dismissal claim was self-explanatory. The claim for a redundancy payment seemed to relate to the Claimant's view that in some way he had been deprived of a voluntary redundancy payment which would have exceeded the statutory redundancy payment that he had received. I treated it as a breach of contract claim.

FINDINGS

6. The Respondent had prepared written representations which had been sent to the Claimant on 28 April 2017. They drew my attention to the relevant EAT cases about the early conciliation process. I accepted the Respondent's contention and found that the Claimant's grievance of 10 June 2016, a copy of which I read and in which the Claimant suggested he was making a complaint of age discrimination, was to a significant extent the same subject matter as his Tribunal claim form. The same matters were complained about including the alleged treatment of the Claimant and his selection for redundancy, but re-labelled by the Claimant as sex discrimination and unfair dismissal, together with his purported entitlement to a contractual voluntary redundancy payment.

7. I found that the grievance and the first Acas notification had been presented after the Claimant had received notice of termination of his employment on the grounds of redundancy and had unsuccessfully appealed that decision. I

found that he was therefore fully aware, at an early stage, of the basis for a potential claim.

8. I noted the Claimant's evidence that he had received advice about his complaints from his trade union, and that he had been able to conduct research on the internet.

9. The crux of the Claimant's case was that he had presented the claim within the time limit because he had raised a different matter (ie sex discrimination not age discrimination) with Acas and had obtained a second EC certificate. I noted that if he was correct about that, then the claim would have been presented within the time limit. I noted that the Claimant put forward no other reason for the timing of the presentation of the claim.

LAW

10. I noted that the term 'matter' in section 18A(1) of the Employment Tribunal Act 1996 is to be widely interpreted; (see, for example, Drake International Systems Ltd v Blue Arrow Ltd [2016] ICR 445, and Compass Group v Morgan [2016] IRLR 924). The early conciliation process is voluntary, and a claimant does not need to explain the basis for any claim or 'matter'. The EC certificate does not disclose the subject matter of the 'matter' raised by a claimant.

11. In cases where an employer has contested that a claimant has not previously raised with Acas claims that appear in the claim form, the EAT has been clear that 'Parliament has deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and the matter and by reference to the word 'matter' itself…..provided that there are or were matters between the parties whose names and addresses were notified in the prescribed manner and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of section 18A(1)' (Compass Group).

12. In the relatively recent case of Commissioners for HM Revenue & Customs v Serra Garau EAT/0348/16, the EAT decided that the EC provisions do not allow for more than one certificate of early conciliation per 'matter' to be issued by Acas. They said that 'if more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period.'

13. Section 111 of the Employment Rights Act 1996 and article 7 of the Extension of Jurisdiction Order 1994 provides that a complaint of unfair dismissal and a complaint of breach of contract shall not be considered by a Tribunal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably

practicable for the complaint to be presented before the end of that period of three months.

14. Section 123 of the Equality Act 2010 provides that a Tribunal shall not consider a complaint of discrimination unless it is presented before the end of the period of three months beginning when the act complained of was done. It goes on to provide that a Tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

15. Both of these provisions are modified to a certain extent by the early conciliation procedure.

16. With regard to the reasonably practicable test, it is established law that this is a question of fact and thus a matter for the Tribunal to decide. In the case of Wall's Meat Company Limited v Khan 1979 ICR 52, the Court of Appeal said that "the test is empirical and involves no legal concept. Practical common sense is the key note ….."

17. The onus of proving that presentation within the time limit was not reasonably practicable rests on the Claimant.

18. In the case of Palmer v Southend on Sea Borough Council 1984 IRLR 119, the Court of Appeal concluded that "reasonably practicable" does not mean reasonable, and does not mean physically possible, but means something like "reasonably feasible".

19. In considering whether it was reasonably practicable to present the claim within the time limit, the Tribunal will consider various factors including whether or not a Claimant was ignorant of his rights or of the time limit; whether there was any misrepresentation by the employer in connection with the employer's ignorance, perhaps of the facts of the matter; whether the Claimant's advisers were at fault; whether the Claimant had been ill and therefore unable to present a claim; whether other proceedings were pending, for example criminal proceedings; and whether internal proceedings were pending. There are also cases covering circumstances where claims have been lost in the post or delayed by fax or e-mail.

20. Where a Claimant says that he was ignorant of a particular fact, he must show that he could not reasonably have been expected to find out matters that he claims were not within his knowledge at the material time. With regard to the question of advisers being at fault, the general principle is that a Claimant is fixed with an adviser's negligence or delay in presenting a claim, pursuant to the decision in the case of Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53.

21. In respect of the case where internal proceedings are pending, case law provides that the existence of an impending internal appeal is not in itself

sufficient to justify a finding that it is not reasonably practicable to present a complaint to a Tribunal within the time limit.

22. With regard to the test for extending time in discrimination claims, it is established law that the Tribunal's discretion is wide. The words in the Act "in all the circumstances of the case" refer to the circumstances relating to why the claim was late.

23. In the case of British Coal Corporation v Keeble and others 1997 IRLR 336, the Employment Appeal Tribunal suggested that Tribunals should consider the factors listed in Section 33 of the Limitation Act 1980. This requires a civil court in a personal injury case to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to al the circumstances of the case, and in particular:-

    (a) The length of, and reasons for, the delay;

    (b) The extent to which the cogency of the evidence is likely to be effected by the delay;

    (c) The extent to which the party sued had cooperated with any requests for information;

    (d) The promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action; and

    (e) The steps taken by the Claimant to obtain appropriate advice once she knew of the possibility of taking action.

CONCLUSIONS

24. Having found that the Claimant's grievance of 10 June 2016 was very similar to the contents of his claim form, I concluded that there was a necessary link between the 'matter' raised by the Claimant in the first early conciliation period and the claim form. I accepted that we do not know the details of what was raised, but the contents of the grievance presented in the same month as the approach to Acas provides clear information from which an inference can be drawn.

25. I accepted the Respondent's submission that, had the Claimant brought a Tribunal claim using the first certificate, and later sought to add a claim of unfair dismissal, it would have been difficult for the Respondent to argue that another certificate was required, because at the time of the first certificate the Claimant had already been given notice of termination, and the dismissal and the redundancy payment were live issues.

26. I concluded that only the first certificate was relevant, following the decision in Serra Garau. There is nothing in the statutory provisions to indicate that additional certificates are required.

27. It was therefore necessary to consider an extension of the time limits, because there was no doubt that the claim had been presented outside the relevant time limits. The effective date of termination was 31 August 2016; the claim was presented on 26 January 2017.

28. I noted in Serra Garau (paragraph 26) that continuing voluntary conciliation, whilst not modifying the time limits, may influence tribunals which have to decide extensions of time, and I factored that into my deliberations.

29. I noted that the Claimant obtained no relief from the first (and only) EC certificate as Day B was 12 August 2016. The extension of time provided by that certificate was to 12 September 2016. The three month time limit expired on 30 November 2016. .

30. As far as the unfair dismissal claim and the breach of contract claim was concerned, the 'clock' was not stopped by the first certificate because the 'clock' did not start to run until 31 August 2016.

31. As far as the discrimination claim was concerned, the matters complained of happened before 31 August 2016. Even if we take 31 August as the date of the last act, and even if the 'clock' is stopped by the first certificate for 44 days, the claim was still presented outside the extended time limit.

32. Turning to the discrimination claim, the question was whether it was just and equitable to extend the time limit from 30 November 2016 to 26 January 2017. I considered the circumstances here. The Claimant was aware at all times of the Respondent's actions about which he complained. This was not a case where important information had recently come to light. He had raised those matters in a detailed grievance, and by inference he had raised them with Acas.

33. The Claimant had advice from his trade union.

34. The Claimant was aware of the Respondent's final grievance appeal decision on 19 October 2016 but delayed his second (although ineffective) Acas notification until 14 November 2016 and his Tribunal claim until 26 January 2017. Neither of those steps could be described as prompt action.

35. I accepted that the reason for delay was partly that the Claimant erred in his (or his advisers) understanding of the EC process. I accepted that the EC process can cause difficulties for litigants in person. I considered whether that gave rise to grounds for extending the time limit. I concluded that it did not in the circumstances because the Claimant had made the same complaint in his grievance in June 2016, knowing all relevant facts at that time. There was no reason for him or his advisers to think that a second certificate was required.

36. I considered the balance of prejudice. If I did not extend the time limit, the Claimant would not be able to bring his claim; weighed against that was the

fact that he had the opportunity to bring a claim at any time after being served with notice of termination (and before that in respect of earlier matters), and up to three months thereafter, and had started the process with the EC in June 2016.

37. If I did extend the time limit, the Respondent would have to defend a claim relating to several old complaints which they had dealt with in the 2016 grievance and which had been presented some months after the limitation period had expired, and after which they were entitled to consider that the matter had been brought to an end.

38. I concluded that it would not be just and equitable to extend the time limit.

39. I then considered the test for extending time in respect of the unfair dismissal and contractual redundancy payment claims. The matters set out in respect of the discrimination claim were relevant and I do not repeat them in any detail here. The Claimant had advice from his trade union. I had found that his misunderstanding about the EC process was not reasonable in the circumstances. He was aware of all of the relevant information necessary to bring a claim and included it all in his grievance in June 2016.

40. I concluded that it had been reasonably practicable to present the claims within the time limit.

41. Even if it was not reasonably practicable, I concluded that the claims had not been presented within a reasonable period thereafter, because of the extent of the delay, without acceptable explanation, between 30 November 2016 and 26 January 2017.

42. In summary therefore, I decided that the claims had been presented outside the time limit; there were no grounds for extending time; the Tribunal had no jurisdiction to consider the claims; and they were accordingly dismissed.

Employment Judge Wallis
25 May 2017