EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Helen Pearce	AND	The Interim Executive Body St Maddern's Church of England Primary School

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 24 September 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Miss S Hornblower of Counsel
For the Respondent: Mr N Moore of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claim is dismissed.

RESERVED REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant's unfair dismissal claim has been brought within the relevant time limit and whether this Tribunal has jurisdiction to hear it. There is also an issue about the validity or otherwise of the ACAS Early Conciliation Certificate relied upon by the claimant.
2. I have heard from the claimant, who also presented letters of support signed by a number of former governors, and I have heard from Miss Hornblower on her behalf. I have heard from Mr Moore on behalf of the respondent. I find the following facts proven on the balance of probabilities having considered the oral and documentary evidence, and having heard the legal and factual submissions made by and on behalf of the parties.

3. The background facts to this matter are set out in detail in my earlier judgment dated 23 May 2018 which was sent to the parties on 31 May 2018. A summary of the chronology of events in this matter is as follows.
4. The claimant commenced employment on 1 April 2013 and the effective date of termination of her employment was 23 October 2017. She engaged with ACAS between 5 December 2017 and 5 January 2018 and obtained an Early Conciliation Certificate dated 5 January 2018 which named Cornwall County Council as the respondent. On 17 January 2018 the claimant issued proceedings for unfair dismissal naming Cornwall County Council as the respondent ("the First Proceedings"). For the record, this council is now more correctly known as The Cornwall Council. The Cornwall Council entered its response to these First Proceedings on 20 February 2018, and the claimant received the response on 26 February 2018. The response stated that the correct respondent to the proceedings was the Interim Executive Board of St Maddern's Church of England School ("the IEB"). By letter dated 23 March 2018 the parties were informed that the Tribunal had listed a Preliminary Hearing in person on 23 May 2018 to determine the correct respondent to the claimant's claim. The claimant's claim was dismissed at that hearing, and the judgment with reserved reasons was sent to the parties on 31 May 2018. Immediately upon receipt of that hearing the claimant attempted to make contact with ACAS again but was unable to speak with them because of a technical fault on the ACAS telephone line. She then issued these tribunal proceedings claiming unfair dismissal on 31 May 2018 naming the IEB as the respondent ("the Second Proceedings"), relying on the original ACAS Early Conciliation Certificate dated 5 January 2018. The legal department of Cornwall Council filed its response on behalf of the IEB on 4 July 2018. The Tribunal then listed this Preliminary Hearing to determine whether the claimant's claim was presented out of time.
5. Other relevant findings of fact are as follows. During the dismissal process in around October 2017 the claimant was represented by her Trade Union. It seems that her original adviser became ill, and his replacement was less aware of the detail of the claim. The claimant then issued the First Proceedings herself.
6. The claimant was on the management team of her school and she knew that the Governing Body of the School was named as the employer on the relevant contractual documentation for her colleagues and other employed staff. The claimant's own contract of employment named the Governing Body as her employer, although the claimant says that following her dismissal she did not have access to these documents because she was not allowed to attend the School premises.
7. It is clear that Cornwall Council took control of matters behind the scenes and the Governing Body was replaced by the IEB. Against the background of this takeover of the Governing Body, a number of governors continued to support the claimant and objected to her dismissal. The claimant says that she retained the support of the Governing Body despite her dismissal. The claimant has always blamed Cornwall Council for taking the decision to dismiss her, and not the Governing Body whom she says continued to support her.
8. The respondent asserts that the claimant must have known that the Governing Body was her employer throughout the whole history this matter, but in any event it was made clear to her when she received the response to the First Proceedings on 26 February 2018. That response makes it clear that the correct respondent to the First Proceedings should have been the IEB, and explained the relevant law in some detail. It seems that the claimant then approached her Trade Union again, and the CAB, but did not take any further action at that stage. The claimant did write to the tribunal on 28 February 2018 which indicates at that stage that she was fully aware that there was a live issue as to the correct respondent. She stated: "The respondent paid me and dismissed me. It therefore seems difficult to argue that they did not employ me and therefore are the correct respondent." The claimant took no further action pending the preliminary hearing which was listed to determine that point. She did not seek to amend her claim nor to join the IEB as a further respondent. It is clear from the claimant's evidence that she considered Cornwall Council to be the "villain of the piece" and that she did not wish to involve the

Governing Body, and that she chose not to do so. She admitted that she knew at that stage that the Governing Body was technically her employer but considered that the Cornwall Council was ultimately responsible.

9. Having established the above facts, I now apply the law.
10. The relevant statute is the Employment Rights Act 1996 (“the Act”). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal 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.
11. Put simplistically, with effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
12. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 (“the ETA”) defines “relevant proceedings” for these purposes. This includes in Subsection 18(1)(b) Employment Tribunal proceedings for unfair dismissal under section 111 of the Employment Rights Act 1996.
13. Subsection 18A(1) of the ETA provides that: “Before a person ("the prospective claimant)" presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.” Subsection 18A(4) ETA provides: “If - (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant." Subsection 18A(8) ETA provides: “A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
14. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision”). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
15. The Employment Tribunal Rules of Procedure are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”). Rule 10(1)(c) provides that the Tribunal shall reject a claim if 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.” Rule 12 deals with rejection of claims and provides that the claim form is to be referred to an Employment Judge for consideration of potential rejection if the claim form is (for example and as set out in Rule 12(1)(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." Rule 12(2A) provides that the claim shall be rejected if the Employment Judge considers that the claim, or part of it, is of a kind described in subparagraph (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. The rules are prescriptive and no discretion is afforded to the Employment Judge.

16. I have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; Mist v Derby Community Health Services NHS Trust UKEAT/0170/15/MC; and Science Warehouse Ltd v Mills UKEAT/0224/15/DA
17. In this case the claimant's effective date of termination of employment was 23 October 2017. The "normal" three month time limit therefore expired at midnight on 22 January 2017. Under the ACAS Early Conciliation provisions, Day A was 5 December 2017 and Day B was 5 January 2018. The normal time limit was therefore extended by 30 days to 22 February 2018. The First Proceedings were issued within time. The Second Proceedings were not issued until 31 May 2018 (relying on the same ACAS Early Conciliation Certificate) and were therefore received more than three months out of time.
18. The question of whether or not it was reasonably practicable for the claimant to have presented her claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
19. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
20. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the

claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

21. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
22. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204)
23. In the first case I apply the statutory test under section 111(2) of the Act, as assisted by the above authorities. This is in the context of the Second Proceedings against the correct respondent, namely the IEB. The first part of that statutory test is to determine whether or not it was reasonably practicable for the complaint (against the IEB) to have been presented before the end of the period of three months.
24. I am persuaded by the claimant that at the time of her dismissal she was not certain that she was employed by the Governing Body as distinct from Cornwall Council. The employer was named as the Governing Body on her colleagues' contracts of employment, and as it happened on her own, but at the time she had been prevented from gaining access to the School to check her documents. She had the support of the Governing Body and was certain that the controlling influence was Cornwall Council. Her belief at the time of her dismissal as to her correct employer was mistaken, but there was nothing specific to put her on enquiry at that time. She was paid by Cornwall Council and she believed that Cornwall Council were the controlling influence behind her dismissal. In addition, the legislation as to the nature of the correct potential respondent in education matters is complicated and not well-known. Its complexity goes beyond an assumed working knowledge of the right to bring Employment Tribunal proceedings within a three month time limit, which of course the claimant did do (by way of the First Proceedings). In these circumstances in my judgment her initial mistaken belief as to the correct respondent was reasonable, particularly as the IEB did not come into existence until 11 December 2017 some weeks after her dismissal. This can amount to an impediment and in my judgment it was not reasonably practicable for her to have presented her complaint against the IEB within time.
25. This now engages the second part of the statutory test, namely whether the Second Proceedings were then issued against the IEB within such further period as the tribunal considers reasonable. It is clear to me that by the end of February 2018 the claimant was clearly aware and on notice that she had issued the First Proceedings against the wrong respondent. The respondent's notice of appearance to those proceedings explained in detailed terms the relevant legislation and why the claimant was mistaken to have issued the First Proceedings against Cornwall Council rather than the IEB (which was explained to be the correct respondent). It is equally clear from the claimant's letter to the tribunal on 28 February 2018 that she knew that there was a jurisdictional issue as to the correct respondent, and did not agree with Cornwall Council's view. The claimant took advice from her Union and the CAB, and it was open to her to take more detailed legal advice, but she decided not to involve the Governing Body in the proceedings. There was no application to amend those First Proceedings which had been issued in time, and neither did the claimant act promptly at that stage to issue any further proceedings such as these Second Proceedings against the body which she had been clearly told was the correct respondent to her claim.

26. Instead the claimant awaited the result of the Preliminary Hearing in the First Proceedings, and only decided to issue these Second Proceedings upon receipt of the judgment which dismissed the First Proceedings as having been brought against the wrong respondent.
27. It has been argued on behalf of the claimant that the respondent will suffer no prejudice if the claimant is granted an extension of time to bring these Second Proceedings, because Cornwall Council have been involved throughout the history this matter, both in the original decision to dismiss the claimant and in defending both sets of proceedings. On the other hand the claimant will suffer significant prejudice if these Second Proceedings are dismissed because she will be deprived of the right to bring her claim. Whereas I agree with those sentiments, it is not the correct test to be applied in this instant case. I have never been asked to consider any application to amend proceedings and apply the Selkent principles, and there is no consideration of what might be just and equitable in the statutory test which I am bound to apply. The claimant having survived the first part of that test, the second element is simply whether the claimant issued these Second Proceedings within such further period as was reasonable.
28. In my judgment the claimant waited over three months before issuing these Second Proceedings when she was clearly on notice with the benefit of a full explanation that she had issued proceedings against the wrong respondent, in circumstances where she did not wish to involve the Governing Body, or to impugn fault against it. She has given no satisfactory explanation for not having done so. In my judgment she did not do so within such further period as was reasonable, and I therefore find that these Second Proceedings were issued out of time. Accordingly, I dismiss the claimant's unfair dismissal claim.
29. I have also been asked by the respondent to make a finding on the jurisdictional point regarding the ACAS Early Conciliation ("EC") Certificate. The EC Certificate relied upon by the claimant for the purposes of these Second Proceedings is the original EC Certificate obtained in the name of Cornwall County Council on 5 January 2017.
30. The respondent makes the point that there is no valid EC certificate against the correct respondent to these Second Proceedings. Before the claimant issued these Second Proceedings there was a judicial determination by way of the judgment dismissing the First Proceedings making it clear that Cornwall Council was the wrong respondent to the claimant's unfair dismissal claim. The claimant did not pursue her enquiries with ACAS and did not obtain a second (correct) EC Certificate before issuing these Second Proceedings.
31. It seems clear from EAT authorities that one should not take too prescriptive an approach and prevent claimants from pursuing prospective claims where there are minor defects on the EC Certificate, and the tribunal can deal with these matters by way of its normal case management powers, for instance in Science Warehouse where a new certificate was not required for an addition to an existing claim, and in Mist where a new certificate was not required where there was an amendment to an existing claim to join a new respondent.
32. However, this case seems to me to be different. The claimant was on notice following the judgment which dismissed the First Proceedings that the correct respondent to her unfair dismissal claim was the IEB. There was no doubt at that stage as to the correct respondent, and in particular there was no doubt that Cornwall Council was not the correct respondent.
33. Subsection 18A(8) ETA provides: "A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4). The claimant did not successfully make contact with ACAS in connection with these Second Proceedings, and did not have an EC Certificate in the name of the body which she knew to be the correct respondent.
34. With regard to Rule 12, Rule 12(1)(f) provides that a claim form should have a named respondent on it which is the same as the name of the prospective respondent on the EC Certificate. Rule 12(2)(A) provides that the claim shall be rejected in default of this

provision unless it is considered 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.

35. I do not consider this to be a minor error. It is not a simple mistake in the name or address of the prospective respondent to the proceedings such that it would not be in the interests of justice to reject the claim. In my judgment it is a more fundamental error because the claimant has simply failed to obtain an EC certificate in the name of the IEB, when she was on notice by way of the earlier judgment that it is the correct respondent to her unfair dismissal claim.
36. In these circumstances I also confirm that I would have rejected the claimant's Second Proceedings because in the absence of an appropriate EC Certificate naming the IEB this tribunal does not have jurisdiction to hear it.

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Employment Judge N J Roper
Dated 24 September 2018