EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111124/2021 (V)

Held in Glasgow on 20 December 2021
(Preliminary Hearing in public conducted remotely by CVP)

Employment Judge Ian McPherson

Mr Piotr Rozniakowski	**Claimant** **In Person**
Castle MacLellan Foods Limited	**Respondents** **Represented by:** **Mr Simon Rochester** **Solicitor** **EEF Ltd t/a Make UK**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved Judgment of the Employment Tribunal is that:

(1) The Tribunal finds that the ACAS certificate relied upon by the claimant in relation to this claim, having been issued on 30 July 2021, when there was a previous ACAS certificate issued on 23 April 2021, is not a valid certificate for the purposes of **Section 18A of the Employment Tribunals Act 1996**, and accordingly the Tribunal should have considered rejecting the claim under **Rule 12 of the Employment Tribunal Rules of Procedure 2013**.

(2) Having considered **Rule 12 (2ZA),** the Tribunal finds that the claimant made an error in providing the incorrect ACAS EC certificate number, on presenting his ET1 claim form, on 28 August 2021, and that it would not be in the interests of justice to reject the claim for that reason.

(3) Further, having considered the evidence led by both parties, and their respective closing submissions, at this Preliminary Hearing, the Tribunal finds that the claim, presented on 28 August 2021, was presented out of

time, but that it is just and equitable, in terms of **Section 123 of the Equality Act 2010**, to extend the time for lodging the claimant's ET1 claim form with the Tribunal.

(4) In these circumstances, the Tribunal does therefore have jurisdiction to consider the claimant's complaint of alleged unlawful racial discrimination against him by the respondents, and having allowed the claim to proceed, although lodged late, the Tribunal orders the claim and response to be listed, in early course, for a one-hour **telephone conference call Case Management Preliminary Hearing,** with a view to deciding upon further procedure and listing the case for a Final Hearing in due course before a full Tribunal for full disposal, including remedy, if appropriate.

REASONS

Introduction

1. This case called before me as an Employment Judge sitting alone at the Glasgow Employment Tribunal for a public Preliminary Hearing by CVP on Monday, 20 December 2021. Scheduled to start at 11:00am, on account of the Judge's connection difficulties with the Tribunal's CVP (Cloud Video Platform) video conferencing facility, proceedings before this Tribunal did not get underway until 11:19am.

2. It had previously called before me, for a private, Case Management Preliminary Hearing, on 29 October 2021, conducted remotely, by telephone conference call, given the implications of the ongoing Covid-19 pandemic, where my written Note and Orders dated 29 October 2021 was issued to both parties under cover of a letter from the Tribunal on 1 November 2021. It included various case management orders for this CVP Hearing.

3. The Hearing was a remote public Hearing, conducted using CVP, under **Rule 46 of the Employment Tribunals Rules of Procedure 2013.** The Tribunal considered it appropriate to conduct the Hearing in this way, and parties did

not object. In accordance with **Rule 46**, the Tribunal ensured that members of the public could attend and observe the Hearing. This was done via a notice published on the ***Courtserve.net*** website.

4. No members of the public attended this Hearing, but the respondent's representative was accompanied by an observer from the respondents' business. Evidence was heard from the claimant, and he was cross-examined. I was satisfied that the claimant was not being coached or assisted by any unseen third party while giving his evidence.

Claim and Response

5. The claimant, acting on his own behalf, had presented his ET1 claim form in this case to the Tribunal, on 28 August 2021, following ACAS early conciliation between 18 June and 30 July 2021. He complained of discrimination against him on grounds of race, and also of victimisation. In the event of success with his claim, he sought an award of compensation from the respondents. His claim was accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 3 September 2021.

6. Thereafter, on 30 September 2021, an ET3 response, defending the claim, was lodged, on the respondents' behalf, by Mr Simon Rochester, solicitor with EEF Ltd t/a Make UK, Gateshead, Tyne & Wear. His grounds of resistance raised various jurisdictional issues, which I return to later in these Reasons, as well as setting out as substantive defence to the claim, if the Tribunal should determine that it had jurisdiction to hear the claimant's complaints.

7. That ET3 response was accepted by the Tribunal administration on 6 October 2021, and, at Initial Consideration by Employment Judge Mark Whitcombe, on 11 October 2021, it was ordered that the case proceed to the listed telephone conference call Case Management Preliminary Hearing scheduled to be held on 29 October 2021.

Lead up to this Preliminary Hearing

8. Notice of this Preliminary Hearing by CVP was thereafter issued to parties on 8 November 2021 assigning a 1-day Hearing. On account of other judicial business before the Judge at 10am, parties were advised by email from the Listing Team on 15 December 2021 that the start time for this case had been moved from 10am to 11am.

9. On 1 November 2021, both parties in this case were ordered to jointly prepare a single set of documents, in an electronic file, incorporating all documents intended by both parties to be referred to at this Hearing. No such electronic file was provided to the Tribunal for use at this Hearing. As such, I only had available to me the Tribunal's casefile, and no Bundle of Documents.

10. In my case management orders, I required, no later than 2 weeks before the start of this Preliminary Hearing, the claimant to prepare and submit a written witness statement, restricted to the disputed preliminary issue of validity of the claim and time-bar, which was to be taken as read, as per **Rule 43 of the ET Rules of Procedure 2013**, and constitute his evidence in chief at this Preliminary Hearing.

11. My orders also included an order for the respondents' representative to prepare and intimate, no later than 2 weeks before the start of this Preliminary Hearing, a written skeleton argument, with hyperlinks to statutory provisions and case law to be relied upon in argument at this Hearing, to assist the claimant as an unrepresented, party litigant, as per **Rule 2** of the Tribunal's overriding objective.

12. The respondents' skeleton argument was timeously intimated to the claimant, and copied to the Tribunal, by Mr Rochester, the respondents' solicitor, by email sent on 6 December 2021 @ 10:52.

13. The claimant's witness statement was intimated late, on 7 December 2021 @ 22:02, by email to the Glasgow ET, with copy to Mr Rochester for the respondents. He apologised for the slight delay (it having been due by no later

than 4.00pm the previous day) explaining that this was "***unfortunately unavoidable due to Fire Service commitments"***.

14. The claimant is a retained firefighter. In an earlier email to the Tribunal, on 6 December 2021 @ 21:15, after having received Mr Rochester's skeleton argument that morning, he had sought an extension of time to 4.00pm on 8 December 2021, as he stated that he had been "***rather busy with my duties within the Fire Service over the last week"***. That email was not referred to the Judge for direction.

15. On 8 December 2021, the claimant's email and witness statement of 7 December 2021 having been referred to me for instructions, I gave a direction to the Tribunal clerk, which was then emailed to both parties later that morning, saying that, although late, I was accepting the claimant's witness statement, exercising my power to allow an extension of time under **Rule 5**.

16. As per that earlier written Note and Orders of 29 October 2021, I had appointed this case to a one-day Preliminary Hearing in public, before me as an Employment Judge sitting alone, to determine the jurisdictional points raised by the respondents at paragraphs 2 to 7 of the grounds of resistance attached to their ET3 response, being ***(1) the validity of the claim, and whether it should be rejected?; (2) if it is a valid claim, and should not be rejected, whether it is in time ?; and (3), if not in time, whether it is just and equitable to extend time?***

Preliminary Hearing before this Tribunal

17. This Preliminary Hearing took place remotely given the implications of the ongoing Covid-19 pandemic. It was a video (V) hearing held entirely by CVP and parties did not object to that format. I heard it in my chambers at Glasgow Tribunal Centre.

18. At this Preliminary Hearing, the claimant appeared on his own behalf, unrepresented, and unaccompanied. He is Polish nationality, and speaks English, and so proceedings did not require any interpreter. The respondents

were represented by Mr Rochester, their solicitor, with a Ms Sue Ballantyne, the respondents' HR Manager, in attendance observing by CVP link.

19. As per my previous case management orders, I had before me the claimant's witness statement, and Mr Rochester's skeleton argument for the respondents. Given that he spoke to this document, in making his oral submissions to the Tribunal, after the close of the claimant's sworn evidence, it is appropriate that I reproduce that skeleton argument here, in its full terms, as follows:

RESPONDENT'S SKELETON ARGUMENT

Issues

1. *The validity of the claim and whether or not it should be accepted?*
2. *If it is a valid claim and should be accepted, whether it is in time?*
3. *If not in time, whether it is just and equitable to extend time?*

Law

1. ***Section 18A of the Employment Tribunals Act 1996*** *provides, so far as material:*

https://www.legislation.gov.uk/ukpga/1996/17/section/18A

"(1) 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.

…

(4) 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.

…

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

…

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations."

2. ***Rule 10(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*** *https://www.legislation.gov.uk/uksi/2013/1237/schedule/1/paragraph/10*

states that the Tribunal shall reject a claim if it does not contain one of the following:

(a) An Early Conciliation number.

(b) Confirmation that the claim does not institute relevant proceedings.

(c) Confirmation that one of the Early Conciliation exemptions applies.

3. Rules 12 (c) and (da)

https://www.legislation.gov.uk/uksi/2013/1237/schedule/1/paragraph/12

state that a claim form shall be referred to an Employment Judge if they consider that the claim, or part of it, may be –

(c) one which institutes relevant proceedings and is made on a claim form that either does not contain an early conciliation number or confirmation that one of early conciliation exemptions applies.

(da) [a claim form] which institutes relevant proceedings and the early conciliation certificate number on the claim form is not

the same as the early conciliation number on the early conciliation certificate.

4. *So far as material,* ***section 140(B) Equality Act 2010*** *("EQA") sets out the modified limitation regime where EC applies:*
https://www.legislation.gov.uk/ukpga/2010/15/section/140B

5. *In* ***Compass Group UK & Ireland Ltd v Morgan [2017] ICR 73*** *,*

https://www.bailii.org/uk/cases/UKEAT/2016/0060_16_2607.html

Simler P held that it did not matter that the early conciliation certificate had preceded some of the events relied on in the case. The word "matter" in section 18A(1) of the Employment Tribunals Act was very broad and could embrace a range of events, including events that had not yet happened when the early conciliation process was completed.

6. *In* ***Commissioners for HM Revenue and Customs v Serra Garau UKEAT/0348/16***

https://www.bailii.org/uk/cases/UKEAT/2017/0348_16_2403.html

the EAT (Mr Justice Kerr) stated that:-

"20. I agree with Mr Northall that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.

21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4). The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of procedure scheduled to the 2014 Regulations.

….

24….. It does not refer to a purely voluntary second notification which is not a notification falling within section 18A(1) . Similarly, I am satisfied that the definition of "Day B" in section 207B(2)(b) of the Employment Rights Act refers to a mandatory certificate obtained under section 18A(4) of the Employment Tribunals Act . Section 207B(2)(b) says as much. It does not refer to a purely voluntary second certificate not falling within section 18A(4) .

25. Therefore such a voluntary second certificate does not trigger the modified limitation regime in section 207B or its counterpart in the Equality Act section 140B. Such a second voluntary certificate is not required under the mandatory early conciliation provisions and does not generate the quid pro quo of a slightly relaxed limitation regime."

7. ***Serra Garau*** *was followed by the EAT in both of the subsequent EAT cases:*

   (a) Mr J Treska v The Master & Fellows of University College Oxford UKEAT/0298/16/BA

   https://www.bailii.org/uk/cases/UKEAT/2017/0298_16_2104.html

   see paras 11 & 27, and;

   (b) ***Mr M Romero v Nottingham City Council UKEAT/0303/17/DM,***

   https://www.bailii.org/uk/cases/UKEAT/2018/0303_17_2604.html

   Simler P – see paras 26 to 28.

8. *In* ***Sterling v United Learning Trust UKEAT/0439/14.***

   https://www.bailii.org/uk/cases/UKEAT/2015/0439_14_1802.html

The error in that case was simply in two digits. The EAT held the ET was entitled to reject the Claimant's claim under Rule 10.

9. *In* ***Cranwell v Cullen UKEAT/0046/14****.*

https://www.bailii.org/uk/cases/UKEAT/2015/0046_14_2003.html

Langstaff J upheld a decision of the ET where a claim was rejected under 12(1)(d) because the claimant had incorrectly stated on her ET1 that she was exempt from EC.

10. *In* ***E.ON Control Solutions Ltd v Caspall [2019] 7 WLUK 319***

https://www.bailii.org/uk/cases/UKEAT/2019/0003_19_1907.html

The EAT held, in terms of the Claimant's claim that gave a number for a certificate that was invalid because a second certificate could not be validly issued in respect of the same matter, the tribunal should have rejected the claim, either under para.10(c) or para.12(1)(c), for failure to contain an early conciliation number

11. *A tribunal can extend time for bringing a discrimination claim by such period as it thinks just and equitable (****Section 123(1)(b), EQA 2010****).*

12. *In* ***Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576,***

https://www.bailii.org/ew/cases/EWCA/Civ/2003/576.html

The Court of Appeal held that time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. See Auld LJ at para 25.

13. *In* ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23,***

https://www.bailii.org/ew/cases/EWCA/Civ/2021/23.html

*the Court of Appeal cautioned against tribunals rigidly adhering to the checklist of potentially relevant factors in **section 33 of the Limitation Act 1980** and adopting a mechanistic approach. When exercising discretion under **section 123(1)(b) of the EqA 2010,** tribunals should assess all relevant factors in a case, including "the length of, and the reasons for, the delay". The Court of Appeal noted that, in **Keeble**, it was suggested that a comparison with the checklist might help illuminate the tribunal's task, not that the checklist should be a framework for any decision.*

Submissions

14. *The Claimant had previously commenced early conciliation on 16th March 2021 and an EC Certificate Reference Number: R122428/21/62 was issued on 23rd April 2021. The Respondent therefore contends that the limitation period within which the claim should have been lodged expired on or around 22nd July 2021. The Claimant commenced a further period of early conciliation on 18th June 2021 and a further EC Certificate which is attached to the Claimant's ET1 in these proceedings under Reference: R148491/21/41 was issued on 30th July 2021. The Respondent notes that the ET1 was received by the Employment Tribunal on 28th August 2021.*

Validity of Claim

15. *The Respondent refers to paras 2 to 7 in its Grounds of Resistance as to the details of the EC processes followed by the Claimant.*

16. *The Respondent submits that the EC certificate attached to the claim is, as per **Serra Garau**, not a valid certificate within the meaning of, or for the purposes of the statutory provisions. As such it does not trigger the extension of time under **S140B EQA**.*

17. *As it is not a valid certificate under the statutory regime, it is not the requisite EC certificate referred to in **Rules 10 & 12 of the ET Rules***

of Procedure 2014 (sic) *and also is not a valid claim. The ET were not to know of the existence of the first certificate and as such the claim was accepted. Considering the decision in Garau, (and had the Tribunal been aware of the 1st certificate) the claim should have been rejected and should be rejected at this stage.*

18. *This is not a case which falls within **Rule 12 (da).** The recent amendment was to address the issue in **Sterling Bank** where Claimant records the EC number incorrectly. The rules can only refer to a valid EC certificate. Therefore **Rule 12(2ZA)** does not apply. The recent amendment was not to address the principle in **Serra Garau** of avoiding Claimant's being allowed to obtain multiple certificates on an ongoing basis.*

Time Bar

19. *Based on the correct certificate, R122428/21/62 time to lodge a claim expired in or around 22nd July 2021 based on any alleged discriminatory acts advanced by the Claimant that occurred at the point the Claimant's employment came to an end. The second certificate does not trigger the extension of time under **S140B EQA**.*

20. *In terms of any alleged discriminatory acts that occurred prior to 9th April 2021, the time limit to lodge a claim will probably have expired well before 22nd July 2021.*

21. *In his agenda the Claimant, confirms his claim of direct discrimination relates to not receiving an interview on 24th September 2020. The period within which to commence EC in respect of this allegation expired on 23rd December 2020. He did not do so. This element of the claim is significantly out of time.*

22. *The Claimant also refers to no promotion. The Claimant's application for the role of Line Leader was unsuccessful in March 2021. This alleged act of discrimination will be covered by the valid 1st certificate issued on 23rd April 2021. As per the Respondent's*

Grounds of Resistance the Claimant thereafter failed to submit the proceedings in time.

23. The Respondent submits that the claim is out of time. The burden is on the Claimant to show why it is just and equitable for the time limit to be extended.

20. Further, in giving his sworn evidence to the Tribunal, the claimant did so speaking to his own written witness statement. As such, and as he was cross-examined on it by Mr Rochester, solicitor for the respondents, and asked questions of clarification by me as the presiding Judge, it is again appropriate that I reproduce that witness statement here, in its full terms, as follows:

Issues:

1. The validity of the claim.

2. Is that claim on time.

3. *Please excuse the lack of formality in my statement.*

1. Validity

I think that all process that I went through with my previous employer is strongly showing that I was not treated fairly and justly. Starting from 23rd September 2020 when I applied for an internal vacancy for Production Supervisor, I discover that I was not even taken into consideration for this post which was given to the person that at that time was not a Castle MacLellan employee. Having a closer look and having a word exchange with Polish workers that are still working for Castle MacLellan (approx. 10%) or were working for them in the past I gained quite shocking information. That there are no foreign workers holding positions of authority and there have never been since 2005 when the UK employment market become open for Eastern Europeans including Polish workers. This fact raised my concerns and made me feel that we (polish community) are only good enough for ground work positions and that thinking is not our strength, despite

the fact that some of us are tertiary educated. A fair proportion of those who had applied for promotion in the past were really upset and did capitulate from any further attempt to increase their role at Castle MacLellan. When I spoke to them not one could tell me why they were unsuccessful. This indicated to me that something was very 'rotten in the state of Denmark' and that I should begin to ask some questions. On 4th of October, I initiated grievance procedures where I tried to raise my concerns but I was not treated seriously at all. Even meeting notes were not accurate to what was discussed at meetings which indicated to me that the issue of discrimination is being hidden and swept under the carpet rather than an attempt made to find a solution. This situation was (and is) unacceptable and detrimental to me and to others. After the third stage of the grievance procedure, I was sure that it is obvious that I was not being taken seriously although at that time I still believed that we could have achieved consensus amicably. Unfortunately, my email asking for further explanations was dispute by General Manager therefore after a period of thinking, I decided to take my concerns higher and contacted ACAS on 16th of March and continued my case with them.

Before I got an answer and certificate from ACAS I was without a job and yet again lost opportunity to progress within Castle MacLellan. None of this was explained to me at the time.

Therefore, on 5th April I decide to rise (sic) *my further findings and I initiated another grievance but this time I also raised a victimization issue. I even agreed to go through the informal stage of this process in order to indicate that I still believed that we could arrange some sort of equitable outcome to this but the other side instead of being case focused, yet again created documents and verbal utterings that traduced me, even going as far as contacting my other employer (Scottish Fire and Rescue Service, (I am a Retained Firefighter)) to falsely accuse myself and my friend who has been supporting me of "unprofessional behavior"* (sic) *and being*

intimidating. Yet no evidence of this behavior (sic) *is to be found within the minutes from that meeting.*

According to company policy a whole grievance procedure should take about 2 weeks (1st stage – one meeting with outcome, 2nd stage – outcome after 48 hours, and 3rd stage - replay (sic) *after 5 days). My grievance took almost* ***four*** ***months***. ***This I saw as a blatant attempt to drag out the process in the hope that I may run out of time****, indeed having perused Mr. Rochester's statement and noting his almost total reliance on technical reasons for denying the abeyance of the time bar, it is my firm belief that my story, if allowed to be told, will be seen as having more Integrity. It was so bad that I had to initiate my queries to ACAS before I finished the grievance.*

As an outcome of this all my concerns were rejected by the Company but when going through ACAS I was offered some money which indicated to me that they (Castle MacLellan) felt that they may be able to buy me off, possibly indicative of something to hide? Unfortunately, the Company still refused to admit that they did anything wrong during the last 15 years and I could not accept that. Yes, money would be nice but for me it is more the unacceptable way that I and others have been treated in the past and possibly still are. This must be resolved.

As I stated earlier throughout all of this process, I have attempted to find a resolution amicably and respectfully, utilising ACAS as well, however being lied about and discredited continually, I have had enough.

I am forced to seek assistance from the Tribunal Service. I hope that given an opportunity I could receive the answers to some really important questions which might discard my queries and provide equal opportunities for foreign nationals still working at Castle MacLellan.

2. Time Bar

As Respondents' representative established, my first certificate R122428/21/62 was issued on 23rd April 2021. Therefore, I should log my claim not later than 22nd July. As I agreed I did not put it in on time. I would like to ask the Judge to consider based on ***Section 123 of the Equality Act 2010, Point 1(b)*** *as although I do understand that the time scale has not been adhered to, I am trying to highlight an ongoing injustice that I believe has not only been detrimental to myself but to others as well. I am trying to show (bad) practices that I feel are institutionalised within this workplace and for me to explain my position fully it is imperative that I be allowed to discuss the events which occurred during the period of which the validity is being disputed. I consider that this would be fairer and that it would allow the Tribunal to adopt a more impartial position. Furthermore, I do strongly consider that there has been a concerted attempt to drag the process out for no reason other than the obvious. With the Company Policy timeframes being vastly ignored by themselves (which is evidential), they have achieved this aim, I think that it would be more equitable to rescind the time bar in order to counter this blatant and underhand maneuvering*.(sic)

Findings in Fact

21. Arising from the claimant's evidence at this Preliminary Hearing, and the information provided in the ET1 claim form, and ET3 response, and the two ACAS Early Conciliation Certificates produced to the Tribunal, I have made the following findings in fact :

(1) The claimant, who is aged 41, was formerly employed by the respondents from 1 October 2019 to 9 April 2021 as a Production Operative at their business premises in Kirkcudbright.

(2) He presented his ET1 claim form to the Employment Tribunal on 28 August 2021.

(3) He complained, at section 8.1 of his ET1 that he had been discriminated against on the grounds of race, and that he had been victimised.

(4) He provided background and details of his claim, at section 8.2, while, at section 9.1, he indicated that if his claim was successful, he sought an award of compensation, and a recommendation.

(5) Specifically, at section 8.2, the claimant stated, so far as material for present purposes, the last paragraph having been redacted by the Judge, in light of a previous objection taken by the respondents at the Case Management PH, as per paragraph 18 of their ET3 grounds of resistance, the redacted words not being admissible (in terms of **Section 18 (7) of the Employment Tribunals Act 1996** (conciliation; relevant proceedings etc), as follows:

> "***An Internal Vacancy for the post of Production Supervisor became available in Sept 2020 .***
>
> ***As it was an internal post, I applied for it. I was the only person who applied. I was not given the opportunity to interview for this and on the 24th of September I received an answer that I was unsuccessful and that the post was given to an individual who at that time was not a Castle Maclellan employee. I queried this at the time as I suspected that I was ignored for this in favour for someone's friend, a kind of cronyism. Given that I and other Polish nationals form a significant proportion of the workforce on site and that this has been true for an extensive period (approx 15 years) and that it is true that not one of this section of the workforce has ever been promoted to a supervisory position within the Company, I began to suspect discrimination.***

In October of that year, I entered a grievance because of this. The outcome of which was unsatisfactory in so much as it was contradictory, factually inaccurate and inadequately explained and my grievance was not upheld. Keith Watson (Quality Manager) and Mrs. Alison McKie (HR) were the company representatives involved.

In November and as a result of my appeal against this my grievance was upheld by Elaine McConnell (General manager) and Sue Ballantyne (Head of HR). Elaine agreed that the process adopted on this occasion probably fell short of the standards we would normally expect to follow when embarking on the recruitment and selection of supervisory roles?. But she did not acknowledge discrimination.

Being recognised as a rising star and person with potential for progress in the future by them, I applied for Line Leader role in February. Unfortunately, again I was unsuccessful with no legitimate reason provided. When I asked for feedback, my employment was terminated. This indicated to me that I was victimized for my previous attempts to resolve the discrimination issue.

Therefore, in April I initiated a further grievance, feeling disappointed with the way that I was being treated. During this process myself and my friend who was assisting me were traduced in an attempt to discredit us and make us desist.

Throughout all of this I have attempted to find resolution amicably and respectfully, utilising ACAS as well, however being lied about and discredited continually …., I have had enough. I am forced to seek assistance from the Tribunal Service."

(6) In presenting his ET1 claim form, the claimant stated, in the affirmative, at section 2.3 of the ET1 claim form, that he had an ACAS early conciliation certificate number, and he expressly provided that number as being **R148491/21/41.**

(7) A copy of that ACAS early conciliation certificate was produced to the Tribunal. It shows that **18 June 2021** was the date of receipt by ACAS of the EC notification, and that **30 July 2021** was the date of issue by ACAS of that certificate, which was issued to the claimant by email.

(8) The certificate confirms that the claimant had complied with the requirement under **ETA 1996 s18A** to contact ACAS before instituting proceedings in the Employment Tribunal.

(9) The respondents were shown as the prospective respondent by their company name, and at the address of their business, being the name and address given by the claimant when providing the respondents' details at section 2 of the ET1 claim form.

(10) At administrative vetting of the ET1 claim form, the Tribunal clerk checked, as per **Rule 10(1) (a) of the ET Rules of Procedure 2013**, that the claim form was date stamped, and on the prescribed form, and, as per **Rule 10(1)(b)**, that it contained the minimum information required, including that it contained an early conciliation certificate number or exemption box ticked, and that the early conciliation number entered on the ET1 matched the early conciliation number exactly as it appeared on the early conciliation certificate.

(11) The Tribunal clerk did not identify any substantial defects, in terms of **Rule 12(1) (a) / (f),** requiring referral to an Employment Judge, or Legal Officer. The clerk gave the claim the administrative jurisdictional codes **RRD** and **UDL**, for race discrimination and unfair dismissal heads of complaint.

(12) The claim against the respondents was accepted under case number **4111124/2021,** and Notice of Claim served on the respondents on 3 September 2021.

(13) On 30 September 2021, an ET3 response was presented on the respondents' behalf, by their solicitor, defending the claim, as per attached grounds of resistance, including jurisdictional arguments. That response was accepted by the Tribunal administration, and a copy sent to the claimant and ACAS on 6 October 2021.

(14) In the respondents' ET3 grounds of resistance, it was specifically stated that:

> ***Jurisdiction***
>
> ***2. The Respondent contends that the Tribunal does not have jurisdiction to hear the Claimant's claim. The Claimant was dismissed with effect from 9th April 2021. The Claimant had previously commenced early conciliation on 16th March 2021 and an EC Certificate Reference Number: R122428/21/62 was issued on 23rd April 2021. The Respondent therefore contends that the limitation period within which the claim should have been lodged expired on or around 22nd July 2021.***
>
> ***3. The Claimant commenced a further period of early conciliation on 18th June 2021 and a further EC Certificate which is attached to the Claimant's ET1 in these proceedings under Reference: R148491/21/41 was issued on 30th July 2021. The Respondent notes that the ET1 was received by the Employment Tribunal on 28th August 2021.***
>
> ***4. The Respondent contends that in accordance with the decision in The Commissioners for HM Revenue & Customs v M Serra Garau UK ET/0348/16 the Claimant's***

second EC period is purely voluntary; the certificate in relation to the second period is not an EC Certificate within the meaning of the statutory provisions and that the second certificate does not trigger the mandatory modified limitation regime under Section 140(B) Equality Act 2010.

5. ***The Respondent therefore contends that the Claimant has not presented his claim within the statutory time limit provided by Section 123 Equality Act 2010. The Respondent contends that if the claim is out of time, it is not just and equitable for time to be extended.***

6. ***Furthermore, the Respondent contends that the Claimant has not attached a valid EC Certificate when submitting his claim and therefore the Claimant's claim is not a valid claim. The Respondent contends consideration should be given as to whether the claim should be rejected.***

7. ***Furthermore, the Respondent contends that any alleged act(s) of discrimination that took place prior to the relevant time limit, considering the EC conciliation period, are outside the statutory time limit of 3 months for presentation of race discrimination complaints. In the circumstances, the Respondent contends that the Employment Tribunal has no jurisdiction to hear such complaints. The Respondent contends that it would not be just and equitable to extend the statutory time limit.***

8. ***If the Employment Tribunal determines that it has jurisdiction to hear any such complaints, and for those complaints that are in time, the Respondent in any event resists the complaints for the following reasons.***

(15) In their ET3 grounds of resistance, at paragraph 1, the respondents admitted that the claimant was employed by them on a temporary contract from 1st October 2019 until 8th January 2021 and again from 13th January 2021 until 9th April 2021 being the date on which the temporary contract came to an end. At all material times, they further admitted that the claimant was employed as a Temporary Process Operative.

(16) Thereafter, at paragraphs 9 to 20, the respondents' grounds of resistance set out certain admissions of fact, and a date line for matters relating to the claimant's unsuccessful application for a temporary Production Supervisor vacancy in September 2020; his subsequent grievance dated 4 October 2020, upheld on appeal in part; his unsuccessful application for a Line Leader vacancy in February 2021; the end of his temporary contract on 9 April 2021, and his further grievance dated 5 April 2021 not being upheld on appeal. The claimant's allegations of discrimination and victimisation were denied by the respondents.

(17) At Initial Consideration by Employment Judge Whitcombe, on 11 October 2021, he considered the file and did not dismiss the claim or response, but ordered that the claim proceed to the listed Case Management Preliminary Hearing by telephone conference call on 29 October 2021.

(18) Judge Whitcombe gave an administrative direction to the Tribunal clerk that the case should only be registered for **RRD**, as the **UDL** coding was not correct – the claimant did not have two year's continuous employment with the respondents to complain of unfair dismissal – **Section 108 of the Employment Rights Act 1996.**

(19) A copy of the earlier ACAS early conciliation certificate referred to in the respondents' grounds of resistance, being **R122428/21/62** was produced to the Tribunal for use at this Preliminary Hearing.

(20) It was called for by Employment Judge Ian McPherson in his written Note & Orders dated 29 October 2021. It was thereafter produced by Mr Rochester, the respondents' solicitor, on 6 December 2021, when intimating his skeleton argument for the respondents. The claimant also provided a copy with his witness statement intimated on 7 December 2021.

(21) It shows that **16 March 2021** was the date of receipt by ACAS of the EC notification, and that **23 April 2021** was the date of issue by ACAS of that certificate, which was issued to the claimant by email.

(22) The certificate confirms that the claimant had complied with the requirement under **ETA 1996 s18A** to contact ACAS before instituting proceedings in the Employment Tribunal.

(23) The respondents were shown as the prospective respondent by their company name, and at the address of their business, being the name and address given by the claimant when providing the respondents' details at section 2 of the ET1 claim form presented on 28 August 2021.

(24) The claimant did not present any earlier claim to the Tribunal, following upon issue of the ACAS certificate **R122428/21/62** issued on 23 April 2021.

(25) At this Hearing, the claimant gave evidence as to the circumstances of bringing his claim. He confirmed that his employment with the respondents had ended on 9 April 2021, and that he presented his ET1 claim form on 28 August 2021, and that he referenced in that his second ACAS EC certificate issued on 30 July 2021, following notification to them on 18 June 2021.

(26) Further, the claimant acknowledged that he had been to ACAS in March 2021, having notified them on 16 March 2021, and he had received his first ACAS EC certificate on 23 April 2021.

(27) As he was using the company's grievance procedure, and he understood things had to be done before he could proceed to the Employment Tribunal, the claimant explained that while he initiated his grievance, on 5 April 2021, it took until 2 August 2021 for him to finally get an answer from the respondents through that grievance procedure.

(28) Under cross-examination, the claimant confirmed that it was on 4 October 2020 that he initiated the grievance procedure about not getting the internal vacancy of Production Supervisor that he applied for on 23 September 2020. He further stated that he knew how to contact ACAS, and he was reading a lot at that time, and looking for advice on Google, as he had some experience of the Equality Act from his service as a retained firefighter in the Scottish Fire & Rescue Service.

(29) By research, the claimant stated that he found out that he needed to contact ACAS, and he saw that there was a conciliation process and that there were strict time limits of 3 months, less one day, as it was explained to him by ACAS. He further stated that the ACAS conciliator told him it was the Judge's decision to make if any extension of time was to be given. He readily accepted that he realises that his claim to the Tribunal is late.

(30) Asked by Mr Rochester about Section 123(1)(b) of the Equality Act 2010, the claimant stated that he was told, by word of mouth, by the ACAS conciliator, after the first ACAS notification and EC certificate, i.e. between 16 March and 23 April 2021, that he had one month after issue of the ACAS certificate to lodge a Tribunal claim, and he was also told to phone Citizens Advice Bureau. He stated further that it does not say one month on the ACAS certificate, and he did not recall getting any covering email from ACAS. It was his decision to lodge his ET claim, and when to do so.

(31) Further, when asked about Citizens Advice Bureau, the claimant stated that he took advice from the CAB, around the end of April 2021, from Dumfries CAB, after he received the first ACAS EC certificate. The CAB advised him about the time limit, and how it works, confirming what he had been told by ACAS, namely 3 months, less one day, from the date when the matter complained of happened.

(32) He agreed that his employment with the respondents had ended on 9 April 2021, and that the first ACAS EC certificate was issued on 23 April 2021. However, he further explained, he had lodged another grievance with his employer on 5 April 2021, and he accepted that it was only after this second grievance, that he decided to seek a Tribunal. He stated that he is not a solicitor, and that he does not know the law, but he thought it was a valid point to continue with his grievances, before going to the Tribunal.

(33) The claimant then detailed the chronology of events. He accepted that his job ended on 9 April 2021, and that he did not lodge an ET claim within 3 months, less a day, notwithstanding he had been advised of that time limit by CAB and ACAS.

(34) Further, the claimant agreed that he had applied for the Supervisor job on 23 September 2020, and that he was told the next day, 24 September 2020, that he was unsuccessful. However, he added, the answers he got from the respondents during the grievance procedure were not clear.

(35) The claimant stated that he was out of time, about that unsuccessful job application, as time ran out on 23 December 2020, but after his job ended, on 9 April 2021, he was going through a second grievance procedure, then lost his job, and he felt he had been victimised by the respondents.

(36) As regards the 5 April 2021 further grievance, the claimant stated that the respondents had advertised a job as Line Leader, in February 2021, he had applied on 12 February 2021, but he got a negative reply, and he was told, on 30 March 2021, in a letter from the respondents' manager, Stuart Maxwell, that he was unsuccessful.

(37) The claimant agreed with Mr Rochester that everything that had happened, up to that point, was before he received his first ACAS EC certificate on 23 April 2021. However, he explained, he contacted ACAS again, and he was going through the respondents' grievance procedure, and trying to find a solution. He described himself as an honest person, looking for a solution.

(38) He agreed that he went back to ACAS, on 18 June 2021, with another notification, and that resulted in the second ACAS EC certificate issued to him on 30 July 2021. The claimant then provided detail about the progress of this second grievance to the respondents. Intimated on 5 April 2021, he stated that it was dealt with informally first, then formally, leading to an outcome, then an appeal, and then an appeal outcome.

(39) In particular, the claimant detailed the chronology of events as follows: on 14 May 2021, he received a letter from Sue Ballantyne, the respondents' Head of HR; he had a meeting with a Julia Heap and Nicola Craggs on 14 June 2021; then an appeal with a Mr Lunney, whose appeal outcome letter was issued on 2 August 2021.

(40) Neither party had lodged with the Tribunal any of the paperwork related to the grievance procedure, and its timeline.

(41) After raising his second grievance, on 5 April 2021, the claimant stated that he went back to ACAS to look for advice and help, as he is not a solicitor. He added that he had tried to find agreement with

the company, but he had not done so. He accepted that he knew there could be some difficulties with the Tribunal timescales.

(42) The claimant described his second notification to ACAS, on 18 June 2021, as being done to demonstrate that he was "***looking for justice***". He had had the grievance meeting on 14 June 2021, and the respondents had thereafter contacted his other job in the Fire Service. The company procedures suggested short timescales, but he had found his grievance being complex and time consuming. It took 4 months, from his grievance on 5 April 2021, to Mr Lunney's letter of 2 August 2021 to go through the grievance procedure with the respondents.

(43) When asked by Mr Rochester, the respondent's solicitor, about the statement in his witness statement, that "***My grievance took almost four months. This I saw as a blatant attempt to drag out the process in the hope that I may run out of time",*** the claimant stated that he knew he was running out of time, as 3 months, less one day, would run from 30 March 2021, when he was told he was unsuccessful for the Line Leader job, but he did not lodge his ET claim then, as "***my nature is to do what is correct, and in the right order***", ACAS before the Tribunal.

(44) Asked why his ET1 claim form had referenced the second ACAS EC certificate, rather than the first, the claimant stated that that was "***an honest mistake***", as he had never filled in an ET1 claim form before, and he is not familiar with the system. He disputed that by so doing he had been lying to the Tribunal, and he also disputed that he had been trying to hide things from the Tribunal. Further, he commented that "***you learn from your mistakes***".

(45) When asked by Mr Rochester, the respondent's solicitor, about the statement in his witness statement, that : "***I think that it would be more equitable to rescind the time bar in order to counter this blatant and underhand maneuvering***"(sic), the claimant stated

that he agreed he had not specified the alleged underhand behaviours, but he explained that his managers had tried to "***traduce me***", by saying he had done things that he would never do.

(46) In answer thereafter, to points of clarification raised by the Judge, the claimant stated that he had raised the victimisation issue, as part of his grievance on 5 April 2021, because it was not explained to him why he was not given the job of Line Leader. He felt it significant that, a few days before, ACAS had phoned the respondents, and advised them that he had raised matters with ACAS, by his first notification to them on 16 March 2021.

(47) Sometime between 16 March and 5 April 2021, the claimant stated that he had spoken to an ACAS conciliator, a Christopher Townsend, sometime after he had got the respondents' letter with a negative answer on 30 March 2021 saying that he had been unsuccessful in his application for Line Leader.

(48) He further stated that he had been on the phone to ACAS, on 25 March 2021, and told them it was alright to contact his employer, the respondents. He had thereafter received the first ACAS EC certificate by email on 23 April 2021.

(49) When, in his witness statement, he had referred to the company's grievance policy, the claimant stated that the time lines specified by him were taken from the respondents' policy, but he could not recall if that company policy had said anything about his rights to go to an Employment Tribunal. The respondents' policy and grievance procedure was not produced to the Tribunal by either party.

(50) Further, added the claimant, the company had never told him about the timescales for an ET, and, as far as he recalled, it was not raised in their policy documents. However, he accepted that he knew, from ACAS and CAB, that there was a time limit of 3 months, less one day.

(51) When asked by the Judge to clarify the basis of his submissions about time-bar, as set forth in his witness statement, the claimant stated that he was asking the Judge to extend the time limit, and he sought to be given the "***green light"*** to go forward, it being just and equitable for the Tribunal to decide the case, after hearing evidence from himself and witnesses for the respondents.

(52) The claimant stated that there had been an "***ongoing injustice",*** and "***institutionalised bad practices***" by the respondents. Having spoken to others, whom he did not identify, the claimant stated that it is bad practice that when people apply for jobs with the respondents, there is never feedback to unsuccessful people for applied for jobs, and, if anything, it was "***word of mouth***" feedback, and not anything in writing.

Tribunal's Assessment of the Evidence led at the Preliminary Hearing

22. The only witness led at the Preliminary Hearing was the claimant himself. At the start of the Hearing, after he had been sworn, he confirmed that he had read the respondents' written skeleton argument, and that there was nothing in his own witness statement that required to be amended. He acknowledged that there were two separate ACAS Early Conciliation Certificates, and that each had its own unique reference number.

23. He gave evidence in chief from 11:22am until 11:29, adopting his witness statement, without amendment, and he was cross examined by Mr Rochester, the respondent's solicitor, from 11:29 to 12:14, before I asked him some points of clarification, and his evidence closed at 12:30. There was no evidence led by the respondents, and Mr Rochester declined an opportunity offered to him to ask further questions, if anything arose from my questions to the claimant.

24. After a comfort break, it was agreed by all concerned that I would proceed to hear closing submissions, respondents first, then, after the lunchtime adjournment, the claimant in reply, and thereafter any questions from the Judge to either, or both of them, as I might feel appropriate.

25. In giving his evidence to the Tribunal, I found the claimant to be a credible and reliable witness, who gave his evidence in chief, without hesitation, or exaggeration, and who readily and without any apparent difficulty answered all questions put to him by Mr Rochester in cross-examination. He came across as a honest, and plain speaking person, who is clearly still aggrieved at the way he was treated by the respondents, which he still regards as being discriminatory.

26. He spoke of matters as best he could recall them, and the chronology of key dates was not in dispute between the parties, nor the fact that this was a case where there were two separate ACAS Early Conciliation Certificates, one issued on 23 April 2021, and the other on 30 July 2021.

27. The claimant had referred only to the latter in his ET1 claim form. The standard question, at section 2.3 of the *pro-forma* ET1 claim form asks : "***Do you have an Acas early conciliation number?"***, and gives a Yes and a No box to be ticked. The claimant ticked Yes, and gave the certificate number **R148491/21/41**, which we now know to be the second ACAS EC certificate issued on 30 July 2021.

Parties' Closing Submissions

28. Mr Rochester made his oral submissions first, on behalf of the respondents, starting at 12:48, after a ¼ hour comfort break for all. He did not read *verbatim* from his written skeleton argument, but just highlighted the main points. He submitted that the claim was invalid, and the Tribunal had no discretion, and the claim should be rejected.

29. He referred me to **Section 18A of the Employment Rights Act 1996**, and to **Rules 10 and 12 of the Employment Tribunal Rules of Procedure 2013**. He also referred me to the EAT judgments in **Morgan, Serra Garau , Treska, Romero, Sterling, Cranwell**, and **E.On Control Solutions Ltd.** Only one ACAS certificate is required to bring proceedings, and a second certificate is unnecessary, and purely voluntary. He described it as "***a nullity***". As per **Serra Garau**, the EC certificate attached to the claim is a second certificate,

and it does not trigger the extension of time under **Section 140B of the Equality Act 2010**. As it is not a valid certificate, it is not a valid claim.

30. He described the EAT Judgment in **E.ON Controls** as illuminating, and very similar to the facts of the present case, as the claim there was also based on a second ACAS certificate. The claimant there was allowed to amend his claim, and give the 1st ACAS certificate, but that was struck down by the EAT, HHJ Eady QC, holding that it was not a matter about which the Tribunal had any discretion and that the claim form containing the wrong EC certificate number must be rejected.

31. Based on the correct certificate, being the first certificate issued on 23 April 2021, Mr Rochester submitted that the time to lodge a claim expired on 22 July 2021. The alleged acts of discrimination were all before the valid 1st ACAS certificate, and so the claim is out of time, the complaint about September 2020 being significantly out of time.

32. On the matter of time-bar, Mr Rochester submitted that , as per the Court of Appeal, in **Bexley**, time limits should be applied strictly, and there is no presumption in favour of extending time. As per the more recent Court of Appeal judgment in **Adedeji,** the Tribunal should assess all the relevant factors in the case, including the length and reasons for the delay.

33. In his submission, Mr Rochester stated that the time to lodge the ET1 claim form expired on or around 22 July 2021, and the events complained of were some months prior to that. Further, he added, the claimant had accepted, under questioning at this Hearing, that he had advice from both ACAS and CASB, and that he knew of the time limit, and all of the material issues complained of him were before the 1st ACAS certificate was issued. He submitted that the claimant had made a "***conscious decision***", notwithstanding this advice, having researched to find out the process, and he accepts he knows he is out of time, yet he had gone back to ACAS for a further period of voluntary conciliation, describing that as an "***honest mistake***".

34. Concluding his oral submissions to the Tribunal, Mr Rochester stated that it was for me, as the Employment Judge, to consider the reason why the claim was lodged late, but he submitted that the claimant's explanation ***"just doesn't make any sense***". The advice was to lodge the claim, and time was running, yet the claimant went back to ACAS, and in making those decisions, Mr Rochester started that the claimant appears to have taken a "***gamble***", and it makes no sense that the claimant referenced the 2nd ACAS EC certificate.

35. In his view, the claimant should not be allowed to benefit from his decisions, and so he should not be allowed to progress with this claim. Indeed, he added, even when the claimant got the 2nd ACAS certificate, on 20 July 2021, he still waited some 3 to 4 weeks before lodging his ET1 claim form on 28 August 2021, almost a further month after the voluntary conciliation period expired. He described that as "***one delay, after another."***

36. Finally, Mr Rochester submitted that it was not just and equitable to grant the claimant an extension of time. If, however, I decided for the respondents on the validity of the claim point, Mr Rochester submitted that time-bar falls away at that stage, if I ruled for the respondents on the validity point.

37. It then being 13:03, Mr Rochester's oral submissions concluded, the Tribunal adjourned for lunch, and resumed at 14:05 to hear the claimant's oral closing submissions. The claimant opened his submissions by stating that he was capable of only doing a general statement on both matters, validity of the claim, and time-bar.

38. On the validity of the claim, the claimant stated that, as per his witness statement, it is quite important for him to have both complaints combined (about September 2020 and March 2021) and to show that the respondents were engaged in bad practices over a period of time. Starting on 24 September 2020, he stated that he was the victim of discrimination, in the internal vacancy for Production Supervisor, and the person who got that job was not an employee of the respondents.

39. He added that he is not in the habit of accusing people, and it is a strong allegation to make, but he learned from his 1st ACAS early conciliation notification, and it would be equitable if the Judge could look at the bigger picture and that people working for the respondents are still being treated badly. He further stated that, with 10 to 15% of the workforce being Polish, he was seeking to prove the respondents' bad practice, and that nobody Polish has ever been promoted in the last 15 years there.

40. Continuing his submission, the claimant stated that it had taken him significant time to find evidence and justify that he had a valid case, and he further stated that he would like a Judge to have a look at it impartially at a further Hearing before the Tribunal. He described his mistakes as "***honest mistakes"***, and stated that he did not try to hide anything, nor to lie to the Tribunal, and he acknowledged that his claim is late, and there were mistakes in the process taken by him.

41. The claimant stated that he relied upon the Judge to apply the relevant law, and that he had nothing to say about the various cases cited by Mr Rochester in his submission to the Tribunal. He added that he believed he had a valid claim, but, he accepts it is out of time, and asks the Tribunal to extend time, and let his case go forward to a Final Hearing. He closed his oral submissions, at 14:13, stating that he had nothing else to add.

42. The claimant's submissions concluded, I raised some points with Mr Rochester. He confirmed that he had nothing to add to his earlier oral submissions, given the claimant's submissions to me. When I asked him about the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, he submitted that, on the validity point, **E.ON Controls** makes the law clear, so the overriding objective dies not come into play. On the time-bar point, he accepted **Rule 2** does come into play, but that it applies to both parties, and that avoiding delay and saving expense are relevant factors.

43. If the claim were to be allowed to proceed, Mr Rochester stated that the respondents would have to defend an invalid claim, presented out of time, and there would be a cost to them of having to do that, in circumstances where

the claimant had delayed in bringing his claim, and that is a factor to take into account.

44. When I asked him about the fact his written submissions did not make any reference to any prejudice or hardship that might be suffered by the respondents by the passage of time, Mr Rochester stated that he was limited to 5 pages in his skeleton argument, and there was the obvious factor of having to defend a claim presented out of time, and incur the costs of doing that.

45. Further, he added, there were some issues arising from September 2020, and so recollection of witnesses would be affected by the delay caused by the claimant, and him going to ACAS EC on two occasions, and one of the respondents' staff involved then, Elaine McConnell, had left the respondents' employment a couple of weeks ago, but after this case was raised at the Tribunal.

46. Other witnesses are still in the respondents' employ, he added, but the issue would be whether they could recall what had happened in September 2020, and he accepted that there is documentary evidence, and that will assist the parties, but these matters were some time ago and the period of time that has passed since those matters now complained of, needs to be taken into account too.

47. At this point, the Judge was disconnected from the CP due to a power fault, but reconnected within 5 minutes. I then raised with Mr Rochester a well-known case law authority that he had not cited in his written submissions : **Apelogun-Gabriels v Lambeth LBC [2002] ICR 713.**

48. When he stated that he was not familiar with it, I posted a hyperlink to it on the CVP chat room, so both parties could access it, and read it, and make any further submission that they felt might be appropriate. Having looked at it on the hyperlink, Mr Rochester advised me that he had noted it referred to Mr Justice Lindsay's judgment, as then EAT President, in **Robinson v Post Office [2000] IRLR 804**, and he drew my attention to the comments of Lord

Justice Peter Gibson in **Apelogun-Gabriels.** The fact that a claimant has awaited the outcome of an internal grievance procedure before making an ET claim is just one matter to take into account, and balance with all the relevant factors, by an ET in considering whether to extend the time limit for making a claim.

49. Mr Rochester then submitted that the claimant was aware of his complaints, well prior to lodging his 5 April 2021 grievance, and he had already felt, at that stage, that something was not right, so he lodged his further grievance, and his ET1 claim form was lodged after his employment with the respondents had ended. On that basis, he stated, the balance of injustice in allowing the claim to proceed, although late, tips more in favour of the respondents than the claimant.

50. The claimant, having listened to Mr Rochester's further submission, stated that he had nothing further to add.

Reserved Judgment

51. When proceedings concluded, on the afternoon of Monday, 20 December 2021, at 14:37, the claimant and Mr Rochester were advised that Judgment was being reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the Tribunal.

52. With no opportunity that afternoon, further private deliberation has only taken place recently, following my return from annual leave after the festive period on 12 January 2022. I apologise to both parties for the resultant delay in this Judgment being issued outwith the Tribunal administration's target date of 4 weeks from date of the Hearing.

Issues for the Tribunal

53. The issues before me were those identified in my PH Note of 29 October 2021, and the Notice of this Preliminary Hearing, as recorded above at paragraph

16 of these Reasons. I deal with them below, in my Discussion and Deliberation.

Relevant Law

54. While the Tribunal received a detailed written skeleton argument from Mr Rochester, with some statutory provisions and some case law references cited by him on the respondents' behalf, the Tribunal has nonetheless required to give itself a self-direction on all aspects of the relevant law. In particular, I have specifically directed myself on the law relating to time limits, and extensions of time, as these matters were not fully addressed by Mr Rochester in his written submissions.

55. Indeed, in the course of discussion with him, at this Preliminary Hearing, I asked him about the judgment in **Apelogun-Gabriels v Lambeth London Borough Council [2002] ICR 713**, often cited in these types of Preliminary Hearing where there has been an internal grievance procedure ongoing between the claimant and respondents. Somewhat to my surprise, he stated that he was not familiar with that case law authority. As such, I posted a hyperlink to it on the CVP chatroom, so that he and the claimant could both consider it. Mr Rochester addressed me on it in his later oral submissions, as I have recorded above.

56. As an unrepresented, party litigant, the claimant did not understandably address me on the relevant law, and, indeed, I had no expectation that he should so address me on the relevant law. I did explained to him that he was entitled to comment on the law, as presented to us by Mr Rochester, as an officer of the Court, and in accordance with his professional duty as a solicitor, but that I would be addressing myself on the relevant law to apply to the facts of the case as I might find them to be after assessing the whole evidence led before me at this Final Hearing. The claimant made no legal submissions to me on the matter of his claim against the respondents.

57. The rules concerning claim forms and the Employment Tribunal's jurisdiction are to be found in the **Employment Tribunals Rules of Procedure 2013**,

and Mr Rochester's written submissions have correctly referenced **Rules 10 and 12** in particular. He has also correctly cited the substantive legislation on ACAS early conciliation as found in **Section 18A of the Employment Rights Act 1996.**

58. As shown in my findings in fact, recorded earlier in these Reasons, at administrative vetting of the ET1 claim form, the Tribunal clerk checked, as per **Rule 10(1) (a) of the ET Rules of Procedure 2013**, that the claim form was date stamped, and on the prescribed form, and, as per **Rule 10(1)(b)**, that it contained the minimum information required, including that it contained an early conciliation certificate number or exemption box ticked, and that the early conciliation number entered on the ET1 matched the early conciliation number exactly as it appeared on the early conciliation certificate.

59. The Tribunal clerk did not identify any substantial defects, in terms of **Rule 12(1) (a) / (f),** requiring referral to an Employment Judge, or Legal Officer. As such, the claim, as presented on 28 August 2021, was accepted by the Tribunal administration, and served on the respondents on 3 September 2021. It was only on receipt of Mr Rochester's ET3 response, presented on 30 September 2021, and its stated grounds of resistance, that it emerged to the Tribunal that there had been an earlier EC notification and ACAS EC Certificate issued on 23 April 2021. He cited the **Serra Garau** judgment in support of his argument that this Tribunal does not have jurisdiction to hear the claimant's claim.

60. Mr Rochester's written submissions, at paragraph 6, have cited the relevant extracts from Mr Justice Kerr's EAT judgment in **Serra Garau**. It is not necessary to repeat them here again. While he cited, at paragraph 10, the EAT judgment in **E.ON Control Solutions Ltd v Caspall** [2019] UKEAT/2019/0003, he did not cite the relevant extract, although in his oral submission, he did refer to Her Honour Judge Eady QC's ruling in **E.ON Controls.** Where, at any stage in the proceedings, a Tribunal forms the conclusion that the claim form should have been rejected initially, even if in fact it was not, it is obliged to give effect to that and reject the claim.

61. For present purposes, it is appropriate to look at that in further detail now. The learned EAT Judge (HHJ Eady QC, as she the was) stated as follows, at paragraphs 51 to 54 (with my emphasis shown in bold):

> *51. In the present case, the Claimant had provided the requisite information to ACAS for the purpose of the EC process and had obtained an EC certificate pursuant to section 18A(4) Employment Tribunals Act 1996. That should have enabled him to launch his ET claim against the Respondent but, in order to be able to do so, he still needed to comply with the relevant employment tribunal procedure regulations. Specifically, the Claimant needed to present his claim on the prescribed form and to include the accurate EC certificate number. Whether he sought to rely on the first or the fourth claim (or, indeed, either of the other claims also before the ET at the Preliminary Hearing), he had failed to do so. The first claim gave an inaccurate EC certificate number, which related to a different Claimant and a different claim; the fourth claim gave a number for an EC certificate that was simply invalid (the second certificate having no validity for section 18A purposes, see Serra Garau).*
>
> *52. Having set out the relevant legal framework, however, it is apparent what should then have happened: in each instance, the ET was bound to reject the Claimant's claim and to return the claim form to him with a notice explaining why it had been rejected and providing him with information about how to apply for a reconsideration. The obligation to reject the claim could have arisen under Rule 10(1)(c)(i) or under Rule 12(1)(c) ET Rules. If rejected under Rule 12, the decision would have been taken by a Judge under Rule 12(2).*
>
> *53. It is apparent, however, that, in both instances, the ET neither rejected the claim under Rule 10 nor did any staff member refer the claim to an Employment Judge under Rule 12(1). It was left to the Respondent to take up this point and object that both claims should*

have been rejected by the ET. This was the point that was thus before the ET at the Preliminary Hearing on 19 September 2018. Although the matter had not been referred to him under Rule 12(1) ET Rules, I cannot see that the obligation arising under Rule 12(2) had ceased to apply: at that stage the Employment Judge ought properly to have considered that both claims were of a kind described in Rule 12(1)(c) - both claim forms failed to contain an accurate EC number.

54. ***The consequence of a failure to include the correct EC number is made clear under Rules 10 and 12: the claim in question shall be rejected and the form returned to the would-be Claimant. That being so, when it became apparent to the Employment Judge that the Claimant's claim forms were of a kind described by Rule 12(1)(c), he was mandated by Rule 12(2) to reject the claims and return the forms to the Claimant.*** *Having complied with that obligation, there would no longer have been any claim before the ET that could have been amended by exercise of the Employment Judge's case management powers under Rule 29, although it would have been open to the Claimant to re-submit a rectified claim form, now including the correct EC number from the first certificate. Had the Claimant adopted this course, the Employment Judge would have been required to treat the claim as thus validly presented on the date that the defect was rectified (Rule 13(4) ET Rules). The claim would have been lodged out of time but it would then have been for the ET to determine whether it had not been reasonably practicable to present the claim in time. In this regard, the ET might have seen it as relevant that the Claimant had not been given a notice of rejection and advised of the means by which he might apply for a reconsideration at an earlier stage (and see the discussion of the interplay between errors under Rules 10 and 12 and the "reasonable practicability" test in Adams v British Telecommunications Plc [2017] ICR 382 and North East London NHS Foundation Trust v Zhou UKEAT/0066/18, [2018] UKEAT 0066_18_0507), although no doubt the Respondent would have countered this suggestion by pointing out that it had raised the*

issue some time before the Preliminary Hearing and the Claimant (who was legally represented throughout) had taken no steps to rectify the error earlier. In any event, the ET did not adopt this course but, instead, purported to allow an amendment to a claim that it ought to have rejected and returned to the Claimant. I understand the Employment Judge's desire to adopt this course but I consider that, by doing so, he erred in law."

62. Had the claim form been rejected under **Rule 10 or 12**, the claimant would have been notified of that fact, and had the right to seek a reconsideration of that rejection within 14 days under **Rule 13**. As Mr Rochester referenced, at paragraph 3 of his written submissions, **Rule 12(1)(da)** states that the Tribunal staff shall refer a claim form to an Employment Judge if they consider that it may be one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate.

63. In that event, **Rule 12(2ZA)** provides that the claim shall be rejected if the Judge decides that it is of a kind described in **Rule 12(1)(da)**, unless the Judge considers that the claimant made an error in relation to the early conciliation number and it would not be in the interests of justice to reject the claim. At paragraph 18 of his written submissions, Mr Rochester submits that **Rule 12(2ZA)** does not apply to the circumstances of the present case, as there is no valid EC certificate. I shall return to this point later under my Discussion and Deliberation.

64. The statutory test for an extension of time in a discrimination complaint is to be found in **Section 123 (1) of the Equality Act 2010** which provides that, subject to **Section 140B** (extension of time limits to facilitate conciliation before initiation of proceedings) proceedings before the Employment Tribunal may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable. **Section 123(3)** further provides that – (a) conduct extending over a period is to be treated as done

at the end of that period, and (b) failure to do something is to be treated as occurring when the person in question decided on it.

65. This is known as the "***just and equitable***" test and applies to the claim for discrimination. It is broader than the "***reasonably practicable test***" found in the **Employment Rights Act 1996**. It is for the claimant to satisfy the Tribunal that it is just and equitable to extend the time limit and the Tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather that the rule – per **Robertson v Bexley Community Centre [2003] IRLR 434*.***

66. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. These are statutory time limits, which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it **: Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 per Sedley LJ at [31-32]**.

67. In considering whether it is just and equitable to extend time, the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434** is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule. At paragraph 25, Lord Justice Auld stated:

> *"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that*

it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

68. In **Chief Constable of Lincolnshire Police v Caston** [**2010] IRLR 327** Lord Justice Wall noted that the comments in **Robertson** were not to be read as encouraging Tribunals to exercise their discretion in a liberal or restrictive manner. The Tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension. As succinctly stated by him, at paragraph 17:

> "…*the discretion under the Statute is at large. It falls to be exercised "in all the circumstances of the case" and the only qualification is that the EJ has to consider that it is "just and equitable to exercise it in the claimant's favour."*

69. The Tribunal may have regard to the checklist in **Section 33 of the Limitation Act 1980** as modified by the EAT in **British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT:**

a. The length and reasons for the delay.

b. The extent to which the cogency of the evidence is likely to be affected by the delay.

c. The extent to which the party has cooperated with any requests for information.

d. The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.

e. The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

70. However, in the applying the just and equitable formula, the Court of Appeal held in **Southwark London Borough v Alfolabi 2003 IRLR 220** that while the factors above frequently serve as a useful checklist, there is no legal

requirement on a tribunal to go through such a list in every case, *'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'*.

71. This was approved by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050** when the Court noted that *"factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

72. The Tribunal must therefore consider:

(1) The length and reasons for the delay

(2) The extent to which the cogency of the evidence is likely to be affected by the delay

(3) The prejudice that each party would suffer as a result of the decision reached

73. I pause here to note and record that the **Limitation Act 1980** to which **Keeble** refers does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act 1973**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, **Section 19 A** simply stating:

"19A Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

74. **Section 123 of Equality Act 2010** does not make reference to either the **Limitation Act 1980** or the **1973 Act**. It does not seek to define itself by reference to either statutory model.

75. As the Employment Appeal Tribunal recognised in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

> "….*There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses…"*

76. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence : **Redhead v London Borough of Hounslow UKEAT/0086/13/LA per Simler J at [70].**

77. The judgment of the Court of Appeal in **Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ. 1853 ; [2002] IRLR 116 ; [2002] ICR 713** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

78. The fact that the claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative : **Apelogun-Gabriels at [16].**

Discussion and Deliberation

79. Having carefully considered the evidence led at the Preliminary Hearing, and considered both parties' closing submissions, in private deliberation, I have decided that the ACAS certificate relied upon by the claimant in relation to this claim, having been issued on 30 July 2021, when there was a previous ACAS certificate issued on 23 April 2021, is not a valid certificate for the purposes of **Section 18A of the Employment Tribunals Act 1996**, and accordingly the Tribunal should have considered rejecting the claim under **Rule 12 of the Employment Tribunal Rules of Procedure 2013**.

80. That, however, simply means that the claim should be considered for rejection at this stage of the proceedings, rather than earlier. However, under **Rule 12(2ZA),** which came into force on 8 October 2020**,** I must reject unless I consider that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

81. It is now clear that the claimant used an incorrect certificate number on his ET1 claim form which does not match the number on the valid 1st ACAS EC certificate issued on 23 April 2021. The respondents, through Mr Rochester, have suggested that this was an intentional act by the claimant to use the later certificate and give its number.

82. On the evidence before me, I prefer to regard it as an "***honest mistake***", as the claimant stated to me, and I do so having regard to the precise terms of the question posed of any claimant when it comes to answering section 2.3 on the ET1 claim form. It only asks if you have an ACAS EC number, with a Yes or No answer box to tick. If Yes, you are asked to give the certificate number. It does not say what to do if you have more than one certificate.

83. As such, I am satisfied that the claimant made an error. The fact that he obtained the first, valid ACAS EC certificate in compliance with **Section 18A** shows to me that he was acting in good faith but, when it came to lodging his ET1 claim form, on 28 August 2021, for whatever reason, he failed to use those first ACAS EC certificate details.

I must then consider whether or not it is in the interests of justice to reject the claim. In my judgment, it is not in the interests of justice to reject the claim, and it is appropriate that I go on to consider whether or not, in all the circumstances of the case, I should grant an extension of time to the claimant.

84. It is clear that the claimant embarked on a valid process of early conciliation via ACAS on 16 March 2021 and he obtained the ACAS certificate compliant with **Section 18A** on 23 April 2021. But for the error in giving the second certificate number, the claim would have proceeded. It would, in my judgment, be an exercise of elevating form over substance if the claim were now to be rejected in these circumstances.

85. As I see matters, however the error in providing the incorrect number occurred, the fact that the claimant went to early conciliation with ACAS allowed the respondents the opportunity to engage in that process, and try to resolve the claimant's dispute before the Tribunal claim began, and that gives some weight to why, in the interests of justice, this claim should not simply be rejected, without considering the arguments about whether, against the claimant's acknowledgement his claim was presented late, he should be granted an extension of time on just and equitable grounds.

86. In the context of a technical error, as to the ACAS EC reference numbers used, there is undoubtedly greater prejudice caused to the claimant, than to the respondents, if I were to simply reject his claim. The primary prejudice to the respondents, it seems to me, is the delay in resolution of this validity of the claim point since they lodged their ET3 response. Accordingly, I have decided that the claim will not be rejected under **Rule 12(2ZA)**, and I will instead proceed to deal with the time-bar arguments, on the basis of the evidence led before me at this Preliminary Hearing, and having regard to parties' closing submissions.

87. In deciding whether or not to extend time, for it is accepted by the claimant that his ET1 claim form was presented late, there are a number of factors which I have taken into account in the balancing exercise that I have required to carry out.

88. The matters with particular significance in the balancing exercise were as follows:

The length of delay:

89. The delay was significant here. The acts complained of were September 2020, when the claimant failed to obtain the Production Supervisor job, March 2021, when he was unsuccessful in the Line Leader job, and termination of his employment on 9 April 2021, yet the ET1 claim form was not presented until 28 August 2021. It was not just a matter of days or weeks late. It was measured in months in respect of the last 2 of the allegations, and almost one year in respect of the September 2020 failure to obtain the Production Supervisor job.

The claimant's awareness of the relevant facts:

90. The claimant had knowledge of the factual matrix which supports his claims against the respondents by the spring of 2021. While he did not institute Tribunal proceedings arising out of the September 2020 failure to obtain the Production Supervisor job, within 3 months, or at all at that stage, it clearly lay there, in the background, and it came to the fore again, in spring 2021, when he was unsuccessful in the Line Leader job in March 2021. He then initiated his internal grievance on 5 April 2021.

Advice received:

91. The claimant had taken advice from both ACAS and CAB, and he was aware that there was a 3 month time limit for going to the Employment Tribunal.

Grievances:

92. Although a grievance will not automatically enable a claimant to say that it was not just and equitable to have presented their ET1 claim form in time, if the grievance process had exhausted the statutory time limit period, it could be a relevant factor.

93. The claimant's grievances in the present case were relevant in two ways here; as I see things, firstly, it reflected the claimants' desire to pursue an internal process with a view to trying to resolve differences with his employer. Although that course of action is no longer a mandatory precursor to proceedings in the Tribunal, it is still to be encouraged.

94. Secondly, and perhaps more importantly, the grievances served to crystallise the claimant's concerns, and so put the respondents, as his employer, on notice that the claimant considered that their treatment of him had been discriminatory, and victimisation, and he was intent on pursuing matters using the established internal procedures first. In short, it seems to me, it gave the respondents the opportunity to take steps to investigate and preserve evidence around the complaint's concerns.

Prejudice:

95. The above points about the grievances feed heavily into the issue of prejudice. The obvious prejudice to the claimant, if his claim is struck out, as time-barred, is that his claim against the respondents will be stopped in its tracks, and there will be no evidentiary Final Hearing. Put simply, his claim will be at an end. The respondents will, in that event, also still have hanging over them, allegations of racial discrimination, which they deny.

96. These were not claims which had been sprung on the respondents from the depths of history. They were complaints which were made in September 2020, and again in March / April 2021, as allegations of discrimination. While Mr Rochester made some oral submissions to me, about the effect of delay, there was no substantial basis for him to suggest that the cogency of the respondents' evidence had been affected, either documentary or oral. I am not at all satisfied that the respondents have shown any actual forensic prejudice. Nor am I satisfied that the cogency of evidence from either party is likely to be affected by the delay in bringing the claim. Delay in bringing the claim is a matter which will likewise impact on the claimant, and his ability to recall matters. It is not a matter which, in my view, impacts in any greater way on the respondents than it does on the claimant.

97. All of the arguments were finely balanced, but those set out in paragraphs 94 to 97 weigh more heavily in the claimant's favour. That is particularly so because, despite the respondent's timelines for dealing with an internal grievance, no satisfactory explanation was provided to me by Mr Rochester why it had taken the respondents almost 4 months (to 2 August 2021) to conclude the internal grievance procedure. That is a delay factor which weighs against the respondents, and in favour of the claimant, when it comes to the balancing exercise.

98. In all the circumstances, I am satisfied that an extension of time is justified in this case and all the claimant's allegations are allowed to proceed. The merits, or otherwise, of the claim and response are matters best addressed by the leading of witness evidence in the case, from both parties, being tried and tested at an evidential enquiry conducted at a Final Hearing of the claim and response, after both parties have put all their cards on the table.

99. As it was necessary to reserve my decision, a further telephone conference call Case Management Preliminary Hearing will be listed, and the parties will receive a Notice of Preliminary Hearing (Case Management) in early course.

100. It will be of assistance to the Tribunal if, for that further Hearing, both parties prepare and submit updated PH Agendas, superceding those presented to me at the previous telephone conference call Case Management Preliminary Hearing held on 29 October 2021. I will instruct the clerk to the Tribunal to issue fresh PH Agendas (Equality Act) for that purpose.

Employment Judge: Ian McPherson
Date of Judgment: 08 February 2022
Entered in register: 09 February 2022
and copied to parties