EMPLOYMENT TRIBUNALS

Claimant:	**Mrs K. Lowe-Bennett**
Respondents:	**(1) Goodmayes Primary School** **(2) Samina Jaffar**
Heard at:	**East London Employment Tribunal (by CVP)**
On:	**9 February and 9 April 2022**
Before:	**Employment Judge Massarella**
Representation	
Claimant:	Mr J. Sykes (Consultant lawyer)
Respondent:	Ms L. Veale (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

in relation to Case No. 3203347/2021 ('Case 1'):

1. **the claim form is rejected, pursuant to Rule 12(1)(f) of the ET Rules, because the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates;**

2. **if the number of the correct early conciliation certificate had been entered on the claim form, the Tribunal would have lacked jurisdiction to determine the claim, because it was presented out of time, in circumstances where it was reasonably practicable to present it in time;**

3. **because there is no longer a claim before the Tribunal, the application to amend Case 1 must fail;**

in relation to Case No. 3204838/2021 ('Case 2'):

4. with the exception of the claims of an alleged failure to provide references (paras 4.16 and 4.17 of the Grounds of Complaint), the remaining claims of direct race discrimination and harassment related to race are struck out: there is no reasonable prospect of a Tribunal finding that they amount to conduct extending over a period; and it is not just and equitable to extend time.

REASONS

The hearing

1. This open preliminary hearing took place over two days: the first, on 9 February 2022, remotely (by CVP): the second, on 9 April 2022, in person.

2. By the conclusion of this hearing, the parties had provided me with:

   2.1. a bundle of documents of 211 pages;

   2.2. a witness statement and supplementary witness statement (with exhibits) from the Claimant;

   2.3. a skeleton argument and supplementary skeleton argument on behalf of the Claimant, with supporting authorities;

   2.4. a skeleton argument and supplementary skeleton argument on behalf of the Respondent, with supporting authorities.

3. The Claimant gave evidence twice and was cross-examined both times by Ms Veale (Counsel for the Respondent). Both Ms Veale and Mr Sykes (the Claimant's representative) made further oral submissions on all issues in relation to both cases.

Procedural history

4. The Claimant presented her first case: 3203347/2021 ('Case 1') on 12 May 2021. The ET1 named a single Respondent: Goodmayes Primary School (now the First Respondent, R1).

5. At box 2.3 of the ET1 the number of the ACAS early conciliation certificate was entered: R118726/21/12 ('the 15 April 2021 certificate'). That number matched the certificate held on the Tribunal file, on which the dates of early conciliation ('EC') were given as 4 March 2021 to 15 April 2021. Under 'Prospective Respondent), the following appeared:

   'Samina Jaffar

   Goodmayes Primary School

   Castleton Road

   Ilford

   IG3 9RW'

6. The Claimant ticked the box for 'unfair dismissal (including constructive dismissal)' at box 8.1. She described a series of adverse incidents between September 2019 and her resignation, including excessive workload, withheld resources, false accusations and unequal treatment. At box 15 of the claim form, the Claimant explained that she had been unable to secure new employment, and alleged that this was because Ms Samina Jaffar, the Head Teacher of the school (now R2), had failed to provide references in a timely fashion. There was no reference to race as a factor in the treatment anywhere in the claim form.

7. At this stage the Claimant was unrepresented and completed the form herself.

8. On 18 June 2021 the Claimant issued another case: 3204838/2021 ('Case 2'), which was brought against R1 and Ms Jaffar as an individual Respondent. By this time, the Claimant was professionally represented by Mr Joe Sykes of Equity Law Solicitors.

9. There were two ACAS certificates associated with this case. In both cases, EC period started and ended on 15 June 2021 ('the 15 June 2021 certificates'). The numbers on the certificates tallied with the numbers entered into the ET1 at boxes 2.3 and 2.6. On one certificate, the Prospective Respondent was identified as:

    Goodmayes Primary School

    Castleton Road

    Castleton Road [*sic*]

    Ilford

    IG3 9RW

    On the other certificate, the Prospective Respondent was identified as:

    Samina Jaffar

    Goodmayes Primary School

    Castleton Road

    Ilford

    IG3 9RW

10. Case 2 included claims of direct race discrimination and harassment against both Respondents, including in relation to the termination of the Claimant's employment and alleged post-termination discrimination (failure to provide references).

11. On the same day (18 June 2021), an application to amend Case 1 was lodged. This document both clarified the existing allegations and sought to add new ones. It made clear that Case 1 was a claim of constructive dismissal, based on a cumulative breach of the implied term of trust and confidence.

12. The two cases were subsequently consolidated and listed for a four-day final hearing before a full tribunal on 14-17 March 2023.

13. A preliminary hearing for case management took place on 22 October 2021 before by EJ Manley, who listed this open preliminary hearing, with the following agenda.

'The preliminary hearing is to consider and determine, as far as it is just, the following preliminary and jurisdictional issues:

13.1. whether to grant the application to amend the claim under case number 3203347/2021, made on 18 June 2021 (the constructive unfair dismissal claim);

13.2. whether the race discrimination claim under case number 3204838/2021 has been brought within the three-month time limit (allowing for ACAS early conciliation), including consideration of whether there was conduct extending over a period so as to bring the claim in time;

13.3. alternatively, whether to strike out the race discrimination claim under rule 37 Employment Tribunal Rules of Procedure 2013 on the grounds that it was presented out of time and the Claimant has no reasonable prospect of showing there was conduct extending over a period so as to bring the claim in time;

13.4. if the race discrimination claims were not brought in time, whether it is just and equitable to extend time to allow those claims to proceed;

13.5. case management for the final hearing, including, but not limited to, agreeing a final list of issues, listing for hearing and making necessary case management orders.'

14. In the event, the hearing before me had to be adjourned, for reasons which I set out in an order sent to the parties on 9 February 2022, and which I reproduce here for convenience:

> 'Having heard from both representatives, and having considered the case of *Caterham School* Limited *v Rose* UKEAT/0149/19/RN, to which EJ Manley was referred at the previous PH, and which is binding on me, I concluded that the correct approach to this hearing is as follows.
>
> It is not for me to conduct a mini-trial to establish, as a matter of fact, whether the Claimant's claims in Case 2 do or do not amount to conduct extending over a period. I will not hear live evidence on that issue.
>
> It is, however, open to me to consider the Respondent's submission that the Claimant has no reasonable prospect of establishing that those allegations in Case 2, which are on their face out of time, amounted to conduct extending over a period and are linked with an in-time allegation. In addressing me on that question, the parties are not confined to the pleadings, but I must take the Claimant's case at its highest.
>
> If I find that there is no reasonable prospect of establishing conduct extending over a period, I may go on to consider whether it is just and equitable to extend time. I will hear evidence from the Claimant on that issue, but strictly confined to

the question of why she issued her claim when she did and not earlier, in the usual way. Mr Sykes (the Claimant's representative) may also make submissions on the question.

I considered that it was also open to me to leave that question to the final hearing, because EJ Manley left it open to me to decide, or not to decide, the issues she listed 'so far as is just'. I considered that formulation gave me a wide discretion.

I informed the parties that we would proceed as follows: evidence from the Claimant and cross-examination; the Claimant's amendment application in respect of case 1 and the Respondent's submissions in response; the Respondent application in relation to time limits in case 2 and the Claimant's submissions in response.

Mr Sykes had also identified a potential issue with the ACAS EC certificate in relation to the first case, but at first sight it appeared to be a matter capable of resolution by agreement. It was agreed that the representatives would do some research during the breaks and we would revisit the issue later in the day.

I proceeded to hear brief evidence from the Claimant in relation to the just and equitable issue; she was cross-examined by Ms Veale (Counsel for the Respondent). I then heard submissions on the amendment application to case 1.

It was at that point that we revisited the ACAS point which we had put to one side; a significant jurisdictional issue came into focus, which led to the adjournment of the hearing.

The primary limitation period for the unfair dismissal claim in case 1 ended on 30 March 2021. On that date, the parties were in early conciliation (EC). There were two EC processes. According to the analysis by Mr Sykes in his skeleton argument, the position was as follows:

1.1. the first was in respect of Ms Samina Jaffar and took place between 4 March 2021 and 15 April 2021; time for presentation was therefore extended by one month from that date to 16 May 2021 ('the first EC');

1.2. the second was in respect of Goodmayes Primary School and took place between 20 March 2021 and 6 April 2021; time for presentation was therefore extended to 7 May 2021 ('the second EC').

In fact, on my calculation (done after the hearing), time in respect of the second EC was extended to 6 May 2021, not 7 May 2021.

Although the first claim was against Goodmayes Primary School, the Claimant inserted the first EC number, i.e. the one relating to Ms Jaffar. That was not spotted by the Tribunal or the Respondent; it was raised for the first time by Mr Sykes at this hearing. He proposed that the anomaly could be cured by an order for substitution. I pointed out that there was no need for substitution, because the Claimant had identified the correct Respondent (she could not bring an unfair dismissal claim against Ms Jaffar).

The solution appeared to be to allow an amendment to the EC number, substituting the number of the correct EC certificate for the incorrect one. Very fairly, Ms Veale pointed out that this would seem to be permissible by reason of the 2020 amendment to the Tribunal rules which at rule 12(2ZA) provides:

> **the claim shall be rejected if the Judge considers that the claim is of the kind described in subparagraph (DA) of paragraph (1) unless the judge considers 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.**
>
> Unfortunately for the Claimant, the consequence of allowing such an amendment would be that she would have to rely on the second EC certificate, which only gave her an extension to 6/7 May 2021, with the result that her claim, issued on 12 May 2021, was presented five/six days out of time. The strict 'reasonably practicable' test would apply to any application for an extension of time.
>
> It was immediately apparent that we would have to adjourn: this was a new preliminary issue, going to the Tribunal's jurisdiction, of which the parties had had no notice. Mr Sykes needed an opportunity to take instructions from his client, who in turn may wish to lead supplementary evidence, and both parties needed to make additional submissions, having had the opportunity to research the technical point thoroughly.
>
> The earliest date which the Tribunal could offer for a resumed hearing was 8 April 2022. I decided that it should take place in person because we had had some audio difficulties during the CVP hearing (feedback and echo) which, although it did not prevent me from hearing the evidence and submissions did mean that I frequently had to ask for things to be repeated, which slowed our progress considerably.
>
> At the resumed hearing, I will hear evidence and submissions on the time point in relation to case 1. I will then go on to hear the time point in relation to case 2. Whether I am give an oral decision on all three matters on the day will depend on how quickly we move through the issues.'

Findings of fact

15. The Claimant was employed from 9 May 2013 (according to the Respondent; 6 May 2013 according to the Claimant), at various stages as: a teacher; lead practitioner for SEND; and Acting Assistant Head Teacher. She resigned on 30 October 2020. She worked her two-month notice period and her employment terminated on 31 December 2020.

16. She then issued the two cases, as described above.

17. In her supplementary witness statement, prepared after the jurisdictional difficulty relating to Case 1 came to light, the Claimant wrote this at paragraph 8:

> 'in terms of time to present the claim, the claim of unfair dismissal arose from dismissal on 31 December [2020]. I had three months less one day to present a claim of unfair dismissal, the time limit being 30 March [2021]. However, if that date fell within the EC period, the time limit for presenting the claimant would be extended by one month from the end of the EC period.'

18. The Claimant confirmed in cross-examination that this is what she understood at the time.

19. At paragraph 6 of the supplementary statement, she wrote:

> 'The inclusion of 'Samina Jaffar' looks like an error. The claim concerns unfair dismissal, and only an employer, not an individual in employment for an employer, can be sued in the Employment Tribunal for unfair

> dismissal. However, the certificate did include the name of my employer, Goodmayes Primary School. I note the certificate was issued by ACAS for the claim of unfair dismissal.'

20. At paragraph 10 she wrote:

> 'I also had a separate EC certificate dated 6th April 2021 […] which gave me one month from 7th April 2021, expiring 6th May 2021. This was solely in the name of Goodmayes Primary School.'

21. When asked, at the beginning of her evidence, whether she wished to amend this statement in any way, the Claimant corrected the dates in para 8 to those shown in square brackets above but made no other amendments.

22. When asked in supplementary questions in chief what she had put down as the Respondent's name in the 15 April 2021 certificate, the Claimant replied 'Samina Jaffar, Goodmayes Primary School […] I was looking at both claims, unfair dismissal and discrimination.' I understood this to mean that she believed she was naming both Respondents on the 15 April 2021 form.

23. I do not accept that evidence for a number of reasons.

24. In my judgement, it is clear from the fact that the Claimant began two separate processes that she did not believe that she was naming both prospective respondents on the 15 April form, but understood that each respondent was the subject of a separate process. She had already named Goodmayes as a prospective respondent when she contacted ACAS on 4 March 2021; it makes no sense that she would contact ACAS on 20 March 2021 to name it again; logically, she can only have contacted ACAS on 20 March to name Ms Jaffar.

25. I consider it far more likely that 'Goodmayes Primary School' was entered as the first line of Ms Jaffar's address. In order to name her as an individual prospective respondent, the Claimant had to give Ms Jaffar's address. She chose to give her professional address, of which 'Goodmayes Primary School' is the first line. I note that this was precisely the form in which Ms Jaffar was identified as a prospective respondent in the 15 June 2021 certificate, which the Claimant accepts relates solely to Ms Jaffar.

26. Finally, the Claimant's evidence on the second day of the hearing is inconsistent with the description Mr Sykes gave of the certificates in his original skeleton argument, submitted before the first day of the hearing, and before I had identified the limitation problem. At para 9 of his skeleton argument, he wrote:

> 'The Claimant entered only the EC number for the first EC, against Ms Jaffar (No. R118726/21/12) in the ET form at section 2.3. The number for the second EC, against the school (No. R123650/21/25) was omitted. Consequently, while the school is sued, the EC number is that of the headteacher. This raises the question of the significance of the wrong EC number in the Claim at section 2.3.'

I assume this was based on instructions and approved by the Claimant.

27. In cross-examination, the Claimant said that, after the 6 April certificate had been issued, ACAS contacted her to say that the school was showing some interest in settlement and had asked for a schedule of loss. In cross-examination, the Claimant said that, because after the 6 April certificate had been issued, she 'thought the EC process was still in progress. There was a 15 May deadline, but in the meantime there was a process continuing'. I do not accept that evidence. The Claimant confirmed in cross-examination that she understood that the issuing of the 6 April certificate ended the conciliation period with the school, and that she was aware that she had one month to bring a claim against it.

28. She did contact ACAS about the conciliation forms, but not until 11 May 2021, after the expiry of the time limit. She spoke on the phone with an ACAS officer, Ms B. Anderson, about various matters. There was a discussion about amending the 15 April certificate to show Goodmayes Primary School as the Respondent. The Claimant's handwritten note records a reference to the *Vento* bands and also contains the following:

> 'Call # ask ACAS to amend respondent and update system. Submit claim to protect my position.'

29. In an email of 12 May 2021, Ms Anderson wrote:

> 'Further to our discussions concerning your request for ACAS to correct the information supplied on your original notification form. I can confirm that Acas has exercised its discretion under Rule 2(3) of the Early Conciliation Rules of Procedure and that with effect from 12/05/2021 16:24. [*sic*]
>
> The information that will go out on your certificate will be as follows:
>
> […]
>
> Respondent:
>
> Goodmayes Primary School
>
> . [*sic*]
>
> Castelton Road
>
> Ilford
>
> IG3 9RW
>
> This amendment was made at your request, however if it is not correct, please contact Acas as soon as possible.
>
> At the conclusion of Early Conciliation, except where the dispute has been settled, Acas issues a certificate. Should a certificate be issued to you this will no record the above amendments.

30. However, although this may have been ACAS's intention, no such amended EC certificate was ever produced. Mr Sykes acknowledged that, as a matter of law, ACAS probably had no power to make such an amendment. Rule 2 Employment Tribunals (Early Conciliation: Exemptions and Rules of

Procedure) 2014, as amended in 2020, gives ACAS a power to amend the information provided by the Claimant, but only during the conciliation period. The conciliation period against both Respondents had ended in April (although that did not prevent ACAS continuing to assist the parties in attempts to settle the dispute).

31. In answer to supplementary questions from Mr Sykes, the Claimant said that the ACAS officer had initiated the discussion about amending the name of the prospective respondent on the certificate, because 'she wanted to make sure things were tidied up if I take the case further'. I find that implausible. I think it more likely that the Claimant initiated the discussion: that is consistent with the email from Ms Anderson, which states that the amendment was made 'at your request' (rather than 'at my suggestion').

32. The Claimant also stated that the ACAS officer advised her that she had to submit her claim by 15 May 2021 'because while conciliation was taking place, I do not want to miss the deadline – the deadline for submitting the claim to the ET office should the matter not be settled by 15 May'.

33. The Claimant confirmed that, between 6 April and 6 May 2021, she was neither incapacitated, nor away from home.

34. Turning to the race discrimination claim in Case 2, the Claimant accepts that she knew she could bring a race discrimination claim at all times, indeed in her oral evidence on the second day, she said that she 'had both claims in mind' when she issued Case 1. That is consistent with the fact that she went through EC separately with Ms Jaffar, in the knowledge that an unfair dismissal case could not be pursued against an individual. It is also consistent with the contemporaneous note she made of the conversation with ACAS on 11 May 2021, which refers to the *Vento* bands. Indeed, in cross-examination on the first day of the hearing, she volunteered that she discussed race discrimination with ACAS during the March/April EC periods. In my judgement, it is inconsistent with her evidence at para 15 of her first statement, in which she wrote: 'I did not include race discrimination in the first Claim because I had no legal advice, and did not know how to go about it'. I do not accept that evidence.

35. In that statement the Claimant went on to say that part of the reason why she did not include a claim of discrimination was because she was in a 'vulnerable and emotional state at that time'. There was no medical evidence before me to suggest that the Claimant was unable to bring a discrimination claim because of ill-health. I do not accept that she was unable to do so: she was able to go through the ACAS process, engage with settlement discussions and draft and lodge a Tribunal claim for unfair dismissal, albeit five days out of time. She need only have ticked the box for race discrimination and state in the grounds of complaint that she believed that her race was a factor in the alleged treatment. As it is, there is no reference to race in the ET1. I have concluded that the Claimant took a decision not to include a claim of race discrimination in Case 1.

The law

<u>Time limits in unfair dismissal cases</u>

36. S.111 Employment Rights Act 1996 ('ERA') provides (as relevant):

> **(1) A complaint may be presented to an employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.**
>
> **(2) Subject to the following provisions of this section, an employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal—**
>
> > **(a) before the end of the period of three months beginning with the effective date of termination, or**
> >
> > **(b) 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.**

37. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

38. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

39. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.'**

40. Where the Claimant makes a mistake, May LJ held in *Palmer*:

> **'Where a mistake is alleged, it is the reasonableness of such ignorance or mistake that is in the end determinative of whether it is reasonably practicable to make a complaint in time.'**

41. If the Tribunal finds at any time in the proceedings that it does not have jurisdiction, it must refuse to hear the claim. In *Rogers v Bodfari (Transport) Ltd* [1973] ICR 325, NIRC, it was only at the remedy hearing, after the

claimant had succeeded at trial, that the respondent raised the limitation point. The NIRC held that the Tribunal had to dismiss the claim for lack of jurisdiction. The decision was approved by the CA in *Dedman*.

Time limits in discrimination cases

42. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

43. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

44. In *Caterham School Limited v Rose* UKEAT/0149/19/RN, the EAT held at [60-66] that if the Tribunal considers at a PH that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed conduct extending over a period together with other incidents, such as to make it in time, that complaint may be struck out. But if it is not struck out on that basis, that time point remains live. By contrast, a determination of whether, substantively, there is conduct continuing over a period, cannot be reached at a PH on the basis merely of consideration of whether there is a *prima facie* case on the pleadings. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence.

45. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

46. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There 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]).

47. 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]).

The ACAS early conciliation process

48. The three-month time limit for presenting a discrimination claim is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

49. Rule 2 Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) 2014, as amended in 2020, provides:

> **[…]**
>
> **(2) An early conciliation form must contain—**
>
> **(a) the prospective claimant's name and address; and**
>
> **(b) the prospective respondent's name and address.**
>
> **(3) ACAS may reject a form that does not contain the information specified in paragraph (2) or may, at any point during the period of early conciliation, contact the prospective claimant to correct the error or obtain any missing information.**
>
> **(4) If ACAS rejects a form under paragraph (3), it must return the form to the prospective claimant.**

50. Rule 12 of the ET Rules provides (as relevant):

> **12.—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—**
>
> **[…]**
>
> **(da) 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;**
>
> **[…]**
>
> **(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.**
>
> **[…]**
>
> **(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers 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.**
>
> **(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim.**

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

51. Rule 13 provides:

> **(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—**
>
> **(a) the decision to reject was wrong; or**
>
> **(b) the notified defect can be rectified.**
>
> **[…]**
>
> **(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.**

52. In *Caspall v Eon Control Solutions*, UKEAT/0003/19/JOJ, the ET was concerned with two claims lodged by the Claimant. The first gave an incorrect ACAS EC number - relating to a different Claimant and a different claim; the second gave the number of an EC certificate that was invalid. Neither had been rejected by the ET under Rule 10, nor had the claims been referred to an Employment Judge under Rule 12. At a PH before the ET, the Claimant applied to amend his claim to correct the ACAS EC number. The ET allowed the application, seeing this as consistent with the overriding objective and the general principle of access to justice given that this was a minor amendment to rectify a technical error. At the time there, was no discretion not to reject the claim, such as now exists in Rules 12(2ZA) and 12(2A) and the EAT held that Judge was obliged to reject the claim. Although such discretion now exists, the case remains authority for the principle that, where a case is rejected, there is no longer a claim before the ET, and the Judge has no power to allow the Claimant to amend. Further, at [54], the EAT made the following observations as to the consequences of rejection:

> **'[…] 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 (r 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 rr 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), 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 […]'**

Conclusions: whether Case 1 should be rejected

53. Mr Sykes' initial submission was that that I have a general power to amend the name of a respondent in an ET1. However, since the name of the Respondent on this ET1 is correct, it would make no sense to do so.

54. Mr Sykes then relied on the discretion in Rule 12(2A) to accept the claim where there has been 'an error in relation to a name or address'. However, I have already concluded that, insofar as there was an error, it was not an error in relation to the name: the name on the claim form was the correct name because the Claimant was bringing an unfair dismissal claim against Goodmayes Primary School, her employer; the name on the ACAS certificate was the correct name because it related to an early conciliation period between the Claimant and Ms Jaffar. The error the Claimant made was more fundamental: she relied on the wrong ACAS certificate altogether. In my judgement, that is not an error which can be excused by Rule 12(2A).

55. For the avoidance of doubt, I agree with Mr Sykes that the power to correct the number of the ACAS certificate, provided by Rule 12(2ZA), is not applicable in this case (contrary to my understanding at the end of the first day of the hearing). It only applies when sub-para 12(1)(da) applies, i.e. when the number of the ACAS certificate and the number entered into the ET1 do not match. That was not the case here.

56. Because neither of the discretions available to the Tribunal to excuse the fact that the name on the EC form does not match the name on the ET1 applies, I must reject the ET1 and order that it be returned to the Claimant.

57. If I am wrong about that, and Rule 12(2A) does apply in these circumstances, I do not consider that it is in the interests of justice to accept the claim because it would effectively allow the Claimant to circumvent the strict time limit provisions in unfair dismissal cases by reliance on an ACAS certificate which was never intended to be used in relation to a claim of unfair dismissal.

Conclusions: the consequences of rejection; the reasonable practicability of issuing Case 1 in time

58. In principle, it would of course be open to the Claimant to resubmit the claim form and apply for a reconsideration. In some circumstances, she might be assisted by the fact that that the error had not been identified by the Tribunal at an earlier stage, thereby giving her an earlier opportunity to rectify it. Unfortunately, as Ms Veale pointed out at the end of the first day, in these circumstances she would not be so assisted, because the Tribunal's failure cannot account for the Claimant's delay between 6 May 2021 (the deadline for submitting the claim) and 12 May 2021 (the date on which it was submitted).

59. Of course, if the claim were now resubmitted, the Tribunal would be obliged to treat the date on which it was resubmitted as the date of presentation, and the extension of time the Claimant would be seeking would be even longer.

60. In case I am wrong in my conclusions above, and because I have heard detailed submissions on the 'reasonably practicable' issue in relation to the delay in May 2021, I record my conclusions here.

61. Looking at the position as it was on 16 April 2021, the Claimant had two EC certificates in her possession: one for the school (issued on 6 April), one for Ms Jaffar (issued on 15 April). She had ample time to present her claim of unfair dismissal in time, by 6 May 2021, using the (correct) 6 April certificate. The Claimant had all the information she needed: she knew that the only possible respondent to an unfair dismissal case was the employer; that is why

she named the Respondent (and not Ms Jaffar) in her ET1; she knew that she had an ACAS certificate for the Respondent, and that the time limit in relation to that certificate was 6 May 2021. Yet she did not present her claim until 12 May 2021, using the (incorrect) 15 April certificate.

62. Whatever the rights and wrongs of the ACAS officer's conduct on 11 May 2021, no amendment to the 15 April certificate was issued and the time limit can only be calculated by reference to the 6 April certificate.

63. It seems to me that there are only three possible explanations for what the Claimant did.

64. The first is the explanation advanced by the Claimant in cross-examination on the second day of the hearing (but, I note, not on the first), which is that she believed the two EC processes were 'all one process'. I do not accept that she held that belief at the time: if she had, she would not haven sought to amend the 15 April 2021 certificate. In answer to questions from Ms Veale, the Claimant accepted that she knew she had one month from the date on which the certificate was issued. I am satisfied that she understood the significance of the difference between the two processes.

65. The second possible explanation is that the Claimant simply missed the deadline and, when she realised what had happened, used the 15 April certificate, knowing it to be the incorrect one, in the hope that it might solve the problem. If I thought the latter was the case, the Claimant acted wrongly and I would have had no hesitation in finding that conduct to be unreasonable.

66. The third possible explanation, which I accept, is the explanation Mr Sykes advanced on the first day of the hearing, before the time limit problem had been spotted: that the Claimant simply muddled up the two certificates, and thought that she had until 15 May 2021.

67. The effect of that is, unfortunately, that the Claimant acted carelessly. That is not generally regarded as a valid explanation for issuing a claim out of time. It was the Claimant's responsibility to ensure that she issued her claim in time, before 6 May 2021, entering the correct ACAS certificate number. That was not an onerous responsibility, but she did not discharge it and, in my judgement, she did not act reasonably.

68. Mr Sykes submitted that, although it was practicable for the Claimant to issue her claim in time, it was not *reasonably* practicable for her to do so, because of the advice ACAS gave her (on 11 May 2021) that the ACAS certificate would be amended and she had until 15 May 2021 to issue her claim. He took me to a number of authorities in which claimants had been given wrong advice by non-lawyers, including ACAS, where it was held that, as a result, it was not reasonably practicable to present the claim in time.

69. I accept Ms Veale's submission that none of those authorities assist the Claimant because the events of 11 May 2021 occurred *after* the expiry of the relevant time limit. The fact that the ACAS officer may have given the Claimant wrong advice then is irrelevant.

70. Mr Sykes also argued that 'it was practicable to present the claim on 6 May 2021, but not reasonably practicable, because it was unreasonable to

terminate conciliation while ACAS held out the prospect of settlement of the potential proceedings.' I also reject that argument. Early conciliation and general settlement discussions are different processes. Discussions may well have continued into May, but early conciliation had ended in April. As I have already found, the Claimant knew this, and knew that she had one month from the date on the certificate to issue her claim.

Conclusion: the application to amend Case 1

71. Because the Tribunal has no jurisdiction to hear Case 1, both Mr Sykes and Ms Veale agreed that the amendment application must fail because there is no case capable of being amended. Mr Sykes invited me to determine the application, on the basis that, if I ruled Case 1 out of time, and the Claimant were successfully to appeal my decision, the parties would know what my views as to the amendment application would have been. I do not consider that to be a proportionate use of Tribunal time. If there is a successful appeal, the Claimant may renew her application, at which point it can be determined.

Conclusion: time limits in Case 2

72. The post-termination allegations about the alleged failure to provide references are in time. All the allegations of acts of discrimination during the Claimant's employment, including the termination of her employment, are out of time. I accept Mr Sykes' submission that the termination on 31 December 2020, should be treated as an act in its own right, even though it came about as a result of the Claimant's own decision to resign and give notice. Although there may be an argument that 'conduct' should be interpreted as meaning an act or omission done by the Respondent, in which case the last alleged conduct was 25 September 2020 (para 4.12 of the Grounds of Complaint), I have not proceeded on that basis in reaching my conclusion below.

73. Taking the view which is more favourable to the Claimant, there is still a gap of just over a month between the effective date of termination and the date, 4 February 2021, on which the Claimant asked for a reference and (she alleges) Ms Jaffar failed to provide one.

74. I have considered carefully whether the Claimant has reasonable prospects of establishing that there was 'conduct extending over a period' during that gap. I have concluded that she does not. Because there was no relationship between the Claimant and the school/Ms Jaffar, let alone an employment relationship, between 31 December 2020 and 4 February 2021, there cannot have been an 'ongoing situation' or 'continuing state of affairs', for which the Respondent was responsible (to use the language of *Hendricks*) during that period. In my judgement, the only permissible analysis is that, whatever situation/state of affairs may have existed during the Claimant's employment, it came to an end with the employment. The Claimant had, by her resignation, chosen to remove herself from the situation.

75. Taking the Claimant's case at its highest, which is that there was a malicious campaign by Ms Jaffar against her during her employment, and that Ms Jaffar continued that campaign by failing to give references, Mr Sykes argued that the evidence of malice would be sufficient to bridge the gap and establish conduct extending over a period. I disagree. If one asks what 'conduct'

occurred during the gap, the answer can only be none: there was neither act nor omission between the two periods. If the Claimant had not asked Ms Jaffar for a reference, there would have been no second period at all. The most the Claimant might establish, if her evidence is accepted, is that Ms Jaffar continued to harbour malicious feelings towards her in the interim; but feelings are not conduct, and the concept of 'conduct extending over a period' does not, in my judgement, apply on these facts. The only possible conclusion is that there are two distinct periods, pre-31 December 2020 and post-4 February 2021.

76. For these reasons, the Claimant requires an extension of time, if her pre-termination claims are to go forward.

77. The delay in bringing the claims is very substantial indeed: the claims are between three and fifteen months out of time. In my judgement, no satisfactory explanation has been advanced for the delay. I have already rejected the Claimant's explanation that she was unable to bring a discrimination because of her state of mind/health. The Claimant knew she could bring a discrimination claim, and could have brought it in time, but chose not to do so.

78. As for the balance of prejudice, plainly there is significant prejudice to the Claimant, if time is not extended. However, that prejudice is mitigated by the fact that she has post-termination claims which, if successful, might lead to significant compensation, certainly in respect of injury to feelings, and potentially also in relation to loss of chance of employment.

79. Mr Sykes originally argued on the Claimant's behalf that there would be no prejudice to the Respondent, if time were extended, because the underlying factual allegations were the same as those set out in Case 1. Of course, because Case 1 has been struck out, that argument falls away. There would be very substantial prejudice to the Respondent in allowing these claims to go forward: they are at best some three months out of time, at worst some eighteen months out of time. Extending time in relation to them would greatly increase the ambit of the hearing and would inevitably put the Respondent to additional costs, which it would be unlikely to recover. There would, in my judgement, also be an impact on the cogency of the evidence, given the passage of time.

80. I reminded myself that time limits in discrimination cases are strictly enforced and that the burden is on the Claimant to persuade me that they should be disapplied. Weighing in balance the fact that the Claimant was aware of her rights, and of the relevant time limits, the length of the delay and the absence of a good explanation for it, and my conclusions as to the balance of prejudice, I have concluded that it would not be just and equitable to extend time in relation to the pre-termination claims.

81. Although only the second of the two allegations in relation to the failure to provide a reference (para 4.17 in the Grounds of Complaint) is clearly in time, I am satisfied that it is reasonably arguable either that there is conduct extending over a period as between that allegation and the earlier alleged failure to provide a reference (para 4.16 of the Grounds), or arguable that it would be just and equitable to extend time. If there was such a failure, it would constitute an omission and the Tribunal would have to consider when the

claim crystallised, as to which I did not hear evidence; further, the Tribunal may consider the shorter delay to be relevant to the just and equitable question. I leave those questions to the Tribunal which hears the full merits hearing.

Next steps

82. It appears to me that a shorter listing is required to deal with the remaining claims. However, because I did not hear representations as to this, the parties shall write to the Tribunal no later than 14 days after this judgment is sent out, setting out their views as to the length of the hearing and proposing directions for the preparation for that hearing, agreed if possible.

Employment Judge Massarella

21 April 2022