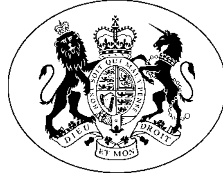

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Hussen	**v**	AvePoint UK, Ltd

Heard at: London Central (OPH By CVP) **On**: 14 November 2022

Before: Employment Judge B Beyzade

Representation

For the Claimant: In person
For the Respondent: Mr M Islam-Choudhury, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1.1. the claimant's claim for unfair dismissal having been withdrawn by the claimant, is dismissed under Rule 52 of the Rules contained in Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.*

1.2. The claimant's claim presented under claim number 2202827/2022 is rejected under Rules 12(1)(c) and 12(1)(d) of Schedule 1 of *The Employment Tribunals (Constitution and Rules of Procedure)*

Regulations 2013. This is because the Claim Form does not contain an ACAS Early Conciliation certificate number and is made on a Claim Form which contains confirmation that one of the ACAS Early Conciliation exemptions applies, whereas an ACAS Early Conciliation exemption does not apply. The Tribunal therefore has no jurisdiction to determine the claimant's age, race and religion or belief discrimination and notice pay, holiday pay, arrears of pay, breach of contract and dismissal for the reason or principal reason that the claimant made a protected disclosure. Accordingly, the claimant's Claim Form shall be returned to the claimant.

REASONS

Introduction

1 The claimant presented complaints of age, race and religion or belief discrimination and notice pay, holiday pay, arrears of pay (relating to commission payments paid on target earnings), breach of contract (wrongful dismissal) and dismissal for the reason or principal reason that the claimant made a protected disclosure (the claimant says he made protected disclosures to Mr N Fitzpatrick in relation to alleged discrimination and breaches of the respondent's legal obligations and thereafter he was dismissed by the respondent purportedly due to performance concerns). The respondent denied the claimant's claim.

2 An Open Preliminary Hearing ("OPH") was held on 14 November 2022. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with the OPH by CVP, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

3 The respondent prepared and filed an Index and Preliminary Hearing Bundle in advance of the hearing consisting of 119 pages.

4 The claimant sent an index of documents to the Tribunal titled '*claimant's revised list of documents in relation to jurisdictional points only for preliminary hearing scheduled for 14 November 2022*' and he said the documents were contained in multiple single email attachments that were sent to the Tribunal. The claimant stated that he sent the index and documents to the respondent by email on 29 October 2022, and he re-sent them on 11 November 2022.

5 I considered the claimant's application made at this hearing to rely on further evidence included in his supplementary index and documents. Upon the respondent objecting to pages 16 to 22 and 32 being adduced (and the respondent's representative not being able to access or identify the documents at pages 24 and 31) and having heard detailed submissions from both parties, I refused the claimant's application to adduce and be able to rely on those documents. The claimant did not provide any good or satisfactory explanation for his failure to provide the documents in question within the Tribunal's deadline or in relation to the timing and manner of his application. It was not in accordance with the overriding objective for the documents to be introduced into evidence at this late stage. I was satisfied that parties had ample opportunity to exchange documents and detailed directions were set down by Employment Judge Snelson. I was not persuaded that the documents the claimant is seeking to rely upon were relevant in terms of the issues before me at this hearing or that the claimant's application and approach is proportionate. The claimant confirmed during his submissions that he spoke to ACAS between 01 and 03 August 2022 and they confirmed to him that they had no record of the claimant or the respondent contacting them. There are also issues with the format of the documents provided by the claimant (by way of example they were not in PDF format, they were provided as multiple individual attachments and they were not presented in an orderly manner or paginated).

6 I advised that the claimant could rely on the remainder of the documents in his index (which the respondent's representative said were included in the Hearing Bundle that the respondent had prepared), and that the claimant must refer me to any documents he wanted me to consider during his evidence and submissions.

7 The claimant disclosed a number of documents to the respondent consisting of email correspondences on 29 October 2022. The relevant emails appear at pages 106 – 112 of the respondent's Hearing Bundle. The respondent objected to the inclusion of those documents in the Hearing Bundle. The claimant sent those emails significantly after the deadline for exchange of documents, and there was no good or sufficient explanation from the claimant in relation to the delay. The emails do not seem to relate to Ms F Cooper who is referenced in the claimant's position statement as the person who (it is alleged) had told him that the respondent had contacted ACAS. The claimant did not provide a witness statement in respect of this hearing, so it is not clear how and when the emails were obtained and what their relevance is to the issues before me today. In those circumstances I am not persuaded that it is in accordance with the overriding objective to grant permission for the emails at pages 106-112 to be included in the evidence bundle for this hearing.

8 The claimant complained that there are relevant recordings that the respondent may have in their possession which they have not disclosed. I advised the claimant that if this is an argument the claimant wishes to pursue, he must make this point to the respondent's witnesses where relevant, and he may make this point during his oral submissions and he may also say what inference he is inviting the Tribunal to draw as a consequence.

9 The claimant accepted that he did not have two years' service at the effective date of termination of his employment. I referred the claimant to section 108(1) of the *Employment Rights Act 1996* ("ERA 1996"), and I invited him to consider this. The claimant advised me that he had limited legal knowledge, he did not intend to make a claim for ordinary unfair dismissal, and that he wished to withdraw that claim. Upon the respondent's application (and the claimant not objecting), and upon the claimant's withdrawal of his unfair dismissal claim pursuant to section 94 of the ERA 1996, I dismissed the claimant's claim for unfair dismissal under section 94 of the ERA 1996 pursuant to Rule 52 of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("ET Rules").

10 At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

10.1 Does the Tribunal have jurisdiction to consider the claimant's claims? In particular:

(a) Has the claimant complied with the requirement in section 18A(1) of the Employment Tribunals Act 1996?

(b) If not, is there a valid exemption that the claimant can rely upon from those requirements?

(c) If there is an exemption or if the claimant has complied, were the claimant's claims brought within the relevant statutory time limits?

These matters were listed to be determined at today's hearing following a Closed Preliminary Hearing that took place before Employment Judge Snelson by CVP on 05 August 2022.

11 The respondent produced a document titled '*respondent's detailed grounds re: jurisdiction skeleton submissions for PH on 14 November 2022*'. Although this was prepared and sent to the claimant on 16 August 2022, a further revised version of this was sent on 28 October 2022 (the changes were tracked and underlined in red). The claimant sent a further document to the Tribunal titled '*claimant's response to: respondent's detailed grounds re: jurisdiction skeleton submissions for PH on 14 November 2022 Updated Skeleton – 10 November 2022*'.

12 I heard oral evidence from the claimant. The claimant did not produce a witness statement. I considered the claimant's pleadings, his position statement, and any other documents to which he referred me to during his oral evidence.

13 I also heard evidence from Ms F Cooper, who currently works as the Director of People Operations EMEA for the respondent and who had produced a written witness statement.

14 I was also provided with written witness statements by the respondent's representative from Mr T Borg (IT Manager of the respondent), Ms A Iosup (HR Business Partner UK & BeNeNord of the respondent), and Mr N Kilpatrick (Chief Strategy Officer at Askrevill.com Limited). The claimant applied to exclude their evidence as their statements were not provided by 21 October 2022 pursuant to Employment Judge Snelson's orders. The claimant stated that this has caused him prejudice as he has not been allowed to produce his own documents in response to these. The respondent's representative confirmed that those three statements were prepared and sent to the claimant on 10 November 2022, and they related to the documents provided by the claimant to the respondent on 29 October 2022 which appeared at pages 106 – 112 of the Hearing Bundle. The respondent's representative stated that in Mr Fitzpatrick's witness statement he denied sending the relevant emails, and that following an investigation in which Mr Borg participated, Ms Iosup investigated the emails in question, and she could not locate these. The respondent's representative conceded that it will not be necessary to rely on those three witnesses in the event that the emails at pages 106-112 are excluded from the Bundle. In light of my decision not to give permission for the documents in question to be adduced in evidence (please see above), and in the absence of a witness statement from the claimant (and having considered the pleadings and the position statement), I determined that it was unnecessary to hear evidence from Mr Borg, Ms Iosup, or Mr Kilpatrick. I considered the overriding objective (Rule 2 of the ET Rules).

15 During the hearing, the claimant represented himself and the respondent was represented by counsel.

16 Both parties made oral submissions.

Findings of Fact

17 On the basis of the documents and witness evidence the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

18 From 1 February 2021 until 17 February 2022 the claimant was employed by the respondent, AvePoint UK, Ltd, as a Senior Account Executive.

19 On 20 January 2022 the respondent sent a letter to the claimant stating: *“Please allow this letter to serve as a written notification that effective today, 20th January 2022, your employment with AvePoint UK, Ltd, hereby terminates. As you are aware, your contract of employment provides for 4 weeks’ notice period, which means that your final day of employment will be 17th February 2022. However, instead of requiring you to work your notice period, the Company has decided to place you on garden leave with immediate effect in accordance with clause 14 of your contract of employment.*

The decision is based on your performance and achievement in 2021, your overall attainment for the year being 0%, and 0% Forecast to be attained in your first quarter of 2022.”

20 On 18 May 2022 the claimant lodged an ET1 Form (the claim was lodged at 00.06am on 18 May 2022 although the confirmation email indicated that the claimant submitted his claim on 17 May 2022) with the Tribunal claiming unfair dismissal, religion or belief discrimination, age discrimination, notice pay, holiday pay, arrears of pay, other payments (commission), breach of contract (wrongful dismissal), and dismissal for the reason or principal reason that the claimant made a protected disclosure.

21 The claimant did not commence ACAS Early Conciliation. In section 2.3 the claimant ticked the relevant box to indicate he did not have an ACAS Early Conciliation certificate number and that this was because his employer had already been in touch with ACAS.

22 On 20 June 2022 the Tribunal issued correspondence advising “*Your claim has been accepted, but please note that you must be able to provide evidence that your employer has indeed been in touch with ACAS about your claim. If that proves not to be the case, the claim will then be rejected later on*.” The claimant was further advised that if he was in doubt he should contact ACAS to obtain his own certificate as soon as possible.

23 By an ET3 and Grounds of Resistance sent to the Tribunal on 14 July 2022 the respondent defended the claim. Paragraph 4 of the Grounds of Resistance

stated that the claimant did not commence ACAS Early Conciliation as he was required to do by 16 May 2022 pursuant to section 18A of the Employment Tribunals Act 1996 ("ETA 1996"). Paragraph 5 of the Grounds of Resistance averred that the respondent had not contacted ACAS about the claim and therefore the exclusion in section 18A(7) and 18B of the ETA 1996 did not apply. It was submitted that in accordance with Rule 10(1)(c) of the ET Rules, there is an obligation on the Tribunal to reject the claim by reason of section 18A(8) of the ETA 1996, and the claim (which was defective) should be struck out. There were also issues of time bar raised and it was contended that the claim should have been submitted by 16 May 2022.

24 The claimant sent a document to the Tribunal titled '*Position Statement*' dated 30 July 2022, in which the claimant stated that he submitted his claim on 17 May 2022 and he maintained that

"*The claimant had been told by the Respondent that they had contacted ACAS and they will pursue this to the Certificate stage.*

The Claimant has been told this over the telephone by Faye Cooper, the Claimant called Faye Cooper using the mobile telephone provided by the Respondent. The phone has been requested to be returned to the AvePoint.

The Claimant has also been told this through email."

25 A Closed Preliminary Hearing took place on 05 August 2022 during which the issues set out in paragraphs 1 and 7 of the Case Management Orders (including all jurisdictional challenges) was listed to be investigated and determined at today's OPH. It was noted that the claimant advised the Tribunal that he had access to advice from his trade union. Pursuant to the orders made at that hearing the respondent prepared a Skeleton Argument dated 16 August 2022 detailing their jurisdictional challenges which included the claimant's failure to commence ACAS Early Conciliation, the claimant not possessing two years' qualifying service that was necessary to bring an ordinary unfair dismissal claim, and issues relating to time bar.

Observations

26 On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

27 As I noted above, the timeline of events including the claimant's dates of employment and the date he commenced his claim were confirmed in the documents within the Hearing Bundle.

28 I was not satisfied that a telephone conversation took place between the claimant and Ms Cooper during which it was confirmed to him that the respondent had contacted ACAS and they will pursue this to the Certificate stage. There was no reference to any conversation between the claimant and Ms Cooper in the claimant's ET1 Form, and the first time this was mentioned was in his position statement. The claimant did not produce a witness statement providing the details of any alleged conversation. There were also notable inconsistencies in the claimant's evidence and documents. The claimant's ET1 Form stated that his effective date of termination was 28 February 2022 whereas he accepted during his evidence that this was not correct (the correct date should have been 17 February 2022). Additionally the claimant said during his oral evidence that he presented his claim on 16 May 2022, although his position statement indicated that this was sent to the Tribunal on 17 May 2022. This was also at odds with the confirmation email he received from the Tribunal and there was no reason provided to explain these inconsistencies. I preferred Ms Cooper's evidence which was on the whole clear and consistent with the documents that were before the Tribunal.

29 Ms Cooper indicated that if she had spoken with the claimant on the telephone the call would not have been recorded as the respondent only records training sessions conducted over Teams. The claimant did not produce a copy of any recording and did not have any evidence to indicate that the alleged call was in fact recorded.

30 Furthermore, I was not satisfied that the respondent contacted ACAS. The claimant confirmed that he contacted ACAS between 01 and 03 August 2022 and they advised him that there was no record of the respondent having contacted them. There was no indication that there was any correspondence between the respondent and the Tribunal in any of the correspondences that were before the Tribunal (and that I was referred to). The claimant did not provide any or any sufficient details about this in his position statement and there was no witness statement prepared by him detailing this matter.

Relevant law

31 To those facts, the Tribunal applied the law –

32 Rule 8 of Schedule 1 of *The Employment Tribunals Rules of Procedure 2013, as amended* ("the Rules") reads as follows:

"*Presenting the claim*

8.— (1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule."

33 In England and Wales, the relevant practice direction is the *Employment Tribunals (England & Wales) Presidential Practice Direction – Presentation of Claims* dated 02 March 2020. Under paragraph 5 of that Practice Direction, a completed claim form may be presented to a Tribunal in England and Wales (1) online by using the online form submission service provided by His Majesty's Courts and Tribunal Service (2) by post to the Employment Tribunals Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG (3) by hand to a Tribunal office listed in the schedule to the Practice Direction.

34 Rule 6 of the Rules reads as follows:

"Irregularities and non-compliance

6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings.

In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—

(a)waiving or varying the requirement;

(b)striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c)barring or restricting a party's participation in the proceedings;

(d)awarding costs in accordance with rules 74 to 84."

35 Rule 10 of the Rules requires the Tribunal to reject a claim in certain circumstances:

"10.— (1) The Tribunal shall reject a claim if—

(a) it is not made on a prescribed form;

(b) it does not contain all of the following information— (i) each claimant's name; (ii) each claimant's address; (iii) each respondent's name; (iv) each respondent's address

[; or (c) it does not contain one of the following— (i) an early conciliation number; (ii) confirmation that the claim does not institute any relevant proceedings; or (iii) confirmation that one of the early conciliation exemptions applies.] (b)

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection."

36 Rule 12 of the Rules states:

"Rejection: substantive defects

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—

(a) one which the Tribunal has no jurisdiction to consider;

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;

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

(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

[(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;] (a)

(e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or

(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.] (b)

(2) 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-paragraphs (a) [, (b), (c) or (d)] (c) of paragraph (1).

[(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.] (d)

[(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](e) error in relation

to a name or address and it would not be in the interests of justice to reject the claim.](f)

(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."

37 Section 18A ETA 1996, reads as follows:

"*18A Requirement to contact ACAS before instituting proceedings*

(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.

This is subject to subsection (7).

(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.

(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(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.

(5) The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.

(6) In subsections (3) to (5) "settlement" means a settlement that avoids proceedings being instituted.

(7)A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

The cases that may be prescribed include (in particular)—

- *cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;*
- *cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;*
- *cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.*

(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)."

38 In *Adams v British Telecommunications Plc UKEAT/0342/15/LA*, Mrs Justice Simler held that if the required minimum information is not provided within the Claim Form, the Tribunal has no option but to reject the claim unless that omission is capable of being excused by some other rule.

39 In *E. ON Control Solutions Limited v Caspall [2020] ICR 552*, HHJ Eady (as she was then) held that a failure to include an accurate Early Conciliation certificate number fell within the scope of Rule 12(1)(c) and that, in such circumstances, a Tribunal was required to reject claims where such an inaccurate number was included in the form. Further Rule 6 of the Rules does not provide discretion to an Employment Judge to disregard a mandatory rule.

40 In the case of *Ash v. ISS Facility Services Limited UKEAT/0098/20/00*, the claim was rejected by the Employment Judge because the claimant did not include an Early Conciliation certificate number on his claim form. Instead, he ticked a box to indicate that an exemption to having a certificate applied in his case. The claimant had in fact obtained a certificate prior to issuing his claim but had sent it to the respondent and a copy had not been retained on his form. The copy sent to the respondent had gone into an email 'junk' folder. He then requested a copy of the certificate, but he was instead issued with a second certificate. In dismissing the claimant's appeal, the EAT held that the Employment Judge had no option but to dismiss the claim and did not err in law.

41 I have also had regard to the judgment of His Honour Judge Shanks sitting in the Employment Appeal Tribunal in *Pryce v Baxterstorey Limited [2022] EAT 61*. The EAT (HHJ Shanks) held that:

a. the only way to rectify an error of starting Tribunal proceedings before there is an ACAS early conciliation certificate in existence is to start them again after the ACAS certificate has been obtained using the standard claim form (paragraph 14);
b. Rule 8 requires a claim to be presented by sending a completed ET1 claim form to the Tribunal – this requirement cannot be waived by either the Tribunal or the respondent (paragraph 15); and
c. Rule 12 does not contain any suggestion that the error of putting in an ET1 claim form without a certificate having been obtained is one of the specific errors subject to the procedure under Rule 13.

Unlawful deduction from wages – statutory time limits

42 Section 23 of the ERA 1996 relates to a complaint made relating to deduction from an employee's wages in contravention of section 13 of the ERA 1996 and it provides as follows:

*"(2)Subject to subsection (4), an **[**employment tribunal**]** shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
(3)Where a complaint is brought under this section in respect of—
(a)a series of deductions or payments, or
(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
[*(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).**]***
*(4)Where the **[**employment tribunal**]** is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the*

complaint if it is presented within such further period as the tribunal considers reasonable."

Breach of contract – statutory time limits

43 Under Articles 3 and 7 of the *Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order")*:

"3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b)the claim is not one to which article 5 applies; and
(c)the claim arises or is outstanding on the termination of the employee's employment."

"Time within which proceedings may be brought
7. An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—
(a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
(b)where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

Unfair dismissal – statutory time limits

44 Section 111 (1) of the ERA 1996 sets out that a claim may be made to a Tribunal against an employer by any individual that he was unfairly dismissed by his employer.

45 Section 111 (2) of the ERA 1996 provides that "*an employment tribunal shall not consider a complaint under the 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."

46 Section 97 (1) (b) of the ERA 1996 identifies the "effective date of termination" in relation to an employee whose contract of employment is terminated without notice, as meaning the date on which the termination takes effect.

Burden of proof – time limits 'not reasonably practicable'

47 The burden rests on the claimant to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time *(Porter v Bandridge Ltd [1978] ICR 943, CA) at 948*).

Statutory time limits under the Equality Act 2010

48 Section 123 of the Equality Act 2010 ("EA 2010") provides for time limits in respect of the presentation of complaints by reference to the protected characteristics of age, race and religion or belief.

49 I had regard to the provisions of Section 123 and considered the provisions of Section 140B of the EA 2010 which serve to extend the time limit under Section 123 of the EA 2010 to facilitate conciliation before institution of proceedings.

50 Subsection (1)(b) of Section 123 of the EA 2010 provides that notwithstanding not being within the three-month time limit stipulated in Subsection (1)(a) a complaint may be presented within "*such other period as the employment tribunal thinks just and equitable.*"

Parties' submissions

51 Both parties made oral submissions (supplementing any written arguments referred to above) which I found to be informative. References are made to essential aspects of those submissions in this judgment.

52 The respondent's representative submitted that the claimant had not complied with the ACAS Early Conciliation requirements set out in section 18A of the ETA 1996, that it was mandatory for the claimant to do so [section 18A(8)], none of the relevant exemptions applied (the claimant's evidence relating to his alleged communication with Ms Cooper was not credible and the respondent

had not contacted ACAS), and accordingly that the ET1 should have been rejected pursuant to Rule 10(1)(c) of the ET Rules and the claim should be struck out. Alternatively, the respondent's representative submitted that the claim should be struck out because the claimant has no reasonable prospect of succeeding in showing that the Tribunal has jurisdiction to hear his claim.

53 The claimant submitted that he relied on the content of the .gov.uk website, that he did not have resources or training, and in particular the advice on that website that if his employer has contacted ACAS he is exempt from any requirement to start ACAS Early Conciliation prior to bringing a Tribunal claim. He said he relied on someone else's actions, and he can prove through metadata and disclosure that he had a conversation with Ms Cooper. He submitted that he has asked for disclosure, from the respondent on 5/6 August 2022 (which he followed up by correspondence he sent thereafter), and the respondent did not send the information he requested to him. He said in light of this he did not feel it would be justice if the ruling of the Tribunal following today's hearing was against him. He submitted that Ms Cooper was not a credible witness, and her evidence was inconsistent.

54 It is also the respondent's position that the claimant's claims should be struck out as his claims were submitted outside the relevant statutory time limits. In relation to the claimant's EA 2010 claims, the respondent's representative submits that from the papers and taking the claimant's claim at its highest, the last act of discrimination can only be the dismissal on 17 February 2022 (the effective date of termination) and therefore the primary time limit for bringing his claim expired on 16 May 2022. It is submitted that the claim was presented 2 days out of time and the claimant is not entitled to an extension of time in terms of the primary time limit under section 140B of the EA 2010 as he did not commence ACAS Early Conciliation. Reference is made to the case of *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23* in which the claimant was 3 days late in complying with the time limit in section 123(1)(a) of the EA 2010 but the Court of Appeal upheld the Tribunal's decision that it was not just and equitable to extend time and Lord Justice Underhill gave guidance for the best approach in considering the exercise of the Tribunal's

discretion (see paragraph 37 "…*to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) 'the length of, and the reasons for, the delay*'). The respondent's position is that absent any valid explanation for the delay, the claims are out of time and should be struck out and that the claimant had not provided a witness statement.

55 The respondent's representative also submits that the remaining claims for automatic unfair dismissal (s 103A of the ERA 1996), breach of contract and any money claims must be brought within three months of the relevant event, unless it was not reasonably practicable to do so, and in which case the claim must be lodged within a reasonable time thereafter – see sections 23(2), 23(4) and 111(2) ERA 1996 and Article 7 of the 1994 Order. It is contended that the claims are two days out of time as the last possible acts were on 17 February 2022, so the limitation period expired on 16 May 2022 and as there was no ACAS Early Conciliation, there was no extension of time (see section 207B ERA 1996 and Article 8B of the 1994 Order).

56 Furthermore it is submitted that the burden of proof is on the claimant to show that it was not reasonably practicable to lodge his claims in time and reference is made to a recent case in which the EAT noted the strict nature of the "reasonably practicable" test [*Cygnet Behavioural Health Ltd v Britton (Jurisdictional - Time Points) [2022] UKEAT 2020_000972 (16 November 2021*)]. It is explained that in *Cygnet*, even though the claimant was having to deal with a fitness to practice investigation, had deteriorating mental health (and dyslexia) did not mean that it was not reasonably practicable to lodge their claim on time. The respondent says that it was reasonably practicable for the claimant to lodge his claims on time given the resources available to him (IT and the internet), the fact that he was not suffering from any ill health or other impairment, and that he had failed to provide reasons why the claim was lodged out of time. Accordingly it is submitted that the claimant's claim should be struck out.

57 The claimant said he believed that the time limit both to bring his discrimination claims and to start ACAS Early Conciliation was 6 months (and not 3 months). He said he had contacted ACAS in August 2022 and they confirmed that there was no previous contact made with them and that they do not want to be contacted. He also believed that his claim based on protected disclosures was subject to a time limit that was greater than 3 months. He referred to the failure by the respondent to comply with Employment Judge Snelson's orders in terms of disclosure of mobile telephone records and Microsoft Teams entries, and he submitted that this prejudiced his case. He maintained that his recollection of the call between him and Ms Cooper on 20 January 2022 was correct.

Discussion and decision

58 On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Jurisdiction – ACAS Early Conciliation requirements

59 The claimant presented his claim on 18 May 2022 (this is the date the Tribunal received and acknowledged receipt of the claimant's claim although I note that the claim was submitted in the late hours of 17 May 2022). At that time, he had not obtained an ACAS Early Conciliation number.

60 Whilst I note that there are several instances where a claimant may institute "relevant proceedings" without the need to comply with the requirement to commence ACAS Early Conciliation under section 18A(1) of the ETA 1996, the only relevant instance in this case, and upon which claimant relies, (if the claimant can demonstrate) that the respondent has contacted ACAS under section 18B of the ETA 1996 in relation to his claim and ACAS has not received information from claimant under section 18A(1) [see section 18A(7) of the ETA 1996]. I note that the requirement under Regulation 3(1)(c) of The *Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254* is that "*A is able to show that the respondent has contacted ACAS in relation to a dispute, ACAS has not received information from A under section 18A(1) of the Employment Tribunals Act in relation to that dispute, and the proceedings on the claim form relate to that dispute*."

61 I do not accept that the claimant has shown that the respondent has contacted ACAS in relation to a dispute (his claim that he is seeking to pursue before the Tribunal), and therefore the relevant exclusion under sections 18A(7) and 18B of the ETA 1996 (and the 2014 Regulations referred to above) does not apply. For the reasons that I indicated in my observations, I did not accept the claimant's evidence relating to the communication he described that he had with Ms Cooper in his position statement (see page 33 of the Hearing Bundle). The claimant did not provide his account of the communication with Ms Cooper he alleges took place in his ET1 Form and he did not send a witness statement to the Tribunal prior to this hearing. His evidence relating to the date he submitted his claim, and his effective date of termination were inconsistent with the documentary evidence. Ms Cooper's evidence was on the whole clear and consistent, and I accepted that she did not contact ACAS and she could not recall the alleged call with the claimant and there was no evidence in terms of the call itself nor the content of the call (there was no mention of the call with Ms Cooper in the email correspondences and there was no attendance note or other record relating to the call). In any event the claimant did not have any communication with ACAS prior to starting his claim and he does not assert that he heard anything further from the respondent in relation to ACAS Early Conciliation (it is not clear in terms of the claimant's account why he did not contact ACAS to follow up the matter until August 2022).

62 Even if I accepted that a conversation between Ms Cooper and the claimant had taken place on 20 January 2022 as alleged by the claimant in his position statement (which I do not accept), this did not change the fact that ACAS had not been contacted by the respondent. The claimant confirmed that ACAS had advised him in early August 2022 that they had no record of the respondent having contacted them.

63 The claimant's ET1 claim form therefore wrongly contains confirmation that one of the ACAS Early Conciliation exemptions applies when no relevant ACAS Early Conciliation exemption applies. He had therefore not complied with the requirements set out in section 18A of the ETA 1996 and the Tribunal does not have jurisdiction to consider his claim.

64 As rule 12(1)(c) and (d) applies, I am required to find that the claim form must be rejected. I have no discretion to decide otherwise: the Tribunal has no general case management power or discretion in the matter which it can exercise in the claimant's favour; *E. On Control Solutions Ltd. v. Caspall* paras. 41, 54 and 56 applied.

65 The claimant mentioned in his submissions that he could provide a reference number (having spoken to ACAS in August 2022). In my judgment, even if a reference number were provided at this stage, the Tribunal still had no power to accept the claim. When the original claim had been issued, it did not contain an ACAS Early Conciliation certificate number. The fact that a certificate number may be subsequently sent to the Tribunal, would not remedy the original procedural irregularity. The Tribunal had no power to accept the claim under s18A Employment Tribunals Act 1996, and any subsequent submission of the ACAS reference number will not cure that irregularity. That in my judgment is in accordance with the decision of HHJ Shanks in *Pryce v Baxterstorey Ltd*, above.

66 In my judgment therefore, the Tribunal does not have jurisdiction to hear this claim and it is rejected pursuant to Rules 12(1)(c) and 12(1)(d) of the ET Rules and under the provisions of s18(A)(8) of the ETA 1996, as it was not presented correctly.

67 Alternatively, if I were wrong to conclude as above, I would have granted the respondent's strike out application for the above reasons (and taking the claimant's case at its highest), on the ground that the claimant has no reasonable prospect of success of showing that the Tribunal has jurisdiction to determine his claim.

Jurisdiction – time limits

68 I also considered whether the claimant's claim were presented in time and if not whether to grant an extension of time in the event that I was wrong to conclude that the Tribunal did not have jurisdiction to consider the claimant's claims due to the claim not being presented correctly (as above). In terms of the claimant's age, race, and religion or belief discrimination claim, under section 123(1) of the EA 2010 (and given that the last act of alleged discrimination was the claimant's dismissal on 17 February 2022), the primary time limit expired on 16 May 2022

(the claimant is not entitled to any extension of time in terms of ACAS Early Conciliation as he did not start this prior to commencing his claim). The email confirmation from the Tribunal indicates the claim was submitted on 17 May 2022 (the respondent points out it was not received by the Tribunal until 18 May 2022), so it was clearly presented outside the statutory time limit.

69 In considering whether to grant an extension of time on a just and equitable basis, although there is a broad discretion, there is no presumption that an extension of time will be granted, and I considered all the circumstances. Although the delay was short, there was no good reason proffered by the claimant and the claimant did not provide a witness statement setting out the circumstances and the reasons for the delay. Whilst I took into account that the claimant was representing himself, it was clear that the claimant had access to the .gov.uk website (which he said he used and relied on to obtain detailed information about ACAS Early Conciliation), and I note that Employment Judge Snelson recorded that the claimant has access to advice from his trade union. I therefore did not consider that the claimant was entitled to an extension of time on a just and equitable basis.

70 The claimant's remaining claim in respect of notice pay, holiday pay, arrears of pay (relating to commission payments paid on target earnings), breach of contract (wrongful dismissal) and dismissal for the reason or principal reason that the claimant made a protected disclosure required to be presented to the Tribunal within three months of the relevant event (in this instance the termination of the claimant's employment on 17 February 2022). The primary limitation periods under sections 23 and 111(2) ERA 1996, and Article 7 of the 1994 Order expired on 16 May 2022 (there was no extension of time by reason of any period spent in terms of ACAS Early Conciliation as this did not take place).

71 I decided that it was reasonably practicable for the claimant to present the remainder of his claim by 16 May 2022. The statutory test is one of practicability and the burden is on the claimant to show that it was not reasonably practicable for him to present his claim in time (and the claimant had failed to discharge that burden). I considered the fact the claimant had not provided a witness statement to explain why he had been unable to present his claim within the statutory

timeframe. He had access to the internet, and he was in a position to undertake relevant research relating to statutory timeframes. There was no evidence provided in terms of the claimant undertaking such research or taking steps to seek relevant legal advice to inform himself of any relevant timescales, and the claimant did not proffer any reason why he said it was not reasonably practicable for the claimant to present his claim within the statutory deadline.

72 In those circumstances, I therefore would have dismissed the claimant's claim presented under claim number 2202827/2022 on the basis that the claimant did not present his claim within the relevant statutory time limits.

Conclusion

73 The claimant's claim made on 18 May 2022 is rejected under Rules 12(1)(c) and 12(1)(d) of the ET Rules. This is because the Claim Form does not contain an ACAS Early Conciliation certificate number and is made on a Claim Form which contains confirmation that one of the ACAS Early Conciliation exemptions applies, whereas an ACAS Early Conciliation exemption does not apply. The Tribunal therefore has no jurisdiction to determine the claimant's claim.

74 Alternatively, the claimant's claim is struck out under Rules 37(a) and (c) of the ET Rules (there is no reasonable prospect of the claimant showing he complied with section 18A (8) of the *ETA 1996* and in addition on the ground that the claimant did not present his claim within the relevant statutory timeframes, and accordingly the Tribunal does not have jurisdiction to hear his claim).

Employment Judge B Beyzade

Dated: 07 January 2023

Sent to the parties on:

09/01/2023

For the Tribunal Office