EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Atuona	**v**	**Royal Mail Group Ltd**

Heard at: London Central (by video)

On: 24 June 2022

Before: Employment Judge P Klimov (sitting alone)

Representation:

For the Claimant: Mr K Josef, Solicitor

For the Respondent: Mr S Harte, Solicitor

JUDGMENT having been given to the parties orally on 24 June 2022 and written reasons having been requested by the claimant on 1 July 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided

REASONS

Background and Issues

1. This was an open preliminary hearing to decide the following issues:

   (i) Whether the claimant's claim form contained a complaint of disability discrimination,

   (ii) If not, consider any application to amend to add a complaint of disability discrimination,

(iii) Whether it was not reasonably practicable for the claimant to have presented the unfair dismissal complaint in time, and if so, whether it was presented within a reasonable period thereafter,

(iv) If it is determined that the claimant's claim form did contain a complaint of disability discrimination, whether it would be just and equitable to extend time for the presentation of the complaint.

2. Mr Josef appeared for the claimant, and Mr Harte for the respondent. I was referred to various documents in the bundle of documents of 79 pages the parties introduced in evidence. The claimant prepared a witness statement. She gave sworn evidence and was cross-examined.

Findings of Fact

3. The claimant worked for the respondent as a postwoman from 12 October 2000 until 23 April 2021, when she was summarily dismissed for breaking COVID-19 self-isolation rules. The claimant claims her dismissal was unfair. She says she did not break the government self-isolation rules. While it is not a matter for me to decide, it appears the whole incident stems from the claimant misreading the UK government text message concerning the requirement to self-isolate when returning to the UK from a non-exempt country she has received upon her return from Nigeria.

4. The claimant commenced early conciliation on 6 July 2021 and obtained the ACAS early conciliation certificate on 12 August 2021. She presented her claim form on 8 September 2021. She completed and presented the claim form online.

5. She ticked the box "*No*" to the question at paragraph 2.3: "*Do you have an Acas early conciliation certificate number?*" The claimant did have the Acas early conciliation certificate but ticked "*No*" because she did not have it in front of her when she was filling the form.

6. In answering the next question: "*If No, why don't you have this number?*", the claimant ticked the box: "*My claim consists only of a complaint of unfair dismissal which contains an application for interim relief. (See guidance)*"

7. In paragraph 8.1 "*Please indicate the type of claim you are making by ticking one or more of the boxes below*" the claimant ticked the boxes: "*I was unfairly dismissed*", "*I was discriminated against on the grounds of*" *"age"* and "*disability*".

8. In box 8.2 the claimant provided the following details of her complaints:

"Went to Nigeria in January 2021, came back on 6th on February. On the 7th I received a text from UK government, that anyone from non exempt countries should isolate or pay fine. Nigeria is not on the non exemption list. So I went back to work on the 8th. The then resources manager told me to go home and

I said to her that I received a text from British Government saying that every one from none exempt country should isolate but I came from Nigeria that is not on none exempt list. She insisted that I should go home.
Then I asked her to allow me to use the phone in her office to call the people that sent me the text to validate the text I received, she agreed but unfortunately I was unable to speak to anyone.

She now refer me to go and see the shift manager , Mr Salim Koheeallee.

I went to see him, he did not even allow me to speak and sent me home.

I still isolated. When I came back from isolation on 22/02/21 I was served a conduct code letter by my manager , Mr Alfie Patel and interview was heard and he decided to transfer the case to his manager Mr Salim Koheeallee (who had dismissed my appointment in 2017 and I was reinstated in 2018)"

9. In answering question in paragraph 12 of the form: "*Do you have a disability?*", the claimant ticked "*No*".

10. In box 15, the claimant provided the following additional information:

    "I want to know why mr Koheeallee delights in dismissing me and he should be dealt with for dismissing me unfairly each time and over trival (sic) things."

11. On 29 September 2021, the claimant's claim was rejected by the Tribunal because it did not contain the ACAS EC certificate number. On 11 October 2021, the claimant went to the Tribunal and handed in the certificate. On 27 October 2021, REJ Wade on reconsideration accepted the claim form as having been presented on 11 October 2021. As a result, the claim was presented out of time.

12. On 22 November 2021, the respondent presented a response denying all the claims and contending, *inter alia*, that the claimant's claim "*contains no recognisable complaint of disability discrimination*".

13. After submitting her ET1, the claimant was able to secure legal representation, and on 20 December 2021, with assistance of her solicitor, she presented an application for an extension of time. The claimant sought an extension of time for the presentation of her claim under Rule 5 of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**") on the grounds that when submitting her claim form she did not have legal understanding of the rules in respect of timing and the significance of that, and she could not afford paid legal representation or secure free representation.

14. On 23 December 2021, EJ Glennie refused the claimant application because the time limit for presenting claims do not arise under the ET Rules. The

Judge stated that the time issue would be for the Tribunal to determine in due course.

15. There was a case management preliminary hearing on 4 May 2022. For the hearing the claimant's solicitors prepared and submitted an agenda and a draft list of issue. In the agenda they indicated that there were no applications to amend, and that the claimant may discontinue her claims for age and disability discrimination. The draft list of issues contained only issues related to the time point and the complaint of unfair dismissal.

16. At the preliminary hearing, the claimant withdrew her age discrimination complaint, but not her disability discrimination complaint. Mr Josef, who appeared for the claimant, indicated that the claimant's position was that she did not need to apply to amend her claim to include a complaint of disability discrimination. The respondent's position was that the claim form did not contain a complaint of disability discrimination, and therefore if the claimant wished to pursue such a complaint, she needed to make an application to amend. EJ Grewal indicated her provisional view that the claimant would need leave to amend to include particulars of her disability discrimination complaint, however stating that: "*it would be an issue for the Judge hearing it to determine whether the Claimant was making a new complaint which had not previously been made or giving further particulars of an existing claim*".

17. EJ Grewal listed the case for an open preliminary hearing to determine the out of time issue and consider any application to amend. The Judge ordered the claimant to serve by 10 June 2022 "*any application to amend in respect of a complaint of disability discrimination and a witness statement explaining why her claim was presented late*".

18. On 10 June 2022, the claimant submitted application for an extension of time to present the claimant's claim supported by the claimant's witness statements with various exhibits. She did not submit any application to amend the claim to include a complaint of disability discrimination.

19. The application for an extension of time was materially the same as the earlier 20th December 2021 application. However, in addition to the reason of "ignorance" of time limits, the claimant submitted that she was "*wholly unwell with [her] legs and face swollen, and [she] was in severe pain with [her] hips recurring discomfort.*"

20. With respect to her disability discrimination complaint, in the witness statement the claimant said that her dismissal "*was also based on [her] disability*". She went on to describe some historic matters going back to 2006 related to her difficulties performing work standing up due to swollen legs and pain in ankles and legs, and that she refused to carry out such tasks standing up, as the respondent required her, and instead carried them out sitting down. She did not explain why she believed her dismissal was because or otherwise in any way connected with her alleged disability.

The Law

Is an application to amend required?

21. Rule 8 (1) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("**the ET Rules**") states:

    "*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*."

22. The question of whether an originating application contained a claim had to be judged by reference to the whole document. A generalised claim require particularisation so that the employer can understand the nature of the claim (see ***Ali v Office of National Statistics*** 2005 IRLR 201, CA at para 39).

23. The mere fact that a box is ticked indicating that a certain claim is being made may not be conclusive in determining whether it sets out the basis for such a claim (see ***Baker v Commissioner of Police of the Metropolis*** EAT 0201/09).

24. In ***Chandhok v Tirkey*** 2015 ICR 527, EAT, at para 18 Mr Justice Langstaff (the then President of the EAT) said: '*[A] system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings*.'

25. In ***Adebowale v ISBAN UK Ltd*** *and ors EAT 0068/15* at para 16 Mrs Justice Elizabeth Laing said: "*In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the [employment judge (EJ)]. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her*".

Should the application to amend be allowed?

26. Employment tribunals have a broad discretion to allow amendments at any stage of the proceedings, either on the Tribunal's own initiative or on application by a party under Rule 29 of the ET Rules. Such a discretion must be exercised in accordance with the overriding objective in Rule 2 of the ET Rules of dealing with cases fairly and justly.

27. In ***Selkent Bus Co Ltd T/A Stagecoach Selkent v Moo re*** [1996] IRLR 661 Mummery J, the then president of the EAT, gave the general guidance to employment tribunals in relation to amendments as follows:−

" *(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

a. The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alternation pleading a new cause of action.

b. The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so whether the time limit should be extended under the applicable statutory provisions . . ."

28. Presidential Guidance – General Case Management state (***emphasis added***):

"12. *While any application for a Case Management Order can be made at the hearing or in advance of the hearing, it should ordinarily be made in writing to the Employment Tribunal office dealing with the case or at a Preliminary Hearing which is dealing with Case Management issues.*

13. ***Any such application should be made as early as possible***."

"*4. In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.*"

29. The Guidance lists the relevant factors, including:

5.1 *“<u>The amendment to be made.</u> ….. The Tribunal must decide whether the amendment applied for is a minor matter or a substantial alteration, describing a new complaint.*”

5.2 *<u>Time limits</u>. If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended….. .*

5.3 *<u>The timing and manner of the application</u>. An application can be made at any time, as can an amendment even after Judgment has been promulgated. Allowing an application is an exercise of a judicial discretion.* ***<u>A party will need to show why the application was not made earlier and why it is being made at that time.</u>*** *An example which may justify a late application is the discovery of new facts or information from disclosure of documents.*”

30. The Guidance makes it clear that the Tribunal must look “*for a link between the facts described in the claim form and the proposed amendment.* ***<u>If there is no such link, the claimant will be bringing an entirely new cause of action</u>***”.

<u>Whether it was reasonably practicable to present the claim in time?</u>

31. Section 111 of the Employment Rights Act 1996 (“**ERA**”) state:

111.— Complaints to employment tribunal .
(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.

32. The following key rules can be derived from the authorities:

a. s.111(2)(b) ERA should be given a ‘*liberal construction in favour of the employee*’ — ***<u>Dedman v British Building and Engineering Appliances Ltd</u>*** 1974 ICR 53, CA.

b. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. Lord Justice Shaw said in ***<u>Wall’s Meat Co Ltd v Khan</u>*** 1979 ICR 52, CA: “*The test is empirical and involves no legal concept. Practical common sense is the keynote….*”.

c. the onus of proving that presentation in time was not reasonably practicable rests on the claimant. “*That imposes a duty upon him to*

show precisely why it was that he did not present his complaint" — ***Porter v Bandridge Ltd*** 1978 ICR 943, CA.

d. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented "*within such further period as the tribunal considers reasonable*".

Meaning of 'reasonably practicable'

33. Lady Smith in ***Asda Stores Ltd v Kauser*** EAT 0165/07 explained it in the following words: "*the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done*".

34. In ***Wall's Meat Co Ltd v Khan*** Brandon LJ explained it in the following terms: "… *The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical … or the impediment may be mental, namely, the state of mind of the complainant oof ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.*" (Pages 60F-61A)

35. The focus is accordingly on the claimant's state of mind viewed objectively.

36. In ***Software Box Ltd v Gannon*** 2016 ICR 148, EAT, the EAT opined that, as a matter of principle, the fact that a complaint was made within time and then rejected did not and should not preclude consideration of whether the tribunal should have jurisdiction in respect of a second claim on the same ground. S.111 ERA required consideration of the complaint which was made, as and when it was presented. Referring to ***Wall's Meat Co Ltd v Khan***, the EAT stated that the focus should be on what was reasonably understood by the claimant and whether, on the basis of that understanding, it was not reasonably practicable for her to bring the second claim earlier.

37. The EAT revisited this question in ***Adams v British Telecommunications plc*** 2017 ICR 382, EAT, confirming that the focus in such a situation must be on the second claim, and that the fact that the claimant was able to present an ET1 within time does not preclude the discretion being exercised. The question for the Tribunal, in those circumstances, was not whether the mistake she originally made was a reasonable one but whether her mistaken

belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances.

38. A claimant's illness as the reason for not submitting a claim in time will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, particularly if the claimant was aware of the time limit. Medical evidence must not only support the claimant's illness, but also demonstrate that the illness prevented the claimant from submitting the claim on time (see ***Midland Bank Plc v Samuels*** (1992) EAT 672/92). However, the Tribunal may also consider the claimant's own evidence as to her health condition (see ***Norbert Dentressangle Logistics Ltd v Hutton*** EATS 0011/13).

39. A mere stress is unlikely to be sufficient. In ***Asda Stores v Kauser*** UKEAT/0165/07/RN Lady Smith stated at paragraph 24: "*….It cannot be sufficient for a Claimant to elide the statutory time limit that he or she points to having been "stressed" or even "very stressed". There would need to be more*".

Submissions and Conclusions

Is an application to amend required?

40. Mr Josef, on behalf of the claimant, argued that the claimant's ET1 contained a complaint of disability discrimination and no application to amend was necessary. He relied on the claimant's ticking the box "*I was discriminated against on the grounds of disability*".

41. Mr Harte, for the respondent, submitted that the claim form must be read as a whole, and when is read as such it contains no discernable claim of disability discrimination. He argued that ticking the "disability discrimination" box was insufficient. He referred me to the cases of ***Ali*** and **Baker** (see paragraphs 22 & 23 above). Mr Harte also pointed out that the claimant had ticked "No" in answering the question whether she had a disability.

42. I asked Mr Josef to refer me to a passage in the claimant's claim form which he says contains a complaint of disability discrimination. Mr Josef accepted that, except for the ticked "disability discrimination" box, there were none.

43. On a fair reading the claimant's claim form as a whole I find no discernable complaint of disability discrimination. I accept that the claimant is a litigant in person and had no legal assistance when completing the form. However, the narrative used by the claimant in describing her complaint contains no reference of any kind to the alleged disability, or that it had anything to do with the claimant's dismissal. She described events leading up to her dismissal and says that Ms. Koheeallee dismissed her unfairly. Apart from the ticked "disability discrimination" box, there is simply nothing in the claim form from

which it could be understood that the claimant complains about being discriminated on the grounds of disability.

44. The fact that the claimant ticked “No” in answering the question whether she had a disability, although by itself is not conclusive evidence, further shows the contradiction between the claimant’s position that the disability discrimination complaint was pleaded in her ET1 and what the ET1 form actually states.

45. For these reasons I find that the claimant’s ET1 does not contain a complaint of disability discrimination, and if she wished to pursue it an application to amend was required.

Should the application to amend be allowed?

46. Having determined the first issues, I asked Mr Josef if the claimant wished to make an application to amend. Mr Josef said that she did. I invited him to make it.

47. Mr Josef said that the claimant would be grateful if the Tribunal would allow her to amend her claim to include a complaint of disability discrimination. I asked Mr Josef to explain what kind of disability discrimination complaint the claimant wished to bring and what alleged discriminatory treatment the claimant complains about. He was unable to articulate that, except for saying that it was in relation to some historic matters and referring me to the claimant’s witness statement.

48. I asked Mr Josef to address me on the issue why the Tribunal should exercise its discretion in favour of granting the application. He said that the claimant was a litigant in person and that it would be “*unfair*” not to allow her to pursue a complaint of disability discrimination. He also said that the respondent had been aware of the claimant’s back pain for some time and for several years had been “*less unfriendly*” to her.

49. The respondent opposed the application. Mr Harte submitted that the application must be refused. He argued that the balance of injustice and hardship lies in favour of the respondent because:

    a. It is not a mere “re-labelling” of an existing claim, but a new course of action.

    b. It is still not clear what the claimant’s claim of disability discrimination is about and would require further and better particulars,

    c. It appears the complaint about some historic events and therefore is significantly out of time. The respondent would be significantly prejudiced if the claim were allowed to proceed, because such a lengthy delay will clearly affect the cogency of the evidence.

d. The application is very late and there is no justifiable reason for the delay. The claimant was legally represented since January 2022. In the agenda for the case management preliminary hearing on 4 May 2022, her solicitors stated that were no applications to amend. Until the hearing today, no such application was made following the preliminary hearing.

50. Applying the ***Selkent*** test (see paragraph 27 above) I find that the balance of injustice and hardship lies in favour of the respondent. The claimant seeks to bring a new course of action based on new and still unspecified factual allegations of historic nature. It is still not clear what the claim is about and how it is being put. Although the claimant's witness statement states that her dismissal "*was also based on [her] disability*", the supporting narrative refers to historic events in 2006 – 2016. The claimant appears to complain about the respondent asking her to do certain tasks standing up when she wished to do them sitting down. There is nothing in her witness statement which can reasonably be read as linking those past events to her dismissal in April 2021.

51. Despite the claimant being represented by a solicitor from January 2022, the claim is still not properly presented. It is not clear what the alleged discriminatory treatment was, what impairment the claimant relies upon as a disability, what type of disability discrimination complaint she seeks to bring. Even at the hearing today, when making the application to amend Mr Josef was unable to clarify any of these issues.

52. It appears the complaints date back to 2006 – 2016, and therefore are significantly out of time. The respondent will be seriously prejudiced if it were required to deal with such historic allegations. It would have to gather relevant evidence to defend the allegations. Given the passage of time, the cogency of such evidence will inevitably be seriously affected.

53. The timing of the application is extremely late. Mr Josef was unable to provide a satisfactory explanation as to why it could not have been made earlier. It is not a case where new facts came to light following the submission of ET1.

54. The delay is even more inexplicable in light of EJ Grewal's preliminary view expressed at the hearing in May 2022 that an application to amend would be required and her order that any application to amend must be made by 10 June 2022, which the claimant's solicitors appear to have ignored.

55. In sum, I find that in the circumstances dismissing the application, although denies the claimant the opportunity to bring a new (and still unparticularised) complaint of disability discrimination, will cause a lesser injustice and hardship to the claimant than it would be caused to the respondent by allowing the application.

56. For these reasons the claimant's application to amend was refused.

Was it reasonably practicable for the claimant to present the claim in time?

57. Following the claimant's oral evidence, Mr Josef submitted that in circumstances it was "*practically impossible*" for the claimant to submit her ET1 in time. He argued that the claimant was a litigant in person and had no legal understanding of the consequences of submitting ET1 without the ACAS EC certificate number. He also said that at the time of sending the ET1 the claimant was in a state of bad health. Mr Josef pointed out that under s.111 ERA the Tribunal had discretion to allow late claims and invited the Tribunal to exercise it in the claimant's favour.

58. Mr Harte argued that it was reasonably practicable for the claimant to submit her ET1 in time because she had the EC certificate and simply had chosen to give incorrect answer because she rushed to complete the form where it would have taken her minutes to get the certificate and type the number on the form. He further submitted that although the claimant was misguided thinking that she could correct the form later, nevertheless it was still reasonably practicable for her to send a correctly completed form in time. The form clearly stated that EC certificate number was required. The claimant had the certificate and knew that she had it. If in any doubt she could have contacted ACAS.

59. Mr Harte referred me to the recent case of ***Ms C Labongo Alum v Thames Reach Charity*** [2022] EAT 8, in which on similar facts an employment tribunal found that it was reasonably practicable for the claimant to add the Early Conciliation number to the claim in time, and the then President of EAT, Mr Justice Choudhury said that "*that aspect of the judge's decision [was] unassailable*".

60. Mr Harte also argued that the alleged ill health was not a real reason because that was not even mentioned as a reason in the claimant's original application for an extension of time and only appeared later. In any event, the claimant was well enough to complete the form, and it is not clear how the alleged ill health could have prevented her from inserting the EC certificate number.

61. Mr Harte also submitted that even if I were to find that it was not reasonably practicable for the claimant to submit the correct form in time, the claimant did not submit the corrected form within a reasonable period of time thereafter because it had taken her a week to do so, after she had been notified by the Tribunal that the claim form had been rejected for the reason of not having the EC certificate number included.

62. As explained above (see paragraphs 35 - 37 above) the focus must be on what was reasonably understood by the claimant and whether, on the basis of that understanding, it was not reasonably practicable for her to bring the second (rectified) claim form earlier. The question is not whether the mistake she originally made was a reasonable one but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances.

63. The claimant's evidence was that she knew that she needed to submit the form within 3 months or else she would be denied the opportunity to have her claim heard by the tribunal. She was told that by ACAS. She also knew that she needed to include the ACAS EC Certificate number on the form. She knew she had that certificate. She might not have had it in front of her at the time of completing the form. However, she did not say that for some reason she had no access to it or there was some other impediment that stopped her from fetching the certificate. She accepted on cross-examination that she could have got it and looked at it. She still had 3 days to submit her claim.

64. The claim form contained the warning that EC certificate was required. The claimant admitted reading it and said that she knew it was "*most important thing*". She knew that she was completing the claim form incorrectly. Her evidence was that she hoped that later she would be able to amend it once she was able to find a solicitor to help her.

65. I accept that she might not have appreciated the consequences of submitting the claim form without the EC certificate number. However, this does not mean that it was not reasonably practicable for her to submit the correct form in time, nor that it was reasonable for her to think that there was no need to submit the corrected form in time. It was not a case of the claimant simply mistyping the EC certificate number on the form and operating under a mistaken belief that the submitted form was correct. She knew that she was giving a wrong answer to the EC certificate question. She admitted in evidence that she knew that she would need to go through the form with a solicitor again and get it amended.

66. I do not accept that the claimant's alleged ill health made it not reasonably practicable to submit the claim form in time. Taking the claimant's case at its highest she was suffering from swollen legs and stress. There is no medical evidence to support that (all medical evidence submitted by the claimant date back to 2016). In any event, the claimant does not explain how the alleged ill health prevented her from putting the EC certificate number on the form. She accepted that she could have got it and put the number in. She said that if she had known it would come to that she would have done that.

67. While I sympathise with the claimant's situation, when she despite trying hard was unable to secure legal assistance before the deadline for submitting her ET1 and felt understandably under stress because of that, nevertheless in the circumstances I find no reason why it can be said that it was not reasonable to expect the claimant to submit her ET1 with the EC certificate number inserted on the form. It follows that the claimant has failed to establish that it was not reasonably practicable for her to present her correct claim form within the statutory time limit.

68. Therefore, I find that the claim was submitted late and under s.111 ERA the Tribunal does not have jurisdiction to hear it. The claim is dismissed for lack of jurisdiction.

69. In conclusion I wish to add that if the applicable standard for exercising my discretion were "just and equitable" (as applies in discrimination and some other cases), in those circumstances it would have been plainly just and equitable to extend the time limit. However, the standard for extending time in unfair dismissal cases is different and stricter – "not reasonably practicable". This, coupled with strict and technical requirements in the ET Rules concerning presentation of claims and rejection of incorrectly presented claim forms, may result in litigants in person being denied access to justice on a mere technicality.

70. On 29 April 2020 the Law Commission published a report, "*Employment Law Hearing Structures*", making a number of recommendations for changes to employment tribunals' powers and jurisdiction, including:

    "*We recommend that in types of claim where the time limit for bringing the claim can at present be extended where it was "not reasonably practicable" to bring the complaint in time, employment tribunals should have discretion to extend the time limit where they consider it just and equitable to do so*."

71. The proposal was supported by many interested parties, which took part in the consultation process. However, so far, the recommendations of the Law Commission have not been implemented by the government. This case further demonstrates why the proposed change was considered by the Law Commission desirable.

Employment Judge Klimov

9 July 2022

Sent to the parties on:

09/07/2022

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For the Tribunals Office

Public access to employment tribunal decisions

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