



EMPLOYMENT TRIBUNALS

Claimant

Respondent

-v-

PRELIMINARY HEARING

Heard at: Leicester **On:** 28 November 2018

Before: Employment Judge Evans (sitting alone)

Representation

For the Claimant: in person
For the Respondent: Ms Bennett, Solicitor

JUDGMENT

1. The decision of the Tribunal dated 26 March 2018 to reject the Claim Form submitted by the Claimant on 28 February 2018 (claim number 2600539/2018) is reconsidered and that decision is varied so that the Claim Form is accepted.
2. The Claimant's claim of race discrimination in relation to his non-promotion in 2017 is dismissed because it was presented out of time and the Tribunal has no jurisdiction to hear it.
3. The Claimant's claims in relation to his dismissal on 16 October 2017 of unfair dismissal, race discrimination and disability discrimination were not presented out of time and so the Tribunal has jurisdiction to hear them.

REASONS

PREAMBLE AND BACKGROUND

The preliminary hearing on 28 November 2018

1. The Claimant was dismissed by the Respondent with effect from 16 October 2017. The Respondent states that the dismissal was by reason of redundancy.
2. Following his dismissal the Claimant contacted ACAS. The date of receipt of the EC Notification was 4 January 2018 and the date of issue by ACAS of the Early Conciliation Certificate was 1 February 2018. The Claimant then twice issued a claim

in relation to his dismissal and other matters. I set out the details of these two claims below.

3. At the preliminary hearing before me on 28 November 2018 (“the Hearing”) the Claimant, who has been unrepresented throughout, represented himself and gave evidence on his own behalf. The Respondent was represented by Ms Bennett, a solicitor. The Respondent did not call any witnesses.
4. The Claimant had not prepared a witness statement for the Hearing. Consequently I asked him questions about the reasons for his delay in presenting his claims and his answers to those questions were his evidence in chief. Ms Bennett then cross-examined the Claimant.

The preliminary hearing on 3 August 2018

5. The Hearing took place as a result of a previous preliminary hearing on 3 August 2018 before Employment Judge Brewer. The Case Management Summary produced following that hearing was at page 84 of the bundle prepared by the Claimant for the Hearing and which ran to 87 pages. All page references in this decision are to that bundle unless otherwise stated.
6. Employment Judge Brewer noted that the details of the Claimant’s claim were unclear. He noted that there was a “significant time limit issue” in this case. He went on to say:

But the question arises therefore whether it made sense to spend time setting out issues for claims which might never go ahead because they are out of time. On behalf of the Respondent Ms Bennison sought a Preliminary Hearing on the time limit issue. The Claimant has not had the benefit of legal advice but I explained in detail what that meant and the Claimant said he understood.

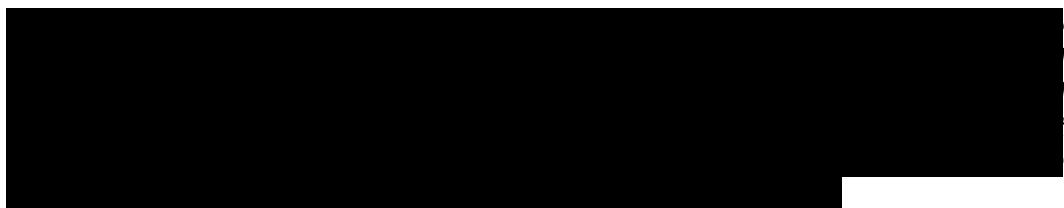
7. Employment Judge Brewer went on to list a one day preliminary hearing to determine whether the claims had been presented in time (“the Time Limit Issue”).

The two claims

8. This matter has a complicated procedural history which it is necessary to set out at this stage.

The First Claim

9. The Claimant first presented a claim to the Employment Tribunal on 28 February 2018 (“the First Claim”). At box 8 of the ET1 form he indicated he was bringing claims of unfair dismissal, race discrimination, disability discrimination, for a redundancy payment, and for other payments. He attached to the ET1 form particulars of claim running to 14 pages.
10. At box 15 of the ET1 form he included the following text:



11. A single paragraph had then in effect been redacted from the 14 page particulars of claim attached to the ET1 form. This was numbered paragraph 1 under the heading "chronological order of incidents and whistleblowing" (page 20) which stated:



12. On 26 March 2018 the Tribunal wrote to the Claimant (page 34). In its letter the Tribunal stated that the First Claim had been rejected under Rule 12(1)(f). The letter stated that the First Claim had been referred to Employment Judge MacMillan and that his reasons for rejecting it were as follows:

(1) The Respondent is entitled to see everything which is in the claim form. The claimant must therefore either submit a fresh claim form or consent to the Employment Tribunal sending a copy of the whole of the current claim form to the Respondent.

The Second Claim

13. The Claimant received the Tribunal's letter of 26 March 2018 on 29 March 2018. Having considered its contents, he submitted a further claim to the Employment Tribunal in the early hours of 30 March 2018 ("the Second Claim"). The ET1 form in the Second Claim was identical to that in the First Claim except:

- 13.1. hours of work at box 6.1 were different;
- 13.2. no claim for a redundancy payment was made at box 8.1;
- 13.3. the text included in box 9.2 and 12.1 was different;
- 13.4. the text included in box 15 of the ET1 form in the First Claim had been deleted in its entirety and replaced by the wording "resubmission for the case REF: 260 0539/2018, as advised."

14. The Claimant attached to the ET1 form particulars of claim running to 14 pages. These were identical to the particulars of claim attached to the ET1 form in the First Claim.

15. The Second Claim was accepted by the Tribunal and sent to the Respondent in the normal way. Respondent then presented a response comprising an ET3 form and Grounds of Resistance running to just over four pages ("the Response").

16. The Second Claim was then listed for a Preliminary Hearing case for management purposes and, as set out above, that took place on 3 August 2018. In addition, standard case management orders were made and the Second Claim was listed to be heard at a final hearing between 8 and 10 July 2019.

THE DISCUSSION AT THE BEGINNING OF THE HEARING AND THE ISSUES

17. As Employment Judge Brewer noted in the Case Management Summary of the preliminary hearing on 3 August 2018, the 14 page particulars of claim are not at all clear. I took the view that in order to determine the Time Limit Issue I needed to understand when the acts and/or omissions giving rise to each of the claims had taken place. I therefore asked the Claimant to explain these.

Clarification of claims and relevant dates

18. The Claimant explained that the claims he pursued were as follows:

- 18.1. **In relation to his dismissal:** a claim that his dismissal was:

- 18.1.1. automatically unfair under section 103A of the Employment Rights Act 1996 (“the 1996 Act”) because the reason for it was that he had made protected disclosures; and, also
- 18.1.2. an act of race and/or disability discrimination.
- 18.2. **In relation to his non-promotion in 2017:** a claim that the Respondent had discriminated against him because of his race by failing to promote him in 2017. The Claimant describes himself [REDACTED].
- 18.3. **In relation to his health conditions:** a claim that the Respondent had discriminated against him by failing to make reasonable adjustments from the end of 2014 until the date of his dismissal.
19. In terms of the relevant dates for establishing whether the claims were out of time, it was agreed by the parties that these were as follows:
- 19.1. **Dismissal-related claims:** the Claimant was dismissed with effect from 16 October 2017.
- 19.2. **Non-promotion claim:** the Claimant had applied for promotion to Professor and his application was declined on 30 March 2017. He appealed and his appeal was rejected by a letter dated 30 June 2017.
- 19.3. **Reasonable adjustments claim:** the Claimant stated that the Respondent had first failed to make reasonable adjustments towards the end of 2014 and that its failures had continued until his employment terminated. However, the pleading of this claim in the particulars of claim is completely inadequate. It is therefore not possible to specify more clearly the dates on which the failures to make reasonable adjustments were said to have taken place.
20. It took a discussion of some considerable length for the Claimant to be able to formulate his claims as set out above. This was above all because the Claimant found it difficult to distinguish between, on the one hand, treatment which might have been unfair and, on the other, treatment which might have been unlawful. Further, the Claimant believes that the Respondent’s treatment of him has caused and/or exacerbated his ill-health. I explained to the Claimant that the Tribunal does not have jurisdiction to hear a free-standing claim of personal injury. I explained that Tribunal could only award damages for personal injury when such injury arose out of a claim which the Tribunal does have jurisdiction to hear, for example a claim of disability or race discrimination, and where such damages are permitted.

The outline of the parties’ cases in relation to the Time Limit Issue

21. The Respondent’s case in relation to the Time Limit Issue may reasonably be summarised as follows:
- 21.1. **Dismissal-related claims:** because the Claimant had been dismissed with effect from 16 October 2017, the latest date for a claim was 15 January 2018. The Early Conciliation. Began on 4 January 2018 and ended on 1 February 2018. Limitation for the dismissal related claims had therefore been extended by the Early Conciliation process but had nevertheless expired on 1 March 2018. The Second Claim had been presented on 29 March 2018 and consequently the dismissal related claims were out of time. So far as the unfair dismissal claim was concerned, it had been “reasonably practicable” to present it on or before 1 March 2018 because it had been so presented (in the shape of the First Claim). So far as the discrimination claims were concerned, it would not be “just and equitable” to extend time.

- 21.2. **Non-promotion claim:** the Claimant knew that he had not been promoted on 30 June 2017. Limitation for any claim relating to his non-promotion therefore expired on 29 September 2017. The Claim had in fact been presented on 29 March 2018 and so was six months out of time.
- 21.3. **Reasonable adjustments claim:** it was not possible to deal with the Time Limit Issue in relation to the reasonable adjustments claim in the absence of further particulars of the claim.
22. The Claimant's case in relation to the Time Limit Issue, on the other hand, may reasonably be summarised as follows:
- 22.1. **Dismissal-related claims:** the claims should have been treated as having been presented on 28 February 2018 (i.e. the date on which the First Claim was presented). They were therefore not out of time. Alternatively, the only reason the dismissal-related claims had not been presented on or before 1 March 2018 was that the First Claim had been rejected and the Claimant had only become aware of this on 29 March 2018 when he received the Tribunal's letter dated 26 March 2018. He had resubmitted the claims in the form of the Second Claim on 30 March 2018 within hours of receiving the Tribunal's letter. It had as such not been reasonably practicable for him to submit the Second Claim prior to 1 March 2018 and he had submitted it within a reasonable period thereafter.
- 22.2. **Non-promotion claim:** the Claimant stated that the reasons that he had not presented the non-promotion claim earlier were that: (1) he had believed that it was necessary for him to pursue the matter internally before beginning Employment Tribunal proceedings; and (2) it was only when he received the outcome of his grievance on 22 December 2017 that he had the information necessary to infer that his non-promotion was because of his race.
- 22.3. **Reasonable adjustments claim:** the Claimant did not deal with the Time Limit Issue in relation to the reasonable adjustments claim.

Discussion of the issues

23. During the course of the Hearing I formed the view that it was highly arguable that the First Claim should not have been rejected by the Tribunal. This was for the following reasons:
- 23.1. As Ms Bennett agreed, the First Claim had been rejected under Rule 12(1)(f) on the basis that it was "in a form which cannot sensibly be responded to" (there was no basis to argue that it was "otherwise an abuse of the process");
- 23.2. However the only problem which the Respondent faced in responding to the Claim was the omission of the single paragraph as set out in paragraph 11 above. That paragraph was simply one "incident" of what the Claimant contended was whistleblowing. The immediate context for it was a 3 page section of the particulars of claim setting out the "Chronological order of incidents and whistleblowing";
- 23.3. I could not see how the Respondent would have been unable to respond to the claim as a result of this omission. The sentence introducing the "Chronological order of incidents and whistleblowing" states:

Following, I will present a chronological list of events prior to dismissal as I believe they are the real reasons behind my dismissal and in order to provide the context for the university's decision.

Clearly, the Respondent knew why it had dismissed the Claimant and the omission of the single paragraph did not prevent it from setting out its case in this respect in response to the First Claim;

- 23.4. Indeed, that that was the case was demonstrated perfectly by the Response. The particulars of claim attached to the Second Claim were identical to those attached to the First Claim (i.e. again the single paragraph as set out in paragraph 11 was omitted) and yet the Respondent had had no difficulty in setting out its detailed reply to the Second Claim in the Response. Indeed the Response does not even refer expressly to the omitted paragraph.
24. I noted that it was of course the case that the Claimant could have sought to review the decision to reject the First Claim but had not done so. However, it seemed to me that in principle it was open to the Tribunal to reconsider the decision to reject the First Claim of its own initiative under Rule 70. I asked Ms Bennett for her views on whether the Tribunal could do this.
25. Ms Bennett was of the view that the Tribunal did have the power to do this under Rule 70. She very properly referred to the decision of the Employment Appeal Tribunal in William Jones Schools Foundation v Parry [2016] ICR 1140 in which Mrs Justice Laing expressed the *obiter* view that a respondent could apply for a reconsideration of a decision not to reject a claim under Rule 70. Ms Bennett said that if this were the case then it would be strange if the Tribunal could not likewise deal with the matter under Rule 73.
26. In light of this, the Tribunal and parties agreed that the issues which would be determined as a result of the Hearing would be as follows:
- 26.1. Whether it was necessary in the interests of justice to reconsider the decision to reject the First Claim and, if it were, whether that decision should be confirmed, varied or revoked. It was agreed that if I decided to reconsider the decision to reject the First Claim and revoked it then the consequence of that would be that the First Claim should be treated as having been accepted. That would mean that the Time Limit Issue would fall away in relation to the Dismissal-related Claims because the First Claim was accepted before 1 March 2018.
- 26.2. If, on the other hand, the decision to reject the First Claim was not revoked, it would be necessary for me to determine in relation to the Dismissal-related claims:
- 26.2.1. **In relation to the unfair dismissal claim:** whether it was not reasonably practicable to present the claim on or before 1 March 2018 and, if it were not, whether it was presented within a reasonable further period;
- 26.2.2. **In relation to the discrimination claims:** whether it was just and equitable to extend time.
- 26.3. In relation to the Non-promotion claim: whether it was just and equitable to extend time.
- 26.4. In relation to the Reasonable adjustment claim: it was agreed that the Time Limit Issue could not be determined in relation to the Reasonable adjustment claim pending further information being provided in relation to it by the Claimant.

THE LAW

Reconsiderations

27. Rule 70 of the Employment Tribunal Rules contained in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:

Principles

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

28. Rule 72(2) to (3) provide:

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

29. Rule 73 provides:

Reconsideration by the Tribunal on its own initiative

73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

The Time Limit Issue

30. Section 111(2) of the 1996 Act contains the time limit for unfair dismissal claims:

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.

31. The Tribunal must therefore consider two things if a claim is presented outside the three month time limit. First, whether it was not reasonably practicable for the claim to be presented within the three month time limit (the burden of proof is on the Claimant).

Secondly, if it was not, the Tribunal must be satisfied that the further period within which the claim was presented was reasonable.

32. The leading case in relation to reasonable practicability remains Palmer and Saunders v. Southend-on-Sea Borough Council [1984] 1 All ER 945, [1984] IRLR 119. In this case, May LJ stated that the test was one of reasonable feasibility: "We think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done - different, for instance, from its construction in the context of the legislation relating to factories: compare Marshall v Gotham Co Ltd [1954] AC 360, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [Singh v Post Office][1973] ICR 437, NIRC] and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."
33. Section 123(1) of the Equality Act 2010 ("the EqA") sets out the time limits for claims brought under that act and provides that a claim may not be brought after the end of
- (a) the period of 3 months starting with the date of the act to which the complaint relates or*
such other period as the employment tribunal thinks just and equitable.
34. The discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. It entitles the Tribunal to take into account anything which it judges to be relevant.
35. The discretion given to the Tribunal is as wide as that under section 33 of Limitation Act 1980: a court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:
- 35.1. the length of and reasons for the delay;
- 35.2. the extent to which the cogency of the evidence is likely to be affected by the delay;
- 35.3. the extent to which the party sued had co-operated with any requests for information;
- 35.4. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- 35.5. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see British Coal Corp n v Keeble [1997] IRLR 336, at para 8).
36. However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220 at para 33, per Peter Gibson LJ).
37. Nevertheless, although the discretion is wide there is no presumption that discretion should be used to extend time – time limits are exercised strictly.

Submissions

38. A full record of the submissions made by the parties is set out in the Record of Proceedings on the Tribunal's file. However, they may reasonably be summarised as follows.
39. Ms Bennett for the Respondent submitted that although it was open to me to reconsider the decision to reject the First Claim on my own initiative, I should not do so. The Claimant could have made an application for a reconsideration of the rejection of the First Claim. However, he had chosen not to do so, and had instead submitted the Second Claim. There was also the issue of delay: the First Claim had been rejected as long ago as March 2018. It should not be reconsidered in December 2018.
40. Further, if I did reconsider the decision to reject the First Claim, that decision was plainly right. This was because the First Claim made clear that it did not contain all the claims which the Claimant wanted the Tribunal to consider. The fact that the Second Claim had been accepted was nothing to the point: indeed, it would be open to me to reconsider its acceptance of my own initiative.
41. Turning to the Time Limit Issue, and the Non-promotion claim, Ms Bennett submitted that it was clear that the Claimant was making race-based comparisons even when he submitted his appeal. I should not accept his statement that he first considered his non-promotion to be related to race on 22 December 2017. So far as his belief that it was necessary to await the outcome of the internal grievance before making an application to the Tribunal was concerned, this was not a good reason for failing to comply with the applicable time limit.
42. Ms Bennett submitted that the cogency of the Respondent's evidence in relation to the Non-promotion claim would be affected by the delay because various relevant witnesses had left the Respondent's employment in the intervening period. She noted the Claimant's failure to act promptly when he was aware of facts giving rise (in his view) to a cause of action. She also noted that the Claimant had had access to legal advice from his union, the University and College Union ("UCU").
43. Turning to the Dismissal-related claims, Ms Bennett first consider the Time Limit Issue in relation to the unfair dismissal claim. The First Claim had been submitted and so clearly it had been reasonably practicable to submit an unfair dismissal claim within the relevant three-month limitation period. The fact was that the Claimant could have sought a reconsideration of the rejection of the First Claim but had chosen not to do so. Ms Bennett accepted, however, that if I concluded that it had not been reasonably practicable to submit the Second Claim within the three-month limitation period, it had been submitted within a reasonable further period, given the promptness with which the Claimant had acted once he had received the Tribunal's letter of 26 March 2018.
44. Turning to the discrimination claims arising on dismissal, Ms Bennett submitted that it would not be just and equitable to extend time. The Claimant had not acted promptly. The Respondent had witnesses who had left its employment.
45. For his part, the Claimant said that he wished to make just two points. First, although he had named other people when he had raised his appeal against his non-promotion, he did not at that point know that his non-promotion was race-based. Secondly, the Claimant said he had not omitted anything from the First Claim. Rather he had made an application for confidentiality.

FINDINGS OF FACT

46. I make the following findings of fact in relation to the Time Limit Issue. In making these findings of fact I have taken into account all the evidence before me and, in particular,

the oral evidence of the Claimant to the Tribunal, a full record of which is set out in the record of proceedings on the Tribunal's file. I do not, however, set that evidence out in full in this decision.

The Dismissal-related claims

47. The Claimant received some advice and assistance from the UCU in the period leading up to and following his dismissal. The UCU has a procedure for deciding whether to provide legal assistance to members and that procedure may take some time to reach a conclusion. For this reason, the Claimant delayed presenting the Dismissal-related claims until the end of February in the hope that this procedure would result in the UCU providing him with legal assistance (it did not).
48. The Claimant then presented the First Claim on 28 February 2018, just before the limitation date for the Dismissal-related claims on 1 March 2018. As set out above, the First Claim was rejected by a letter dated 26 March 2018 which the Claimant received on 29 March 2018. The Claimant then presented the Second Claim on 30 March 2018, just a few hours after he had received the letter rejecting the First Claim.
49. The reason for the Second Claim being out of time was therefore quite simply the rejection of the First Claim. Until the Claimant received the letter dated 26 March 2018 he understood that he had submitted claims in relation to his dismissal (i.e. the First Claim) before the relevant time limit expired and that for the time being he needed to do nothing more.

The Non-promotion claim

50. The Claimant knew that his application for promotion had been unsuccessful when he received a letter dated 30 June 2017 rejecting his appeal. I find in accordance with his evidence that the Claimant received this letter shortly after 30 June 2017, certainly by Monday 3 July 2017.
51. So far as the delay between then and 22 December 2017 when he received the outcome of a grievance was concerned, the Claimant ascribed the delay to two separate but related reasons. The first was that he believed that he had to pursue the grievance that he presented to its conclusion before beginning a tribunal claim. The second was that he only concluded that the reason for his non-promotion might be race discrimination when he received certain documents following the conclusion of the grievance on 22 December 2017.
52. In fact so far as the delay until 22 December 2017 is concerned, I find that this was due simply to a misconception on the part of Claimant that he could not begin an employment tribunal claim until the grievance which had begun on or around 22 June 2017 had concluded. In so finding I accept the Claimant's evidence that this was his own misconception which he "should have checked". I note that whilst his evidence was that UCU had not told him that he could begin a Tribunal claim without awaiting the outcome of the grievance, equally he did not suggest that UCU had told him that he had to wait. Further, I find UCU was not formally representing the Claimant during this period, even if they were providing him with some assistance. Consequently I find not only that the delay of the Claimant in presenting the claim between June 2017 and 22 December 2017 was simply due to a belief on his part that he could not pursue a Tribunal claim prior to the outcome of the grievance but also that this was a belief held as the result of the Claimant not taking the steps that one might reasonably expect a highly intelligent and educated man to have taken in these circumstances to establish how time limits worked (and I note that at no point did the Claimant suggest that he was unaware of the relevant time limit). Such steps would have involved specifically

asking UCU or some other source of legal advice when limitation for any claim relating to his non-promotion would expire.

53. I do not accept the Claimant's evidence that he found out for the first time information on 22 December 2017 which caused him to believe that the reason for his non-promotion might have been race. This is because his oral evidence in this respect was inconsistent and contradictory. The Claimant first said in his evidence in chief that it was only on 22 December 2017 that he received a letter prepared by ██████████ which demonstrated (in the Claimant's view) that ██████████ had lied about the publications record of the Claimant. However, he then accepted in cross examination that he was aware that ██████████ had (in the Claimant's view) provided incorrect information about his publications record prior to the meeting of the appeal panel on 30 June 2017. Indeed, he accepted in cross-examination that his appeal was based in part on ██████████ having lied about his publications record. Nevertheless, at the end of his cross-examination he stated that he did not know that ██████████ had lied about his publications until 22 December 2017. This significantly contradicted what he had said twice just a few minutes earlier. Overall, the Claimant failed to produce a coherent account of what information he received for the first time on 22 December 2017 that suggested that his non-promotion was related to his race.
54. So far as the delay following 22 December 2017 was concerned, the Claimant said that this was due to him delaying presenting a claim for so long as possible in the hope that UCU would provide him with legal assistance. I accepted his evidence in this respect and therefore conclude that this was indeed the reason for that part of the delay.

Conclusions

The reconsideration issue

55. I turn first to the question of whether a reconsideration of a decision to reject a claim under Rule 12 may be carried out under Rules 70-73 notwithstanding the fact that Rule 13 specifically deals with applications for a reconsideration of a decision to reject a claim and provides for such an application to be made only by the Claimant.
56. I conclude that a reconsideration of the decision to reject the First Claim under Rule 12 may in principle be carried out under Rules 70-73. I so conclude for the following reasons: (1) the rejection of the First Claim was a "judgment" because it was capable of finally disposing of the claims included in the First Claim; (2) in principle, therefore, the reconsideration of the rejection comes within the scope of Rules 70 to 73; and (3) there is nothing in the Rules which states that a rejection of a claim form may not be reconsidered under Rules 70 to 73.
57. However, in principle any reconsideration shall be by the Employment Judge who made the original decision unless that is not practicable. It was not practicable in this case because Employment Judge MacMillan retired in the summer of 2018. When it is not practicable for the original judge to deal with the matter, the Regional Employment Judge shall appoint another employment judge to deal with it. In this case, Regional Employment Judge Swann appointed me to deal with it after the date of the Hearing but before the date on which I reached this reserved decision.
58. I turn now to whether it is "necessary in the interests of justice to" reconsider the decision to reject the First Claim. In approaching this issue I bear in mind that I must seek to give effect to the over-riding objective to deal with cases "fairly and justly" which includes: (1) ensuring that the parties are in an equal footing; (2) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (3) avoiding unnecessary formality and seeking flexibility in the proceedings; (4)

avoiding delay, so far as compatible with proper consideration of the issues; and (5) saving expense.

59. I have concluded that it is necessary in the interests of justice for the decision to reject the First Claim to be reconsidered and that on that reconsideration the decision should be varied with the result that the First Claim is accepted rather than rejected. I have reached this conclusion for the following reasons:

59.1. Avoiding delay wherever possible is part of dealing with cases “fairly and justly” but the reality in this case is that reconsidering the decision to reject the First Claim does not result in any delay.

59.2. Any decision by Employment Judge MacMillan deserves very considerable respect. However the decision to reject was an interlocutory decision taken on the papers without the benefit of representations by either party and should be approached in that light. Further, Employment Judge MacMillan would not on the date he took that decision (no later than 26 March 2018 but in all likelihood at least several days earlier) have had the benefit of the judgment of the Court of Appeal in Trustees of the William Jones’s Schools Foundation v Parry [2018] I.C.R. 1807 which was handed down on 28 March 2018.

59.3. In light of that judgment I conclude that the decision to reject the First Claim was plainly wrong. As agreed with the Respondent, the relevant part of Rule 12 (1) (f) was that the First Claim could not “sensibly be responded to”. However, it was perfectly possible for the Respondent to sensibly respond to it, and in particular that part in which some details had been omitted as set out in paragraph 11 above. The details omitted were relevant to the Claimant’s claim that he has been dismissed for making protected disclosures. The Respondent was at all relevant times aware that the Claimant had been dismissed and also was aware of its reason or reasons for having dismissed him. The Respondent was therefore able to sensibly respond to the Claimant’s claim. This is very clearly illustrated by the fact that when identical particulars of claim were attached to the Second Claim, the Respondent submitted the Response in reply. In its response it did not refer to any problems presented by the omission set out in paragraph 11 above.

59.4. I further note that the decision to reject the First Claim appears to have been based to some extent on a view that the Claimant did not consent to the Employment Tribunal sending a copy of the whole of the First Claim (i.e. the ET1 form and the attached particulars) to the Respondent. However, the Claimant did not state that this was the case in either the ET1 form or the attached particulars. Indeed, the omission of certain details as set out in paragraph 11 above seems to have arisen as a result of the Claimant’s assumption that the ET1 form and particulars of claim would be seen by other people.

59.5. The incorrect rejection of the First Claim puts the Claimant at a substantial disadvantage because it causes the Time Limit Issue to arise in relation to the Dismissal-related claim which would not otherwise have arisen. This is because First Claim was submitted within three months of the Claimant’s dismissal. Further, the only factor causing the Second Claim to be out of time was the rejection of the First Claim, given the promptness with which the Claimant acted once he had received the Tribunal’s letter of 26 March 2018.

The Time Limit Issue

60. I discussed with Ms Bennett how we should proceed if I decided to reconsider the decision to reject the First Claim and if, on reconsidering it, I varied that decision with the result that the First Claim was accepted. Ms Bennett agreed that the Tribunal

should treat the First Claim as having been delivered (as it may do under Rule 91) and that the Response should be treated as the Response to the First Claim. That is to say I should go ahead and deal with the Time Limit Issue but on the basis that the First Claim was accepted. I did, however, say that I would deal with the Time Limit Issue in the alternative basis that the decision to reject the First Claim was correct.

The Dismissal-related claims

61. If my decision in relation to the reconsideration of the decision to reject the First Claim is correct, the Time Limit Issue falls away in relation to the Dismissal-related claims because they were presented within three months of the effective date of termination of the Claimant's employment.
62. However, if I am wrong about that, I would have reached the following decision in relation to the Time Limit Issue in relation to the Second Claim.
63. Turning to the unfair dismissal claim, if I had concluded that it was not necessary in the interests of justice to reconsider the decision to reject the First Claim and to vary that decision, because that decision was correct, I would have concluded that it was reasonably practicable to submit the claim of unfair dismissal within the primary limitation period because that is what the Claimant did when he submitted the First Claim.
64. Turning to the discrimination claims, I would have concluded that it was just and equitable to extend time in light of the following factors: (1) the very brief delay; (2) the fact that, realistically, the cogency of the Respondent's evidence could not be affected by the delay in the claims being presented between 1 March 2018 when the three month limitation period expired and 30 March 2018 when the claim was submitted; (3) that the Claimant was unrepresented and that the issue which had led to the First Claim being rejected was an esoteric one; (4) that the Claimant had taken steps to obtain advice and representation following his dismissal and that the fact that the First Claim had been presented late in the three month limitation period (with the result that the Second Claim could not be submitted within that period following its rejection) was due to the Claimant understandably waiting to see whether his trade union would provide him with legal assistance.

The Non-promotion claim

65. Turning to the Non-promotion claim, I have approached the Time Limit Issue on the basis that the First Claim has been accepted. I conclude that it is not just and equitable to extend time in light of the following factors: (1) the length of the delay is considerable - the last day for a claim to be presented in light of my findings of fact above was 2 October 2018 but the claim was not presented until just under five months later; (2) the reason I have found for the delay - the Claimant's incorrect belief that he could not pursue a claim until the grievance procedure had been concluded - was not a good reason given the Claimant's failure to make the kind of enquiries that might reasonably have been expected to have been made by a man of his education and intelligence in relation to how time limits worked; (3) the cogency of the Respondent's evidence may well be affected by a delay of this length of time, particularly in light of staff departures; (4) the Claimant had access to advice throughout the relevant period via his trade union but did not ask the correct questions despite being aware that his union was not minded to provide him with legal assistance to begin a tribunal claim and that it was therefore up to him to do so (or to find alternative representation) unless and until the union changed its position.
66. The result of my conclusions above is that;

- 66.1. The Tribunal has jurisdiction to hear the Dismissal-related claims;
- 66.2. The Tribunal has no jurisdiction to hear the Non-promotion claim;
- 66.3. The question of whether the Tribunal has jurisdiction to hear the Reasonable adjustment claims remains to be decided.

67. I shall separately make case management orders dealing with the future conduct of the claims.

Employment Judge Evans

Date: 9 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS