EMPLOYMENT TRIBUNALS

Claimant: "A"

Respondent: British Broadcasting Corporation

RECORD OF A PRELIMINARY HEARING

Heard: Remotely, via CVP **On:** 23 November 2020
(and in chambers on 20 January 2021)

Before: Employment Judge Clark (sitting alone)

Appearances
For the claimant: Ms S George of Counsel
For the respondent: Mr T Kibling of Counsel

JUDGMENT

UPON the tribunal concluding that the ET1 claim form ought to have been rejected in accordance with rule 12(2)(d) of the 2013 rules **and hereby so rejecting it**.

AND UPON the tribunal concluding that there is no power to dispense with the requirement under rule 12(3), the claim form shall be returned to the claimant together with these reasons giving notice of why the claim has been rejected.

AND UPON the tribunal waiving the requirement to resubmit a fresh application for reconsideration under rule 13, such formalities having been complied with on 19 November 2020 when a pre-emptive application was lodged together with a claim form rectifying the notified defect.

AND UPON determining the reconsideration application in accordance with rule 13, the tribunal being satisfied that the rejection was correct but the defect has been rectified with effect from **19 November 2020**.

The tribunal's judgment is that: -

1. The claims were presented out of time.

2. The claim of unfair dismissal is **struck out** on the ground that it was reasonably practicable to present it within 3 months of the effective date of termination.

3. It is just and equitable to extend time for the presentation of the claims of disability discrimination to 19 November 2020.

REASONS

1. Introduction

1.1 In Barton v Wright Hassle LLP [2018] UKSC 8, a divided Supreme Court considered the rules and effect of non-service of a claim form alleging professional negligence under the civil procedure rules. What, it may be asked, does the present claimant's situation have to do with a claim that had no connection with an employment relationship; does not refer to the Employment Tribunal's rules and focused on a procedure that has no corresponding application to Employment Tribunals, namely the concept of service of a claim form by a claimant? The answer is this. The one issue that united the majority and dissenting minority was that a fundamental purpose of the rules of procedure in litigation before any competent judicial body is to identify, with certainty, how and when that judicial body becomes seized of the proceedings and the parties become subject to its jurisdiction. Whatever form the relevant procedural rules might take, they serve to define when any limitation stops running against a claimant and when procedural time starts running against a defendant.

1.2 Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the rules") is far less prescriptive than the civil procedure rules, but achieving that fundamental purpose remains an essential feature of litigation before the Employment Tribunal. In broad terms, the dispute in this case is whether the course that this particular claim has taken complied with those rules so that it can be said there is a claim before the tribunal or, as the respondent says, the proceedings are a "nullity". I must consider what powers or duties the tribunal had, and now has, in this situation and where it has such competence to act, what orders ought to be made. If the result is that there is a claim before the tribunal and its date of presentation can be defined, the question that then arises is one of time limits and whether to permit any necessary extension.

2. Preliminary issues

2.1 I have made orders under Rule 50. The identity of the claimant is anonymised. I have also made a restricted reporting order prohibiting anything being reported that may identify the claimant, including the specific post she occupied at the material times. Beyond that, the respondent is keen that the proceedings remain public, if for no other reason that the interests of transparency of its decision making as a publicly funded body. Those orders will last until final judgment unless, before then, a further order is made extending them beyond that date. In order to further the aim of those orders, I apologise at the outset for necessarily using impersonal pronouns of "the claimant", "she" and "her" throughout.

2.2 I must also say something about the nature of the applications before me. It has required me to consider the rules of procedure against the facts of events that have already happened. That necessarily touches on decisions that have already been made, to one degree or another, by the same level of judge. At times it may appear to engage in a review

of the lawfulness of those decisions. It is not an appeal and I make clear that I have been at pains not to let anything in my approach drift towards or be misconstrued as such. I have taken the approach that the issues are case management issues, that the tribunal's jurisdiction to exercise those powers under the rules remains extant and that the authorities make clear that the rules governing the initial stages in the life of a claim are not fixed to any particular procedural stage. Where appropriate, therefore, judicial decisions that the respondent says should have been taken remain open to me to take now.

2.3 Finally, there are other issues before the tribunal which are not addressed here. In particular, there is an application to amend any claim found to be before the tribunal and a draft amended ET1 was submitted on 16 November 2020. It was common ground between the parties and tribunal that consideration of the proposed amendment should be deferred until these jurisdiction issues have been determined at which point, depending on the outcome, it may be appropriate to deal with it on paper.

3. The Notice of Issues for this Hearing

3.1 Following a preliminary hearing held before EJ Batten on 2 March 2020, the issues set down for determination at paragraph 3 of her order were identified as: -

> ***3.1 Whether the claim presented on 28/11/2019 should have been rejected by the tribunal pursuant to rule 10.***
>
> ***3.2 If so what was the effect of the claimant supplying an early conciliation certificate number on 5 December 2019? Did the presentation of an early conciliation certificate number rectify any defect?***
>
> ***3.3 Was the claim presented outside the applicable time limits?***
>
> ***3.4 If so, should time be extended?***
>
> ***3.5 Alternatively, because of those time limits and /or because of the requirement to engage in early conciliation, should either or both complaints be struck out***
>
> ***3.6 In the alternative to 3.5, should one or more deposit order be made.***

3.2 After discussion with the parties, I have modified that list of issues. First, the thrust of the issue at 3.1 goes to the question of the rejection of a claim. Rejection may arise under rule 10, as identified, but may also arise under rule 12 which has not been explicitly identified and which is arguably the main focus of this case. In order to deal with the rejection point fully, the arguments put before me by both parties have not, therefore, been limited to the application of rule 10 and I consider both rules.

3.3 Secondly, and again with the agreement of Counsel, the issues identified at paragraphs 3.5 and 3.6 should never arise. The tribunal either has jurisdiction or it does not and the claim is either in time or it is not. The answer to both of those questions will be decided by virtue of the issues at 3.1 to 3.4. Once decided, there will then be no question of whether those issues engage with the "reasonable prospects of success" tests so as to lead to a strike out or deposit order.

3.4 Finally, for the purpose of structuring these reasons, I have grouped the issues at 3.1 and 3.2 together as "the rejection issue". I have grouped the issues at 3.3 and 3.4 together as "the time limit issue".

4. Background and Findings of Fact

4.1 Many of the events during the relevant chronology are not in dispute. In respect of some, I do need to make findings of fact to be able to assess their nature, quality and relevance to the rules. I must also make findings in respect of the claimant's case on extension of time. In that latter regard only, the claimant has given affirmed evidence and been questioned. On that basis, and on the balance of probabilities, I make the following findings of fact.

4.2 On 28 November 2019, the claimant presented her ET1 claim form to the tribunal after completing it using the GOV.UK website. Her claim related to her employment with the respondent between 1 March 2008 and 1 September 2019, when she originally said it terminated. She now accepts the date of termination was one day earlier, on 31 August 2019. She was unrepresented at the time it was submitted and has remained so until relatively recently, although it is clear to me that she had obtained competent advice at various stages in the past dispute. She drafted the claim form herself. However, although she was a litigant in person, her professional background is in journalism and, at the time of the claim, she had recently commenced a two-year master's degree in law and those studies are continuing. Taken together, it seems to me I can infer a finding of fact that she has some level of skill in research and analysis generally, and the basic principals at least of the necessary steps in advancing legal complaints. Notwithstanding the state of her mental health, that puts her somewhere above average in the general population.

4.3 As to the background to the claim itself, this is something I should be careful not to make findings of fact about save where absolutely necessary to resolve the issues before me. For present purposes, it seems to me it is enough to summarise events as neutrally as possible and, in the next paragraph, what I say should be treated as being for context only. There is clearly a substantial body of disputed evidence behind my summary and if matters proceed that far, the fact finding will be for another tribunal.

4.4 A few years ago, events related to the workplace led to the claimant being unable to work at her original location and she was redeployed. There were periods of sickness absence and at times she was quite unwell in respect of her mental health. The redeployment was supported by the respondent although it took place within a policy framework which meant the roles were temporary in nature and she would need to apply for a substantive post, which at times she attempted. That had an effect on her status under the various applicable policies. In the absence of a permanent alternative post, one option open to her was the employer's contractual career break scheme. Of the two types of career break contemplated under that scheme, the claimant's then circumstances were interpreted to mean she was entitled only to career break "B". Of the two, that is the one providing a reduced level of employment protection. In short, it required her to resign and reapply at a later date. She did resign and has used the break to further her education with the LLM. The

events that cause her to take that option, including the requirement to resign, form the foundation of her claim.

4.5 Returning to the findings of fact, box 2.5 of the ET1 claim form requires the claimant to provide details of an ACAS early conciliation certificate. She did not do so. Instead, in the exemption boxes that immediately follow, she ticked a box to indicate that: -

> ***"ACAS does not have the power to conciliate on some or all of my claim".***

4.6 In the process of completing an online claim as the claimant did, the website contains various prompts and provides more information. One such information box deals explicitly with starting the claim, early conciliation and time limits. I am not entirely sure that the respondent is correct to describe this as a "pop-up", at least as I understand that phrase in the context of websites to mean an automatic pop-up over which the user has no initial control, but I am satisfied that the information it contained was available to see by no more than a single further click during the process of completing the online form. More importantly, I am satisfied that the claimant saw and considered either it, or information to like effect. The box I have seen is headed "Making a claim to an Employment Tribunal" which is followed by three sub-headings. The first is headed "Are you in time?" which gives information on time limits. Below it is a heading "Have you contacted ACAS?" which then goes on to state: -

> ***"Before making a claim to an employment tribunal you have to contact ACAS to use their free early conciliation service."***

4.7 The last three words of that sentence are hyperlinked to direct the user further along the path of completing the necessary early conciliation process.

4.8 The third and final section is headed "what you will need" and reminds the prospective claimant that they will need an ACAS Early Conciliation certificate number. This wording, once again, contains a further hyperlink to further information.

4.9 The claimant has given evidence about the state of her mental health at various stages throughout the history of this matter. She seeks to rely on that as part of any assessment of time limits. I have no doubt she was in a fragile state. I say nothing about the cause of that but am satisfied that both mentally and psychologically, she was not the person she might have thought herself to be a few years earlier. Nothing I say should be taken as diminishing that or ignoring the various serious bouts of mental ill health she suffered during the earlier acute phases of her illness. However, I have to look at all that was happening at the time these claims were open to be made in making my overall findings. Before the claim, she had maintained her alternative employment in a similar field of journalism, albeit the work was pushing her towards production rather than presenting. She had researched and engaged in the career break application process and I am satisfied she was able to understand the implications of the different policies that were available. I do accept, however, that reaching what she understood was some sort of 'end of the line' decision in the absence of any other permanent solution had knocked her and in early August 2019 she self-referred to local mental health services. The social worker's report of that referral, however, paints a reasonably confident person who was at least embarking on a determined path to take control of her life. Part of that, it seems, is that around then she had applied for and been accepted

onto what on any measure is a demanding course of academic study leading to an award of an LLM. She had researched and identified claims of constructive unfair dismissal and disability discrimination. That research had led her not only to the fact that the employment tribunal existed to determine such claims, but the online process for submitting such a claim and, I find on the balance of probabilities, the time within which such claims must be made. Her understanding about ACAS and early conciliation may have been muddled but, considered against the picture of those other matters that she was able to navigate, it seems to me I cannot isolate it as being a feature of her state of mind or mental health. It may have given rise to confusion and mistake, but that will fall to be considered against the reasonableness of such a mistake and particularly as the reason why the claimant may have believed ACAS did not have the power to conciliate her claims. That has not been particularly explained and still less has it in the context of what information is available online to prospective claimants to explain the role of early conciliation. The information was either read and not followed, or the claimant chose not to read it and guessed at an answer providing an exemption.

4.10 On 3 December, the claimant's ET1 claim form was subject to the administrative process known as ET1 vetting. As a result, a clerk noted the potential issue with early conciliation and referred the claim to an employment Judge. The referral process that I can see on the tribunal's file, and the letter generated as a result which was emailed by the tribunal to the claimant is, regrettably, somewhat confused. I do not know whether it was a casualty of the Judge having a particular heavy day working on referrals as it makes references to a different type of claim against a different employer. I do not know whether this represents a one off or, as Ms George submitted, may be indicative of an established practice of the Tribunal as to how it responds to the issues in this case. The suggestion advanced is that the errors in this letter flow from a template or previous direction being used where the name of respondent had not been altered. I am not aware of any such template nor is this my practice on vetting referrals.

4.11 Nevertheless, despite its erroneous parts, the letter identified the correct claimant and the correct case number. The substance was relevant to the claimant's case in that it identified an absence of a valid early conciliation number and questioned the application of the alleged exemption. Significantly, so far as the status of this letter is concerned, it said that the Judge was: -

> ***proposing to direct that your claim against [wrong respondent's name] should be rejected because…***

4.12 It then sets out three matters of substance explaining why the exemption reason did not apply. In short, that was that the claim appeared to be relevant proceedings; that the claimant should therefore have engaged in early conciliation before commencing a claim unless one of the exemptions applies; and that the exemption reason that "ACAS doesn't have the power to conciliate some or all of my claim" did not appear to apply. The letter ended with: -

> ***If there is a relevant early conciliation number naming [wrong respondent's name repeated] please provide the tribunal with a copy of it. If there isn't, but there is a good reason why the***

> ***claim should not be rejected because the claim (or part of it) that you are bringing are not "relevant proceedings", please tell the tribunal in writing what the reason is and what the claim is that you say ACAS do not have power to conciliate upon. The category of claim that are "relevant proceedings" and require an early conciliation certificate can be found at section 18 Employment Tribunals Act 1996.***
>
> ***The Employment Judge has asked me to inform you that if, within 7 days of the date of this letter, you don't provide the tribunal with a relevant early conciliation certificate or with any such good reason, the Claim Form will be rejected.***

4.13 Despite the errors in that correspondence, it prompted a swift and decisive response from the claimant. She did not set about providing an explanation of why the stated exemption was relied on. She stated before me in evidence that she accepted it did not apply and she immediately realised that she should have engaged in early conciliation. That in itself reinforces my conclusion about the claimant's general level of cognitive functioning at the relevant time. I find she readily understood the significance of the warning and the effect it had on her claim submitted only 5 days earlier. She immediately engaged with ACAS and it is significant, at least in the context of any question on time limits, that she was able to do so as quickly as she was. So immediate was her response that the date of notification of a dispute to ACAS, (what could become Day A for the purpose of the early conciliation extension of time provisions) is in fact the same day as the tribunal letter was sent, that is 3 December 2019. I find no advice was sought or received between her receipt of the Tribunal's letter and making contact with ACAS to initiate early conciliation. Again, this reinforces my conclusion that the claimant either knew of the process, or was able to research and engage with it with relative ease and speed.

4.14 By an email dated 5 December (the date that could potentially become Day B) ACAS sent the claimant her early conciliation certificate under a certificate number R804769/19/69. That certificate accurately named the claimant and British Broadcasting Corporation as prospective claimant and respondent respectively. The claimant then sent that to the employment tribunal the same day under cover of an email in which the claimant stated: -

> ***Please find a copy of the relevant certificate required within 7 days. My tribunal number is 2603453/2019.***

4.15 This email followed one sent minutes earlier which had omitted any reference to a case number. The tribunal number is 260345**2,** but it seems this correspondence was placed on the correct file. In fact, the claimant was also wrong in her assertion that this email attached the certificate that had been required within 7 days. Whatever the procedural status of the tribunal's letter of 3 December 2019, it seems to me that what the claimant was being asked for was whether she already had a relevant early conciliation certificate at the time of presenting her claim, it was not an invitation to go and get one.

4.16 I find, whatever the state of the claimant's ill health around this time, there was no material difference between how it presented on or around 3-5 December and how it had presented in the preceding weeks.

4.17 There is then nothing I can see on the tribunal file, and nothing that the parties can direct me to, which explains exactly what happened between 5 December and 18 December.

Something must have happened as on 18 December 2019, a letter was sent to the claimant indicating that her claim had been "accepted". It is not possible to discern from the tribunal file whether, and if so when, a Judge considered the claimant's response and there is no referral from a clerk to a Judge on that point. Although I would like to be able to say that the "acceptance" letter would not have been sent out without such a referral, in the circumstances of this case, I cannot be confident that that was the case and in the absence of any explanation of judicial intervention, conclude that is what happened. I am once again required to express regret that the content of the Employment Tribunal's file, so far as it can be relied on to convey a record of what happened and when it happened, is less than clear, complete and accurate, at least during these early weeks of the life of this claim. On the face of the correspondence, only the claimant was notified of the claim being accepted on 18 December. According to the tribunal file, the notice of claim and the 'response pack' appears to have been sent to the respondent on 23 December 2019 giving notice of the claim and also giving notice of a final hearing for 3 days listed in April 2021. The listing is a standard direction in open track cases. I cannot be confident that that correspondence is accurate. On 20 December 2019, the respondent applied for an extension of time to submit an ET3 response, 3 days before the Tribunal's file says the tribunal wrote to it notifying it of the claim. In fact, with the assistance of the respondent's solicitor, it has been possible to discern that a notice and response pack was in fact sent on 18 December in a letter which purported to list the matter for a final hearing in March 2021. Both Counsel described this part of the chronology accurately, albeit with undeserved generosity, as not showing the Tribunal in its best light.

4.18 In any event, on 20 December 2019, the respondent's application for an extension of time to present its ET3 response identified that it had not had any contact from ACAS and it was not aware of the potential for this claim. On 24 December 2019, EJ Hutchinson granted the extension of time to 2 February 2020.

4.19 On 31 January 2020, the respondent filed its response. In addition to pleadings going to the substantive claim, so far as it was understood, the response also pleaded various matters of jurisdiction. One of which was that the claimant had not engaged in early conciliation before presenting her claims to the ET as she was required to do. It said it was incumbent on the respondent to raise this jurisdiction issue having regard to the overriding objective.

4.20 A telephone preliminary hearing took place before EJ Batten on 2 March 2020. Amongst other things, at paragraph 3 of the orders arising from that hearing, the Judge ordered a hearing to determine the matters I have set out above. The initial response to Covid-19 has caused that hearing to be adjourned to today.

4.21 On 4 March, 2020, the existing case management orders were stayed pending conclusion of the matters ordered for today.

4.22 On 16 November 2020, the claimant submitted proposed amended particulars of claim.

4.23 On 19 November 2020, the claimant resubmitted the original ET1 claim form (that is, in its unamended form) rectifying the defect in the original claim in that this version of the ET1 claim form contained a valid ACAS EC number. This was submitted under cover of an email to the Midlands (East) Employment Tribunal which stated: -

> ***The Respondent argues that these proceedings (case number 2603452) are a nullity. I argue that any defect has been cured and the claim was validly accepted on 18 December 2019. That will be decided on 23 November 2020. If the Respondent succeeds in their primary submission, and the Employment Judge rejects the claim under r.12(2) of the Employment Tribunal Rules of Procedure 2013, please treat this as an application under rule 13 for a reconsideration of the rejection.***

5. The Rejection Issue

5.1 The relevant law is principally found in rules 10, 12 and 13 of schedule 1 of the rules. Rule 10 provides: -

> ***Rejection: form not used or failure to supply minimum information***
>
> ***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.***
>
> ***(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.***

5.2 The relevant parts of rule 12 provide: -

> ***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) …***
>
> ***(b) …***
>
> ***(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;

(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;...; or

(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) of paragraph (1).

(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made an error in relation to a name or address and it would not be in the interests of justice to reject the claim.

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

5.3 Rules 10 and 12 sit alongside their own specific procedure for reconsideration of any such rejection under them. Rule 13 so provides: -

Reconsideration of rejection

13. — (1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a re- consideration on the basis that either—

(a) the decision to reject was wrong; or

(b) the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the no- tice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the ap- plication, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise, the application shall be considered at a hearing attended only by the claimant.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.

5.4 In addition, rule 6 provides as follows:

— 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 ... does not of itself render void 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;

5.5 As with all the rules, they fall to be interpreted by reference to rule 2, the overriding objective.

5.6 I have been referred to and considered a number of authorities relevant to the interpretation of these provisions. They are **E.ON Control Solutions Limited v Caspall UKEAT/0003/19/JOJ**; **The Commissioners for HM Revenue and Customs v Serra Garau IKEST/0348/16/LA**; **Sterling v United Learning Trust UKEAT/0439/14/DM**; **Adams v British Telecommunications PLC UKEAT/0342/15/LA**; **North East London NHS Foundation Trust v Shou UKEAT/0066/18/LA**; **Cranwell v Cullen UKEATPAS/0046/14/SM**; and **Science Warehouse Ltd v Mills [2016] I.R.L.R. 96**. All deal with the rejection regime under the rules in the context of early conciliation and the consequential application of the relevant extension of time provisions. I refer to some in particular as the propositions for which they are authority arise. All of these cases are to be considered in terms of the regularly repeated observations of the higher Tribunals and Courts that the purpose of early conciliation is to resolve disputes, not to create new satellite disputes but that until others address those growing consequences, the law is to be interpreted as it stands.

5.7 Unpicking this narrow procedural issue and navigating what I might do now, compared to what other judges have decided in this case already, has proved to engage a surprisingly wide range of complicated and inter-related issues which has necessarily taken some time to set out in these reasons.

Rule 10

5.8 Upon a claim being presented to the tribunal, the first stage of consideration is an administrative one. All that is required by Rule 10 is for a clerk to check that the claimant has used of the correct prescribed form and that it contains the minimum information required. Mr Kibling's skeleton argument focused only on sub-paragraph (i) of rule 10(c). He is of course correct insofar as provision of an ACAS cert number was missing from the claimant's claim form but the three items in the list are expressed as alternatives. Mr Kibling readily accepts that all that was required at the rule 10 stage was for the claimant to confirm whether the claim does not institute any relevant proceedings or one of the exemptions applies. She did that and rule 10, the stage at which there might have been an administrative rejection, was satisfied.

5.9 For my part, whilst it is correct that rule 10 was in fact satisfied in this case, I am not sure that is the end of the matter. It may or may not be important to keep in mind *why* rule 10 was satisfied as one goes on to consider rule 12. In this case it was the existence of an exemption to the obligation to engage in early conciliation (or possibly that the obligation was not engaged at all). It is that which causes the claim to proceed to the next stage of "vetting" under the rules and, in turn, that which informs the notified defect should a judge then reject the claim. The reason this is important is because had the claimant not ticked to indicate an 'exemption' applied, the absence of a certificate number should (and on this point I think I can be confident in saying *would*) have led to the claim being rejected at rule 10. The notified defect would then have been the absence of a certificate number or confirmation that any exemption applied.

The Rule 12 procedure

5.10 Although rule 10 only requires the correct form to be completed with minimum information, rule 12 deals with what is headed "substantive defects" and provides the basis on which the Tribunal administration may refer a claim to a Judge for a decision about rejection. Rule 12(1)(a) to (f) set out various circumstances in respect of the claim form which then give rise to a duty to reject. Sub-paragraphs (a) and (b) are not relevant to this case. Sub-paragraphs (c) and (d) are potentially directly relevant. Sub-paragraphs (e) and (f) are, in my judgment, not relevant at all. Where they are considered to apply, they will similarly lead to rejection under paragraph (2A), but only after first considering the minor error and interests of justice test giving some scope for an erroneous claim to nonetheless avoid rejection. The respondent has argued that this "escape route" does not apply where the defect is in respect of the situations defined in rule 12(1)(a) - (d). I agree. The rules say as much. However, to the extent that the respondent further argued that rule 12(2A) goes to influence or inform the scope or extent of either the duty to reject under rule 12(2), or the power or extent of the reconsideration exercise under rule 13 I do not agree. There is no restriction on reconsiderations under rule 13 for claims rejected under rules 12(1)(c) or (d) arising from rule 12(2A).

5.11 Breaking rule 12 down, a clerk is under a duty to refer the claim to a judge where they consider the claim *may* fall within one of those paragraphs. In turn, where the judge considers the claim *is* of a kind falling within one of the paragraphs they are then under a mandatory duty to reject the claim. Rule 12(3) governs the administrative acts that will follow such a judicial rejection. It is significant that that process requires the return of the claim form and provision of details of how to apply to reconsider the rejection. Accompanying the returned claim form will be a notice of rejection which must state the Judge's reasons for rejection. That is an important procedural step because it is that notice which then informs what is meant by the "notified defect" in the context of what might later become the grounds for reconsideration under rule 13(1)(b).

The meaning and nature of an exemption

5.12 It is worth briefly reflecting on what is meant by exemptions. The power to prescribe is set out in s.18A(7) of the Employment Tribunals Act 1996. The rules so prescribed are found in the Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regs 2014 at regulation 3 under which the obligation to conciliate is exempted. It includes at r.3(1)(b) the exception relating to instituting relevant proceedings "*on the same claim form as claims that are not relevant proceedings*" along with others. For most of the exemptions, there is a corresponding box to tick on the ET1 claim form mirroring the terms of the prescribed exemption. That is not so in the case of r.3(1)(b) and there is no explicit exemption in the Act or the Regulations that *"ACAS does not have the power to conciliate on some or all of my claim"* as used in the ET1 claim form. Ticking that box may be relevant to one of two separate situations which, one way or the other, do arise under the act and regulations but the distinction between them may be important at the point of rejection. One situation is where the claimant believes, in accordance with regulation 3(1)(b) that the claim form institutes a mix of relevant proceedings and claims which are not relevant proceedings. Clearly, where ACAS does not have the power to conciliate some of that prospective

claimant's claims this provides an exemption from the obligation to provide an early conciliation number in respect of the claims that otherwise would require it. However, the other possibility is that a claimant believes there are no relevant proceedings instituted at all within the claim. In the case of the latter, this cannot be an "exemption" as one cannot be exempt in law from doing something that the law does not first require the claimant to do. This distinction between exemptions and non-relevant proceedings is seen in the options for rejection at rule 10(c), in particular (ii) and (iii).

5.13 I should add that it goes without saying that if a claimant advances a claim in an ET1 claim form that ACAS genuinely does not have power to conciliate, it must nevertheless be a claim that the employment tribunal otherwise has jurisdiction to determine in order for the exemption to engage. It is not an issue before me in this case but it seems to me highly unlikely that a claimant could circumvent the rules by including in an ET1 a claim of, say, defamation alongside a claim of unfair dismissal.

5.14 Whether that distinction proves significant or not, whether what is relied on is an exemption, properly called, or simply that the EC obligation is not engaged in the first place, a claimant's plea that they are not required to provide a certificate number may be advanced by correctly or under a genuine mistake. It may even be deliberately advanced by a claimant that knows it does not apply in an attempt to circumvent the obligation in s.18A, although there is no suggestion of that here. The bottom line is that, at some point, the tribunal will have to determine whether the exception applies or not. That potentially becomes an issue of jurisdiction just as with any other jurisdictional issue. If the proceedings are relevant proceedings and the exemption does not apply, then the claimant will be found to have failed to discharge her obligations under s.18A of the Employment Tribunals Act 1996. On determining that the plea has failed, the tribunal does not then have jurisdiction over the claim and the parties.

5.15 The reason for noting the different situations in which an exemption might arise is because the nature of each differs as does the information that might need to be available to the tribunal in order to reach the necessary "consideration" of it. The apparent issue might arise at different stages of the life of a claim depending on the type of exemption relied on. This is relevant to an issue in this case of whether the tribunal was permitted to engage in the correspondence with the claimant to seek out further information. For example, the exemption that "*my employer has already been in touch with ACAS*" (r.3(1)(c)) *might* require further enquiry and evidence before it is be possible to properly reach the necessary standard of "considering" that the exemption did not apply. At the time of a rule 12 vetting referral, all the Judge will have is the claimant's confirmation that the exemption applies. It would seem unlikely that there would be any proper basis to "consider" at that stage that that exemption did not apply. To then leave it to the respondent to raise in their ET3 response would be tantamount to reducing a jurisdiction point to a limitation defence or pleading point. It must therefore be possible for the tribunal to hold of the issue and take some case management steps short of rejecting the claim under rule 12 but to keep open the determination of that issue to a later date. The fact that a claim is not rejected at an initial referral does not end the ability of the Tribunal to consider the issue at a later date (see **E.ON** at para 42). I cannot see

that the rules prohibit some acknowledgement of the issue being engaged but not yet decided and if that is correct, some appropriate case management order being made by the tribunal to progress the that jurisdictional issue towards a determination. This is potentially possible as the rejection stage is only a negative action. The fact that a claim is not rejected, has no corollary that the claim has therefore been 'accepted'.

5.16 However, where a claimant relies on the exemption that "*ACAS does not have the power to conciliate on some or all of my claim*", as the claimant did, the need for further enquiry would not arise. I would expect that in most if not all cases the applicability of that exemption should be readily apparent to a Judge without need for more enquiry and certainly having regard to the safety net of rule13.

The meaning of "considers".

5.17 As the Tribunal clearly did take some steps in this direction, and because I am being invited to determine whether the tribunal did reject or should be deemed to have rejected the claim, I must consider more fully the concept of what it means for either the clerk or the Judge to "consider" that one of the sub-paragraphs in rule 12(1) may apply. In particular, whether this is a decision that has already been reached or remains open to me to make.

5.18 This raises a question of what is meant to "consider", which is all the rules require of either clerk or judge. I do not feel comfortable using the phrase "standard of proof", but something of a standard is meant by "considers" which distinguishes it from other expressions such as being "satisfied" or proved or its cognates. It is clearly referring to a state of belief reached on reviewing the relevant facts available. Its use in rule 12 is different to its use in rule 13(3) where it is used to describe the process of evaluating the evidence on a particular state of affairs as opposed to the conclusion reached by that process. If one "considers" something to be the case, one has a reasonably settled view that that state of affairs is the case, although that may be something less than being satisfied, and much less than being sure, but it seems to me that is all rule 12 requires. Alternatively, its use as a word to define the decision reached may also be a means of simply distinguishing it from other decisions made under the rules which have a formal meaning such as an 'order' or a 'judgment' as until the case is properly before a judicial body it has no power to express either form of decision. Nevertheless, it seems to me that in order to "consider" something to be the case, rule 12 requires the person exercising that judgment to come to a settled view on the available evidence that one of the applicable states of affairs contemplated by sub paragraphs (a)-(f) in rule 12(1) is made out.

5.19 The risk that this paper decision making process could lead to a wrong decision on the limited information available is mitigated by the specific reconsideration process provided for in the rule 13. Although rule 13 obviously requires a rejected claimant to initiate the reconsideration process, their access to justice is maintained as they may seek reconsideration as of right and the opportunity then exists to put right a rejection that was "wrong" or to put right a claim which was correctly rejected.

5.20 In this case, there is no question in my mind that the claims of disability discrimination and unfair dismissal, even in their presently unparticularised form, are most definitely claims that ACAS has the power to conciliate and there is nothing further in the ET1 to think there might be some other type of claim falling outside s.18(1) of the Employment Tribunals Act 1996. At the time that the claim form was referred by the tribunal clerk, for my part, I would take the view that there is enough information available to reach a conclusion that the exemption did not apply. As far as I can see from the correspondence sent out on 3 December 2019, it seems to be the case that the judge at that time could be said to have "considered that" the claim was of a kind falling within at least one of the sub paragraphs of rule 12(1) and this conclusions is largely found in the conditional nature of the correspondence. In other words, unless the defects raised could be resolved, the claim would be rejected. If that means it is correct to say that that decision has already been reached, then it is no longer open to me to make it. Either way, however, it seems to me that where that decision has been made, the rules required the tribunal to then reject the claim. That is a step that I cannot see did happen and whether it flows from the original judge's "consideration" or mine, it remains open to me to make it happen. First, I must consider whether it can be said that it did happen or could be deemed to have happened.

The Formality of Rejection.

5.21 Rejection is not simply an abstract concept, it gives rise to tangible practical consequences under the rules. Once a Judge applying rule 12 concludes the circumstances in rule 12(1) are made out, rule 12(3) (or 10(2) as the case may be) engages to impose a mandatory administrative process whereby three significant things happen:-

a) The claim form is returned to the claimant;

b) The claimant is provided with a notice of rejection (setting out why the claim form has been rejected);

c) The claimant is provided with information about how to apply for a reconsideration of the rejection.

5.22 These stages clearly have purpose. They mark a significant decision that the claim has been rejected. Unless there is an application to reconsider it, there is nothing further for the Tribunal to do and nothing to be asked of the prospective respondent. Secondly, they make clear *why* the claim has been rejected. That in turn forms the basis of any reconsideration application that may be lodged or, alternatively, a rejected claimant may simply elect to present a fresh claim. Thirdly, if there is a successful reconsideration, the date on which the claim is presented can be determined with precision. If the success is founded on the fact that the original rejection was wrong, then that date is the original date of presentation. If it is founded on the fact that the notified defect has been rectified, then it is the date that defect was rectified.

5.23 On this occasion, it is clear from the correspondence that the tribunal was close to rejecting but stopped short of actually rejecting in that initial correspondence. It seems the letter in terms shows the Judge had enough information to "consider that the claim or part of it

was a of a kind described in sub-paragraphs within 12(1)(a), (b), (c), or (d)" as leading to the requirement to reject under rule 12(2). Rule 12(2) would seem to have required that to lead to a rejection. I cannot say with any confidence that the claimant's response on 5 December was referred to a Judge such that it can be said there has positively been a judicial decision *not* to reject.

5.24 It is not in dispute that the three practical consequences of the rejection process set out above did not happen in this case.

Deemed Rejection/Deemed Reconsideration

5.25 There was some argument before me whether the effect of the correspondence of 3 December 2019 amounted to a rejection or not, could be a conditional rejection and whether it was open to me to "deem" it to be a rejection. If it was a deemed rejection, whether it was open to me to "deem" the claimant's response as a reconsideration.

5.26 There are two ways of analysing what happened. One way is to interpret the tribunal's correspondence of 3 December 2019 as a conditional rejection giving a period of time to remedy the defect after which the conditional rejection would either be reconsidered or rejection confirmed. There are two problems with that even if the rules could be interpreted to provide for such a process. The first is that the claimant did not rectify the defects that she was informed of. To the extent that the Tribunal's correspondence can be said to have included a notice of the ground (or grounds) of rejection, they related to the basis on which the pleaded exemption was made out or providing a *pre-existing* certificate number. The claimant could not and did not satisfy either. Instead, she went to ACAS to obtain a new certificate number. The second problem is that on failing to provide the required information, even if this was intended to be some sort of conditional rejection, the subsequent formal rejection procedure did not follow when the conditional requirements were not met, nor was there any further action to consider the correctness of the grounds of the (conditional) rejection or to engage with the consequences of when the rectification took effect to mark the presentation of the claim.

5.27 The other way to look at it is that it simply served no function under the rules. I have already considered the scope to seek information in advance of a rejection decision. In that respect, I have already concluded that in appropriate cases the process of reaching a position where a judge can "consider" that the claim is of a kind falling within rule 12(2) must include some power of case managing an appropriate judicial enquiry to examine the plea and reach a decision. That is coupled with the fact that the issue might not arise until much later in the life of a claim and the power to determine it remains extant until it is exercised. However, such an approach has to be limited to the nature of the issue and, in particular, the sub-paragraph of rule 12(2) said to be engaged and which might in due course form the notified defect. It may have been appropriate in this case to explore why the claimant said these were not relevant proceedings in whole or in part in order to consider that issue but, frankly, the issue seems beyond argument and in any event, rule 13 provides a safety net for the rare case where there may be such a mix of claims wrongly rejected. The correspondence on file appears to have conflated the procedures in rule 12 and 13. The result is that, whilst the

provision of a wholly new ACAS EC certificate number is arguably something which does remedy the defect of exemptions, the way it happened has left the tribunal and the parties without a clear position on the fundamental question of when a valid claim could be said to have been presented and whether it is properly before the tribunal.

5.28 I do not accept it is open to me to "deem" a rejection from the events that have happened and equally, therefore, there can be nothing from which I could "deem" a reconsideration application to have been made. There are four reasons for this.

5.29 The first is that rejection and the subsequent reconsideration application are clear cut events in a process under the rules that cannot happen by accident. They either happen or they do not and they did not happen in this case.

5.30 Secondly, a rejection has consequences under the rules which cannot be inferred from the facts of what happened in this case in a number of respects. The rejection must identify the defect which becomes the notified defect. The letter of 3 December arguably does identify three potential defects but falls short of rejecting the claim. The letter does not then cause the administrative rejection process of returning the claim form. That is an essential procedural step because without that, the claimant cannot engage in the reconsideration process. Any such reconsideration process that could have happened requires the claimant to set out one of two things. Either the basis on which the rejection was wrong or that the notified defect has been rectified. It follows that the notified defect is pivotal to the process as it is either *that* notified defect that is shown to have been wrong or *that* notified defect is subsequently rectified. In the absence of such notice, there cannot have been a reconsideration.

5.31 Thirdly, it may be arguable whether a claimant whose claim has been rejected can engage in a reconsideration application under rule 13 on grounds unrelated to the notified defect although they could, of course, simply commence a fresh claim satisfying the necessary jurisdictional requirements at the same time. To the extent that the tribunal's letter of 3 December 2020 did set out what might potentially have become a notified defect, the response on 5 December neither established that decision was wrong, nor did it provide the information requested by way of a pre-existing certificate number.

5.32 Finally, a fundamental requirement of any litigation is to be able to determine precisely when a claim is presented. That is left hanging in uncertainty on any attempt to reinterpret what happened by "deeming" inchoate actions as complete. The reason for the administrative process under rule 12(3) of returning the claim form is to mark the fact that the claim has been rejected and, unless there is some action by the claimant, is not before the tribunal. Perhaps more important is so that any reconsideration that does follow carries a clear date upon the rectified defect being represented to the tribunal. As things presently stand, that date is not clear and that uncertainty fundamentally undermines the purpose of an initial process governing the presentation of claims. It has led to arguments in this case whether such a "deemed" approach should mean the claim is deemed presented when the information was in fact put before the tribunal or when some sort of judicial evaluation of it led to the claimant being sent the letter saying her claim was "accepted". Those are artificial

arguments that only arise because the tribunal had not yet rejected the claim in accordance with steps required by the rules. The process of returning the claim form, and the claimant resubmitting the claim form duly rectified as part of any reconsideration application (or fresh claim) is more than a formality. It gives everyone concerned the certainty of a new presentation of the claim.

Actual Rejection and Reconsideration

5.33 That analysis leads me to conclude that I must now reject the claim.

5.34 Rejection does not happen in the abstract. It is specifically whether the claim is of a kind described in the relevant paragraphs of rule 12(1). In this case sub-paragraph (d) is engaged on the facts of this case and based on how the claim passed through the rule 10 vetting stage. That state of affairs is engaged where an exemption is confirmed in the claim form but is found not to apply. Not only does that (and did that) appear to be the case on the face of the papers, the claimant has confirmed it to be the case. I will cause the formal rejection process to be administered that flows from that decision although for reasons that I will come to, that may serve no practical purpose.

5.35 As the claim form presented on 28 November 2019 is the only claim form, the question then turns to reconsideration. The process of reconsideration under rule 13 is required to be in writing, presented within 14 days of the notice of rejection and explain why the decision was wrong or has been rectified. It may appear as a matter of logic that there cannot be a reconsideration before there has been a rejection. However, there are two reasons why I have concluded that I can look to a prior date for what amounts to an application for reconsideration rectifying the defects in the original claim.

5.36 The first relates to the extent of the restriction on judicial discretion arising under rule 6. I am just persuaded that rule 6 is available to me when I consider rule 13 in a way that I accept it is not when considering rules 10 and 12. The process of making and determining a reconsideration application has a different nature and quality to the mandatory procedures found with rules 10 and 12 which otherwise so directly affect jurisdiction and the very existence of a claim. In that respect it is common ground before me that rule 6 is not available to bring about a result a result whereby something which the mandatory rule 12(2) has brought to an end is not then brought to an end (see **Baisley v South Lanarkshire Council [2017] ICR 365** and its analysis by HHJ Eady QC in **E.On** at para 57). There is an argument that says rule 13 is merely an extension of that mandatory procedure but I have decided the process of reconsideration under rule 13 could admit some flexibility where that is necessary to do justice in accordance with the overriding objective although I recognise it is still dealing with a situation where there is, at that time, no live claim before the tribunal until and unless the application is successful and, by definition, the act of reconsideration requires the tribunal to focus on what was required by rule 12 or 10 as the case may be.

5.37 A factor carrying particular weight in my judgment is that a claimant in receipt of notice of rejection need not engage with the reconsideration application process at all. Clearly, if they are of a view that the rejection was wrong, the consequences to the date of presentation

means they would be well advised to seek reconsideration. If, however, the basis of reconsideration would be to seek to rectify the defect, there is no material difference to the claimant between a successful application to reconsider the claim and merely presenting a fresh, and procedurally compliant, ET1. There is nothing in rule 13 which serves to prevent such a fresh claim. By definition, the procedural rejection of the initial claim does not render the proceedings res judicata. Time limits will often be a significant issue in whichever route is pursued but where a claim is otherwise still in time, a rejected claimant is not bound to adopt only the rule 13 route.

5.38 Against that background, there are four possible points in the chronology when it could be said that the claimant has done what was necessary to either present a fresh claim or, with some application of rule 6 to vary certain requirements, could be said to have made an application for reconsideration under rule 13.

5.39 The first arises on 5 December when she emailed the tribunal attaching her newly acquired ACAS EC certificate. The second is on or around 18 December 2019 when the tribunal, in what I have to conclude was a purely administrative act (i.e. without referral to a judge) sent a letter to the parties which describes the Tribunal having “accepted” a claim. The third is on 16 November 2020 when the claimant submitted a proposed amended particulars of claim, amongst other documentation. The fourth is three days later on 19 November 2020 when she presented a new ET1 claim form which rectified the defect in that it contained a valid early conciliation certificate number and made an explicit and anticipatory application for reconsideration, should the decision at today’s hearing be to reject the claim. In addition to these four past dates, it remains open to me to conclude that there cannot be an application for reconsideration until after there is a rejection and the administrative process of rejection has taken place which, if that is the conclusion that I come to, will mean there is not yet a reconsideration application before the tribunal.

5.40 I have decided that I can look to the earlier dates but that it is only the fourth date, 19 November 2020, which sufficiently satisfies the requirements of a reconsideration or could potentially amount to the presentation of a fresh claim.

5.41 I have rejected the date of 5 December 2019 as at this stage the claimant did not provide what had been asked for and even to the extent that the information meant she could have done so, the information was not provided within a claim form that could theoretically have amounted to a fresh claim. Nor can I construct or “deem” her to have resubmitted a rectified claim form in response to a “deemed” rejection even if it might be said that, on that date, the constituent parts of a valid claim were then all available to the tribunal.

5.42 I have rejected 18 December 2019 as it is clear to me that the implications of rule 12, though identified by a Judge as engaged, had not been concluded. There is no evidence that there was any further consideration of the issue or rejection and, as established in the authorities, there is no “acceptance” process within the rules, at least insofar as claims are concerned, and claims remain susceptible to rejection at any point that the jurisdiction issue arises.

5.43 I have rejected the date of 16 November as this is clearly said to amount to an amendment application which is not open to the tribunal to determine unless there is already a valid claim before it. It does not present a fresh claim, does not rectify the defect and were a claim presented based only on a "grounds of complaint", it would be rejected at rule 10.

5.44 The date of 19 November is different. It could amount to the presentation of a fresh claim, albeit the medium by which it gets before the tribunal does not strictly comply with the presidential practice direction. It does contain an ET1 in which the defect has been rectified. It is presented at a time when the tribunal and all parties are fully aware of the jurisdiction point engaged and it is explicitly stated to be such an application complying with rule 13. The only part of rule 13 that raises a question is the meaning of "within 14 days of the date that the notice of rejection was sent". Such time limits are routinely amenable to extension of time under rule 6 where to do so is in the interests of justice. That may not be necessary if the temporal requirement is interpreted to mean "not later than 14 days after.." which necessarily includes at any time before. Similarly, as the parties may reasonably have expected a decision on 23 November 2020 and the delay in its promulgation is my responsibility, not that of the parties, it may be said that an application made on 19 November does fall "within 14 days" of 23 November. The combination of all these factors weigh heavily in not dismissing the application for reconsideration made pre-emptively and explicitly on 19 November 2020 and I therefore treat it as properly made. To the extent it is necessary to purport to invoke rules 2 and 6 to waive the temporal requirements in rule 13, I would do so.

5.45 As to the reconsideration application itself, it is clear that the newly drafted ET1 does meet the requirements of rule 10. The defect that the stated exemption does not apply was correct but the defect has been rectified in that the erroneous exemption is no longer relied on and a valid ACAS EC certificate has been provided. The claim could have been presented afresh in that form on 19 November 2020. Of course, had it been presented then it would have been substantially out of time but the effect of a successful reconsideration is the same.

5.46 The claim will stand presented on 19 November 2020.

6. The Time limit issue

6.1 The time for presenting a claim of unfair dismissal is determined by s.111(2) of the Employment Rights Act 1996 which provides:-

> ***(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.***

6.2 There is no dispute that the effective date of termination was 31 August 2019. The time limit set by s.111(2)(a) expired on 30 November 2019, 2 days after the defective claim was actually first presented. It is theoretically subject to modification by s. 207B of the 1996

Act where the time spent in early conciliation serves to disapply certain days so that they are not counted when calculating that time limit (or to otherwise provide a new date when the time limit set by this provision expires). In this case, that has no effect as early conciliation was not commenced at any time during which the days were being counted to determine this relevant provision. As a result, the claim presented on 19 November 2020 has been presented 11 ½ month's out of time.

6.3 It is universally understood that the discretion to extend that time limit as provided by s.111(2)(b) is a stricter test than its equivalent in other claims for which a just and equitable test is provided. This test requires the claimant to satisfy me first that there was some state of affairs operating on her ability to bring the claim such as to be able to say it was not reasonably practicable present a claim in time. If she cannot satisfy this test the claim is out of time without further consideration. If she can, she then has to satisfy me that the time within which the claim was presented is itself a further reasonable period of time.

6.4 Knowledge of one's rights, how to enforce them and knowledge and access to the procedure to follow to do so are all potentially available to an out of time claimant to explain why, in any particular case, it was not reasonably practicable to present a claim in time. A claimant's mental health is also a factor which, in an appropriate case, could meet the test as are genuine mistakes or misunderstandings which were reasonable to make in the circumstance.

6.5 In this case, I have decided the evidence does not assist the claimant with any of these potential explanations. I have reached that conclusion for a number of reasons. First, to a small degree I have regard to the claimant's professional background in journalism which demonstrates she is an intelligent individual whose professional working life had within it some degree of requirement to research and understand unfamiliar concepts and distil them in a way to present them to an audience. I don't place a great deal of weight on this factor, but it does serve to balance another relevant fact that the claimant was a litigant in person. A factor that is mitigated further by the fact that she has had access to some competent advice at various stages.

6.6 That, of course, can be tempered by the state of her mental ill health which I accept has at times been serious. However, it has fluctuated over time and, at the material time relevant to the unfair dismissal time limit, had not prevented her from embarking on the master's degree in law. I did not consider the evidence showed it had materially affected her ability to present a claim to the ET, which she otherwise did. I also found that whatever the state of her mental health had been, there had been no material change in circumstances in the relevant period. I then have to consider whether it was reasonable for this claimant to labour under the mistaken belief that her claims were not claims that ACAS had the power to conciliate. I am not satisfied that it was a reasonable mistake. In addition to what research this particular claimant might reasonably have been expected to be able to conduct, it is hard to imagine anyone being able to conduct even the most cursory internet search of employment tribunal claims without the issue of ACAS Early Conciliation being returned. Perhaps more problematic for her, however, is that the online process for submitting a claim requires the prospective claimant to engage, head on, with the issue of early conciliation in

order to be able to submit the claim. Faced with that part of the process, I do not accept that it would be reasonable for anyone to simply guess at what that meant without some further enquiry. I would have reached that conclusion in any event but I am reinforced in these circumstances as the online process itself provides signposting to the necessary guidance and information. The claimant presented her claim late in the 3 month time limit but she could not be said to have been up against the deadline. The erroneous claim was presented 2 days before the deadline. Finally, and perhaps most persuasively, I have had regard to how much effort was required or how much difficulty encountered by the claimant when she was subsequently notified that there was a problem with her claim. There is no suggestion of any apparent difficulty in researching what was needed. The process happened on the same day as the tribunal sent its communication of 3 December 2019 and, in a matter of hours, the claimant was apparently able to engage with the particular problems the tribunal had identified. She was able to recognise, understand and accept that the exemption relied on did not apply. She was able to identify how she might attempt to remedy the defect, to find out what to do to engage in early conciliation in theory and, immediately thereafter, to actually do so in practice. That puts the relative competencies, understanding and abilities of the claimant in the spotlight. I do not accept that with equal diligence those steps could not reasonably have been undertaken at any time in the previous few months. Such that there was any genuine misunderstanding or mistake as to the application of early conciliation, it was not a reasonable one to hold.

6.7 The test of reasonable practicability is more generous than a question of literal or physical practicality, but more onerous that a mere reasonableness test. Even giving that test a liberal interpretation in favour of the employee, it still requires her to establish the facts of the reason why a timely claim was not reasonably practicable. For the reasons I have given, it follows that she has not and I am not satisfied that it was not reasonably practicable for the claim of unfair dismissal to have been presented in time. As a result, there is no requirement to consider the second limb of the test.

6.8 The time for presenting a claim of disability discrimination is set by s.123(1) of the Equality Act 2010 which provides:-

> ***(1)Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—***
>
> ***(a)the period of 3 months starting with the date of the act to which the complaint relates, or***
>
> ***(b)such other period as the employment tribunal thinks just and equitable.***

6.9 The first consideration is to identify when time starts to run. This is an unparticularised claim which, had it been accepted at the time of its original presentation would have required further particularisation and possibly permission to amend. That much is acknowledged in the application to that effect which I am aware of but have sought to put out of mind for the present purpose of assessing time limits of the unamended claim. To some degree that is artificial. On the other hand, if the unamended claim remains, the question of the time limit of the proposed amendments can be considered at the time of the amendment. For present purposes, the ET1 potentially points to unparticularised allegations arising much earlier in the

chronology but a clear thrust of the complaint is unfavourable treatment in the context of having to deploy the career break option in the absence of any other long-term adjustments. That is treatment which takes place during July and August 2019, the respondent says 2 August, when the career break option is pursued and agreed and, arguably, continues until it is implemented with the termination of employment on 31 August 2019. It seems to me that the circumstances that lead to termination of employment are part and parcel of her claim of disability discrimination and that the decision that leads to termination of employment should be used for present purposes to assess time limits. Anything earlier than that may or may not form part of conduct extending over a period or alternatively will be subject to a discrete consideration of time limits if and when the application to amend is considered.

6.10 Even on this basis, the claim is considerably out of time. Indeed, it may be said that even the claim first presented on 28 November 2019, would not, had it been valid, have persevered claims occurring or ending on or before 29 August 2019 and it may be that the claimant might have had to resort to the discretion to extend time for some of all of her claim even if the original claim had been valid.

6.11 The discretion to extend time on a just and equitable basis is a fundamentally different test to the not reasonably practicable test. I am given a broad discretion to permit a claim to proceed out of time. All that is required is that I give consideration to those factors which are relevant and ignore those that are irrelevant. It is often said the checklist of factors found within s.33 of the Limitation Act 1980 are relevant as was offered as guidance in **British Coal Corporation v Keeble [1997] IRLR 336**. In most cases they probably will be relevant and serve a useful reminder of the sort of considerations that might help balance the prejudice between the parties of granting or refusing the extension of time. Conversely, if one or more of the s.33 factors are not relevant, the statutory test does not require me to consider it. Mr Kibbling reminds me of **Robertson v Bexley Health Centre [2003] EWCA Civ.576** and the often cited observations of Auld LJ at paragraph 25 in particular. He submits that it is for the claimant to establish that it is just and equitable to extend time and that the exercise of discretion is the exception rather than the rule. I confess, I have never found those comments to actually mean what respondent's often seek to suggest they are authority for. In respect of the former point, the claimant of course has a legal burden as unless she applies for the discretion to be exercised, it is not going to be. She necessarily has an evidential burden on to advance factors on which a tribunal could rely on to justify such discretion being exercised. Similarly, however, a respondent is perfectly entitled to discharge an evidential burden to show why an extension of time would be unjust or inequitable to it, for example because of the loss of evidence or witnesses or other relevant intervening matters. In respect of the latter point relied on, I have never understood Auld LJ observations to be setting a threshold for the claimant to overcome before the discretion can be exercised in her favour. It remains no more than a judicial discretion, and a wide one at that, to be exercised in the usual manner having regard to justice, fairness, relevance and reason.

6.12 Ms George for the claimant reminds me of the same authorities but argues that the tribunal needs only weigh the explanation for the delay, it does not need to find "good" reason for delay as a necessary step towards a just and equitable extension (**Abertawe Bro**

Morgannwg University v Morgan [2018] I.C.R. 1194). She also says that it is a relevant factor for the tribunal to note and weigh where there is an absence of any real prejudice to an employer (**Baynton v South West Trains Ltd [2005] ICR 1730**).

6.13 There are two stages to the explanation why there is now delay in presenting the claim. The first relates to the claimant's mistake in completing the claim form. Had she obtained a certificate number, as she so easily did on 3 December 2019, the claims would have been in time at least as far as the date of dismissal was concerned and only a matter of two or three weeks out of time insofar as the claim relating to the decision to may have crystalised on or around early August 2019. Her mistake in taking the approach she did was not a reasonable one to make, even having regard to the claimant's history of mental ill-health. That history of ill health, however, is not rendered wholly irrelevant in understanding the genesis of this claim, how it has been framed and how the claimant has come to understand the central trigger for it, namely being forced to take the career break option with the consequence that her employment had to come to an end.

6.14 The second stage of analysis is what has happened since within the tribunal system in the year it has taken to determine the jurisdiction point arising under rule 12. That delay is excessive and regrettable. However, I do not regard any of that delay to fall at the door of the claimant (nor, for that matter, the respondent). Had the tribunal itself clearly rejected the claim on 3 December 2019, it would have had a proper application for reconsideration only 2 days later. Whilst the claim would then still have been out of time, as it might be in parts in any event, it is wrong in my judgment to say the claimant carries any responsibility for matters being where they are now. I do not accept that the fact the claimant's recently appointed legal advisers proposed an approach on 19 November to lodge a formal application for reconsideration is evidence that she has delayed in any material respect or contributed to the delay since early December 2019. If that had been lodged 6 months earlier, this hearing would still have taken the course that it did.

6.15 The effect of this is that I do not regard the further delay to be a factor which weighs heavily in the balance against the exercise of discretion. To the extent that there is any element of considering how promptly the claimant acted in response to the facts that found her claim, not only did she attempt to bring a claim within time but then acted particularly promptly in seeking to put right the defect in that original claim. The ease with which that was done weighed heavily against her in the consideration of whether the timely presentation of the unfair dismissal claim was not reasonably practicable. Against these considerations of just and equitable discretion to extend time, I regard it as assisting her application.

6.16 In respect of the year that has passed, a further relevant factor to weigh is that the respondent has been aware of the claim, such as it is from mid-December 2019. In fact, even allowing for the additional correspondence between tribunal and claimant, it had learned of the claim in a little over three weeks after the original presentation date. At peak times of processing new claims, that is a prompt turnaround. More particularly, it has been able to present a response. Insofar as the issues are broadly set out in the claim it has been in a position to secure such evidence as there may be that is relevant to the circumstances of the claimant's recent employment history, her redeployment and engaging the career break

policy. There may or may not be specific issues of delay and the quality of evidence when the amended claim comes to be considered, but they can be considered at that time. What is clear is that there is no particular substantial prejudice evidenced or advanced by the respondent beyond the fact that it has a time limit point to argue in addition to merits until the time limit point is determined. In that regard I accept Ms George's point that the absence of real prejudice is a material factor I must weigh.

6.17 The history and events relevant to this matter, including the employer's original responses to the situation is clearly one which was well documented including not only contemporaneous correspondence between the claimant, her managers and HR but also occupational health reports. There is no particular suggestion that contemporaneous documentation has been destroyed or lost and its disclosure will no doubt inform how both parties present their cases. There is always a general risk of some deterioration in the quality of evidence as time goes on. All jurisdictions seek to minimise that delay but some delay is inevitable in any process of reconstructing past events in the evidence adduced before a court. To the extent that this is a relevant factor in this case, the risk of fading recollections is a neutral factor affecting the claimant and respondent equally.

6.18 This is not a case where there is any concealment or lack of cooperation arising as relevant considerations.

6.19 The circumstances then fall to be considered against the overall balance of hardship of allowing or refusing the application. If it is refused, the claimant cannot advance her claim at all. If it is granted, the respondents will be required to defend it on its merits. In this case I am satisfied the factors tip in favour of granting the application at least insofar as it relates to the career break and termination of employment. As I have already said, the relevant expiry of time limits of any further claims particularised or identified as a result of the amendment application may still have to be considered.

6.20 Finally, I recognise the potential harshness of my conclusion on when the rejected claim could be said to have been rectified, namely 19 November 2020 as opposed to 5 December 2020 when the certificate number was provided in the abstract. That was principally because the rejection process is prescribed and mandatory and the rectification flows from that. However, as things stand, it seems to me nothing has turned on that in the conclusions in respect of time limit. Had I settled on 5 December as the date of presentation following some sort of 'deemed' rectification of the defects, it seems to me I would have been bound to come to the same conclusion in respect of unfair dismissal time limits and could only have been further reinforced in the conclusion I came to in respect of the disability discrimination time limits.

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Employment Judge Clark

20 January 2021