Claim number: 3311994/2022 & 3301792/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms P. Charles	AND	Hertfordshire County Council
		Clare Macdonald

HEARD AT: **Watford Tribunal** (via CVP) **ON:** 10 November 2023

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: In person

For Respondent: Mr Khan, solicitor

RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. **The claims of race discrimination within the first claim (3311994/2022), against the first Respondent, are struck out.**
2. **The claims of race discrimination within the second claim (3301792/2023), are struck out against both Respondents.**

3. **The complaint of unfair dismissal within the second claim, against the second Respondent is struck out.**

REASONS

Background

1. This case was scheduled for a preliminary hearing to determine:
    1.1. Whether the Tribunal has jurisdiction to hear the race discrimination claim under the first claim against the first respondent without ACAS EC;
    1.2. Whether the presentation of the second claim raises any jurisdictional issues if it is the same as the first claim;
    1.3. Whether the second claim raises additional race discrimination claims not set out in the first claim against the second respondent. *If so, this claim will be out of time as the second ACAS EC certificate does not extend time and thus the Tribunal may need to consider whether it is just and equitable to extend time in respect of claim 2;*
    1.4. Whether the health and safety claim should be dismissed as the Tribunal does not have jurisdiction to hear it.
2. In advance I was provided with:
    2.1. An electronic bundle of 108 pages. Numbers within [ ] in this judgment are to pages within that bundle.
    2.2. An email from the Claimant dated 20 October 2023, attaching a document 'further particulars' and copies of three ACAS certificates (one dated 22 July 2022 in the name of the second Respondent and one for each of the Respondents dated 1 December 2022) - these are also within the bundle
    2.3. An email from the Claimant dated 3 November 2023, attaching her schedule of loss. This sets out the amount claimed for the unfair dismissal claim and, although there was a section for compensation in relation to discrimination, no figure has been entered.

2.4. Emails from the Claimant regarding provision of the hearing bundle

Facts

3. On 22 July 2022, the Claimant started early conciliation in relation to the second respondent. ACAS issued a certificate (R197724/22/37) on 2 September 2022 [4].
4. On 29 September 2022, the Claimant presented the first claim (3311994/2022) to the Tribunal against the first and second respondent, referencing only the ACAS certificate obtained in relation to the second respondent [5]. The Claimant selected that she was bringing a complaint of race discrimination.
5. Where the particulars would usually be set out, the Claimant has stated *"See attached"* [11], however there is no attached file.
6. The Claimant provides details of her representative as Nalin Cooke from the trade union UNISON [13].
7. The Tribunal system shows that the Tribunal sent the Claimant correspondence on 14 October 2022, which stated:

   "The Legal Officer Khan has requested to present to the Tribunal Office, the ACAS Early Conciliation Certificate for Respondent One "Hertfordshire County Council" which predates the presentation of this claim."
8. No response appears to have been received from the Claimant to that request, but on 25 October 2022, the Claimant was notified that her claim had been accepted.
9. On 8 November 2022, a response was filed on behalf of the first respondent identifying that as there had been no conciliation in relation to the first respondent the claim should have been rejected under Rule 10(1) or 12 [22]. The Tribunal system shows that notification of the response being accepted was sent to the Claimant on 4 January 2023.
10. On 1 December 2022, the Claimant started early conciliation in relation to the first respondent and the second respondent. ACAS issued a certificate for each of the respondents (R2700058/22/95 and R2700059/22/86 respectively) on 12 January 2023 [26-27].
11. On 10 February 2023, the Claimant presented a claim (3301792/2023) to the Tribunal against the first and second respondent, referencing the correct ACAS

certificates for each respondent. The Claimant selected that she was bringing complaints of unfair dismissal and race discrimination and made additional reference to "Health and Safety" [39].

12. Where the particulars would usually be set out, the Claimant has stated *"Please see attached"* [40], and a separate document sets out the claims [46 – 63]. The document sets out various events involving the second Respondent between 25 October 2021 [46] and 27 April 2022 [55].
13. Paragraph 33 then sets out that:

> *"On 5 May 2022, Petra raised a grievance with the Chair of Governors, Peter Williams. in which she alleged race discrimination and bullying and harassment. In her grievance she outlined the events set out more In depth."*

14. The grievance and disciplinary processes are described, including appeals. The grievance was not upheld on 6 September 2022, and on 11 October 2022 the appeal against dismissal was rejected [63]. The Claimant had Union representation throughout the internal processes.
15. Paragraph 60 of the document [63] concludes:

> *"It is submitted the [sic] Petra Charles has a case against Kingwood [sic] Nursery School on the following grounds:*
> *Race Discrimination*
> *Health and safety*
> *Unfair dismissal"*

16. The unfair dismissal claim is described as:

"

- *Insufficient reason for dismissal as there was considerations of other sanctions.*
- *Bullying and harassment.*
- *Unfair procedures were followed"*

17. Reference to Kingswood Nursery School appears to be to the location where the Claimant worked -recorded as that in the second claim [35] and "Kingswood Early Years Centre" in the first claim form [6] – not to either the first or second Respondent specifically.

18. No representative details are recorded in the second claim [42].
19. On 1 April 2023, EJ Maxwell ordered that the Respondent's file amended grounds of response in relation to claim 3311994/2022.
20. On 3 April 2023, a response was filed on behalf of both Respondents. Within the grounds of resistance, they requested that the new (second) claim should be joined with the earlier (first) claim.
21. On 4 May 2023, amended grounds of response were filed in relation to claim 3311994/2022.
22. On 12 September 2023, Judge King ordered the Claimant to provide the following information by 20 October 2023:
    - *22.1. "First claim, by reference to the particulars of claim the date and each allegation relied upon as discrimination. Against whom is that allegation brought and the claimant should confirm whether it is a claim for direct or indirect discrimination or harassment.*
    - *22.2. Second claim, by reference to the particulars of claim where this is not set out above already in respect of the first claim the date and each allegation relied upon as discrimination. Against whom is that allegation brought (1st or 2nd respondent or both) and the claimant should confirm whether it is a claim for direct or indirect discrimination or harassment in respect of each allegation."*
23. On 20 October 2023, the Claimant sent a document titled 'further particulars' to the Respondent and Tribunal. I have been provided this as a separate document, but it also appears within the hearing bundle [98 – 104]. Within that document, she set out a number of allegations regarding events between 25 October 2021 and 27 April 2022. After the majority of these, the following phrases, or variations of these, are included: *"Clare MacDonald's unwanted treatment towards Petra is harassment on the grounds of race in accordance with section 26 of the Equality Act 2010"; "This treatment from Clare MacDonald is harassment on the grounds of race in accordance with section 26 of the Equality Act 2010"; "this was another act of unwanted conduct on the grounds of race in accordance with section 26 of the Equality Act 2010".*

24. I note that although the Claimant is clear about all of her discrimination claims amounting to harassment, contrary to section 26 Equality Act, she uses other phrases that allude to other types of claims, possibly dorect discrimination. For example: *"Clare Macdonald treated other staff members, who are white, differently when they took time off in their carers' role"; "This shows Clare Macdonald's treatment towards Petra as alleged was less favourably".* However, although she is unrepresented, she was given information in the previous case management orders about the elements of each type of discrimination and has had the time and opportunity to consider these and seek legal advice on her claims. I am therefore satisfied that she is bringing claims of harassment on the grounds of race.
25. Unfortunately, the Claimant makes no distinction between complaints within the first and second claim as ordered by EJ King.
26. The dismissal claim is set out at the end of paragraph 39:

"Unfair Procedure – the grievance process was not complete, and the outcome of appeal decided after Petra's dismissal.

Disciplinary hearing – procedure not in accordance with the Employment Rights Act 1996, under section 98 (4)(a) and (b). There was no consideration about any alternative sanction other than dismissal, obfuscation about the appeal process and Petra was dismissed before the outcome of her grievance appeal."

The law

27. **Rule 10 - Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**

"Rejection: form not used or failure to supply minimum information

(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."

28. Rule 12 - Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

"Rejection: substantive defects

(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

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

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

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

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

(da) one which institutes relevant proceedings and the early conciliation number on the claim form is not the same as the early conciliation number on the early conciliation certificate;

(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.

(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).'

(2ZA) The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

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

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

29. I reminded myself of the case law relating to when a claim is accepted by the tribunal when it should have been rejected under rule 10 or referred to an employment judge under rule 12. In that situation, the EAT has held, on several occasions, that it remains incumbent on an employment judge considering the claim at a later stage to reject the claim under rule 12 as it was not validly presented, with the result that the tribunal lacks jurisdiction to determine it. However, that line of cases has now been overruled by the Court of Appeal in *Clark and ors v Sainsbury's Supermarkets Ltd 2023 ICR 1169, CA*.

30. In *Clark,* the Court determined that unless the claim is rejected under rule 10 or 12, the case moves on to the judicial sift under rules 26–28, and then on to the case management stage, where rule 37 gives the tribunal the power to strike out a claim on a number of grounds, including non-compliance with any of the rules or that the claim has no reasonable prospect of success. In the Court's view, if no such rejection occurs, it is not open to a respondent to argue at a later stage that the claim *should* have been rejected. The respondent's remedy is to raise any points about non-compliance with the rules in the ET3 response form, or in appropriate cases at a later stage, and to seek dismissal of the claim under rule 27 for want of jurisdiction or apply for it to be struck out on one of the permissible grounds for strike-out under rule 37. Where such an application is made, the wide power to waive an irregularity under rule 6 applies.

31. **Rule 27 - Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**

"Dismissal of claim (or part)

(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—

(a) setting out the Judge's view and the reasons for it; and

(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.

(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).

(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.

(4) If any part of the claim is permitted to proceed the Judge shall make a case management order."

32. Rule 37 - Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

"Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

33. I also reminded myself that the Tribunal Rule 34 of the Tribunal Rules gives the Tribunal a wide discretion to add, substitute and/or remove parties to proceedings at any stage, even after the time limit for bringing a fresh claim against a new respondent has expired:

"Addition, substitution and removal of parties

The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."

34. 18A Employment Tribunals Act 1996

"Requirement to contact ACAS before instituting proceedings

(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7).

...

(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases. The cases that may be prescribed include (in particular)—

(a) cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;

(b) cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;

(c) cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

...

(10) In subsections (1) to (7) "prescribed" means prescribed in regulations made by the Secretary of State

(11) The Secretary of State may by regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).

35. Section 123 Equality Act 2010

"Time limits

(1) Subject to section 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.

...

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

..."

36. Section 140B Equality Act 2010

"Extension of time limits to facilitate conciliation before institution of proceedings

(1) This section applies where a time limit is set by section 123(1 (a) or 129(3) or (4).

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."

37. A useful summary of the principles governing the exercise of the 'just and equitable' discretion was set out by Mrs Justice Elisabeth Laing (as she then was) in *Miller and ors v Ministry of Justice and ors and another case EAT 0003/15*:

•the discretion to extend time is a wide one

•time limits are to be observed strictly in employment tribunals. There is no presumption that time will be extended unless it cannot be justified. The reverse is true: the exercise of discretion is the exception rather than the rule

•if a tribunal directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, 'perverse', i.e. no reasonable tribunal properly directing itself in law could have reached it, or the tribunal failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence

•what factors are relevant to the exercise of the discretion, and how they should be balanced, are a matter for the tribunal. The prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases

•the tribunal may find the checklist of factors in S.33 of the Limitation Act 1980 helpful but this is not a requirement,

38. *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT* sets out the Limitation Act factors, requiring the court to consider the prejudice which each

party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular:

38.1. the length of, and reasons for, the delay;

38.2. the extent to which the cogency of the evidence is likely to be affected by the delay;

38.3. the extent to which the party sued has co-operated with any requests for information;

38.4. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Submissions

39. Following the Claimant's provision of her further and better particulars document, the Respondent provided written submissions on 7 November 2023 [105 – 108], which were supplemented by oral submissions to me. I do not replicate the submissions in full here, but by way of a summary, the Respondents say:

39.1. As set out in the further particulars, the Claimant clearly only intended to bring the race discrimination (harassment) claims against the second Respondent;

39.2. In relation to those claims, they are all individual allegations with no evidence of continuing conduct. Having started conciliation on 22 July 2022, any act before 23 April 2022 is out of time;

39.3. As the Claimant did not start early conciliation in relation to the first Respondent before presentation of the first claim, it should be rejected under Rule 10(1)

39.4. The dismissal is not alleged to be discriminatory, so the unfair dismissal can only be against the first Respondent. The second Respondent should be removed from that claim.

39.5. If the Claimant's intention was to bring the race discrimination claims within the second claim against the first Respondent, the claims are out of time, and it is not just and equitable to extend time;

39.6. The Claimant had advice from Unison, who must have explained about conciliation and time limits. The only explanation is that she had bad advice, but this is a 'bread and butter matter';

39.7. The Claimant is a teacher – a smart lady, who will have given thought to the process;

39.8. There is no prejudice to the Claimant as she can still litigate all her claims, whereas there is significant prejudice to the first Respondent as a public authority in having to defend these claims.

40. The Claimant's position was not particularly clear, but in response to the above submissions and in reply to questions from me, she said the following:

40.1. She didn't understand the process – Unison was helping in the background, but she completed the claim form herself;

40.2. She thought the first certificate in September was for race claims against Mrs MacDonald, and the two certificates in December were bringing everything together. Her understanding was all claims were in time;

40.3. She intended the claims against the first and second Respondent, but as the school had separated the grievance (discrimination complaints) and dismissal (disciplinary) she did the same. The second claim was then bringing everything together;

40.4. When she contacted ACAS in December 2022, it was because the Respondent had contact Unison to say they wanted to conciliate *[I note that this was disputed by the Respondents' representative, with reference to their response to the first claim which set out that the Tribunal had no jurisdiction to deal with claims against the first Respondent]*;

40.5. She is not a teacher. She worked under a teacher and doesn't know about the law.

Conclusions

Whether the Tribunal has jurisdiction to hear the race discrimination claim under the first claim against the first respondent without ACAS EC

41. The Respondent's application was for the claim to be rejected under the provisions of Rules 10 (and 12). That is plainly incorrect following the decision in ***Clark***, and the proper application is for strike out under Rule 37. Whilst that wasn't the application before me, the Tribunal can consider it on its own initiative. Although there were no specific submissions on this, the details remain the same. I am therefore satisfied that the Claimant had a reasonable opportunity to make representations about whether the claim should proceed or not.
42. The requirement in section 18A Employment Tribunals Act 1996 to contact ACAS before instituting proceedings is supplemented by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as permitted by s.18A(11) of the Act. As Rule 12(1)(f) of the 2013 Regulations provides for a claim to be rejected where 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, by inference that Rule requires the name of the Respondent on the claim form and conciliation certificate to match.
43. In the absence of an early conciliation certificate with the first Respondent's name, there cannot be any match on the claim form. Therefore, the Tribunal Rules – specifically Rule 12 – have not been complied with. On that basis, the claim is liable to be struck out under the provisions of Rule 37(1)(c).
44. In this situation, the Tribunal is required to have regard to the overriding objective in Rule 2, and in particular must consider:
    - 44.1. the magnitude of the non-compliance;
    - 44.2. whether the default was the responsibility of the party or his or her representative;
    - 44.3. what disruption, unfairness or prejudice has been caused
    - 44.4. whether a fair hearing would still be possible, and
    - 44.5. whether striking out or some lesser remedy would be an appropriate response to the disobedience

45. The non-compliance by the Claimant in this instance is not minor – it relates to the primary requirement to begin a claim. It is deemed a substantive defect, to the extent that non-compliance should result in a rejection without further input from the Claimant.
46. The Claimant's explanation that the Respondent had separated the grievance and disciplinary matters, so she did too, only makes sense in relation to her initial approach to ACAS. When that happened in relation to the second Respondent on 22 July 2022, the disciplinary process had not concluded. Similarly, when the certificate was issued in relation to the second Respondent on 2 September 2022, the Claimant had not yet been dismissed.
47. However, when the first claim was presented on 29 September 2022, the Claimant had been dismissed more than three weeks prior, on 5 September. Even in the Claimant's mind there can no longer have been separation at that point. In those three weeks after dismissal, the Claimant could have approached ACAS in relation to the first Respondent, whether that was to conciliate to simply to obtain a certificate. Although, I note that the appeal against dismissal was not concluded until October 2022 – it is possible for there to be a mistaken belief as to the interaction between/effect of an ongoing internal appeal and an external tribunal claim.
48. I take into account that the Claimant had the assistance of a trade union representative. Whilst not legally qualified, they would/should have been aware of the basic requirement to conciliate with a prospective respondent. Similarly, the union representative should have been aware that an employer can be vicariously liable for acts of discrimination perpetrated by its employees, and so the Claimant could have entered into conciliation with both Respondents in July 2022. Taking everything into account, it is more likely than not that it was an active decision to only enter conciliation with the second Respondent at that time.
49. When the Claimant started conciliation with both Respondents in December 2022, she hadn't yet received the response to the first claim, so wasn't aware of the defects in relation to conciliation with the first Respondent. However, she would have been on notice about this when the second conciliation certificates were

issued on 12 January 2023, and certainly when the second claim was presented on 10 February 2023. She could have addressed the issue at this point, clarifying that there was an intention to bring the race discrimination claims in the first claim against the first Respondent, and explaining why she had not conciliated with them. The Claimant told me herself that she knew the first ACAS certificate was for Mrs MacDonald and the race claims.

50. Nowhere within the particulars for the second claim, or the further and better particulars that the Claimant was permitted to submit, is there any reference to the first Respondent's liability for the actions of Mrs MacDonald. I therefore conclude that the Claimant did not intend to bring race discrimination claims against the first Respondent at any time.
51. The first Respondent has been prevented from engaging in conciliation by the Claimant's failure. Although that would not prevent them from entering into similar settlement negotiations if they were formally a Respondent to the proceedings. However, there is clearly a prejudice to the first Respondent if they are party to proceedings by accident rather than design, in terms of the resources to defend the claim and the remedy if found liable at the end of a contested hearing.
52. The issues have arisen so early in the proceedings that the prejudice is limited at this stage. The problem could be rectified by recognising the Tribunal's acceptance of the claim without a conciliation certificate as adding the Respondent to the claim under the provisions of Rule 34.
53. Ultimately, the most relevant and persuasive evidence is that the Claimant, with advice from her trade union, made an informed decision to only enter conciliation with the second Respondent.
54. On this basis, the complaints of race discrimination against the first Respondent contained within the first claim are struck out for non-compliance with the Tribunal Rules, specifically Rule 12(1)(f) in relation to the requirement for Respondent names to match on the conciliation certificate and claim form.

Whether the presentation of the second claim raises any jurisdictional issues if it is the same as the first claim

55. As no particulars were attached to the first claim a direct comparison cannot be made with the particulars that accompanied the second claim. I do note that all of the allegations of race discrimination set out in the second claim predate the approach to ACAS prior to presentation of the first claim.
56. I also didn't have the benefit of seeing the allegations set out in the Claimant's internal grievance - which may have indicated what was in her mind more closely in time to the submission of the first claim – so could not compare this to the second claim either.
57. I am not assisted by the further and better particulars provided by the Claimant as, despite clear instructions from Judge King on the last occasion, they do not distinguish between the first and second claims.
58. On that basis, and in the absence of any evidence from the Claimant to the contrary, I conclude that the race discrimination claims within the first claim are the same as those within the second claim.

Jurisdiction – first respondent

59. The Claimant has never suggested that the dismissal itself was an act of race discrimination, so the last allegation relates to 27 April 2022. The Claimant was therefore required to present her claim to the Tribunal no later than 26 July 2022 (3 months less 1 day) or approach ACAS before that date to pause time. The earlier complaints will only be considered to be 'in time' if the Claimant can show that they form part of a course of continuing conduct.
60. When the Claimant approached ACAS in relation to the first Respondent on 1 December 2022, she was already more than 4 months past the time limit. As it had already expired, time did not stop running. By the time that the second claim was presented on 10 February 2023, more than 6 months had passed since the expiry of the primary limitation date.
61. Therefore, I have to determine whether it would be just and equitable to extend time in relation to the race discrimination complaints within the second claim

against the first Respondent (the unfair dismissal claim is in time). The Tribunal has a wide discretion to hear out-of-time claims within whatever period they consider to be 'just and equitable'.

62. I rely on the conclusions I reached in relation to the issues above. Having determined that it was not the Claimant's intention to bring the race discrimination claims against the first Respondent, it is difficult to envisage a scenario where it would be just and equitable to extend time to allow the claims to proceed against them.
63. The reason for the delay is that there was no intention to bring those claims against the first Respondent.
64. Even if the Claimant and her representative were operating under a mistaken belief about the need to conciliate with the first Respondent at an earlier point (and the effect of internal disciplinary/appeal processes), because of a perceived separation of issues internally, they would have been aware of the need to conciliate by the time the appeal was rejected. This was on 14 October 2022, but the Claimant only approached ACAS in relation to the first Respondent on 1 December 2022. Whilst this was in time for the unfair dismissal claim, as the dismissal itself is not claimed as an act of discrimination, it was already too late in relation to the discrimination claims. Then, as referred to above, the Claimant waited for the conciliation period to complete, rather than simply obtain a certificate. This is not prompt action.
65. I don't agree with the Respondents' representative's assertion that there is *no* prejudice to the Claimant if the race discrimination claims don't proceed against the first Respondent. It is correct that she gets to litigate everything against someone, and the factual background of the claims against the second Respondent will be ventilated before the same Tribunal who deal with the unfair dismissal claim against the first Respondent. But there is the potential that recovery of any remedy against an individual (in the event of a successful claim) may be limited as compared to a public authority. However, I don't know how much of an issue this as the Claimant hasn't included the value of the discrimination claims within her schedule of loss. Additionally, even if the claims proceed against

the first Respondent, they could still involve the statutory 'reasonable steps' defence – if that was successful the Claimant would be in the same position regarding the second Respondent even if any of her claims are successful. The prejudice to the Claimant is therefore limited.

66. Taking everything into account, it is not just and equitable to extend time in relation to the claims of race discrimination against the first Respondent. The Tribunal therefore has no jurisdiction to deal with these claims, and they are struck out.

Jurisdiction – second respondent

67. As the race discrimination claims within the first and second claims are the same, it would be an abuse of process to allow the race discrimination claims in the second claim to proceed against the second Respondent.
68. Separately from this, as an individual, the second Respondent cannot be liable in relation to the Claimant's dismissal.
69. The Tribunal has no jurisdiction to deal with any of the claims within the second claim, against the second Respondent, and they are dismissed.

Whether the second claim raises additional race discrimination claims not set out in the first claim against the second respondent.

70. As determined above, the race discrimination claims within the first claim are the same as those within the second claim.
71. There are therefore no additional considerations necessary in relation to a just and equitable extension of time to present the second claim against the second Respondent.

Whether the health and safety claim should be dismissed as the Tribunal does not have jurisdiction to hear it.

72. The only reference to Health and Safety is in paragraph 29 of the further particulars [102]. As EJ King already explained to the Claimant, the Tribunal has no jurisdiction to deal with stand-alone claims under the Health and Safety at Work

Act. Nothing within the further and better particulars document suggests this is anything other than that. I note that this allegation is also asserted as a harassment complaint.

73. On that basis, this claim is struck out because the Tribunal has no jurisdiction to deal with that claim.

Summary

74. The claims of race discrimination within the first claim, against the first Respondent, are struck out.
75. The claims of race discrimination within the second claim, are struck out against both Respondents.
76. The complaint of unfair dismissal within the second claim, against the second Respondent is struck out.
77. The claims of race discrimination within the first claim, against the second Respondent, will proceed to a final hearing. As this preliminary hearing was not to deal with the time limits as they relate to continuing conduct, I have made no findings in relation to this, and it will be an issue for the Tribunal to determine.
78. The complaint of unfair dismissal within the second claim, against the first Respondent, will proceed to a final hearing.
79. The claims have already been consolidated and will be heard together. At the last preliminary hearing, Judge King noted that unless the Claimant could show just cause why the claims shouldn't be heard together then this is what would happen. Nothing that the Claimant said to me indicated that the claims didn't arise out of the same factual matrix and, as Judge King has already explained, the Tribunal will not want two multi day hearings covering the same background and lead up the dismissal whether as race claims or unfair dismissal claims.
80. The issues to be determined at the final hearing will include time limits regarding whether the Claimant has established a course of conduct relating to her harassment claims.

Case management

81. Case management orders to progress the remaining claims to a full merits hearing will be sent separately.
82. Finally, I am aware that the Regional Employment Judge has written to the parties in general terms about the delay in this judgment being completed. I would like to take this opportunity to apologise to the parties and their representatives for the time that this has taken. I am grateful for the patience of all involved. The delay has been caused by my ill health, and I have finalised and promulgated the judgment as soon practicable.

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Employment Judge Douse

Date: 1 November 2024

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SENT TO THE PARTIES ON

4 November 2024

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL