EMPLOYMENT TRIBUNALS

Between

Claimants: **Mr A C Walsh and others (see schedule)**

Respondent: **Govia Thameslink Railway Limited**

Heard at London South Employment Tribunal on 7 September 2017

Before Employment Judge Baron

Representation:

Claimant: ***Natasha Joffe***

Respondent: ***Julian Milford***

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal as follows:

1 The Tribunal has the jurisdiction to determine the question as to whether each of the Claimants is entitled to a statutory redundancy payment in accordance with Part XI of the Employment Rights Act 1996;

2 That the Tribunal has the jurisdiction to determine the claims made by each of Mr Jordan (case number 2301391/2017) and Mr Brooks (Case number 2301387/2017) for unfair dismissal made under Part X of the 1996 Act, and for a contractual redundancy payment made under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994;

3 That the Tribunal does not have the jurisdiction to consider the claims for unfair dismissal made under Part X of the 1996 Act, and for a contractual redundancy payment made under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 by each of the other Claimants and such claims are dismissed.

REASONS

1 These proceedings arise out of the much publicised dispute concerning the use of Conductors on Southern rail services, being part of the Respondent. It is not necessary to go into the details of the dispute for the purposes of this hearing. It suffices to record that notice was given to the Claimants to terminate their employment as Conductors to take

effect on 31 December 2016. Re-employment was offered in the role of On-Board Supervisors. Each of the Claimants apart from Mr Chew accepted the new role. Those Claimants bring claims of unfair dismissal based upon the *Hogg v. Dover College* principle. Mr Chew brings a more straightforward unfair dismissal claim, as he left the employment of the Respondent. Each of the Claimants is also making claims for both contractual and statutory redundancy pay.

2 The issue before me for decision in relation to most of the Claimants is, in broad terms, whether the Tribunal has the jurisdiction to consider the claims of unfair dismissal and for contractual redundancy pay taking into account the statutory time limits and the ACAS early conciliation procedure. Miss Joffe accepted that if I were to find that any of the claims were presented outside of the time limit then none of the Claimants could seek to extend the time limit on the basis that it had not been reasonably practicable to present the claim in time.

3 The facts are not in dispute, and it is easiest to approach them in chronological order.

3.1 On a date not specified, notices of termination of employment were given to the Claimants to take effect on 31 December 2016.

3.2 On 14 November 2016 Mr Rodway presented an early conciliation form to ACAS (or telephoned ACAS) in accordance with rule 1 of the Early Conciliation Rules of Procedure – 'the EC Rules'. The relevant certificate was issued on 20 December 2016.

3.3 As already stated, the causes of action arose on 31 December 2016.

3.4 Between 10 January and 16 February 2017 each of Messrs Walsh, Chew, Gillespie, Hills, Thake, Richardson and Bartlett presented early conciliation forms to ACAS in accordance with the EC Rules.

3.5 The ACAS early conciliation certificates were issued between 10 February and 20 February 2017.

3.6 Mr Bartlett presented an early conciliation form to ACAS on 20 March 2017, and the certificate was issued on 4 April 2017.

3.7 What I will refer to at present as 'the group notification' was made to ACAS on 22 March 2017 and 'the group certificate' was issued on 22 April 2017, being one month and one day later.

3.8 Mr Brooks presented an early conciliation form to ACAS on 28 March 2017 and the certificate was issued on 18 April 2017.

3.9 The claim form ET1 was presented to the Tribunal on 17 May 2017 on behalf of all the Claimants. In section 2.3 of the form the ACAS certificate number was given as MU000703/17/61.

4 Something further needs to be said about 'the group notification' and 'the group certificate'. There is nothing in the EC Rules which makes

provision for any such notification or certificate. The Rules specifically refer to 'claimant' in the singular. I have been informed by the clerk of the Tribunal responsible for checking such matters that all group certificates which are issued have a 'MU' number, and those relating to individual claimants have an 'R' number. However, attached to any group 'MU' certificate is a schedule listing the names of the individuals to whom it relates, and importantly also a 'R' number for each individual. By using that 'R' number the clerk is able to obtain the certificate for the relevant individual. At this hearing it was concluded that the use of a group notification and a group certificate was a system adopted by ACAS outside of, or alongside, the EC Rules to facilitate the administration of the system. The important point is that that procedure still results in the issuing of individual certificates. The group certificate in this case covered all of the Claimants except Mr Bartlett and Mr Brooks. I will continue to refer to 'the group certificate' for convenience, but in reality that phrase means the individual certificates issued to the nine Claimants named in the schedule attached to the group certificate.

5 The statutory and other material provisions set out in the submissions of Miss Joffe are as follows:

> ***Employment Tribunals Act 1996***
> **18A Requirement to contact ACAS before instituting proceedings**
> (1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7).
> (2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.
> (3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.
> (4) If--
>
> (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or
> (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.
>
> (5) The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.
> (6) In subsections (3) to (5) "settlement" means a settlement that avoids proceedings being instituted.
> (7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases. The cases that may be prescribed include (in particular)--
>
> cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;
> cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;
> cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.
>
> (8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
> (9) Where a conciliation officer acts under this section in a case where the prospective claimant has ceased to be employed by the employer and the proposed proceedings are proceedings under section 111 of the Employment Rights Act 1996, the conciliation officer may in particular--

(a) seek to promote the reinstatement or re-engagement of the prospective claimant by the employer, or by a successor of the employer or by an associated employer, on terms appearing to the conciliation officer to be equitable, or

(b) where the prospective claimant does not wish to be reinstated or re-engaged, or where reinstatement or re-engagement is not practicable, seek to promote agreement between them as to a sum by way of compensation to be paid by the employer to the prospective claimant.

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.

(11) The Secretary of State may by employment tribunal procedure 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).

(12) Employment tribunal procedure regulations may (in particular) make provision--

(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4);

(b) requiring ACAS to give a person any necessary assistance to comply with the requirement in subsection (1);

(c) for the extension of the period prescribed for the purposes of subsection (3);

(d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a).

Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014

3 Exemptions from early conciliation

(1) A person ("A") may institute relevant proceedings without complying with the requirement for early conciliation where--

(a) another person ("B") has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B;

(b) A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings;

(c) A is able to show that the respondent has contacted ACAS in relation to a dispute, ACAS has not received information from A under section 18A(1) of the Employment Tribunals Act in relation to that dispute, and the proceedings on the claim form relate to that dispute;

(d) the proceedings are proceedings under Part X of the Employment Rights Act 1996 and the application to institute those proceedings is accompanied by an application under section 128 of that Act or section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992; or

(e) A is instituting proceedings against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.

(2) Where A benefits from the exemption in paragraph (1)(a), the requirement for early conciliation shall be treated as complied with for the purposes of any provision extending the time limit for instituting relevant proceedings in relation to that matter.

Employment Rights Act 1996

207B Extension of time limits to facilitate conciliation before institution of proceedings[1]

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

[1] There is a similar provision in article 8B of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

> But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.
> (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 a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
> (4) If a time limit set by a relevant provision 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) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

6 There are also provisions in the Employment Tribunals Rules of Procedure 2013 concerning the requirement for a claim form ET1 to contain an early conciliation number, or for there to be confirmation that one of the exemptions in regulation 3 of the 2014 Regulations applies. I do not consider it necessary to set those rules out.

7 The circumstances of two of the Claimants can be dealt with easily.

7.1 Mr Jordan. He first made contact with ACAS under the early conciliation procedure via the group notification on 22 March 2017. That was within the primary time limit. The certificate was issued on 22 April 2017. The claim form was presented on 22 May 2017, and is therefore in time.

7.2 Mr Brooks. Mr Brooks was not included in the group notification. He contacted ACAS on 28 March 2017 and the certificate was issued on 18 April 2017. Both the initial contact, and the presentation of the form were in time.

8 There then remains the claim by Mr Bartlett, and also the claims by the other eight Claimants. Mr Milford made submissions for the Respondent and Miss Joffe for the Respondent, to which Mr Milford replied. I am very grateful to them for their assistance in disentangling the various strands involved in this aspect of the claims.

9 I start with the submissions by Mr Milford for the Respondent. He first of all dealt with the claim by Mr Bartlett. He is the other of the Claimants in addition to Mr Brooks who was not included in the group notification and group certificate. Mr Bartlett presented his early conciliation form to ACAS on 20 March 2017, being before the group notification was made. That presentation is accepted as being within the primary time limit which was 30 March 2017. The certificate was issued on 4 April 2017. The time limit was therefore extended to 4 May 2017 under section 207B(4) of the Employment Rights Act 1996. The claim form presented on 17 May 2017 was therefore out of time unless Mr Bartlett was able to place reliance on another certificate.

10 It is the remaining seven concerning which most of the submissions were concerned. Those seven are Messrs Rodway, Chew, Walsh, Gillespie, Hills, Thake and Richardson. The remainder of these reasons will be concerned only with those individuals save as stated otherwise. Mr Milford neatly summarised the point in paragraph 5 of his submissions as follows:

> They all engaged in individual ACAS early conciliation, and received ECCs dated before 18 April 2017 (i.e. more than 1 month before their claims were lodged). To that extent they are in the same position as Mr Bartlett. However, they also engaged in collective early conciliation (the ECC for which is dated 22 April 2017).

11 Mr Milford submitted that each of those Claimants was unable to rely on the group notification and certificate, and had to rely on their individual earlier notifications, the consequence of which was that the claims were all out of time as the claim form was presented on 17 May 2017.

12 Mr Milford relied upon the judgment of Kerr J in *HMRC v. Serra Garau* UKEAT/0348/16 as confirmed by HHJ Eady QC in *Treska v. University College Oxford* UKEAT/0298/16. Miss Joffe accepted of course that the decision was binding of the Tribunal but sought to distinguish it on the facts. I refer to her submissions further below.

13 The facts in *Serra Garau* were simple. The sequence of events was as follows. Notice of termination was given. The early conciliation form was presented to ACAS and a certificate was duly issued. The notice expired. A further early conciliation form was then presented to ACAS and a further certificate issued. A claim form ET1 was subsequently presented. If the claimant had been able to rely on the second certificate then the claim would have been within time. If he were not able to rely on it, then the claim was out of time. It was held (according to the summary) that '[i]f more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period.' Paragraphs 18 to 27 of the judgment are as follows:

> 18. I come to my reasoning and conclusions. I am in no doubt whatever that the Respondent's submissions are to be preferred. Only one mandatory process in enacted by the statutory provisions. The effect of the provision is to prevent the bringing of a claim without first obtaining an early conciliation certificate. Once that has been done, the prohibition against bringing a claim enacted by section 18A(8) of the **Employment Tribunals Act** is lifted.
>
> 19. The *quid pro quo* for the prohibition against issuing a claim until a certificate is obtained, is that the limitation regime is modified so that the certification process does not prejudice the claimant. That is how section 207B of the **Employment Rights Act** . . . .
>
> 20. I agree with [counsel for the Respondent] that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.

> 21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4). The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of procedure scheduled to the **2014 Regulations**.
>
> 22. Section 207B then deals with the impact of the section 18A regime (and the **2014 Regulations**) on unfair dismissal time limits. . . . .
>
> 23. That section modifies the limitation regime by defining "Day A" and "Day B" and discounting for limitation purposes periods falling between them, and giving the claimant a further month in which to claim after the end of Day B, where the primary period of limitation would expire during the period between one day after Day A and Day B. There is no provision requiring Day A or Day B to fall within a primary limitation period however; either or both may or may not do so.
>
> 24. I am satisfied that the definition of "Day A" in section 207B(2)(a) refers to a mandatory notification under section 18A(1). It does not refer to a purely voluntary second notification which is not a notification falling within section 18A(1). Similarly, I am satisfied that the definition of "Day B" in section 207B(2)(b) of the **Employment Rights Act** refers to a mandatory certificate obtained under section 18A(4) of the **Employment Tribunals Act**. Section 207B(2)(b) says as much. It does not refer to a purely voluntary second certificate not falling within section 18A(4).
>
> 25. Therefore such a voluntary second certificate does not trigger the modified limitation regime in section 207B . . . . Such a second voluntary certificate is not required under the mandatory early conciliation provisions and does not generate the *quid pro quo* of a slightly relaxed limitation regime.
>
> 26. That does not mean, of course, that continuing voluntary conciliation under the auspices of ACAS is other than useful and to be encouraged. Voluntary conciliation through ACAS has been available for decades, since long before the mandatory element was introduced in 2014. Such voluntary conciliation does not, of itself, modify time limits; though it may influence tribunals which have to decide whether to allow amendments, grant extensions of time, or make other case management decisions.
>
> 27. I reach these conclusions without regret. It is a well known feature of litigation in many jurisdictions that settlement has to be considered alongside time limits and the running of time, and the obligation to litigate in a manner that is fair to the opposing party and to other users of the court or tribunal. Under procedural rules, defendants and respondents are entitled to benefit from the expiry of limitation periods. The entitlement to that benefit is only diluted to a limited extent in return for the obligation on a claimant, in this particular jurisdiction, to comply with the mandatory early conciliation provisions.

14 Mr Milford submitted that the Claimants in question fell within the principle in *Serra Garau*, and consequently the claims were out of time. As Miss Joffe had conceded that she could not properly argue for an extension of time, therefore the Tribunal did not have the jurisdiction to

hear the claims of those individuals of unfair dismissal and for a contractual redundancy payment.

15 Miss Joffe submitted that the claims in question could be distinguished from *Serra Garau* on the facts 'because of the different requirements in relation to group claims'. She added:

> There was no requirement on these individuals to commence early conciliation. All of them were entitled to rely on the EC process conducted in relation to their mutual 'dispute' by Mr Brooks of the group EC (in the case of Mr Bartlett) because of the exemption in reg 3(1)(a) of the ETs (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014.

16 It will be recalled that Mr Brooks' individual certificate was issued on 18 April 2017, and the group certificate was issued on 22 April 2017, and that neither Mr Brooks nor Mr Bartlett were included in the group certificate. In the alternative Miss Joffe reserved the right to argue that *Serra Garau* and *Treska* had been wrongly decided. Miss Joffe said that none of the Claimants needed to contact ACAS under the early conciliation procedure because they could rely on the early conciliation certificate obtained by Mr Brooks. Mr Bartlett could rely on the group certificate.[2]

17 Regulation 3(2), said Miss Joffe, made it mandatory only for one claimant to contact ACAS and then any other claimants with the same dispute could apply to the Tribunal on the same claim form. It was not *mandatory*[3] therefore for the other Claimants to undertake the early conciliation process at all.

18 Miss Joffe relied on the overriding objective of the Tribunal to deal with matters justly. One had, she said, to look at the early conciliation regime as a whole and seek to do justice. Another aspect of the overriding objective was to avoid complexity, and Miss Joffe submitted that having a multitude of different certificates and limitation dates created such complexity and administrative burdens.

19 My conclusion is straightforward. I prefer the submissions of Mr Milford and conclude that I am bound by the decision in *Serra Garau*. The sequence of events is slightly different, but the clear conclusion to which Kerr J came was that a prospective claimant can only go through the early conciliation process once. A second certificate issued to the same prospective claimant is a nullity. In these cases the Claimants were in a better position than Mr Serra Garau. The early conciliation period in his case began and ended during his notice period, and he did not benefit from any extension of time. Here the early conciliation process occurred after the termination of the employment and the Claimants did have the benefit of an extension of time.

20 There is a distinction to be made in that here there are multiple Claimants. In my view the scheme is clear. I am not attracted by the argument sought to be made by Miss Joffe as to the distinction between voluntary and mandatory conciliation in this respect. It is mandatory that

---

[2] It will be recalled that he was not a member of the group.
[3] Miss Joffe's emphasis

a prospective claimant obtains a certificate before a claim can be presented to the Tribunal, subject to certain exceptions. The material exception is in regulation 3(1)(a). I entirely accept (and Mr Milford agreed) that if it had not been for the issuing of the first certificates then the Claimants would have been able to rely on the certificate issued to Mr Brooks, but that is not what occurred. The bar on the presentation of a claim form ET1 had been removed by the issuing of the earlier certificates, yet no claim forms were presented. The exemption in the 2014 Regulations is of no benefit to the Claimants.

21 In the claim form ET1 the 'MU' number was inserted rather than the number of Mr Brooks' certificate. I do not have to decide the point as to whether absent the earlier certificates a claimant would be able to rely on a certificate different from that stated in the ET1. The fact remains that certificates had been issued to the Claimants on various dates up to 20 February 2017. It is not possible to rewrite history and pretend that the first set of certificates had not been issued.

22 I note the points made about the overriding objective and the interests of justice. In my judgment this is simply a case of statutory construction, and not a case where there is any discretion to seek to what is perceived to be justice.

23 My conclusions are therefore as follows:

23.1 The claims for statutory redundancy payments are in time as there is a six month time limit;

23.2 The claims of unfair dismissal and for a contractual redundancy payment made by Mr Jordan (case number 2301391/2017) are in time because he only had one early conciliation certificate (as part of the group certificate) which was issued on 22 April 2017; [4]

23.3 The claims of unfair dismissal and for a contractual redundancy payment made by Mr Brooks (case number 2301387/2017) are in time because he is able to rely on either the only early conciliation certificate issued to him on 18 April 2017, or on the group certificate in accordance with regulation 3(1)(a);[5]

23.4 The claims of unfair dismissal and for a contractual redundancy payment by Mr Bartlett (case number 2301386/2017) are out of time because he had an earlier certificate issued to him on 4 April 2017, although otherwise he would have been able to rely on the group certificate and regulation 3(1)(a);

23.5 The claims of unfair dismissal and for a contractual redundancy payment listed below are out of time because although the Claimants obtained an early conciliation certificate on 22 April 2017 each of them had previously obtained an early conciliation and the claims were presented out of time based upon such certificate. The claims are:

[4] That conclusion is not in dispute between the parties.
[5] Ditto

2301388/2017 – Mr J W Chew
2301389/2017 – Mr S Gillespie
2301390/2017 – Mr G J Hills
2301392/2017 – Mr G G Richardson
2301393/2017 – Mr C Rodway
2301394/2017 – Mr F Taylor
2301395/2017 – Mr M E Thake
2301396/2017 – Mr A C Walsh.

Employment Judge Baron

08 September 2017