Appeal No. UKEAT/0348/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 24 March 2017

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

THE COMMISSIONERS FOR H M REVENUE & CUSTOMS — APPELLANT

MR M SERRA GARAU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL NORTHALL (of Counsel) Instructed by: The Commissioners for H M Revenue & Customs Government Legal Department Ralli Quays 3 Stanley Street Salford M60 9LB
For the Respondent	MR KEVIN McNERNEY (of Counsel) Instructed by: Nationwide Employment Solicitors The Lansdowne Building 2 Lansdowne Road Croydon CR9 2ER

SUMMARY

PRACTICE AND PROCEDURE - Application/claim

PRACTICE AND PROCEDURE - Preliminary issues

The early conciliation certificate provisions introduced from 6 April 2014 do not allow for more than one certificate of early conciliation per "matter" to be issued by ACAS. If 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. The Employment Judge was wrong to hold otherwise.

THE HONOURABLE MR JUSTICE KERR

1. Parliament has enacted mandatory "early conciliation" provisions to steer parties in employment relationships towards resolving their differences without litigation. These provisions may do much good, but they also give the parties something else to litigate about. This is at least the fifth case of this kind we have had in the last couple of years. The appeal arises from a dispute about dispute settlement.

2. This appeal is brought by the Respondent below (now the Appellant, but referred to in this Judgment as "the Respondent" in the usual way) by leave of the President, against a Decision of a single Employment Judge sitting in Liverpool, that claims for unfair dismissal and disability discrimination brought by the Claimant against the Respondent were not out of time.

3. The Claimant was an administrative assistant, formerly employed by the Respondent, a tax authority. The Claimant had been on long-term sickness absence. He claims to suffer and to have suffered from a disability within the **Equality Act 2010**. The issue of disability is no longer contentious.

4. On 1 October 2015, the Claimant was given notice of termination of his employment by the Respondent. The notice was to expire on 30 December 2015. On 12 October 2015, the Claimant contacted ACAS for the first time, using the mandatory early conciliation procedure. On 4 November 2015, ACAS issued an early conciliation certificate. On 30 December 2015, the Claimant's employment came to an end on expiry of his notice period.

5. Nearly, but not quite three months later on 28 March 2016, he contacted ACAS for a second time. The next day, 29 March 2016, was the day on which, subject to the operation of the early conciliation regime, the primary three month limitation period would have expired. On 25 April 2016, ACAS issued a second certificate. One calendar month later, on 25 May 2016, the Claimant presented his claim for disability discrimination and unfair dismissal.

6. The issue arose whether the claims, or either of them, were in time or out of time. That issue came before the Employment Judge on 31 October 2016 at an oral hearing attended by the same counsel who have made their helpful submissions to me today. The Judge issued his Reserved Judgment and Reasons dated 14 November 2016 and they were sent to the parties on 18 November 2016.

7. After setting out the history and the main contentions of the parties, the Employment Judge said at paragraph 8 and following:

> **"8. Here there are unusual circumstances because the first EC [early conciliation] Certificate was issued before the limitation period had commenced, certainly with regard to the unfair dismissal claim, and the second EC Certificate was issued during the limitation period and after dismissal. The certificate is issued not by the parties but by ACAS. That is important.**
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> **9. The respondent cannot avoid acknowledging that there are two EC Certificates issued by ACAS. Consequently whatever the intention of the parties they were in conciliation during the second period in 2016 as well as during the first period in 2015. *Tanveer* [*v East London Bus and Coach Co Ltd* [2016] ICR D11] is authority for the proposition that the amount of time spent on early conciliation will not count in calculating the date of expiry of the time limit. The clock stopped during the second EC period. I see nothing in the legislation that opposes that view. More importantly it seems to me that such a conclusion is within the spirit of the legislation, namely to obviate the necessity of litigation. The more conciliation, the fewer ET1s will be issued and that was … probably the intention of Parliament when it decided on this process being implemented. The hope was there would be less litigation.**
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> **10. To penalise the claimant, or indeed any party for entering into conciliation seems to be wrong. Here there is in place a valid second EC Certificate issued by ACAS to the claimant. Mr Serra Garau got a valid certificate in April this year. He is entitled to rely on it. His claim was therefore issued in time and he can proceed with his claims. …"**

8. The statutory provisions, so far as material, can be briefly explained as follows:

(1) They were brought into force on 6 April 2014 as a package.

(2) Section 18A of the **Employment Tribunals Act 1996** provides, so far as material:

> **"(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.**
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> **…**
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> **(4) If -**
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> > **(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,**
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> **the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.**
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> **…**
>
> **(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).**
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> **…**
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> **(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations."**

(3) What is the prescribed period? It is the period provided for in Rule 6(1) and (2) of the Rules scheduled to the **Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014** ("the 2014 Regulations").

(4) In Rule 6 of those **Rules of Procedure** the period of early conciliation is up to one calendar month; starting on the date of receipt by ACAS of the early conciliation form or alternatively a telephone call to the same effect, and ending up to one month later, subject to a possible extension, once only, of up to fourteen days.

(5) Rules 1 to 3 of the same **Rules of Procedure** set out the requirements of early conciliation. They are limited, as has been explained in other cases. A form must

be submitted in writing or online, or alternatively a telephone call made to ACAS, stating the names and addresses of the parties. That is all.

(6) Also as part of the package, brought in with effect from 6 April 2014, provision was made for modifying the limitation regime in consequence of the early conciliation requirements being complied with. Section 207B of the **Employment Rights Act 1996** was inserted into it from that date. Section 111(2A) of the same **Act** was also inserted from the same date, and provides for section 207B to have effect. It is agreed that there is a materially identical counterpart provision in the **Equality Act 2010**, namely section 140B which was inserted into that Act. I can therefore confine myself to section 207B of the **Employment Rights Act 1996**.

(7) So far as material, section 207B provides as follows:

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

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9. Case law establishes the following parameters and guidance in relation to that legislative regime in a manner that was not controversial before me today.

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10. In **Science Warehouse Ltd v Mills** [2016] ICR 252, Her Honour Judge Eady QC held that the broad language used in section 18A(1) of the **Employment Tribunals Act**, "proceedings relating to any matter", precluded an argument by the employer that the employee was obliged to go through fresh mandatory early conciliation where she sought to amend her claim to add a new cause of action for victimisation following the employer's response to her initial claim for discrimination on the ground of pregnancy or maternity.

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11. At paragraph 30, HHJ Eady QC pointed out that the requirement to engage in conciliation is purely voluntary apart from the initial obligation to contact ACAS. The Employment Tribunal was entitled to allow the amendment sought on the basis that the employee had already obtained an early conciliation certificate in respect of the same "matter".

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12. In **Tanveer v East London Bus and Coach Co Ltd** [2016] ICR D11, the Digest states that HHJ Eady QC dismissed an appeal in which the limitation period, as modified by the operation of section 207B of the **Employment Rights Act**, expired one day before the employee presented his claim. The Digest records the Judge as saying that:

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> **"… the purpose of section 207B … was to ensure that, with regard to employment tribunal time limits, a claimant was not disadvantaged by the amount of time taken during the relevant limitation period for early conciliation compliance. Thus the amount of time spent on early conciliation would not count in calculating the date of expiry of the time limit; the clock simply stopped during the early conciliation period. …"**

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13. In **Compass Group UK & Ireland Ltd v Morgan** [2017] ICR 73, the employee contended that she suffered from a disability. There was a mobility clause in her contract of employment and the employer required her to work at a changed location. She brought a grievance and obtained an early conciliation certificate from ACAS. Two months later she

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resigned and claimed constructive dismissal, among other things. An Employment Judge held that the early conciliation requirement had been satisfied.

14. Dismissing the employer's appeal, Simler P held that it did not matter that the early conciliation certificate had preceded some of the events relied on in the case. The word "matter" in section 18A(1) of the **Employment Tribunals Act** was very broad and could embrace a range of events, including events that had not yet happened when the early conciliation process was completed. The learned President pointed out at paragraph 21 that Parliament had not chosen to limit the scope of an early conciliation certificate, either by requiring it to relate to past events or by providing for it to be time limited, i.e. to lapse after a certain amount of time.

15. Against that background, the issue before me in this appeal is whether more than one certificate can be issued by ACAS under the statutory procedures and what effect, if any, a second such certificate has on the running of time for limitation purposes.

16. The main submissions of Mr Northall, for the Respondent, were as follows:

> (1) The legislation only requires a claimant to comply with the mandatory early conciliation requirement once. The obtaining of an early conciliation certificate frees the claimant to issue the claim. There is no place in the statutory scheme for a second such certificate. Thus, the section 18A(8) prohibition against presenting a claim without having engaged in early conciliation only applies once.

(2) The second certificate in this case (issued on 25 April 2016) was therefore unnecessary, if not a nullity, and had no effect on the running of time for limitation purposes. The limitation period of three months therefore expired in the normal way on 29 March 2016. As it happened, on the facts of this case, the first early conciliation certificate did not affect the running of the limitation period, at least for unfair dismissal purposes, since it was issued before limitation had started to run at all; i.e. before the Claimant's dismissal took effect on 30 December 2015.

(3) The Employment Judge made the error of considering the issue from the perspective of what was fair and just. That was wrong. The provisions are "formulistic" (Mr Northall's word, not mine); i.e. either the early conciliation requirement is complied with or it is not, and there is no room for an assessment of fairness or the exercise of discretion.

(4) Thus, there can only be one "Day A" and one "Day B" for any "matter" falling within section 18A(1).

(5) The Employment Judge had misunderstood the **Tanveer** case. The policy of the legislation was not to extend limitation periods as such, it was to facilitate settlement by discounting periods of conciliation falling within limitation periods and modify the regime to the limited extent provided.

(6) The regime did not enable an employee to engage in early conciliation a second time for the purposes of extending limitation. There was a risk of abuse and the buying of time by successive notifications to ACAS.

(7) The policy of the provisions was only to stop limitation running to the extent that conciliation under the mandatory procedure took place during a time when limitation would otherwise run and, where applicable, for an additional month after the end of Day B.

(8) In the present case, the Employment Judge was therefore wrong in law to decide that the second certificate had saved the claims from being out of time.

17. The main submissions of Mr McNerney, for the Claimant, were these:

(1) There was nothing in the legislation that ruled out the validity of the second early conciliation certificate issued by ACAS in this case. The Employment Judge was right to describe it as valid.

(2) Parliament could have chosen to enact a regime that expressly provided for early conciliation under the section 18A(1) procedure to be capable of invocation only once. It did not choose to do so.

(3) Neither section 18A inserted into the **Employment Tribunals Act**, nor the **2014 Regulations**, nor section 207B inserted into the **Employment Rights Act**, contain any such restriction on a second or third use of the procedure. The Employment Judge's reasoning was therefore correct and could not be faulted.

(4) The **2014 Regulations** used the indefinite article - "a" and "an" - to describe an early conciliation certificate.

(5) It was consistent with the policy of promoting early dialogue and settlement without litigation to permit more than one early conciliation certificate to be issued in respect of the same matter. Thus, in this very case, ACAS had issued a second certificate which had endured for a longer period (nearly a month) than the first one did (a few weeks).

(6) It would be contrary to the spirit of the legislation to permit only one early conciliation certificate. In the present case, it would mean that the Claimant derived no limitation benefit at all from her commendably early notification of the dispute to ACAS.

(7) Conversely, if the Employment Judge's reasoning were rejected and only a single early conciliation certificate were permissible, ACAS would be put in a difficult position. It might feel obliged to reject the issue of a second certificate in a case where it considered that conciliation was likely to lead to settlement, and thus would be thwarted from doing the good that was intended.

(8) There was no risk of the provisions being abused by the use of successive early conciliation certificates preventing the limitation period from expiring. The primary period could only be extended by, at the most, one month after the end of Day B, under the last issued certificate whose duration covered the date on which the primary limitation period would (but for early conciliation) have expired.

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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.

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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** and its counterpart section 140B of the **Equality Act** operate.

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20. I agree with Mr Northall 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.

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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**.

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22. Section 207B then deals with the impact of the section 18A regime (and the **2014 Regulations**) on unfair dismissal time limits. Section 140B of the **Equality Act** deals in the

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same way with discrimination claims, as is agreed. I can therefore confine myself to section 207B.

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 or its counterpart in the **Equality Act** section 140B. 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.

A 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.

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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
C 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
D the mandatory early conciliation provisions.

28. The Employment Judge was, with respect, wrong to describe the **Tanveer** case as
E authority for the proposition that "the amount of time spent on early conciliation would not count in calculating the date of expiry of the time limit". That is a misunderstanding of **Tanveer**. In that case, limitation had already started to run when the claimant contacted ACAS in accordance with the early conciliation requirement. HHJ Eady QC correctly identified the
F statutory purpose in the first sentence attributed to her in the Digest, which I have already cited above.

29. In the following sentence, she said: "… the amount of time spent on early conciliation
G would not count in calculating the date of expiry of the time limit; the clock simply stopped during the early conciliation period". But she was referring there to the clock stopping during the early conciliation period pursuant to a certificate falling within the regime, and one which
H operated during a period in which time would otherwise be running for limitation purposes.

30. The present case is different from **Tanveer** on two counts. First, the limitation clock could not stop under the first certificate, because it had never started. Secondly, the second certificate was not a certificate falling within the statutory scheme at all; it was a purely voluntary exercise with no impact on the running of time.

31. It follows that the Employment Judge ought to have found that the three-month primary time limit expired on 29 March 2016, and that the claims were therefore presented out of time, unless (in the case of the disability discrimination claim) that claim could be rescued by invocation of the statutory concept of conduct "extending over a period", or unless time were extended in the exercise of the tribunal's discretion.

32. The appeal must therefore be allowed. I will substitute a finding that the primary time limit expired on 29 March 2016.

33. I have to consider the question of remission, and the factors identified in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I think that this is a case where a fresh judicial mind would be appropriate. It is not any disrespect or criticism of the Judge to say that part of his reasoning was a degree of sympathy for the course taken by the Claimant in going to conciliation a second time. The expression of that sympathy, while it may have been wholly appropriate and in no way misplaced, is an expression of a sentiment that is at least capable of influencing the exercise of discretion.

34. While I do not say that that was necessarily wrong, I think that because it formed part of an erroneous analysis which favoured the Claimant in a manner that would also point in the direction of exercising relevant discretions in his favour, it seems to me better that this goes back to a Judge who is able to come to the issues with an entirely fresh mind, not having

considered it before on a basis that was legally flawed. I say all that intending no discourtesy or disrespect to the Employment Judge.