Case No: 2600141/2017

# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Romero

**Respondent:** Nottingham City Council

**Heard at:** Nottingham **On:** Friday 7 July 2017

**Before:** Employment Judge Legard (sitting alone)

**Representatives**

**Claimant:** Mr Lee Bronze of Counsel
**Respondent:** Ms Paulette Brown, Solicitor

# JUDGMENT

The claim for unfair dismissal was struck out for want of jurisdiction.

# REASONS

## 1. Background

1.1 This case concerns time limits and the impact upon the same by what are known as the 'Early Conciliation' ('EC') provisions.

1.2 The Claimant was employed by the Respondent as a Community Protection Officer from June 2008 until his summary dismissal which took effect on 28 September 2016. This matter is listed before me today in order to determine whether or not the Tribunal has jurisdiction to hear his complaint of unfair dismissal in circumstances where there has been more than one EC certification. I also note that the claim for wrongful dismissal has previously been withdrawn but for reasons given by Employment Judge Heap that claim has not been dismissed in order to allow the

Claimant to bring the complaint in an alternative jurisdiction.

## 2. Evidence and Submissions

2.1 I have heard evidence from the Claimant upon which he was cross examined. I found him to be a truthful witness of fact. I have also been provided with written submissions from both Ms Brown and Mr Bronze, supplemented orally and I am extremely grateful to both for their assistance.

## 3. Findings of Fact

3.1 These findings of fact are made on a balance of probability and are restricted to those which are relevant to the determination of what is a purely jurisdictional issue. The facts which underpin the disciplinary and appeal process (most of which are or appear to be contentious) are not relevant for the purpose of this hearing and accordingly I do not propose to rehearse or refer to the same within the context of this judgment.

3.2 On 28 September 2016 the Claimant attended a disciplinary hearing at the conclusion of which he was dismissed without notice. That decision was communicated to him orally at the time and later confirmed in writing by letter dated 5 October. The parties agree that, for the purposes of this complaint, his effective date of termination ('EDT') was 28 September 2016.

3.3 The Claimant appealed and, following a hearing that was held on 25 November 2016, the appeal was dismissed. The appeal decision was communicated to the Claimant by letter dated 5 December 2016. At all times, certainly those relevant to this issue, the Claimant was represented by (and a member of) a trade union, namely the GMB. At the hearings he was represented by Ian Passey, Branch Secretary and subsequently he sought advice and representation from Chris Needham, a full time trade union official. Both were experienced.

3.4 On or around 8 November 2016, a fortnight or so before the appeal, the

Claimant's case was referred to a firm of solicitors (namely Simpsons based in Liverpool) who have a department specialising in employment law. The solicitor allocated to the case was Rebecca Bull.

3.5 Meanwhile, following advice from his trade union, the Claimant contacted ACAS on 25 October 2016, approximately 4 weeks after having been dismissed. Conciliation was unsuccessful and ACAS duly issued a certificate dated 3 November at which point of course the Claimant was still within his primary limitation period.

3.6 In December Ms Bull wrote to the Claimant advising him on his prospects of success but concluding with these words:

*"Please be aware that … because your employment ended on 28 September 2016 you must commence early conciliation via ACAS by 28 December 2016."*

Ms Bull followed that up with advice on how to go about it. It would appear that at the time of writing she was not aware that the Claimant had in fact attempted conciliation via ACAS in October.

3.7 A follow up e-mail dated 14 December from Ms Bull to the Claimant again says as follows:

*"The deadline to present an Employment Tribunal claim will be determined by the date on which early conciliation ends and an early conciliation certificate is issued. You must make sure you meet that deadline."*

3.8 In earlier e-mail correspondence between Ms Bull and Mr Needham of the GMB, Ms Bull was to say this:

*"I have drawn his (the Claimant's) attention to the time limits for early conciliation and underlined that this impacts on the deadline to make an Employment Tribunal claim."*

3.9 On 15 December the Claimant, via his solicitor, contacted ACAS for the second time and a second certificate was issued in respect of that second period of abortive conciliation on 9 January 2017.

3.10 On 10 January 2017 Ms Bull wrote to Mr Geoff Smith stating as follows:

*"Unbeknownst to me Chris had already completed early conciliation and obtained a certificate on 3 November 2016. ACAS found out last night from the Respondent and have therefore issued the certificate for the EC which I had commenced. I will work to the deadline provided by the second ECC which is now 9 February."*

3.11 Again in an earlier e-mail on the previous day addressed to the same person Ms Bull had said:

*"Early conciliation is still underway so we do not have a limitation date as yet."*

3.12 The Claimant issued his claim form on 8 February 2017.

3.13 Finally some background about the Claimant, although it is fair to say that there is only sparse detail of the same within his statement and much of this has been obtained through oral evidence. It would appear that the Claimant has spent much of his life in the United States of America. Indeed he told me that he spent approximately 27 years working in law enforcement (as I understand it in the state of Texas) and he appears to have established a good working knowledge of "courtroom" process in that country's jurisdiction. Very candidly the Claimant says that he still views the United Kingdom's legal processes through a "US courtroom glasses". He had understood ACAS to be responsible for arbitration as opposed to conciliation. He did not readily understand the EC process (and indeed still struggles to) but accepts that he maintained regular contact with and sought advice from both his union and his lawyers. He described his union representatives as being 'easy to talk to.' He was not unwell at any time throughout this process and he gives no specific excuses or explanations as to the late submission of a claim form save for his and

possibly his lawyer's ignorance and/or misunderstanding of how the EC provisions operate in practice. Quite clearly the Claimant has relied heavily on the advice of others. Paragraph 7 of his witness statement which I accept in full, he says as follows:

*"My belief was that ACAS would make sure that the Respondent followed the correct procedure and in doing so it would rectify the misapplication of the disciplinary process and the unfair hearing that I received. I thought that this would mean that the original decision would be overturned. I thought that ACAS was meant to resolve employment problems and so I believed that I would be reinstated and there would therefore be no need to start an Employment Tribunal claim."*

## 4. <u>Relevant Law</u>

<u>Statute</u>

4.1 s.18A of the 1996 Employment Tribunals Act provides as follows:

"(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.

(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.

(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 employment tribunal procedure regulations."

4.2 s.111 of the Employment Rights Act provides as follows:

"(1) A complaint may be presented to an Employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) … An Employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal:-

(a) Before the end of the period of 3 months beginning with the effective date of termination or;

(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months."

4.3 s.111 (2A) then refers to ss. 207A and 207B. s.207B ERA deals with the extension of time limits to facilitate conciliation:

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

4.4 There are various early conciliation 'exceptions' and the above is also to be read in conjunction with the relevant Rules of Procedure Regulations 2014 (a useful synopsis of which is given by Kerr J in the *Gorale* case to which I refer below). In broad terms the standard 3 month time limit (as provided for by s.111 ERA) is affected by the early conciliation process in the following way. When a Claimant who is still within his or her primary time limit contacts ACAS (day A) the clock is stopped and will only start to run again once a certificate is produced (day B). If having started the conciliation process the time limit would have expired during the period day A to day B then the time limit will expire one month after day B. In other words the time taken in conciliation is (generally speaking) not counted when working out time limits.

Case Law

4.5 *Tanveer v East London Bus and Coach Company (UKEAT/0022/16)* provides a useful guide as to how the EC provisions operate in practice

when faced with a limitation point which I have read with interest. In determining this case I have also taken into account the comments and observations of Her Honour Judge Eadie QC in the *Science Warehouse Limited v Mills [2016] ICR 252* and specifically the fact that a Claimant is not required to renew fresh EC proceedings in respect of each and every fresh cause of action. There is also useful guidance by Simler P in the case of *Compass Group and Ireland v Morgan [2017] ICR 73* in which the Claimant was permitted to rely upon an EC certificate notwithstanding the fact that it related to matters that preceded some of the events that were relied upon in that case.

4.5 Most importantly, however, in the context of this case is the judgment of the EAT (Kerr J) in *HMRC v Garau* heard in March of this year. In that case the Claimant had obtained 2 EC certificates in respect of the same matter, albeit one of which had been obtained prior to the limitation period commencing. Overturning the Tribunal Kerr J found amongst other things that:

*"Only one certificate is required for "proceedings relating to any matter". A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.*

*It follows in my judgment that a second certificate is not a certificate falling within s.18A, subsection 4. The certificate referred to in Section 18A(4) is one that a prospective Claimant must obtain by complying with the notification requirements and the rules of procedure scheduled to the 2004 Regulations."*

Applying that finding to s.18A and to s.207B Kerr J went on to say as follows:

*"I am satisfied that the definition of day A refers to a mandatory notification under Section 18A. It does not refer to a purely voluntary second notification which is not a notification falling within Section 18A. Similarly I am satisfied that the definition of day B refers to a mandatory certificate obtained under Section 18A(4). It does not refer to a purely voluntary*

*second certificate not falling within that section.*

*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 prid pro quo of a slightly relaxed limitation regime."*

4.6 Kerr J makes the fair and obvious point (at paragraph 26) that nothing should prevent Claimants from engaging in voluntary conciliation through ACAS at any time, although such efforts will not impact upon time limits.

4.7 I have also considered relevant case law in relation to the test of 'reasonable practicability.' It is effectively a two stage test. First the Tribunal must be satisfied (and the onus of proof is firmly upon the Claimant) that it was not reasonably practicable for a complaint to be presented in time and secondly, if so persuaded, that the complaint was nevertheless presented within such further period as the Tribunal considers reasonable. There are no hard and fast rules that dictate a Tribunal's approach. In *Palmer v Southend-on-Sea Borough Council [1984] IRLR* it was suggested that a "reasonable feasibility" test should apply. There is also an extremely useful summary of the relevant factors set out by the then Underhill J in the case of *Northamptonshire County Council against Entwhistle [2010] IRLR 740*. I have also been referred to the case of *Porter v Bandridge Ltd [1978] IRLR 271* and the question of whether or not the Claimant ought reasonably to have known of his right to bring a claim. The fact of an internal appeal pending does not necessarily render it not reasonably practicable. As for what might be considered a reasonable period thereafter the Tribunal has an unfetted discretion, albeit a discretion that must be exercised judicially, see, for example, *Marley(UK) Ltd v Anderson [1996] IRLR 163*.

## 5. Conclusions

EC certification

5.1 I am satisfied that, for limitation purposes, time began to run against the Claimant from the effective date of his termination, that being 28 September 2016. Absent any early conciliation provisions, time would have otherwise expired on 27 December 2016, see s.111 ERA.

5.2 The Claimant contacted ACAS on 26 October. For the purposes of performing an EC calculation, that date is 'day A.' ACAS issued a certificate on 3 November and, again for the purposes of an EC calculation, that I find is 'day B.' At that point in time the Claimant was still within his primary limitation period and accordingly the primary time limit was extended by 9 days. Accordingly the Claimant had until 5 January 2017 by which to lodge his claim form. The claim form was in fact lodged on 8 February 2017.

5.3 Applying *Garau* I find that the second EC process and certification was in relation to the same matter. There can only be one day A and one day B in respect of any one matter within the meaning of s.18A and, for the purposes of extending time, the second EC process and certification is therefore of no effect. The second certificate was not a certificate within the meaning of s.18A(4) and can therefore only be described as the product of a voluntary as opposed to mandatory process. Were that not the case, the Claimant could arguably extend time ad infinitum by simply continuing the EC process and seeking to rely on the latest certificate. In this case, unlike in *Garau*, both EC certificates were issued within or after the limitation period had commenced but this fact does not assist the Claimant.

5.4 Accordingly, and not without considerable sympathy for the Claimant, I find that the primary limitation period as extended by s.18A, s.207B and in accordance with the regulations, expired on 5 January 2017 and accordingly the claim for unfair dismissal is prima facie out of time.

5.5 I have gone on to consider whether or not it was "reasonably practicable" for the complaint to be brought within time. I find that it was reasonably practicable. The Claimant was obviously aware that he had been dismissed. At all times he was in receipt of expert assistance and advice from both his union and a firm of specialist lawyers and there was clear evidence before me that he was advised with respect to time limits and importantly the effects of EC provisions upon them. There was no evidence before me to suggest that illness, postal strikes or any other unforeseeable factor affected either his or his representative's ability to present a claim form in time. Whether or not the Claimant has a cause of action against those from whom he sought advice from is a matter entirely for him. I sympathise very strongly with the Claimant. Clearly he had an honest but mistaken belief in the purpose and indeed the jurisdiction of ACAS. He thought of ACAS as arbitrators, capable of intervening to the extent of dictating terms to the Respondent and indeed to the extent of restoring him to his position. That belief was clearly coloured by his experiences in the United States of America.

5.6 I am also sympathetic in terms of his lack of understanding with regard to the EC process. He is not alone. It is a complex set of law and regulations and in most cases requires legal experience or expertise in order to navigate one's way through it, sometimes achieving the opposite to that which Parliament may have originally intended. Often lawyers get it wrong.

5.7 However such misunderstandings or ignorance cannot render it <u>not</u> reasonably practicable to bring a complaint. The Claimant knew of his right. He knew that time limits were 'in play.' He sought and obtained expert advice and the fact that he hoped it would settle or the fact that he hoped he would be reinstated is (unfortunately for him) nothing to the point. It follows that I do not need to go on to consider whether the period within which the claim form was issued was itself reasonable. That said, had I done so, I would have found that it was not reasonable. There was no explanation provided to me as to why (given that his solicitors were on notice in January that an earlier certificate had been issued) the claim was delayed until 8 February.

5.8 For the above reasons the Tribunal lacks jurisdiction to hear the complaint of unfair dismissal and accordingly I have no option but to strike it out.

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Employment Judge Legard

Date 24th July 2017

JUDGMENT SENT TO THE PARTIES ON

...12.8.17.......................................................................................

..S.Creswell.......................................................................................
FOR THE TRIBUNAL OFFICE