Appeal No. UKEAT/0092/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 21 November 2017
Judgment handed down on 5 February 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MRS M ONI — APPELLANT

UNISON TRADE UNION — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM COGHLIN (of Counsel) Direct Public Access
For the Respondent	MR ANDREW SMITH (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB

SUMMARY

CONTRACT OF EMPLOYMENT

PRACTICE AND PROCEDURE

In 2009 the Claimant/Appellant presented complaints of unfair dismissal, race discrimination and victimisation against her former employers (the Trust). The claims were dismissed in February 2011. In March 2011 she presented claims against the Respondent Unison, her former union, alleging race victimisation and detrimental treatment by its representative in connection with her claim against the Trust. The claims were dismissed in 2013 and costs awarded against her in 2014. In 2016 she issued the present claims against the Respondent Unison, alleging breach of her contract of membership in respect of the claims against the Trust and against Unison; and that she had been unjustifiably disciplined by Unison in pursuing her for costs in the previous claim. The breach of contract claim was made on the basis that it fell within the ET's jurisdiction under Article 3 of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** (the 1994 Order). No early conciliation certificate was obtained before presentation of the claim.

The ET struck out the breach of contract claim on the bases that Article 3 of the **1994 Order** applied only to claims of an employee against her employer; and that in each claim the requisite Early Conciliation certificate had not been obtained.

The decisions were appealed on the basis that (i) the effect of the **1994 Order** and its governing legislation (section 3(2) **ETA 1996**) was that a claim for breach of contract could be brought against a non-employer Respondent provided that the contract was 'connected with' the Claimant's employment; and that the Claimant's contract of membership with her union satisfied that requirement; and (ii) the claims fell within the exemption provided by Regulation

3(1)(c) of the **Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014** (the EC Regulations), since correspondence between Unison and ACAS in 2011/2012 was 'contact' in relation to the same dispute as in the present claim.

The EAT dismissed the appeal on each ground, upholding the Respondent's contentions that:

(i) on its proper construction Article 3 of the **1994 Order** was confined to claims of an employee against her employer for breach of the contract of employment or of another contract connected with that employment; and

(ii) Regulation 3(1)(c) of the **EC Regulations** was governed by section 18B **ETA 1996**. This require the Respondent's 'contact' to involve a request for the services of a conciliation officer in relation to a matter that (if not settled) is likely to give rise to relevant proceedings against that person. The cited correspondence of 2011-12 all related to the first (2011) claim which had been presented against the Respondent. Whilst one of these letters included a request for conciliation in relation to that claim, none was prospective, i.e. related to a matter that was likely to give rise to relevant proceedings.

THE HONOURABLE MR JUSTICE SOOLE

1. This appeal raises two questions. First, whether the provisions in Article 3 of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** (the 1994 Order) limit claims thereunder to those by an employee against his/her employer. Secondly, as to the ambit of Regulation 3 of the **Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014**. The Appellant (Mrs Oni) appeals against adverse decisions on both issues by Employment Judge Snelson dated 11 October 2016.

2. By the present claim Mrs Oni contends that the Respondent trade union (Unison), of which she was a member from about 1971 until 2013, (i) breached her contract of membership by its handling of her previous claims against her employer NHS Leicester City (the Trust) and against Unison itself; and (ii) unjustifiably disciplined her contrary to section 64 **Trade Union and Labour Relations (Consolidation) Act 1992** (TULRCA).

3. By his decision, which followed a hearing at which argument was heard only from Mrs Oni (by her husband), EJ Snelson rejected the claims on the grounds that the ET had no jurisdiction to consider them.

4. As to the breach of contract claim, this had 'two insurmountable bars': 'First, the Tribunal's contract jurisdiction is limited to employees [*citing Article 3*] … Mrs Oni was not an employee of Unison. Secondly, contract claims are within the scope of the EC regime and the tribunal cannot consider a claim where there is no Certificate. Mr Oni argued that reliance could be placed on earlier EC Certificates, but he cited no warrant for that view and there is none.' As to the claim of unjustified discipline, '… the tribunal's jurisdiction is ousted by the

failure to cite an EC Certificate number in the claim form. The observations in my last paragraph apply equally here.' Thus the question of exemptions was not directly addressed. A reconsideration application was dismissed by the Judge on 24.10.16.

5. The first ground of appeal challenges the Judge's decision on the **1994 Order** and depends on the proper construction of Article 3, together with the primary legislation now contained in section 3(2) **Employment Tribunals Act 1996** (ETA). The second ground of appeal contends that certain correspondence between Unison and ACAS provided exemption from the early conciliation requirements, by virtue of Regulation 3 of the **EC Regulations**. In order to proceed with her breach of contract claim Mrs Oni must succeed on both grounds.

Background

6. Mrs Oni was employed by the Trust from 6 October 2006 to 6 July 2009 as a Haemoglobinopathy Specialist Nurse. On 13 February 2009 she issued proceedings against the Trust claiming race discrimination and constructive unfair dismissal (the first 2009 claim). On 17 August 2009 she withdrew that claim.

7. On 14 August 2009 she made a fresh claim against the Trust alleging race discrimination, constructive unfair dismissal and victimisation (the second 2009 claim). At the hearing of that claim her Unison representative (Mrs McGregor), who had previously advised her and accompanied her at various meetings, was called by the Trust as a witness. Mrs Oni's objections to this on grounds of privilege was rejected by the ET. Following a 13 day hearing (EJ Ahmed and lay members) all her claims were dismissed in February 2011.

8. On 16 March 2011 Mrs Oni issued a claim against Unison alleging race victimisation and detrimental treatment by Mrs McGregor. By judgment of EJ Rogerson sent to the parties on 24 November 2011, the complaint of Mrs McGregor giving evidence in the hearing of the second 2009 claim was struck out on the grounds of witness immunity. The rest of the claim was held to have little reasonable prospect of success and a deposit order of £300 was made.

9. Following a 3-day hearing those claims were dismissed by the ET (EJ Britton and lay members) in a reserved judgment sent to the parties on 4 February 2013.

10. By further decision promulgated on 3 March 2014 the same ET ordered Mrs Oni to pay the Trust's costs of the claim, subject to a detailed assessment. On appeal that issue was remitted to a fresh ET. That tribunal again made an order for costs. Subsequent appeals were dismissed, ultimately by the Court of Appeal (Elias LJ) refusing permission on 30 November 2016.

11. In the meantime the present claim was presented on 14 September 2016. The claim recites the contract of membership, alleges breach of express and implied terms thereof and refers to section 131(2) **Employment Protection (Consolidation) Act 1978** (EPCA 1978). The claim contends that Unison (i) by Mrs McGregor and a Regional Head (Mrs McKenna), was in breach of contract in connection with the second 2009 claim and the 2011 claim; and (ii) unjustifiably disciplined her by pursuing her for costs in the 2011 claim.

12. In answer to the question on the ET1 'Do you have an ACAS early conciliation certificate number', the 'no' box was ticked; as was the 'reasons' box 'ACAS doesn't have the

power to conciliate on some or all of my claim.' It is common ground that the latter was incorrect.

The 1994 Order issue

13. By the enabling provisions of section 131 **EPCA 1978** there was power to make orders conferring jurisdiction on [employment] tribunals in respect of claims for the recovery of damages or any sum (save in respect of personal injuries) including:

> **'(2) … (a) a claim for damages for breach of a contract of employment or any other contract connected with employment … being in each case a claim such that a court in England and Wales and Scotland … would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.**
>
> **(3) An order under this section may make provision with respect to any such claim only if it satisfies either of the following conditions, that is to say - (a) it arises or is outstanding on the termination of the employee's employment; or (b) it arises in circumstances which also give rise to proceedings already or simultaneously brought before an [employment] tribunal otherwise than by virtue of this section; or, if the order so provides, it satisfies both those conditions.'**

14. The power was not exercised until the **1994 Order**. As subsequently amended this provides as material:

> **"*Transitional provision***
>
> **2. This Order does not enable proceedings in respect of a contract claim to be brought before an employment tribunal unless -**
>
> > **(a) the effective date of termination (as defined in section 55(4) of the 1978 Act) in respect of the contract giving rise to the claim, or**
> >
> > **(b) where there is no effective date of termination, the last day upon which the employee works in the employment which has terminated,**
>
> **occurs on or after the day on which the Order comes into force.**
>
> ***Extension of jurisdiction***
>
> **3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -**
>
> > **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;**
> >
> > **(b) the claim is not one to which article 5 applies; and**
> >
> > **(c) the claim arises or is outstanding on the termination of the employee's employment.**

4. Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies;

(c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and

(d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.

5. This article applies to a claim for breach of a contractual term of any of the following descriptions -

(a) a term requiring the employer to provide living accommodation for the employee;

(b) a term imposing an obligation on the employer or the employee in connection with the provision of living accommodation;

(c) a term relating to intellectual property;

(d) a term imposing an obligation of confidence;

(e) a term which is a covenant in restraint of trade.

…

Time within which proceedings may be brought

7. Subject to … an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented -

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

8. An industrial tribunal shall not entertain a complaint in respect of an employer's contract claim unless -

(a) it is presented at a time when there is before the tribunal a complaint in respect of a contract claim of a particular employee which has not been settled or withdrawn;

(b) it arises out of a contract with that employee; and

(c) it is presented -

(i) within the period of six weeks beginning with the day, or if more than one the last of the days, on which the employer (or other person who is the respondent party to the employee's contract claim) received from the tribunal a copy of an originating application in respect of a contract claim of that employee; or

(ii) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within that period, within such further period as the tribunal considers reasonable.

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> ***Limit on payment to be ordered***
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> **10. An employment tribunal shall not in proceedings in respect of a contract claim, or in respect of a number of contract claims relating to the same contract, order the payment of an amount exceeding £25,000."**

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15. Section 3 of the **ETA 1996** replaced section 131 **EPCA 1978**. Sub-sections (2)-(4) provide:

> **"(2) Subject to subsection (3), this section applies to -**
>
> **(a) a claim for damages for breach of a contract of employment or other contract connected with employment,**
>
> **(b) a claim for a sum due under such a contract, and**
>
> **(c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,**
>
> **if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.**
>
> **(3) This section does not apply to a claim for damages, or for a sum due, in respect of personal injuries.**
>
> **(4) Any jurisdiction conferred on an employment tribunal by virtue of this section is exercisable concurrently with any court in England and Wales or in Scotland which has jurisdiction to hear and determine an action in respect of the claim.'**

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By section 44 and Schedule 2 Part 1 the **1994 Order** has effect as if made under this section. It is agreed that there is no material difference between section 131(2)(a) 'or any other contract connected with employment' and section 3(2) 'or other contract connected with employment'. Save where necessary in the historical context, all subsequent references are to section 3(2). 'Employment' means 'employment under a contract of employment and 'employed' shall be construed accordingly' (**ETA** section 42).

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16. In **Capek v Lincolnshire County Council** [2000] ICR 878, 882 the Court of Appeal cited with approval Keene J's statement in **Sarker v South Tees Acute Hospitals NHS Trust** [1997] ICR 673 that the intention of the **1994 Order** was '… to avoid the situation where an employee (or for that matter an employer) is forced to use both a tribunal and a court of law to

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have all his or her claims determined. In simple terms, the purpose of the extension of jurisdiction was to enable an industrial tribunal to deal with both a claim for unfair dismissal (which we take as an obvious example) and a claim for damages for breach of the same contract of employment. Two sets of proceedings are thus avoided.' (pp.680-681).

17. However it is common ground that the **Order** is not confined to claims for breach of the contract of employment. **Capek** and **Sarker** concerned claims under the contract of employment, but Article 3(a) refers back to section 3(2) which extends to 'or other contract connected with employment'. This is exemplified by **Rock-It Cargo Ltd v Green** [1997] IRLR 581 where a claim on a compromise agreement between employee and employer was held to fall within Article 3; see also **Miller Bros. & F P Butler Ltd v Johnston** [2002] ICR 744.

Appellant's Submissions

18. On behalf of Mrs Oni, Mr Tom Coghlin submits that her contract of membership with Unison was unanswerably 'connected with' her contract of employment by the Trust. Thus the union was involved in collective bargaining on her behalf; the contract of employment provided that 'The PCT is committed to working in partnership with Staff Side organisations (Trade Unions) … The PCT actively encourages you to join any Trade Union, or Professional Body of your choice, subject to any rules for membership that organisation may apply…'; and the Trust deducted union fees from her wages every month.

19. Turning to the critical words in Article 3 ('in respect of a claim of an employee'), those do not require that the claim must be against the employer. Rather they reflect the limiting device identified by Parliament in section 3(2), namely that the claim must at least be under a

A contract 'connected with' the employment relationship of employee and employer. Thus Article 3(a) identifies the category of Claimant but not of the Respondent.

B 20. In thus broadening the claim 'of an employee', Article 3 is in contrast to the unfair dismissal provisions in the **Employment Rights Act 1996** (ERA) whereby 'An employee has the right not to be dismissed by his employer' (section 94) and 'A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer' (section 111). Thus if the intention had been to confine the jurisdiction to claims against the employer, Article 3 would have used such language.

D 21. Article 3 is also to be contrasted with Article 8 which concerns the Tribunal's jurisdiction to entertain 'employer's contract claims'. Article 8(b) requires that the claim arises out of a contract 'with that employee', i.e. the 'particular employee' who has presented an employee's contract claim (Article 8(a)). In contrast to Article 3, Article 8 identifies the necessary Respondent to the employer's contract claim.

F 22. The matter is put beyond doubt by Article 8(c)(i) which identifies the time for presentation of the employer's contract claim as running from the day (or, if more than one, the last of the days) on which the employer '*(or other person who is the respondent party to the employee's contract claim)*' received the originating application in respect of the employee's contract claim. The only inference from the parenthesis is that Article 3 does not limit the jurisdiction to a claim by the employee against his employer. On Unison's construction those words are otiose.

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23. As to Article 5, whilst (a) and (b) are referable only to a contract of employment between employee and employer, this cannot be said of (c)-(e). For example, an employee might have a contractual relationship with another company in the same group as the employer. Thus e.g. it was commonplace for employees to be employed by company A but paid by associated company B in the same group.

24. The construction also accords with the overall policy of avoiding the unnecessary duality of proceedings, so as to ensure that all matters 'connected with' the employee's employment are heard in the same tribunal, albeit subject to the constraints of Article 3(b) and (c) and the financial limit in Article 10. A restriction of claims to those by employee against employer would undermine that objective. On Unison's construction, Article 3 did not even permit an employee's claim in the cited example of a contract with associated company B.

25. Furthermore claims by members against their unions have long been a familiar part of the employment tribunal jurisdiction: e.g. section 26A **EPCA 1978** as inserted by section 11 **Employment Act 1982**; Chapter V of **Trade Union and Labour Relations Act 1992**; **Equality Act 2010**, section 57.

Respondent's Submissions

26. In response, Mr Andrew Smith submits that the words 'the claim of an employee' in Article 3 are critical and decisive. They make clear that the claim must be in the capacity of an employee, as opposed to any other capacity e.g. as trade union member or indeed consumer. On the Appellant's construction those words are otiose.

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27. It is not surprising that the original enabling legislation (section 131(2)) did not use the language of 'claim of an employee', since the **EPCA 1978** in its original form related only to claims against the employer. It is no answer that section 26A and other subsequent employment legislation had given jurisdiction for a range of claims by union members against their unions, since the Appellant's case is that Article 3 extended the ET's contract jurisdiction to a much wider range of potential Respondents.

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28. As to the other provisions of the **1994 Order**, Articles 3(b)(c), 5 and 7 are supportive of the Respondent's construction. Further, by way of symmetry with Articles 3 and 7, Articles 4 and 8 make provision for 'employer's contract claims' and for no other. There is no rational basis for giving greater rights to an employer Respondent than to a non-employer Respondent. To do so would be inconsistent with the policy of avoiding duality of proceedings. Mr Smith advanced a range of examples of contracts potentially 'connected with employment' (e.g. a broadband service to the employee's home office; or the retainer of a lawyer for advice in a employment claim) which might give rise to a Respondent's counterclaim for which the tribunal would have no jurisdiction. There is no basis to conclude that the statutory intention was to extend the jurisdiction to such a radical extent.

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29. On the contrary, authority favoured a restrictive interpretation of the ambit of the **Order**. Thus in **Miller Bros** the EAT (Mr Recorder Langstaff, as he then was) stated that '[Counsel for the employer] pointed out that the jurisdiction of the employment tribunal in matters of contract was plainly both limited, and intended by Parliament to be so limited. Only a restricted range of contractual claims fall within its jurisdiction. Not only is there no persuasive reason to regard the legislative purpose, identified in **Capek**, as requiring a more generous interpretation of the vital phrase in this case, but, if anything, the reverse is the case.

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Jurisdiction in contract is in any event shared by the county court or High Court. The width of the jurisdiction does not exclude any party from his or her rights. Where there is a general absence of jurisdiction in a particular body, and such jurisdiction as there is is conferred only to avoid the inconvenience of the duality of proceedings in cases where it naturally arises, there is more good reason for a restrictive than there is for a liberal interpretation of the provision conferring that jurisdiction': para.26.

30. As to Article 8(b) the words 'that employee' are simply a reference back to the 'particular employee' who has made the Article 7 claim. As to Article 8(c) this is not a provision bestowing jurisdiction but a time limit provision. It does not supersede or supplant Articles 3 or 4. The parenthesis in Article 8(c)(i) simply envisages that a complainant might seek to include a non-employer Respondent (for which there is no jurisdiction); and then gives the employer the benefit of extra time to respond if that party is served with the proceedings.

31. Mr Smith further submitted that, if I were to conclude that the provision is ambiguous, it would be permissible to have resort to statements of Government ministers in Hansard under **Pepper v Hart** [1993] AC 593 when presenting (i) the 1978 Bill in respect of the words 'or any other contract connected with employment' in what became section 131(2) and (ii) the **1994 Order**. These supported the narrower construction.

Appellant's Reply

32. In reply Mr Coghlin submitted that there is no coherence in a construction of Article 8(c)(i) which explains the parenthetical Respondent as someone who cannot be a Respondent under the **Order**.

33. As to floodgate arguments concerning the range of potential Respondents under contracts 'connected with employment', constraint is provided by the limitations of Articles 3(c) and 10 and by the time limits for the employee's claim in Article 7.

34. The requirements of **Pepper v Hart** are not satisfied. There is no ambiguity obscurity or absurdity in the relevant provisions; nor relevant clarity in the ministerial statements relied on.

Conclusions on the 1994 Order

35. In the absence of the parenthesis in Article 8(c)(i) I would have found this a straightforward issue to determine. Article 3(a) refers back to section 131(2). In the context of **EPCA 1978**, which in its original form related entirely to claims by employees against employers, the natural implication is that the Respondent to a claim for breach of 'any other contract connected with employment' must be the employer under the contract of employment. It would have required express language to widen the potential category of Respondents in any respect, i.e. even to an associated company of the employer.

36. Whilst **EPA 1978** was amended to include certain claims against trade unions and subsequent legislation enlarged the ET's jurisdiction in that respect, I do not accept that this affects the natural meaning of the critical words in Article 3, i.e. 'the claim of an employee [against his employer]'. By parity of reasoning, the natural meaning of 'claim of an employer' and 'employer's contract claim' in Articles 4 and 8 is a claim against his employee.

37. Save in respect of the parenthesis in Article 8(c), the language of the **Order** is all supportive of and consistent with this interpretation. This includes Articles 2 (transitional

provisions, which did not feature in argument), 3(b)(c), 4(b)(c) and 5. Whilst the excluded categories in Article 5(c)-(e) could extend to claims against non-employers, they are fully consistent with the relationship of employee and employer. Likewise Articles 7 and 8, with their contrasting reference to an 'employee's contract claim' and an 'employer's contract claim'. As to 8(b), I conclude that the reference to 'that employee' is simply, and for clarity, a reference back to the 'particular employee' who brought the claim.

38. However the parenthesis in Article 8(c)(i) is evidently consistent with the Appellant's construction of Article 3. On the face of it, those words envisage circumstances in which an employee may have brought a contract claim against a Respondent other than his employer. Furthermore if there is no jurisdiction to entertain any such claim against a non-employer, it is not easy to understand why it might be considered necessary to postpone the running of time (i.e. beyond the date when the employer received his employee's originating application) for the employer to present his contract claim against the employee.

39. However, the **Order** has considered as a whole and in the context of its source in the primary legislation. I am not persuaded that the parenthesis provides a sufficient counter to the construction which otherwise is compelled by the primary legislation and the rest of the Order. I am inclined to accept Mr Smith's explanation of the purpose of the parenthesis; but in any event am not persuaded that the insertion of those words within the time-limit provision for employer's contract claims has significant weight in the overall construction of the **1994 Order**.

40. True it is that this means that there is no jurisdiction for the employee to bring a claim on a contract with an associated company of the employer e.g. as in the example previously

cited. That may result in duality of proceedings and be a potential inconvenience. However, in circumstances where there is jurisdiction to pursue such claims in the ordinary Courts, I agree with the observations in **Miller Bros** that a restrictive construction of section 3(2) and the **1994 Order** is appropriate. I do not accept Mr Coghlin's contention that Mr Recorder Langstaff was merely reciting the submissions to that effect of counsel for the employer.

41. In reaching this conclusion I have not been persuaded that the requirements **of Pepper v Hart** have been met. I do not accept that the statutory language is ultimately ambiguous; nor that it is obscure or leads to absurdity; nor that the ministerial statements are clear in the relevant respect.

42. I therefore dismiss this ground of appeal. Had I concluded otherwise I would have remitted the question of 'connection'. Although Mr Coghlin's submissions on this point have obvious force, I consider that this issue would require express consideration by the ET.

Early Conciliation

43. Before its amendment in April 2014 section 18(2) **ETA** imposed a duty on the conciliation officer, on request by the parties to Tribunal proceedings or in the absence of such request if he considered that he could do so with a reasonable prospect of success, to endeavour to promote a settlement proceedings.

44. By section 18A, commencing 6 April 2014:

> **"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) -

> **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."**

45. By section 18B:

"Conciliation before institution of proceedings: other ACAS duties

(1) This section applies where -

> **(a) a person contacts ACAS requesting the services of a conciliation officer in relation to a matter that (if not settled) is likely to give rise to relevant proceedings against that person, and**
>
> **(b) ACAS has not received information from the prospective claimant under section 18A(1).**

(2) This section also applies where -

> **(a) a person contacts ACAS requesting the services of a conciliation officer in relation to a matter that (if not settled) is likely to give rise to relevant proceedings by that person, and**
>
> **(b) the requirement in section 18A(1) would apply to that person but for section 18A(7).**

(3) Where this section applies a conciliation officer shall endeavour to promote a settlement between the persons who would be parties to the proceedings."

46. By **EC Regulation** 3:

"(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; …"**

47. Mr Coghlin submits that the requirements of Regulation 3(1)(c) were satisfied by 'contact' from Unison. Mr Smith submits that those requirements are governed and to be interpreted by reference to section 18B(1) and were not satisfied.

48. Mrs Oni relies on three documents, two of which were before the ET. First, a letter from ACAS to Unison dated 1 April 2011 and relating to her 2011 claim which had been presented on 16 March 2011. The letter advises that ACAS has been sent the claim; that its conciliators have a legal duty to try and help the parties reach settlement; and that the writer will be in touch to discuss the claim and possible settlement. Although the letter was from ACAS not Unison, Mr Coghlin submits that it is to be inferred that there was some subsequent contact in response from Unison.

49. The second document is a letter dated 19 May 2011 from Unison's solicitors to ACAS (attaching a letter of the same date to the ET), stating that they had been instructed to represent Unison in the case. Mr Coghlin submits that this demonstrates 'contact' from the Respondent Unison in relation to a dispute.

50. The third document is a letter from Unison's solicitors to Mr Oni dated 31 July 2012 (and copied to ACAS) in which 'without prejudice save as to costs' they warn that if successful at the impending hearing of the 2011 claim they will seek an order for payment of Unison's costs. The letter concludes: 'We are copying this letter to Bill Bletcher, the ACAS conciliator for this claim. ACAS conciliators have a legal duty to try and help the parties in tribunal cases settle their differences without the need for a tribunal hearing.'

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51. As to whether this correspondence satisfies the requirement of Regulation 3(1)(c) that 'the proceedings on the claim form relate to the dispute', i.e. that the 2011 and 2016 claims relate to the same dispute, Mr Coghlin pointed to authority which emphasises the broad interpretation to be given to the words 'dispute' or 'matter' in this context: see **Compass Group v Morgan** [2017] ICR 73 per Simler P at paras.18-21. However he accepted that, if the appeal were otherwise successful, this factual issue would have to be remitted to the ET.

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52. Mr Coghlin thus focussed his arguments on the language of Regulation 3(1)(c). As to sections 18A and 18B, he pointed to the words in section 18A(7) 'The cases that may be prescribed include (in particular) - …'; so that the list which followed was not exhaustive. Thus Regulation 3(1)(c) did not stem from the section 18A(7) reference to 'cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted'. Accordingly section 18B was irrelevant to the construction of Regulation 3(1)(c). The limited requirements of that Regulation simply reflected Rule 2 of the **Employment Tribunals Rules of Procedure**, i.e. the overriding objective and the need to avoid unnecessary formality and to seek flexibility in the proceedings.

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53. Conversely, if the Regulation were to be construed by reference to section 18B(1), the identified correspondence demonstrates Unison's request for the services of a conciliation officer. The ACAS letter of 1 April 2011 provides a powerful prima facie case that there must have been a subsequent request to that effect by Unison. The letter of 19 May 2011 contains an implied request. The letter of 31 July 2012 contains an express request for conciliation.

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54. However, Mr Coghlin ultimately accepted that none of the identified letters satisfies the section 18B(1) requirement that the matter to which it related was, if not settled, 'likely to give

rise to relevant proceedings against [Unison].' He rightly acknowledged that the correspondence related only to the claim which had been presented in March 2011.

Respondent's Submissions

55. In response Mr Smith first pointed to the undisputed facts that (i) there was no prior contact between Unison as prospective Respondent and Acas before the 2011 claim; (ii) the Early Conciliation regime did not come into force until three years after the presentation of the 2011 claim; (iii) when Mrs Oni presented the present claim, she did not rely on the exemption under Article 3: see the tick box answer. The effect of her case was that, because Mrs Oni had sued Unison in 2011 and there was some factual overlap, the present claim falls outside the early conciliation regime.

56. The underlying purpose of the regime is to provide a structured opportunity for early conciliation: see **Science Warehouse v Mills** [2016] ICR 253 per HH Judge Eady QC at para. 30.

57. He accepted that the list of prescribed cases in section 18A(7) is not exhaustive. However, Regulation 3(1)(a)-(c) mirrors, albeit in different language, those three particular cases. Thus Regulation 3(1)(c) reflects section 18B(1). The Explanatory Note to the **Regulations** further supports this link: 'The exemption in regulation 3(1)(c) means that the claimant need not comply with the requirement for early conciliation where the prospective respondent has already contacted ACAS in relation to the dispute.' Thus the purpose of the exemption is simply to provide that if, before issue, a prospective Respondent has sought conciliation for the claim, there is no need to require the parties to go through that process once more.

58. As **Harvey** observes, the exemption applies if 'the claimant can show that the respondent has contacted ACAS (under **ETA 1996** section 18B) in relation to the dispute that is the subject of the claim, and ACAS has not received information from the claimant under **ETA** section 18A(1)': para. 289(c).

59. As to the correspondence, none of the three documents arose in the context of Unison as a prospective Respondent. On the contrary, all were in connection with the proceedings which had already been instituted, i.e. the 2011 claim. This failed the governing requirement of section 18B(1) that the contact must be in relation to a matter that '(if not settled) is likely to give rise to relevant proceedings' against that person. The proceedings having already begun, there was no reason to consider that the matter or dispute could give rise to relevant proceedings.

60. In any event, even if section 18B is disregarded, the opening words of Regulation 3(1)(c) ('A person ('A') may institute relevant proceedings without complying with the requirement for early conciliation where …') make clear that the condition of contact must be satisfied before institution of the relevant proceedings.

61. Furthermore the alleged contact in 2011 and 2012 predated the promulgation of the EC regime. A Respondent could not be bound by the consequence of pre-EC events. Indeed Unison did not know about the present claim until it was sent the decision under appeal. Thus there had been no opportunity for conciliation and nothing to request.

62. As to the identity of the dispute, the dismissal of the 2011 claim had ended one dispute and the present claim raised another. However he accepted that the issue of whether the contact

between Unison and ACAS was in relation to the same dispute as the present claim admitted of more than one answer and thus would have to be referred to the ET if the statutory requirements were otherwise satisfied.

Appellant's Reply

63. In reply, Mr Coghlin submitted that, before its amendment in April 2014, section 18 **ETA** imposed a duty on the conciliation officer to attempt conciliation - hence the letter of 1.4.11. As to the difference in wording between section 18(1) and Regulation 3(1)(c), that was a consequence of the non-exhaustive provisions of section 18A(7) and must be taken as deliberate. Thus the language of the Regulation was determinative.

Conclusion on EC

64. I prefer the submissions on behalf of the Respondent. Whilst acknowledging that the section 18A(7) list is not exhaustive, I accept that each of (a)-(c) in Regulation 3(1) is intended to reflect the three particular instances identified in that sub-section. Regulation 3(1)(c) thus reflects the provisions of section 18B(1) and must be construed consistently. Accordingly, the 'contact' in Regulation 3(1)(c) must involve a request by a person for the services of a conciliation officer in relation to a matter that (if not settled) is likely to give rise to relevant proceedings against that person.

65. The underlying motif is that there is no need to undertake the early conciliation process (or at least obtain the EC certificate) if, before issue, the Respondent has sought the assistance of the conciliation officer in respect of the dispute.

66. All of the letters post-dated the issue of the 2011 claim. None were in relation to a matter that was likely to give rise to relevant proceedings. The 1.4.11 letter was from ACAS to Unison; and provides no basis to infer a subsequent request by Unison for the services of a conciliation officer. The 19.5.11 letter contained no such implied request. The 30 July 2012 letter did contain a request, but not in relation to a matter likely to give rise to relevant proceedings against Unison.

67. In any event, even if the analysis were confined to the express language of Regulation 3(1)(c), its opening words make clear that the necessary contact must have taken place before the relevant proceedings were instituted. This again reflects the underlying theme that involvement with the early conciliation process is not required where it has already been sought by the prospective Respondent.

68. For completeness, (i) I am not persuaded that the requirements of the Regulation cannot be satisfied by a request made by a Respondent prior to the EC provisions coming into force; (ii) had I allowed the appeal I would have held that the issue of whether the 'contact' or 'request' was in relation to the same dispute should be remitted to the ET.

69. In my judgment the result does not involve undue technicality or unfairness. On the contrary it simply reflects the absence of compliance with the requirements of section 18A(1) before this present claim was presented.

Conclusion

70. For these reasons the appeal on each ground must be dismissed.