Appeal No. UKEAT/0303/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 April 2018

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

MR M ROMERO — APPELLANT

NOTTINGHAM CITY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEVIN McNERNEY (of Counsel) Instructed by: Simpsons Solicitors Third Floor, Thorne House 36 Station Road Cheadle Hulme Cheshire SK8 7AB
For the Respondent	MR JEFFREY JUPP (of Counsel) Instructed by: Nottingham City Council Legal Services Loxley House Station Street Nottingham NG2 3NG

SUMMARY

JURISDICTIONAL POINTS

1. The appeal involved a reformulation of arguments run and rejected by the Employment Appeal Tribunal in **HMRC v Serra Garau** [2017] ICR 1121. Since **Garau** was not decided *per incuriam* and is not manifestly wrong, it should be followed: only one mandatory EC process is enacted by the EC provisions in section 18A **Employment Tribunals Act 1996**, and only one certificate is required for "proceedings relating to any matter". A second certificate, where obtained and relating to the same matter, has no impact on the limitation period.

2. Since the Employment Tribunal was entitled to conclude that the two certificates both related to the same "matter", it was also entitled to conclude that the claim was made out of time and that, since it was reasonably practicable for it to have been made in time, there was no jurisdiction to hear it.

3. The appeal therefore failed.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. This is a yet further appeal arising out of disputed interpretations relating to the interplay between the early conciliation ("EC") provisions and the limitation period for bringing claims for unfair dismissal in Employment Tribunal proceedings. This appeal raises the principal question whether a second EC certificate in relation to the same matter where more than one has been issued, can have an impact on the primary limitation period by extending time for bringing a complaint in the Employment Tribunal. Employment Judge Legard held, in a Judgment sent to the parties on 12 August 2017, that it could not. In doing so, he applied the decision of the EAT (Kerr J) in **HMRC v Serra Garau** [2017] ICR 1121 which was binding on him. Since the Employment Judge concluded that the two certificates related to the same matter, the claim was struck out for want of jurisdiction because it was not lodged within the relevant time limit, whether as extended by the conciliation period, and because it was reasonably practicable, he found, for it to have been lodged in time.

2. Mr Romero appeals against that Judgment and is represented by Mr Kevin McNerney, of counsel, who did not appear below. The appeal is resisted on behalf of the Respondent by Mr Jeffrey Jupp, of counsel, who also did not appear below. I am grateful to both counsel for the succinct submissions made on this appeal. I shall refer to the parties as they were below for ease of reference.

Relevant Legal Background

3. It is helpful to start with the legal framework for the EC scheme contained in section 18A **Employment Tribunals Act 1996** ("ETA"), inserted by the **Enterprise and Regulatory Reform Act 2013**. In broad terms, the scheme operates by requiring a prospective claimant to

notify ACAS of an intention to bring Employment Tribunal proceedings. The EC officer then attempts to contact the prospective claimant, and if he or she agrees, the case is passed to a conciliator who contacts the potential respondent. If the potential respondent consents, there is then a month in which to attempt to resolve the dispute. If EC is refused or is unsuccessful, an EC certificate is issued confirming that EC has been complied with.

4. The importance of these provisions, apart from the sensible objective of encouraging the early resolution of disputes, is the impact they have on time limits. In order to encourage parties to disputes to engage with ACAS, the period beginning the day after contact is made with ACAS by a prospective claimant, and continuing up to and including the date when the certificate is received or deemed to be received, does not count towards the primary limitation period. In other words, the clock stops for that period.

5. Section 18A **ETA** provides:

> **"(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 -**
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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,**
>
> **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).**
>
> **(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."

6. The modification to the primary limitation period is achieved by section 207B **Employment Rights Act 1996** ("ERA"). So far as material, this provides:

"(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."

7. There are also Regulations, and in particular, the **Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014** which provide by Schedule 1 paragraph 6, as follows:

"(1) For up to one calendar month starting on the date -

(a) of receipt by ACAS of the early conciliation form presented in accordance with rule 2; or

(b) the prospective claimant telephoned ACAS in accordance with rule 3,

the conciliation officer must endeavour to promote a settlement between the prospective claimant and the prospective respondent.

(2) The period for early conciliation may be extended by a conciliation officer, provided that the prospective claimant and prospective respondent consent to the extension and the conciliation officer considers that there is a reasonable prospect of achieving a settlement before the expiry of the extended period.

(3) An extension under paragraph (2) of the period for early conciliation may only occur once and may be for up to a maximum of 14 days."

8. Early guidance from the EAT in relation to the EC provisions establishes the following:

(i) the phrase "proceedings relating to any matter" used in section 18A(1) **ETA** is broad and does not require the EC process to be undertaken in respect of each claim. Claimants do not have to undertake early conciliation again where they are applying to add a new claim but have previously obtained an EC certificate: **Science Warehouse Ltd v Mills** [2016] IRLR 96.

(ii) The broad construction of the word "matter" in section 18A(1) has the effect that it can embrace a range of events, including events that have not yet occurred by the time the EC process comes to an end. Thus, for example, in a case where there is a disciplinary investigation into misconduct at the time early conciliation concludes, but, ultimately, the individual is dismissed after completion of early conciliation, "matter" is capable of embracing both the disciplinary process and the dismissal resulting from it: **Compass Group UK & Ireland Ltd v Morgan** [2016] IRLR 924.

(iii) Broad as the word "matter" is, however, it must be related to relevant proceedings: see section 18A(1) **ETA**. Critically, for the purposes of this appeal, in **Garau** the claimant obtained two certificates; one was received before the limitation period started to run, and the other was obtained after the expiry of the primary limitation period, albeit contact with ACAS was before its expiry. The issue in that case was 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 or expiry of the primary limitation period for the purposes of proceedings in the Employment Tribunal.

9. In **Garau** the EAT allowed the appeal of the employer, holding that the effect of the requirement in section 18A **ETA** meant only one certificate was required. Any further certificates issued are purely voluntary and do not affect the running of the limitation period. At paragraphs 18 to 21 the EAT held:

> **"18. I come to my reasoning and conclusions. I am in no doubt whatever that the employer'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 1996 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 1996 and its counterpart section 140B of the Equality Act 2010 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."**

10. The EAT rejected the claimant's submission in that case (also represented by Mr McNerney) that there was a limit to the extension of time due to Day A being tethered to the primary limitation period:

> **"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."**

11. Applying that approach to sections 18A and 207B, the EAT held at paragraphs 24 and 25 as follows:

"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 1996 refers to a mandatory certificate obtained under section 18A(4) of the Employment Tribunals Act 1996. 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 section 140B of the Equality Act 2010. 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."

The Factual Background

12. The Claimant in this case was employed by the Respondent as a Community Protection Officer from sometime in June 2008 until his summary dismissal which took effect on 28 September 2016. The decision was communicated to him at a disciplinary meeting on 28 September 2016, and confirmed subsequently in writing by letter dated 5 October 2016. His effective date of termination was, on any view, 28 September 2016, so that the primary limitation period for any claim of unfair dismissal in the Employment Tribunal expired on 27 December 2016. The Claimant appealed against the dismissal decision and his appeal was not upheld.

13. He was represented throughout the period (November and December 2016) by his trade union (the GMB) and his case was referred to a firm of solicitors (with a department specialising in employment law) on or about 8 November 2016. Following advice from his trade union, the Claimant contacted ACAS. The exact date on which that contact was made was either 25 or 26 October; the precise date is not material to the outcome of this appeal, but it seems to me both dates having been mentioned by the Tribunal (see paragraphs 3.5 and 5.2) that 25 October 2016 is the correct date because the clock was stopped for nine days. Conciliation was unsuccessful and ACAS issued a certificate dated 3 November 2016. The

clock was treated as stopped for nine days allowing an extension to the limitation period to 5 January 2017, as all parties appear to have agreed.

14. On 15 December 2016, the Claimant contacted ACAS through his solicitor for a second time, and a second certificate was issued in respect of a second unsuccessful conciliation period on 9 January 2017. Although the Claimant's solicitor discovered the existence of the first ACAS certificate on or about 10 January 2017, nonetheless he worked on the basis that the limitation period would extend, by reference to that second EC certificate, to 9 February 2017. The claim form was therefore filed on 8 February 2017, claiming unfair and wrongful dismissal, but was struck out by the Employment Judge in the impugned Judgment.

15. The Employment Tribunal was required to address two questions: first, whether the second EC process and certificate operated to extend the time limit; and secondly, whether or not it was reasonably practicable for the complaint to be brought within the primary limitation period if not.

16. In relation to the first question, Employment Judge Legard found that the second early conciliation process and EC certificate had no effect on the time limit (see paragraph 5.3). First, applying **HMRC v Garau** he held that the second process and certificate was in relation to the same matter as the first, that there could only be one Day A and one Day B in respect of any one matter within the meaning of the legislation. Secondly, the second certificate was not a certificate within the meaning of section 18A(4), it being the product of a voluntary, as opposed to a mandatory, process. Thirdly, the Claimant, if he was correct could extend time *ad infinitum*. Fourthly, the fact that, unlike in **Garau**, both certificates were issued within or after

A the limitation period did not assist the Claimant. His claim for unfair dismissal was accordingly out of time (paragraph 5.4).

B 17. As for the second question, Employment Judge Legard found that it was reasonably practicable for the complaint to have been brought within time (see paragraph 5.5). The Claimant was aware that he had been dismissed, he had the assistance of the trade union and expert legal advice, and there was no evidence of any other unforeseeable factor that affected his ability to present his claim on time (paragraph 5.5).

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The Appeal

D 18. There are three grounds of appeal that, together, raise two issues. The first issue is whether ACAS can issue more than one EC certificate under the statutory regime, both of which have an effect on the primary limitation period. The second issue is whether the two certificates in this case relate to the same matter.

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Issue 1: Multiple EC Certificates

F 19. On this issue, Mr McNerney advances two separate arguments by reference to the first two grounds of appeal. First, he submits that the Employment Judge took into account irrelevant factors by stating that the Claimant could, if his arguments were correct, extend the time limit *ad infinitum* by obtaining additional EC certificates. Secondly, he submits that

G **Garau** was decided *per incuriam*. As to the first argument, Mr McNerney submits that the Employment Judge was incorrect to state that a Claimant could extend time limits *ad infinitum* if additional EC certificates could be used to extend time. The statutory scheme provides that the latest possible Day A is the date before the expiry of the primary limitation period, and Day

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A is therefore tethered to the primary limitation period so there is a statutory maximum extension of time.

20. On this argument, the Respondent concedes that the Employment Judge was wrong to conclude that time could be extended *ad infinitum*, but says that this had no effect on the Employment Judge's conclusion as he was bound, in any event, by **Garau**.

21. I agree. Although, as the EAT said in **Garau** at paragraph 23, Day A and in fact Day B do not have to fall within the primary limitation period, if Day A is outside the primary limitation period, it cannot effect an extension of the limitation period. Logically, therefore, the last date on which Day A can have the effect of extending the limitation period is the date the limitation period expires. Furthermore, it is clear from section 207B(4) that if the primary limitation period expires between Day A and the period ending a month after Day B, the time limit expires at the end of that period. That, accordingly, provides a long stop for any extension.

22. However, the Employment Judge's conclusion in this regard does not render his decision erroneous. He was, as Mr Jupp contends and Mr McNerney agrees, bound by **Garau** in any event. Accordingly, although this ground succeeds, the error does not lead to the conclusion that the decision cannot stand.

23. As to the second argument, Mr McNerney submits, both in writing and in oral argument, initially at least, that **Garau** was decided *per incuriam.* He went on to contend that the division between mandatory and voluntary certificates does not appear in the legislative scheme; if the scheme had intended to distinguish between different sorts of certificates, it

would have said so. Furthermore, if Parliament intended that anything beyond a first certificate should be ineffective for the purposes of extending time limits, again it would have said so. Moreover, Mr McNerney points to the use in section 18A(4) **ETA** of the indefinite article when referring to "certificate", thus making clear that more than one certificate can be obtained and can have the effect, by reference to section 207B, of extending time limits. Mr McNerney submits that every certificate obtained by a claimant should count and, on a proper construction of the legislation, does count; albeit, in reality, it will be the last one that determines the time of expiry of any extended limitation period. Although section 207B **ERA** refers to "the certificate", that is unsurprising and is a reference to each certificate obtained by reference to section 18A. Moreover, he submits that the prohibition on a second or further valid certificate having the section 207B effect of extending the limitation period would defeat the legislative intention of reducing tribunal litigation. Parliament plainly intended that parties should have additional time to settle their disputes without recourse to employment tribunals, and the possibility of voluntary conciliation misses the point that only a valid certificate extends time to settle matters and thus avoid proceedings. Mr McNerney points to the fact that an EC certificate issued before the beginning of a primary limitation period would have no effect on limitation, but the construction of these provisions in **Garau** would preclude another EC certificate having the effect of extending the limitation period if issued during the running of that limitation period.

24. Mr McNerney recognises that this argument has already been determined in **Garau**. Whilst the EAT is not bound by decisions of other EAT panels, it is well established that it will only depart from a previous EAT decision in exceptional circumstances (see **Secretary of State for Trade & Industry v Cook** [1997] IRLR 150). The established exceptions were summarised by Singh J (as he then was) in **British Gas Trading Ltd v Lock** UKEAT/0189/15.

A Two of the five exceptions identified are potentially relevant to this appeal: first, where the earlier decision was *per incuriam;* and secondly, where the earlier decision is manifestly wrong.

B 25. The grounds of appeal rely only on the first exception to which I have just referred, namely that the decision in **Garau** was *per incuriam.* The words "*per incuriam*" mean where the decision is one in which a relevant legislative provision or binding decision of the courts was overlooked or not considered. It is immediately apparent when the words "*per incuriam*" C are properly understood, that the Claimant's reliance upon the *per incuriam* exception is misplaced; so much was conceded, eventually, by Mr McNerney in the course of argument.

D 26. It is not said by the Claimant that a statutory provision or binding authority was overlooked or ignored. Instead, the arguments advanced, both in writing and orally, are the same arguments as were rejected in **Garau**, on the basis of the self-same statutory provisions. E That is an impermissible approach. The EAT does not depart from a previous decision in such circumstances (see **Lock** at paragraph 74). To the extent that Mr McNerney sought to argue that **Garau** is manifestly wrong and that is what was intended by the words *per incuriam*, again I disagree. Not only was **Garau** not decided *per incuriam*, it was also not manifestly wrong. F Furthermore, it has since been followed in **Treska v The Master & Fellows of University College Oxford & Another** UKEAT/0298/16 by Her Honour Judge Eady QC (see paragraphs 11 and 27).

G 27. The central conclusion in **Garau** is that there is one mandatory conciliation process but nothing to prevent a claimant from contacting ACAS on a further occasion to seek assistance on a voluntary basis in order to achieve resolution of his or her dispute (see paragraph 26). Once a H claimant has embarked on the EC process, the rules of the process apply in terms of extensions

A of time limits to the single mandatory process and not in relation to any subsequent process that relates to the same matter.

B 28. I consider that reasoning in **Garau** is plainly correct. While section 18A **ETA** refers to a certificate and the possibility of more than one certificate therefore exists, the words of section 207B **ERA** indicate that there is only one certificate envisaged as affecting time. Section 207B(2)(a) defines Day A as "the day on which the complainant or applicant concerned C complies with the requirement in subsection (1) of section 18A". It does not provide for "days" or the "latest date". It identifies a single day only. Similarly, section 207B(2)(b) defines Day B as "the day on which the complainant or applicant concerned receives or, if earlier, is treated as D receiving … the certificate issued under subsection (4)". It does not provide "the day or, if more than one certificate is issued, the latest day". Those are words that would have to be read into this provision if the Claimant's argument is correct that multiple certificates can each separately have the effect of extending time.

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29. The arguments advanced on this appeal by Mr McNerney are, in reality, simply a reformulation of the same or substantially similar arguments advanced by him unsuccessfully in F **Garau** (see in particular paragraph 17). These arguments do not begin to persuade me that the judgment in **Garau** is manifestly wrong.

G *Issue 2: The Same Matter*

30. In the alternative, the Claimant submits that the first EC certificate in this case was not issued in relation to the same matter as the second, and is not therefore caught by the limitation H in **Garau**. Mr McNerney submits the first contact with ACAS was to seek arbitration by ACAS in order to compel the Respondent to reinstate the Claimant or come to a mutually

agreed resolution. The second contact with ACAS was different, and was in furtherance of pursuing an Employment Tribunal claim for unfair dismissal. That important distinction was not appreciated by the Employment Tribunal in error of law. Had the Tribunal appreciated that distinction, which was supported by the Tribunal's own findings, it would have realised that only the second certificate could be valid for the purposes of issuing an Employment Tribunal claim and therefore the second certificate has the effect of extending time under section 207B. The Employment Tribunal was thus in error in concluding that the certificates related to the same matter.

31. I do not accept this argument. As Mr Jupp contends, and I agree, it is wrong for several reasons. Mr McNerney's reliance, in particular on the conclusions of the Employment Judge at paragraph 5.5, is misplaced. The Employment Judge held:

> **"5.5. … 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."**

Mr McNerney submits that demonstrates that the issues the Claimant sought to raise in his first contact with ACAS had nothing to do with unfair dismissal proceedings and everything to do with a mistaken belief that ACAS could intervene in the dispute between him and the Respondent, dictating terms, and restoring his position.

32. The submission ignores the evidence and findings of the Tribunal about the objective facts that were, in fact, raised by the Claimant. The Tribunal made findings at paragraph 3.13, accepting in full what the Claimant himself said at paragraph 7 of his witness statement as follows:

> **"My belief was that ACAS would make sure that the Respondent followed the correct procedure and in doing so 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."**

That is, classically, a complaint that the dismissal was unfair on procedural grounds, that the Claimant did not have the benefit of a fair hearing, and that he wanted reinstatement. That was, something ACAS is expressly encouraged to promote, pursuant to section 18A(9)(a) **ETA**.

33. In light of that evidence, it seems to me that the Employment Tribunal, which concluded at paragraph 5.3 that the second EC process and certificate was in relation to the same matter, made an unassailable and unsurprising finding of fact that the second certificate related to precisely the same matters as the first. Paragraph 5.5 is not addressing this question at all. It is directed at the question whether or not it was reasonably practicable for the complaint to be brought in time. The Employment Judge found that it was reasonably practicable, but, in doing so, canvassed the Claimant's mistaken belief about the purpose and jurisdiction of ACAS. In other words, the Claimant's subjective belief could not impact on the objective facts and matters he raised at the time of the first contact, and the finding of the Employment Judge was plainly a finding that was open on the facts. Whatever his subjective belief was, on any view, the facts he raised had a link to or related to unfair dismissal proceedings.

34. Furthermore, I agree with Mr Jupp that if the Claimant simply wished for ACAS to arbitrate and had no intention of bringing proceedings it was open to him to seek to engage the services of an ACAS officer outside the statutory scheme. He did not need to use the EC scheme to contact ACAS and only needed to use that scheme if he had an intention of commencing proceedings in relation to a matter raised with ACAS. As I have already indicated, wide as the expression "matter" is, it must nevertheless relate to the relevant proceedings.

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35. For all these reasons the appeal fails on all grounds and is dismissed.

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