THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr R Patterson	**AND**	**City Facilities Management (UK) Limited**

Held at: **North Shields** **On:** **13 November 2017**

Before: **Employment Judge A M Buchanan**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr A Moore, Solicitor**

JUDGMENT ON PUBLIC PRELIMINARY HEARING having been sent to the parties on 14 November 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1.1 The issue to be determined at this public preliminary hearing was set out in the Orders of Employment Judge Shepherd on 25 October 2017 namely whether the Tribunal has jurisdiction to hear the claim of unfair dismissal advanced by the claimant taking account of whether the claim was submitted in time or out of time pursuant to section 111 of the Employment Rights Act 1996 ("the 1996 Act").

1.2 I heard evidence from the claimant who was cross examined. The respondent called no witnesses. I had a small bundle before me extending to 64 pages. Any reference in these reasons to a page number is reference to the corresponding page in that bundle.

1.3 The claimant consented pursuant to section 18(7) of the Employment Tribunals Act 1996 for his communications with ACAS officers to be admitted in evidence.

2. The relevant statutory provisions are:

2.1 Section 111(2) of the 1996 Act which reads:

.....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 three months beginning with the effective date of termination or (b) within such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months.

2.2 Section 111(2A) which reads:

.....section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection 2(a).

2.3 Section 207B of the 1996 Act - the relevant parts of which read:

(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 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.

2.4 Section 18A of the Employment Tribunals Act 1996 – the relevant parts of which read:
(1) Before a person (a prospective claimant) presents an application to institute relevant proceedings relating to any matter the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter. This is subject to subsection (7).
(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.
(3) The conciliation officer shall during the prescribed period endeavour to promote a settlement between the persons who would be parties to the proceedings.
(4) If –
(a) during the prescribed period the conciliation officer concludes that a settlement is not possible or
(b) the prescribed period expires without a settlement having been reached
the conciliation officer shall issue a certificate to that effect in the prescribed manner to the prospective claimant.
(8) A person who is subject to the requirement of subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

(11) The Secretary of State may by employment tribunal procedure regulations make such further provisions as appear to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).

2.5 The schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 ("the 2014 Regulations") provides;
(1) To satisfy the requirement for early conciliation, a prospective claimant must –
(a) present a completed early conciliation form to ACAS in accordance with rule 2: or
(b) telephone ACAS in accordance with rule 3.
2(1) An early conciliation form which should be presented to ACAS must be –
(a) submitted using the online form on the ACAS website: or
(b) sent by post to the ACAS address set out on the early conciliation form.
2(2) An early conciliation form must contain –
(a) the prospective claimant's name and address; and
(b) the prospective respondent's name and address.
2(3) ACAS may reject a form that does not contain the information specified in paragraph (2) or may contact the prospective claimant to obtain any missing information.
5(1) ACAS must make reasonable attempts to contact the prospective claimant;
5(2) If the prospective claimant consents to ACAS contacting the prospective respondent, ACAS must make reasonable attempts to contact the prospective respondent.
5(3) If ACAS is unable to make contact with the prospective claimant or prospective respondent it must conclude that settlement is not possible.

3. The history of these proceedings is as follows:

3.1 The claimant filed this claim on 9 May 2017 against City Facilities Management Limited and referred to an early conciliation certificate numbered R122416/17/85. The Tribunal noted that that certificate showed the respondent as City Facilities but an Employment Judge in Scotland (where the claim was filed) directed that the claim should be accepted because the difference was a minor error and the interests of justice required acceptance.

3.2 The respondent filed its response on 12 June 2017 and in the response took the point that the claimant had until 22 April 2017 to submit a timely claim and that therefore the claim appeared to be out of time.

3.3 On 16 August 2017 the claimant filed an agenda for case management and his response to the respondent's form of response in which he stated amongst other things "the claimant followed guidance off ACAS regarding timescales".

3.4 A preliminary hearing took place in Glasgow on 25 August 2017 before Employment Judge Garvie. That hearing resulted in the case being adjourned and consideration being given to a transfer of the file to the Newcastle Tribunal. That transfer was authorised by the President of the Employment Tribunals England & Wales on 3 October 2017 and on receipt of the file at that office the hearing before Employment Judge Shepherd referred to above was scheduled. That hearing resulted in the public preliminary hearing which comes before me today.

4. The relevant factual matters are as follows:

4.1 The claimant was dismissed by the respondent on 3 January 2017. He entered into a process of early conciliation on 16 March 2017 by contacting ACAS and named as respondent "City Facilities": he carried out this process using an automated system and did not speak to any officer of ACAS (page 40).

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4.2 The claimant was contacted by an ACAS officer in relation to the matter on 21 March 2017 (page 41). I see reference to a conversation between the claimant and an ACAS officer who advised the claimant that the form which he had completed was being checked and he was told that he must be sure that all the details he had given were correct. The claimant advised the ACAS officer that the respondent's name may be incorrect and that it should properly be City Facilities Management Limited but he would check his payslip or contract of employment and call back and confirm how he would like to proceed.

4.3 A conversation took place between the claimant and an ACAS officer on the following day 22 March 2017 (page 43) and the claimant confirmed that the respondent's name was incorrect and that he would resubmit his request for early conciliation. The officer's note records that the case was closed with the claimant's permission. In order to clear that matter from their system ACAS issued a certificate to the claimant bearing number R122416/17/85 ("the first certificate") which shows the respondent named as "City Facilities". This is the certificate referred to in the claim form.

4.4 On the same day the claimant started the process of early conciliation again with the correct name of the respondent company namely City Facilities Management Limited. He did this at 14:51 and the reference generated by ACAS for that process then beginning was R123908/17 (page 46). I am satisfied that no conciliation of any description took place between 16 and 22 March 2017 under the reference of the first certificate and that the first certificate was issued to the claimant simply to clear that request from the ACAS system and certainly not for either of the reasons set out in section 18A(4) of the Employment Tribunals Act 1996.

4.5 I am satisfied that the early conciliation process began on 22 March 2017 with the claimant having named the respondent correctly. A conversation took place between the claimant and the ACAS conciliator on 30 March 2017 (page 49) which was the first time the claimant had explained his case to ACAS. The respondent was contacted by ACAS for the first time on 30 March 2017 at 16:36 (page 50) and on 11 April 2017 (page 53) there was a conversation between the claimant and ACAS (page 53) in which the claimant was told by the ACAS official of the respondent's position and that a certificate would be issued. I infer that the respondent had said it was not interested in conciliation because on that same day a certificate ("the second certificate") bearing number R123908/17/43 was issued to the claimant.

4.6 I am satisfied that an effective but unsuccessful process of early conciliation took place between 22 March 2017 and 11 April 2017 resulting in the issue of the second certificate.

4.7 The claimant sought advice from ACAS on 5 May 2017 at 12:10 (page 56) as to the time limit for instituting his claim at the Tribunal and was told "*good rule of thumb to lodge within 1 month of cert issue date which would be 10/5/17 however may have a few days longer but ultimately up to the Tribunal whether within time".* This note was clearly referring to the second certificate.

4.8 The claimant instituted these proceedings on 9 May 2017 and referred in error on the claim form to the first certificate. He was met by a response that the claim was out of time and on 29 August 2017 (page 61) the claimant was in touch again with ACAS and stated that he had only ever received one certificate and so the matter was looked into by ACAS. A conversation took place between the claimant and ACAS on 30 August 2017 in which the ACAS officer stated that on 22 March 2017 it was established that the name of the respondent on the first certificate was incorrect and "*it was agreed with you that the application would be closed down and you would re-submit a claim in order to ensure the company name was correct. Upon closure you would have been sent a certificate to confirm that you had registered the first claim".* The claimant was then sent a copy of the second certificate. The claimant now accepts that he had received the second certificate when it was issued to him in April 2017 but that, when he filed the claim form, he erroneously referred to the first certificate having forgotten that he had received a later certificate.

5. Submissions – the respondent

5.1 I received written submissions from Mr Moore on behalf of the respondent which focused in the main on the decision in **HMRC –v- Serra Garau UKEAT/0348/16/LA** and also the decision in **Treska –v- (1) The Master and Fellows of University College Oxford and (2) University College Oxford UKEAT/0298/16**. It was submitted that those authorities show that only the first certificate can be accepted.

5.2 It was submitted that the claim was therefore out of time and that the burden or proving that it was not reasonably practicable to file in time rested with the claimant and that an extension of time was the exception and not the rule. The chronology of the matter was pointed out and it was submitted that there was no reasonable explanation for the claimant's delay in approaching ACAS for the first certificate on 16 March 2017. The advice on 5 May 2017 to the claimant came when the claim was already out of time if the first certificate was the relevant certificate. It was reasonably practicable for the claim to have been filed in time.

5.3 If the Tribunal were to consider that it was not reasonably practicable the period from the expiry of the time limit under the first certificate, namely 22 April 2017, and the date of issue on 9 May 2017, was not reasonable and time should not be extended.

6. Submissions - the claimant

6.1 The claimant submitted that if he had simply referred to the second certificate in his claim form then this particular hearing would never have taken place because the respondent would have known nothing about the first certificate. There had been no conciliation under the first certificate.

6.2 The claimant submitted he had been dismissed after 19 years service and it was a very stressful time for him and his priority in the weeks following his dismissal was to look after his family by finding another job but in any event he believed he had submitted his claim in time. He had simply attached the wrong certificate to the claim form and that he had a right to take three months plus one month from the end of Day B on the second certificate and he took advice from ACAS and followed that advice.

7. The relevant authorities

7.1 I have considered the decision of Mr Justice Kerr in **HMRC –v- Serra Garau** (above). I have noted the relevant facts of that matter were that the claimant was given notice of termination of his contract on 1 October 2015 which was to expire on 30 December 2015. On 12 October 2015 the claimant contacted ACAS for the first time and on 4 November 2015 received an early conciliation certificate. On 30 December 2015 the claimant's employment came to an end on expiry of his notice period. On 28 March 2016 he contacted ACAS for a second time and on 25 April 2016 ACAS issued a second certificate. The claimant issued proceedings on 25 May 2016. The decision is at paragraph 24:

"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 pure voluntary second notification which is 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 under section 18A(4) of the Employment Tribunals Act 1996. Section 207B(2)(b) states 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 modification 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".

7.2 I have considered the decision in **Treska** (above) in which **Serra Garau** was followed. In that case it appears the claimant was dismissed on 6 August 2014. On 15 October 2014 the claimant made two notifications of early conciliation (one of which was treated as a duplicate) in respect of which early conciliation ended (after an extension) on 29 November 2014. On 5 November 2014 the claimant made a further notification of early conciliation in respect of which (if valid) the period ended on 5 December 2014. The claim was issued on 5 January 2015. In that case the Employment Appeal Tribunal found that the Tribunal had permissibly found that the first certificate validly complied with the requirements of section 18A of the Employment Tribunals Act 1996 and that matter was upheld by the EAT.

8. Discussions and conclusions

8.1 It is common ground that the ordinary time limit for advancing these claims is three months less one day from the date of termination of the claimant's employment on 3 January 2017. This would mean that a timely claim would need to have been filed by 2 April 2017 in the absence of an extension of time provided by the early conciliation

provisions. It is the agreed position that if the first certificate is valid then the time limit is extended to 22 April 2017. If the second certificate is valid, it is agreed that the time limit is extended to 11 May 2017. In this case the claim was filed on 9 May 2017 namely in time if the second certificate is valid but out of time if the first certificate is valid.

8.2 I distinguish the decisions in **Serra Garau** and **Treska**. I do so because in those cases it is clear that the first certificate obtained by the claimant in those cases was validly obtained after a process of conciliation had in fact taken place in sharp contrast to the situation before me. In this case I conclude that the first certificate was not validly obtained by the claimant or validly issued by ACAS.

8.3 In relation to the first certificate, the claimant had named the wrong respondent. ACAS discussed that matter with him and before conciliation of any description had taken place the claimant looked to amend the name of the respondent. It would appear that if that is the case, then ACAS must issue a certificate to close down the original erroneous notification and begin the process again. ACAS therefore issued the first certificate on 22 March 2017 but did so in neither of the circumstances set out in section 18A(4) of the Employment Tribunals Act 1996 for the issue of a valid certificate. When the first certificate was issued the conciliation officer had not concluded that a settlement was not possible because he had not even started the process of conciliation nor had the prescribed period for early conciliation expired without a settlement having been reached. Thus the first certificate was not validly issued under the provisions of section 18A of the Employment Tribunals Act 1996 and in my judgment it is a nullity. Instead the second certificate was validly applied for by the claimant with the correct name of the respondent and validly issued by ACAS under the provisions of section 18A(4)(a) for it is clear that during the prescribed period for the second certificate the conciliation officer had concluded that a settlement was not possible.

8.4 If the first certificate was the relevant certificate in the circumstances of this case, then it would mean that the claimant was to rely on a certificate issued by ACAS simply to enable it to close down what was an ineffective request for early conciliation from its system. It seems unfortunate that ACAS issue a certificate at all in the circumstances such as applied in this case to the first referral but, given that ACAS does so, it is clear that it is not a certificate issued for either of the reasons set out in section 18A(4) of the Employment Tribunals Act 1996 and it can have no relevance for the purposes of the slightly relaxed limitation regime as it was referred to in **Serra Garau** .When he came to complete his claim form the claimant referred to the first certificate and not the valid second certificate. That was an unfortunate error on his part but an understandable one given the claimant acts in person. I accept his contention that if he had in fact referred to the second certificate then no one – least of all the respondent – would have been any the wiser. The provisions of section 18A of the Employment Tribunals Act 1996 are there to encourage settlement of claims and so avoid litigation in the Tribunal. If a claimant can be prevented from bringing a timely claim in this case by having to rely on a certificate issued before any conciliation of any description had been attempted then that result would fly in the face of commonsense and the interests of justice.

8.5 The cases referred to by the respondent were very different indeed. In those cases it is clear that the first certificates were issued after a meaningful process of conciliation had taken place and had been issued in the circumstances envisaged by

section 18A(4) of the Employment Tribunal Act 1996. That is not so in this case and thus I conclude that the first certificate is not relevant. I conclude that it is the second certificate which governs the situation in this case and it is that certificate which must be referred to in assessing the extension of time granted to the claimant. It is common ground that that extension brings the claimant to 11 May 2017 and that his claim was filed on 9 May 2017. In those circumstances I conclude that this claim of unfair dismissal has been filed with the Tribunal in time and it is not necessary for time to be extended under the "reasonably practicable" test contained in the provisions of section 111 of the 1996 Act.

8.6 If I should be wrong in that conclusion and the first certificate is the governing certificate, then I have considered whether it was reasonably practicable for the claimant to have filed his claim in time namely by 22 April 2017 as opposed to 11 May 2017. I am satisfied that in view of the confused situation in respect of the issue of certificates and the fact that the claimant had been guided by ACAS that he had at least until 11 May 2017 in which to file his claim that it was simply not reasonably practicable for the claimant to have filed his claim by 22 April 2017.

8.7 In those circumstances I have considered whether the period of time from 22 April 2017 to 9 May 2017 is a reasonable period in which to file the claim out of time. Given that the claimant did so within the period of the extension provided by the second certificate, I conclude that that is a reasonable period of time and I would have in any event (had it been necessary) extended time to 9 May 2017 for the claimant to have filed a timely claim. However, in the circumstances of this case and in light of my decision in respect of the certificates generally, it is not necessary that I consider that matter further.

8.8 I say two final things. The claimant is the author of his own misfortune in having to attend this hearing this morning. He erroneously referred to the first certificate and accepts now that he had the second certificate but simply chose the wrong number. It is an understandable mistake but it is one which has caused this hearing to have to take place. Secondly it is clear that the respondent knew nothing about the issue of the first certificate and had the claimant not referred to it on the claim form this hearing would not have taken place. The second certificate was applied for in time and the conciliation process which is encompassed within the second certificate was the only process of conciliation which took place and the only one of which the respondent was therefore aware. That gives me further grounds for saying that the first certificate is simply a nullity and it is the second certificate which on the unusual facts of this case is the one which is the governing certificate unlike the situation in the two cases on which the respondent relied and which I distinguish.

9. The claim for unfair dismissal is in time and will proceed to final hearing.

10. Case management orders have been issued separately.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 1 December 2017