# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Benyon

**Respondent:** Gorgemead Limited

**Heard at:** Manchester Employment Tribunal

**On:** 10 July 2020

**Before:** Employment Judge Dunlop

**Representation**

**Claimant:** Mr J Boyd, Counsel
**Respondent:** Mr P Gorasia, Counsel

# JUDGMENT

The claim is out of time. The Employment Tribunal has no jurisdiction to hear the claim, and the claim is therefore dismissed.

# REASONS

**Background**

1. By a claim form presented on 19 December 2019 the claimant brought claims of constructive unfair dismissal (s.98 Employment Rights Act 1996 'ERA') and detriment on the grounds of public interest disclosure (s.47B ERA) and/or health and safety (s.44(1)(c) ERA). She later applied to amend those claims to also allege that the dismissal was 'automatically' unfair on the grounds of public interest disclosure (s.103A ERA) and/or health and safety (s.100(1)(c) ERA). That application had not been dealt with when I gave my decision in relation to time limits. The parties were agreed that the merits of the time limit application were unaffected by the proposed amendments. In view of the judgment above, the proposed new claims fall away along with the claims already pleaded.

2. The respondent asserts that all of the claims were presented outside the relevant time limits set out in s111(2) ERA and s.48(3) ERA. Although the

time limit for the unfair dismissal claim is contained in separate statutory provisions to the time limit for the detriment claims, the same test applies. In summary, the claim must be presented within three months of the act complained of unless there is any extension available due to ACAS Early conciliation, as provided for in s.207B ERA. Any further extension of time will be permitted only where it was not "reasonably practicable" for the case to be presented within the primary time limit.

3. The claimant's effective date of termination is agreed to be 23 August 2019 and all the alleged detriments pre-date the termination. The parties agree that the claim is out of time unless the claimant can avail herself of the s207B extension. (Mr Boyd helpfully confirmed at the outset that he did not seek to argue for any separate extension on the grounds that it was not reasonably practicable for the primary time limit to be complied with.)

4. The dispute as to whether the s207B extension applied arose because there were two periods of Early Conciliation. Again, the dates were agreed, and they were as follows:

   4.1 First period: The claimant contacted ACAS on 10 January 2019 and ACAS issued the EC certificates on 10 February 2019. Certificates were issued against 'Mark Forest' and 'Cohens Chemist'.

   4.2 Second period: The claimant contacted ACAS on 10 September 2019 and ACAS issued the EC certificate on 10 October 2019. One certificate was issued against 'Gorgemead Limited'.

5. In the case of **Commissioners for HM Revenue and Customs v Serra Garau UKEAT/0348/16** the EAT held (in summary) that where a claimant entered into a voluntary second period of Early Conciliation that did not give rise to a s207B extension.

6. The question for the Tribunal today, therefore, was whether the second period of conciliation in this case was mandatory or purely voluntary. The key statutory provision is s18A(1) Employment Tribunals Act 1996 which provides:

   *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.*

7. Therefore, to determine whether the second period of conciliation was mandatory or voluntary, it is necessary to determine whether it related to the same "matter" as the first period of conciliation. In order to determine that question, an examination of the background facts is needed.

8. I did not hear evidence from the claimant or any other witness about the matters in dispute between the parties at the relevant times or the content of any discussion with ACAS, nor was it proposed by either counsel that I should. Instead, both parties made full submissions, supported by detailed skeleton arguments. Those submissions included, specifically, analysis of a grievance letter dated 18 January 2019 (contemporaneous with the first period of conciliation) from the claimant's solicitors to the respondent; of the

claimant's resignation letter dated 23 August 2019 (which was also sent on her behalf by her solicitors); and of the particulars of claim as they were eventually submitted. It is worth recording that those particulars were professionally drafted and are full and detailed. Whilst I am unable to make findings of fact in respect of any disputed area, I have, where necessary, assumed in the claimant's favour that she will be able to make out her claim as pleaded.

## Facts

9. The respondent operates a well-known chain of pharmacy shops under the trading name 'Cohens Chemist'. The claimant worked as a pharmacy manager at a particular branch in Liverpool, branch 21. The claimant alleges that between July and October 2018 she made various disclosures regarding staffing at Branch 21. There are disputes around what the content of those communications were, and whether they amount to protected disclosures (or acts of bringing relevant matters to her employer's attention) for the purposes of triggering statutory protection. I shall, however, refer to the pleaded communications as 'disclosures' for the purposes of this Judgment.

10. The claimant alleges that a series of detriments resulted from her making these disclosures. Specific key alleged detriments included being temporarily moved to another shop (16 October 2018), the launch of a disciplinary investigation and a lengthy investigative interview (27 November 2018) and a resulting formal disciplinary process which the claimant was notified of on 2 January 2018 and which concerned, broadly, her management of branch 21 and her treatment of staff working under her. The claimant was notified that the process could potentially lead to the imposition of a final written warning or dismissal, as the allegations were said to constitute gross misconduct.

11. The alleged detriments up until this date prompted the submission of the grievance letter mentioned above. The letter makes clear that the claimant would consider a final written warning or dismissal resulting from the extant disciplinary procedure to be related to the disclosures and unlawful.

12. A grievance meeting was held on 2 May 2019 (at which point the disciplinary procedure appears to have been effectively in abeyance). The outcome of the grievance meeting was delayed. There were some without prejudice discussions with both parties have referred to for the purposes of explaining the time line, without waiving privilege as regards the content of those discussions.

13. On 1 August 2019 there was a further informal meeting where new disciplinary matters were raised in relation to alleged competitive activity in breach of the claimant's contract. The claimant was then signed off sick for two weeks. During this period she was informed that the new matters would be proceeding to a formal disciplinary hearing. She was informed that she would received the grievance outcome on 23 August 2019 and returned to work. On that date, however, the claimant did not receive the grievance outcome as expected. She was instead informed that the grievance

outcome would be further delayed and the disciplinary would progress to a formal hearing. She then resigned with immediate effect.

## Discussion and conclusion

14. I am grateful to both counsel for their thorough arguments, supported by the authorities which they referred to and handed up. I will not set out in these reasons all of the points which I was taken to in argument.

15. It is sufficient to say that various authorities, notably **Compass Group UK & Ireland Ltd v Morgan [2016] IRLR 924**, make it clear that the term 'matter' is to be broadly defined, albeit not without limits. See, for example, paragraph 23 of **Morgan**:

> *"Ultimately, we can see no reason artificially to restrict the scope of the phrase "relating to any matter". That does not mean that an EC certificate affords a prospective claimant a free pass to bring proceedings about any unrelated matter; it does not. In our judgment, it will be a question of fact and degree in every case where there is a challenge (and we hope and anticipate that there will be very few such challenges) to be determined by the good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided the requisite information to ACAS. In circumstances where the only requirement is to make contact with ACAS but do nothing more and the information required to be provided is limited as it is, we do not consider that this construction defeats the object of the EC process at all."*

16. In many cases, this will assist claimants, who are not required to make repeated applications for Early Conciliation, and will reduce the scope for preliminary challenges that the Early Conciliation procedure has not been complied with. This intended characteristic of the regime has been recognised within the authorities, as summarised in paragraph 9 of **Morgan:**

> **"…** *it was part of Parliament's intention in enacting the EC scheme and in adopting the broad terminology referred to that the Rules of Procedure would operate in a flexible and pragmatic way, avoiding the sort of disputes and satellite litigation that was spawned by the dispute resolution procedures enacted under the Employment Act 2002.*"

17. **Serra Garau**, however, looks at the question from the other end of the telescope. If a claimant has already obtained one EC certificate in relation to a matter, can a second certificate still trigger the extension of time? The answer, accordingly to the EAT in that case is a clear 'no'. That has been confirmed in the subsequent EAT cases of **Treska v Master and Fellows of University college Oxford UKEAT/0298/16** and **Romero v Nottingham City council UKEAT/0303/17**, to which Mr Gorasia also referred. The broad definition of the term 'matter', which assists claimants to defeat arguments that they have not adequately conciliated, poses a significant hurdle for claimants such as Ms Benyon, who may find, perhaps unwittingly, that they have conciliated too much.

18. In my assessment, there is sufficient connection in this case between the claim ultimately brought and the matters in dispute between the parties to

enable them to be properly considered as the same matter. The following factors lead me to this conclusion:

18.1 First, and most obviously, these two periods of conciliation involved the same parties and a dispute arising from the same employment. (Although Mr Gorasia anticipated that a point may be taken on the use of the respondent's trading name on the first conciliation certificate, Mr Boyd did not, in fact, seek to rely on that discrepancy. That was a sensible concession.) Although no conciliation was entered into in respect of Mark Forrest (who is a manager employed by the respondent) on the second occasion, I considered that had no bearing in either direction. Allegations are made against Mr Forrest in the particulars of claim, and, if the claim was successful the respondent would be liable for those actions in the absence of any specific defence.

18.2 Second, the alleged disclosures which (on the claimant's case) prompted her poor and unlawful treatment by the respondent, all predated the first period of conciliation. The addition of further alleged examples of detriment (up to and including, for these purposes a dismissal) is a very typical of the way in which such claims develop. This, to my mind, is analogous to the sorts of examples envisaged by Kerr J in **Akhigbe v St Edward Homes Ltd UKEAT/0110/18** as being a scenario where a later claim was likely to relate to the 'same matter' as an earlier period of conciliation. (See **Akhigbe** paragraphs 49-51).

18.3 Related to the above, this case is one of a cumulative build-up of alleged poor treatment. There was no line drawn in respect of the first proposed disciplinary or the grievance, after which the relationship stabilised before becoming unstuck for a second time. Rather, what is alleged is a sustained and consistent campaign to target the claimant following on from her disclosures.

18.4 It is notable that the claimant's grievance, which was contemporaneous with the first attempt at Early Conciliation, envisaged a potential dismissal. Although the final proposed disciplinary was on different grounds, it is relevant that it was squarely within both parties' contemplation in January that the employment relationship was heading towards a termination, regardless of the precise means by which that came about.

19. Against these factors, the main factor pointing in the other direction is the significant temporal delay between the two periods of conciliation. Although that gives me some pause for thought, I am satisfied that little of significance actually happened in that period. The issues between the parties were still, largely, the same issues as they had been back in January.

20. Mr Boyd referred to the counter-example given by Kerr J in **Akhigbe** at paragraph 51, and submitted that this case, like that example, was a case where "there is merit in a further conciliation opportunity". It is not suggested that conciliation was not available to the claimant in September 2019, nor that it was inappropriate of her to avail herself of it. What she cannot avail herself of, however, is a related extension of time for the presentation of her claim.

21. I do have sympathy for Ms Beynon, and, indeed, her advisors. The operation of the principle in **Serra Garau** has deprived her of a claim which may well have been a meritorious one and works rather against the aims

referred to in **Morgan** that the EC Rules of Procedure would operate in a "flexible and pragmatic" way. Nonetheless, this is a binary question – conciliation is either mandatory or voluntary and, if voluntary, the extension does not apply. I have no real hesitation in concluding that the second period of conciliation in this case was voluntary, and from that it follows that the tribunal has no jurisdiction to hear the claim.

**Employment Judge Dunlop**

Date: 13 July 2020

SENT TO THE PARTIES ON

16 July 2020

FOR EMPLOYMENT TRIBUNALS