EMPLOYMENT TRIBUNALS

Claimant: Miss K Samuel

Respondent: Salford Royal NHS Foundation Trust

Heard at: Manchester (by CVP) **On:** 8 April 2021

Before: Employment Judge A M Buchanan
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr A P Gibson, Solicitor

JUDGMENT ON PUBLIC PRELIMINARY HEARING

It is the judgment of the Tribunal that the claimant's claims of unfair dismissal and wrongful dismissal were presented in time. Accordingly, the Employment Tribunal has jurisdiction to hear those claims.

REASONS

Introduction

1. There comes before me this morning a public preliminary hearing in this matter to decide two questions. The first question is whether the claims filed by the claimant in this matter on 21 August 2020 were filed in time. The second question is, if the claims were not filed in time, was it reasonably practicable for the claims to have been filed in time, and if not, have the claims been filed within such further period as is reasonable. The relevant statutory provisions are referred to below.

Background

2. By way of background, the claimant filed her claim with the Tribunal in this matter on 21 August 2020, bringing a claim of unfair dismissal relying on the provisions of sections 94-98 of the Employment Rights Act 1996 ("the 1996 Act"), and a claim of wrongful dismissal in respect of notice pay relying on the provisions of

Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order").

3. The claim form filed on 21 August 2020 was accepted, and it referred to an early conciliation certificate numbered R147054/20/76 ("the ECC") on which Day A was shown as 11 May 2020 and Day B as 15 May 2020. The claimant asserted that she had been dismissed on 21 May 2020 and thus the period of early conciliation referred to in the ECC predated the dismissal by some days.

4. When filing its form of response in this matter, the respondent raised the issue that the claim appeared to have been filed out of time by one day. It is accepted by both parties that the dismissal of the claimant occurred on 21 May 2020. Therefore, the limitation periods relevant to these claims (unless extended by reason of a period of early conciliation) which are set out in the same terms in section 111(2) of the 1996 Act (unfair dismissal) and in Article 7 of the 1994 Order (wrongful dismissal), expired on 20 August 2020. On the face of it, the claim form was filed one day late.

5. In the response, the respondent referred only to the question of reasonable practicability of filing the claim in time and asserted it was for the claimant to show that it was not reasonably practicable for her to have filed in time. No mention was made of the question of early conciliation and no objection was taken to the ECC.

6. When the matter was reviewed by an Employment Judge pursuant to Rule 26 of Schedule I of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, it was noted that, if the claimant were able to rely on the period of early conciliation referred to in the ECC, the claim would in fact have been filed in time. Thus, a public PH was convened to consider two questions. First, was the claim in time by reference to any extension permitted in section 140B of the 1996 Act and regulation 8B of the 1994 Order and, if not, should an extension of time be allowed pursuant to the provisions referred to in paragraph 4 above.

7. The letter sent by the Tribunal to the parties convening this hearing did not set out the two issues referred to in paragraph 1 above in any detail. I raised this with the parties at the outset of the hearing and both expressed themselves willing and able to continue. I allowed some time after the evidence was complete for the parties to prepare submissions - particularly with regard to the question of whether the claim form had in fact been filed in time. Both parties expressed themselves content with that arrangement and there was no application for an adjournment.

Evidence

8. At the hearing I heard brief evidence from the claimant who was cross examined by the representative of the respondent. I heard from no other witnesses. I gave Judgment orally and was asked by Mr Gibson to provide written reasons. Thus, I issue this Judgment with full reasons in order to comply with that entirely proper request. These written reasons prevail over the oral reasons in the event of inconsistency.

9. I had a bundle of documents ("the Bundle") before me extending to 78 pages which included the pleadings and a statement from the claimant running to 13 paragraphs with 25 appendices attached. The appendices contained details of the

claimant's correspondence with her trade union, and it was clear that she had been advised by her union from before the date of her dismissal until at least the date on which the claim form was filed on 21 August 2020. Any reference to a page number in these Reasons is a reference to the corresponding page in the Bundle. The claimant confirmed that, for the purposes of this public preliminary hearing only, she waived any privilege which may attach to any document contained in the Bundle.

10. During the course of cross examination, the claimant confirmed that she knew from as early as 27 May 2020 that there was a time limit for filing her claim with the Tribunal and she knew that it was three months less one day from the date of her dismissal namely 20 August 2020. The claimant confirmed that she had appealed against her dismissal and that the appeal hearing had taken place over two days namely 5 and 11 August 2020 and that she had been told on 11 August 2020 that her appeal had been unsuccessful – even though she did not receive written confirmation for some time after that. The claimant confirmed that she had sent a copy of the ECC to her advisors on 19 August 2020 and that her union had filed the claim form on her behalf on 21 August 2020. The claimant confirmed she was relying on her union to protect her position. She confirmed that she knew the time limit was running out but the fault in relation to filing the claim one day late was that of her union. The claimant had gone so far as to file a second claim form some days after the time limit had expired, because she was not sure her union had filed one on her behalf. However, the second claim form was rejected by the Tribunal as it did not contain details of an early conciliation certificate. Nothing turns on that point.

Findings of Fact

11. I make the following findings of fact on the balance of probabilities in relation to the time issues relevant to this decision:

11.1 The claimant was summarily dismissed by the respondent and the effective date of termination of her employment was 21 May 2020.

11.2 Unless extended by reason of the process of early conciliation and the statutory provisions referred to below, the primary limitation period for both claims ran from 21 May 2020 until 20 August 2020. The claim was filed on 21 August 2020 and, on the face of it, was one day out of time.

11.3 The claimant was advised throughout the period of time from April 2020 until the claim was filed on 21 August 2020 and beyond that point by her union and she relied on her union to represent her at the disciplinary and appeal hearings in May and August 2020 respectively. She also relied on her union to file a timeous claim on her behalf with the Tribunal in respect of unfair and wrongful dismissal.

11.4 The matters which led to the claimant's dismissal occurred on 28 April 2020 and the claimant entered into early conciliation with the respondent in relation to those matters on 11 May 2020 and an early conciliation certificate was issued to her on 15 May 2020. The certificate was numbered R147054/20/76 and was the certificate referred to in the claim form filed on 21 August 2020. That certificate showed Day A as 11 May 2020 and Day B as 15 May 2020. The period of early conciliation thus pre-dated the dismissal to which the claims before the Tribunal relate and thus pre-dated the beginning of the limitation period. The claimant was brought before a

disciplinary panel of the respondent on 19 May and 21 May 2020 in relation to the matters which occurred on 28 April 2020. The claimant was represented by her union at both disciplinary hearings.

11.5 The claimant was advised by her local trade union representative Sally-Ann Griffiths who, in turn, liaised with Darren Isherwood who was a regional official of the trade union UNISON. On 27 May 2020, the claimant received from her union a letter (page 33) which included the words: "....*there are strict time limits of three months less one day from the date of the incident you are complaining about, in which you must lodge your Employment Tribunal claim form ("ET1") with the Tribunal".* The claimant was asked by her union for details of the early conciliation she had entered into in May 2020 and on 19 August 2020 ACAS sent her a copy of the ECC (page 47).

11.6 On 21 August 2020 the claimant contacted ACAS to begin another period of early conciliation and received a reference number R183220/20. By this time, her claim to the Tribunal was already out of time. A copy of any resulting early conciliation certificate was not produced to me at the hearing, but the claimant received a certificate from ACAS in respect of that attempt at early conciliation on 21 September 2020 (page 60) and it was numbered R183220/20/17.

11.7 A second ET1 was issued by the claimant in late August 2020 but rejected by the Tribunal as it failed to contain any reference to an early conciliation certificate.

The statutory provisions

12. The following statutory provisions are relevant to the issues for this hearing:

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

"Subject to the following provisions of this section, 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 in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months".

12.2 Section 207B of the 1996 Act which reads:

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

(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 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 the time limit set by relevant provision, the power is exercisable in relation to the time limit as extended by this section.

12.3 Article 7 of the 1994 Order which reads:

Subject to articles 8A and 8B, 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……..

(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.

12.4 Article 8B of the 1994 Order which, save for necessary amendments, is in the same terms as section 207B of the 1996 Act set out at paragraph 12.2 above.

Submissions

13. I received brief submissions which are summarised:

13.1 For the respondent, Mr Gibson submitted that the conflict in first instance decisions of the Employment Tribunal, in respect of whether a period of early conciliation taking place before the beginning of a relevant limitation period could be relied on to extend the limitation period pursuant to section 207B(3) of the 1996 Act (and other provisions), had been resolved by the decision of the EAT in **HMRC-v-Serra Garau 2017/UKEAT/0348/16/LA** and that such a period of early conciliation could not be so relied on.

13.2 There were two certificates in this matter. The first was issued before limitation began and the second added nothing as Day A on the second certificate was after the limitation period had expired on 20 August 2021. The purpose of section 207B(3) of the 1996 Act is to stop the limitation clock running whilst the claimant attempts conciliation so that the claimant is not disadvantaged by taking part in the process of early conciliation. In other words, the clock is paused whilst early conciliation takes place. In this case, the clock had not started so it could not be paused. The claim was filed out of time.

13.3 It is clear that the claimant knew of the relevant time limit to file a timely claim as early as May 2020. There was a flurry of activity around 19 August 2020 by the claimant's trade union, but the claim was lodged one day out of time.

13.4 No explanation has been provided by the claimant's union for the late filing of the claim. It is clear that the claimant's advisors made a mistake in filing the claim one day late. The claimant's remedy – if there is one – lies against her advisors. She cannot rely on their error to say that it was not reasonably practicable for the claim to have been filed in time. It was clearly practicable for the claim to have been filed in time. The claimant has not discharged the burden which lies on her to show that it was not reasonably practicable to file in time. Time should not be extended, and the claims should be dismissed for want of jurisdiction by the Tribunal.

13.5 If the Tribunal decides that it was not reasonably practicable to file in time, no argument is advanced that the claimant has failed to file within a reasonable time of the expiry of the limitation period, as the claim is only one day out of time. However, that question does not need to be considered.

13.6 In submissions, the claimant confirmed she had contacted ACAS in relation to early conciliation before her dismissal, as that was what she presumed she needed to do. The ECC contains dates before the dismissal but after the disciplinary proceedings which led to her dismissal were ongoing.

13.7 The claimant stated that she was new to the Tribunal procedure and relied on her local and regional union officers to assist her. She had not been in a position like this before and did not know what to do.

Discussion and Conclusions

The first issue

14. I deal with the first issue namely whether the claim form filed on 21 August 2020 was actually filed in time. That can only be the case if the claimant can take advantage of section 207B(3) of the 1996 Act and Article 8B(3) of the 1994 Order to add the period from the day after Day A on the ECC and ending on Day B to the limitation period. In this case that means potentially adding the period of 4 days from 12 May 2020 until 15 May 2020 to the limitation period and thus extending it by 4 days to 24 August 2020. That would mean that the claim form filed on 21 August 2020 would have been filed in time and there would be no need for me to consider the second issue in relation to an extension of time. It is clear that the further possible extension of time provided for by section 207B(4) of the 1996 Act and Article 8B(4) of the 1994 Order has no application on the facts of this case and need not be considered further.

15. In relation to the submissions made by Mr Gibson, I have reviewed the decision of Mr Justice Kerr in **HMRC v Serra Garau.** I set out the brief review contained in that decision of the authorities at that time:

"9. Case law establishes the following parameters and guidance in relation to that legislative regime in a manner that was not controversial before me today.

*10. In **Science Warehouse Ltd v Mills** [2016] ICR 252, Her Honour Judge Eady QC held that the broad language used in section 18A(1) of the **Employment Tribunals Act**, "proceedings relating to any matter", precluded an argument by the employer that the employee was obliged to go through*

fresh mandatory early conciliation where she sought to amend her claim to add a new cause of action for victimisation following the employer's response to her initial claim for discrimination on the ground of pregnancy or maternity.

11. At paragraph 30, HHJ Eady QC pointed out that the requirement to engage in conciliation is purely voluntary apart from the initial obligation to contact ACAS. The Employment Tribunal was entitled to allow the amendment sought on the basis that the employee had already obtained an early conciliation certificate in respect of the same "matter".

.12. In ***Tanveer v East London Bus and Coach Co Ltd*** *[2016] ICR D11, the Digest states that HHJ Eady QC dismissed an appeal in which the limitation period, as modified by the operation of section 207B of the* ***Employment Rights Act****, expired one day before the employee presented his claim. The Digest records the Judge as saying that:*

> ***"… the purpose of section 207B … was to ensure that, with regard to employment tribunal time limits, a claimant was not disadvantaged by the amount of time taken during the relevant limitation period for early conciliation compliance. Thus the amount of time spent on early conciliation would not count in calculating the date of expiry of the time limit; the clock simply stopped during the early conciliation period. …"***

13. In ***Compass Group UK & Ireland Ltd v Morgan*** *[2017] ICR 73, the employee contended that she suffered from a disability. There was a mobility clause in her contract of employment and the employer required her to work at a changed location. She brought a grievance and obtained an early conciliation certificate from ACAS. Two months later she resigned and claimed constructive dismissal, among other things. An Employment Judge held that the early conciliation requirement had been satisfied.*

14. Dismissing the employer's appeal, Simler P held that it did not matter that the early conciliation certificate had preceded some of the events relied on in the case. The word "matter" in section 18A(1) of the ***Employment Tribunals Act*** *was very broad and could embrace a range of events, including events that had not yet happened when the early conciliation process was completed. The learned President pointed out at paragraph 21 that Parliament had not chosen to limit the scope of an early conciliation certificate, either by requiring it to relate to past events or by providing for it to be time limited, i.e. to lapse after a certain amount of time.*

15. Against that background, the issue before me in this appeal is 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 of time for limitation purposes.

16. I conclude that any comments made in the **Serra Garau** decision in respect of whether or not a period of time prior to a limitation period beginning can extend time were comments made obiter. I have noted some indications as to whether or not a period of early conciliation before the limitation period begins is relevant to an extension of time. At paragraph 23 of the Judgment, Kerr J comments that there is no provision requiring day A or day B to fall within a primary limitation period and that either or both may or may not do so. At paragraph 28 of the Judgment onwards, to which Mr Gibson particularly took me, I see reference there being made to it being difficult to reconcile a period of time prior to the beginning of the limitation period actually being relevant to an extension of a limitation period which had not begun. I note that the ratio of the decision in **Serra Garau** related to the question of whether or not a claimant could effectively rely on two early conciliation certificates and it was concluded that he could not. The summary of the ratio of the case is set out in these terms: *"The early conciliation certificate provisions introduced from 6 April 2014 do not allow for more than one certificate of early conciliation per "matter" to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period".*

That is not the issue in this case. However, the obiter remarks made by Kerr J are highly persuasive remarks and I have considered them, and the other authorities to which Kerr J refers in his Judgment.

17. So far as I can see there is no binding appellate authority on the point in issue namely whether a period of early conciliation undertaken before the limitation period begins can be utilised to extend the limitation period. I have noted the obiter remarks of HHJ Eady (as she then was) in **Tanveer** and the obiter remarks of Simler J (as she then was) in **Compass Group** referred to by Kerr J in **Serra Garau**. However, the point has been considered at first instance by various Employment Tribunal Judges and different conclusions have been reached. I have considered the remarks from the learned editors of **Harvey on Industrial Relations and Employment Law (Division P Practice and Procedure - Paragraph 290.05)** on this point which reads:

"Whilst the central purpose of s 207B(3) is to extend time limits where days are lost during the limitation period through participation in the compulsory conciliation process, the statutory provisions have not been phrased in a way which orients the calculation around this. Instead, the extension is fixed around Day A and Day B, irrespective of whether any or all of that period occurs during the limitation period. As such, a number of tribunals have disagreed with the Fergusson approach and have held that, based on the natural and ordinary meaning of the statutory words, the period that is not to be counted is not confined to the days lost through participation in the conciliation process following the start of the limitation period (see Fairhurst v Orchid Plastics Ltd (Case No 1400996/17 (29 January 2018), ET; Walsh v Globe Integrated Solutions Ltd (Case No 1300798/17) (15 June 2017), ET; Myers v Nottingham City Council (Case No 2601136/15), ET; Chandler v Thanet District Council (Case No 2301782/14) (27 January 2015), ET). ***It is suggested that this construction is to be preferred over that adopted in Ferguson and Ullah"****. (highlight added)*

18. In the absence of any binding appellate authority and paying due regard to the obiter remarks referred to above, I find the opinion set out in **Harvey** referred to above to be very persuasive. I conclude that I should follow it for the following reasons:

18.1 I do not read the decision in **Serra Garau** above guiding me in any direction on this point.

18.2 The ordinary and natural meaning of the words in section 207B(3) and Article 8B state that the period of time beginning with the day after day A and ending on Day B is not to be counted. There is nothing in either section which restricts that concession in any way or adds another requirement such as that the days in conciliation are not to be counted only if they fall within a relevant limitation period. In order to achieve such a result, words would need to be added to the statutory provisions. It is not necessary to add words as the provisions as drawn are clear.

18.3 The purpose of the early conciliation provisions is to encourage parties to conciliate at the earliest opportunity and, if a claimant cannot take advantage of an extension related to a period of early conciliation before the limitation period begins, that purpose would be thwarted.

18.4 The decision in **Serra Garau** would mean that if the claimant in this case had disregarded the ECC and had entered into conciliation within the limitation period, she could have been met with an argument from the respondent that the resulting second certificate was not valid and could not give her any extension of time under

either or both of the relevant provisions in section 207B and/or Article 8B.That would also thwart the purpose of the legislation as that would mean the claimant, in the circumstances of this case, could not benefit from any extension of time arising from the early conciliation process.

18.5 I am entirely satisfied from the evidence of the claimant that the ECC was issued after an attempt to conciliate the subject matter of the issues which led to her dismissal which, in these proceedings, she claims to be unfair and wrongful. Thus, I am satisfied that the period of conciliation referred to in the ECC relates to the matter in respect of which the proceedings are brought. I accept that the dismissal had not occurred, but the subsequent dismissal was because of the events which had occurred on 28 April 2020 and were then the subject of disciplinary proceedings, and the conciliation attempt was in respect of those matters. Thus, the definition of Day A in section 207B(2)(a) of the 1996 Act and Article 8B(2)(a) is satisfied.

18.6 It follows that I am satisfied that the definition of Day B contained in those same provisions is also satisfied.

18.7 The claimant could not file a claim with the Tribunal unless she gave details of an early conciliation certificate. This she did and the respondent raised no objection to it being relied on for the purposes of filing a claim form compliant with Rule 10(1)(c) of the 2013 Rules. That certificate refers to a period of 4 days between the day after Day A and Day B and applying the ordinary and natural meaning of the words in section 207B(3) and Article 8B, that period is not to be counted in working out a relevant time limit.

19. Therefore in my judgment, on the particular facts of this case, it is right that I should add to the period of limitation, a period of four days, namely the period from 12 to 15 May 2020, which means that the limitation period for filing a timeous claim of unfair dismissal and wrongful dismissal is extended to 24 August 2020. That is crucial in this case because the claim form was filed on 21 August 2020. Accordingly, I conclude that the claim filed on that day was filed in time and that the Tribunal has jurisdiction to hear the claims advanced and that it is not necessary to consider the question of an extension of time.

The second issue

20. With that decision in place the second issue, namely whether or not it was reasonably practicable for the claim to have been filed in time and, if not, whether it was filed within such further period as was reasonable, falls away.

21. However, in case my conclusion on the first issue should be wrong, then I will deal with the second issue and can do so briefly.

22. It is settled law that in most cases the fault of the claimant's chosen advisers in issuing a claim out of time binds the claimant and does not provide grounds for a conclusion that it was not reasonably practicable for the claim to have been filed in time. That principle derives from the well-known authority of **Dedman -v- British Building and Engineering Appliances Limited 1974 1WLR 171** and was applied to Trade Union advisers in the decision in **Times Newspapers Ltd v O'Regan 1977 IRLR 101, EAT.**

23. I conclude in this case that the claimant was told by her advisers as early as 27 May 2020 of the correct time limit. It is clear that the claimant was relying on her trade union to assist her both in the internal appeal procedure which was ongoing and in the Tribunal proceedings. The appeal process ended on 11 August 2020 and there was then a flurry of activity to prepare the Tribunal claim but the claim was filed one day late.

24. I have seen some reference in the Bundle to a view from a union official that the time limit did not expire until 24 August 2020, but I had no evidence on why that view was expressed or whether there was any misunderstanding of fact or law which might have provided grounds for an analysis of whether it was reasonably practicable to file the claim in time. I had no evidence that the advisers had considered the first issue, which I have had to consider, and reached the same conclusion.

25. In the absence of any such evidence or explanation, I conclude that the claimant was clearly relying on her union to file a timely claim on her behalf and (if I am wrong in my conclusion on the first issue) they failed to do so. That fault is attributable to the claimant. I conclude that the claimant has not established that it was not reasonably practicable for the claim to have been filed in time and thus the claim is out of time. Time limits are not optional and are to be observed.

26. It is therefore not necessary for me to consider whether the claim was filed within such further period as was reasonable. Had that been an issue for me, I would have decided that, in filing the claim only one day late, the claim had been filed within such further period as was reasonable.

27. Accordingly, I would conclude on the second issue that it was reasonably practicable for the claim form in this case to have been filed in time. Thus, if my conclusion on the first issue is wrong, the claim is out of time and the Tribunal has no jurisdiction to consider the claim further which would be dismissed for want of jurisdiction.

Final conclusion

28. For the above reasons, I conclude that the claim form filed on 21 August 2020 was in fact filed in time by reference to the relevant statutory provisions. Accordingly, the matter will proceed to final hearing. Case management orders are issued separately.

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Employment Judge A M Buchanan
Date: 12 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 May 2021

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