



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**  
Miss A Sharp

**AND**

**Respondent**  
Noah's Ark Pre-School  
(Southampton) Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD BY VIDEO (VHS)**

**ON**

24 March 2021

**EMPLOYMENT JUDGE GRAY**

### Representation

**For the Claimant:** Daniel Piddington (Counsel)

**For the Respondent:** Nigel Henry (Professional Representative)

### JUDGMENT

The judgment of the tribunal is that the Early Conciliation Certificate under reference R129924/20/16 is the applicable certificate for the purposes of these proceedings, and the Claimant's complaints of unfair dismissal and breach of contract were presented in time.

However, if that determination were incorrect, it is also determined that it was not reasonably practicable for the Claimant to issue her claim in time based on the Early Conciliation Certificate under reference R100259/20/57 as she believed that to be invalid, so her complaints of unfair dismissal and breach of contract were therefore presented within such further time as was reasonable based on Certificate reference R129924/20/16.

As to the detriment complaints, their time limit jurisdiction remains to be determined as no evidence was presented on why they are in time pursuant to section 48(3)(a) of the Employment Rights Act 1996, as asserted by the Claimant. This is therefore proportionately addressed as an issue to be determined at the final hearing after all relevant evidence has been heard.

JUDGMENT having been delivered orally on the 24 March 2021 (and then having been sent to the parties on the 25 March 2021) and written reasons having been requested by email dated 24 March 2021 (this request having been referred to the Employment Judge on the 11 May 2021), in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

**REASONS**

1. This is the judgment following a Preliminary Hearing to determine whether or not the Claimant's claim was presented in time.
2. Employment Judge Roper, at the case management hearing on 9 December 2020, set out that the Preliminary Issues to be determined are:

(1) With regard to the Early Conciliation Certificates, whether the First Certificate under reference R100259/20/57 or the Second Certificate under reference R129924/20/16 is the applicable certificate for the purposes of these proceedings; and

(2) Whether the claimant's unfair dismissal; detriment; and breach of contract claims were presented in time, and if not, whether it was not reasonably practicable to have done so and whether the claims were then presented within such further time as was reasonable (see sections 111(1) and (2), and 48(3)(a) and (b) of the Employment Rights Act 1996, and Article 7(a) and (c) of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

3. The Relevant Background to this matter has been helpfully set out in paragraphs 33 to 38 of Employment Judge Roper's case management summary:

"33. The claimant issued these proceedings relying upon an ACAS Early Conciliation Certificate under reference R129924/20/16. The dates on this Certificate are: Day A - 18 March 2020 and Day B - 2 April 2020. The respondent asserts that the claimant had already obtained an earlier certificate, and that the certificate relied upon for these proceedings under reference R129924/20/16 is the claimant's second certificate ("the Second Certificate"). The respondent asserts that the claimant had earlier approached ACAS on 2 January 2020 (Day A), and that a certificate was first issued on 2 February 2020 (Day B) under reference R100259/20/57 ("the First Certificate"). The respondent adduced a copy of this First Certificate with its list of documents which it had prepared for the purpose of this hearing.

34. The respondent relies upon the decision of the Employment Appeal Tribunal in HMRC v Mr M Serra Garau UKEAT/0348/16 reported at [2017] ICR 1121 as authority for the proposition that where a first Early Conciliation Certificate has been issued, the second or any subsequent Early Conciliation Certificate is outside the statutory scheme and has no impact on the limitation periods.

35. The effect of this appears to be as follows, depending upon which Early Conciliation Certificate applies.

36. The First Certificate: The claim form was presented on 30 April 2020. The claimant commenced the Early Conciliation process with ACAS on 2 January 2020 (Day A). The Early Conciliation Certificate was issued 31 days later on 2 February 2020 (Day B), with the respondent named as Noah's Ark Day Nursery. Accordingly, the claimant's claims for detriment, unfair dismissal and wrongful dismissal which arise before or on the termination of her employment on 20 December 2019 should have been brought before 20 April 2019 (which allows an extension under the "stop the clock provisions" of 31 days from the normal limitation period of three months expiring on 19 March 2019). These complaints are therefore potentially out of time so that the Tribunal may not have jurisdiction to hear them.

37. The Second Certificate: The claim form was presented on 30 April 2020. The claimant commenced the Early Conciliation process with ACAS on 18 March 2020 (Day A). The Early Conciliation Certificate was issued on 2 April 2020 (Day B), with the respondent named as Noah's Ark Pre-School (Southampton) Ltd. Accordingly, any act or omission which took place before 19 December 2019 (which allows for a one month extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint. This would mean that the claimant's detriment complaints are potentially out of time, although her unfair dismissal and wrongful dismissal claims arising from the termination of her employment on 20 December 2019 are within time.

38. I have therefore decided to list this matter for a Preliminary Hearing to determine which Early Conciliation Certificate applies, and whether some or all of the claimant's claims are out of time."

4. For this hearing I was provided with:
  - a. An agreed hearing bundle running to 54 pages;
  - b. Witness Statement of the Claimant;
  - c. Skeleton argument on behalf of the Claimant; and
  - d. A bundle of case authorities.
5. I heard from the Claimant and found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

## **The Facts**

6. The Claimant was employed by Noah's Ark Pre- School (Southampton) Ltd from 24 June 2019 until she resigned with immediate effect on the 20 December 2020.
7. On 2 January 2020 the Claimant's mother contacted Acas on her behalf to initiate the Acas Early Conciliation process. She put the name of the Claimant's employer as "Noah's Ark Day Nursery". The certificate for this period of Acas Early Conciliation was issued on 2 February 2020 (page 1

of the bundle). It can be seen from the ACAS certificate that the address stated for the Respondent was:

**Lowford Community Centre  
Portsmouth Road  
Bursledon Southampton  
so31 8ES**

This is the same address as given by the Claimant in her claim form submitted on the 30 April 2020 as her place of work (answer to question 2.4), see page 4 of the bundle.

8. In oral evidence (submitted after recalling the Claimant, at her request and with the consent of the parties, as she had originally said in oral evidence that the google search referred to in her statement was done around the 18 March 2020 but believed this to be wrong on reflection), the Claimant explained that it was in January 2020, after the ACAS process had started, that she and her mother undertook a google search that she describes in paragraph 7 of her witness statement "... a google search reveals that there are at least eight other "Noah's Ark" nurseries in the UK (in London, Portsmouth, Wolverhampton, Stevenage, Banbury, Cornwall, Narbeth and Wymondham).".
9. The Claimant explained that the first ACAS certificate was issued against Noah's Ark Day Nursery as that is what she knew her employer as. She says she did the google search to see if she had got it right, and then she contacted her parents' legal expenses insurance (DAS Legal Expenses Insurance Company Limited) on the 2 February 2020 to see if they would cover her employment tribunal claim.
10. The Claimant's uncontested evidence is that on the 18 March 2020 the insurer told the Claimant that the Acas certificate was not against the correct legal entity. She says that she was told to go back into Acas Early Conciliation "TODAY" as otherwise her claim may not be accepted because the certificate was incorrect.
11. The Claimant says that she then instructed DC Employment Solicitors on an ad hoc basis to keep legal fees to a minimum. In oral evidence she confirmed that this was on the 18 March 2020.
12. The Claimant says she instructed DC Employment Solicitors, through her mother, to initiate Acas Early Conciliation against "Noah's Ark Pre-School (Southampton) Ltd on 18 March 2020. This certificate was issued on 2 April 2020 (page 2 of the bundle). The address of the Respondent is:

**20 Mosaic Close  
Southampton  
SO19 6RR**

- This is the same address as given by the Claimant in her claim form submitted on the 30 April 2020 as the address of the Respondent (answer to question 2.2) – see page 3 of the bundle.
13. This is also the name and address of the Respondent as confirmed in the Response Form (page 22 of the bundle).
  14. The Claim form does record that Tina Sharp (the Claimant's mother) is her representative in the claim (page 12 of the bundle).
  15. About the contact with ACAS the Claimant confirmed in oral evidence that it was her mother that had communicated with ACAS on both occasions. The Claimant confirmed that she did not give instruction to her mother in respect of ACAS, and that she did not know what her mother said to ACAS. In Cross examination the Claimant said in response to questions, that it was clear the Respondent had received the notification and was engaged in the process – yes, in January 2020 – yes. No confusion over who the Respondent is – no. There is though no evidence presented to this Tribunal to show what if anything was discussed between the parties and ACAS on either occasion.
  16. It is the Claimant's position that, as she sets out in paragraph 7 of her witness statement ... "I believed that the first Early Conciliation certificate against "Noah's Ark Day Nursery" was invalid because it contained a substantial error, namely the certificate was issued against the incorrectly named legal entity, and, as such, it would not have given me access to make an employment tribunal claim. This was because the first certificate was not issued against my former employer, which was Noah's Ark Pre-School (Southampton) Ltd. I was certainly led to believe this by my insurer. Therefore, I believed that the first EC certificate was ineffective and irrelevant to the claim as it was clear to me that we hadn't issued it against my former employer."
  17. The Claimant's evidence is that she then acts on making her claim to the Tribunal reliant on the second ACAS certificate and that it was issued in time for that. She says that she did not believe it was reasonably practicable to issue the claim on the basis of the first certificate because the first certificate was not against her former employer (paragraph 9 of her statement).
  18. It appears correct that most of the Claimant's complaints are submitted within time reliant on the second ACAS certificate (and potentially all if it is ultimately proven there were detriments that are part of a series of similar acts or failures, with the last of those continuing to the Claimant's resignation, as the Claimant asserts). Based on the date of resignation (20 December 2019), when the claim form was presented (30 April 2020) and when the second Early Conciliation process commenced with ACAS (18 March 2020). The Early Conciliation Certificate was issued on 2 April 2020, with the respondent named as Noah's Ark Pre-School (Southampton) Ltd.

So, any act or omission which took place on the 19 December 2019 or after is in time reliant upon the second certificate.

19. The Claimant does not rely upon anything else to say why it was not reasonably practicable to issue her claim before that.

## **The Law**

20. The relevant statute is the Employment Rights Act 1996 ("the Act"). Sections 48(3) and 111(2) of the Act provides that an employment tribunal shall not consider a complaint of detriment or unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of the act or failure to act / termination, or where the act or failure is part of a series of similar acts or failures or 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.
21. These provisions are effectively replicated for breach of contract claims under Article 7(a) and (c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
22. In short, with effect from 6 May 2014, a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
23. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows:
24. Section 18 of the Employment Tribunals Act 1996 ("the ETA") defines "relevant proceedings" for these purposes and it includes the complaints the Claimant makes in this claim.
25. Subsection 18A(1) of the ETA provides that: "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." Subsection 18A(4) ETA provides: "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." Subsection 18A(8) ETA provides: "A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)".
26. The prescriptive steps which must be taken in order to satisfy the EC requirements and to obtain an EC certificate are set out in the Schedule to

- the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (“the EC Regulations”).
27. In Rule 2(2) of the Early Conciliation Rules of Procedure it confirms that the Early Conciliation form must contain “the prospective respondent’s name and address”.
  28. The EC Regulations also set out certain limited prescribed exemptions which are set out in Regulation 3(1) (a) to (e). These do not apply in this claim. On the Employment Tribunal originating application prescribed form (the ET1) there are five boxes which a claimant can tick to claim exemption from the EC requirements. No such box was ticked on the Claimant’s claim form (see page 4 of bundle).
  29. The Employment Tribunal Rules of Procedure are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
  30. Rule 10(1)(c) provides that the Tribunal shall reject a claim if it does not contain all of the following information - (i) an early conciliation number; (ii) confirmation that the claim does not institute any relevant proceedings; or (iii) confirmation that one of the early conciliation exemptions applies.”
  31. Rule 12 deals with rejection of claims due to substantive defects, such as the name of the respondent on the claim form not being the same as the name of the prospective respondent on the early conciliation certificate (Rule 12(1)(f)).
  32. Rule 12(2A) (as was applicable at the time) permitted a minor error in respect of the name or address to be excused if an Employment Judge considered it not to be in the interests of justice to reject the claim ... “[2A] The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made [an](b) error in relation to a name or address and it would not be in the interests of justice to reject the claim.](c)”.
  33. I have also considered the following case authorities:
  34. **Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372**, where following its general review of the authorities, the Court of Appeal (per May LJ) concluded that “reasonably practicable” does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like “reasonably feasible”. This is an issue of fact for the Tribunal. The Tribunal should consider matters such as: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the

employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

35. **Giny v SNA Transport Limited (UKEAT/0317/16)**, which confirms that a wrong name and address can be considered a substantive error.
36. **HMRC v Serra Garau [2017] ICR 1121**, in summary, G's employer gave him notice on 1 October 2015 to terminate his employment. G submitted an EC request on 12 October and on 4 November Acas issued an EC certificate. His employment came to an end on 30 December, when his notice period expired. The EAT confirmed that the time spent in EC had no effect on the primary limitation period because that period had yet to begin. As Mr Justice Kerr (sitting alone) put it, 'the limitation clock could not stop under the... certificate because it had never started'. The EAT went on to hold that G had not extended the time limit by contacting Acas a second time on 28 March 2016 (the day before the primary three-month limitation period was due to expire), prompting Acas to issue a second certificate on 25 April. The statutory EC provisions do not allow for more than one EC certificate 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. The employment judge ought therefore to have found that disability discrimination and unfair dismissal claims presented by G on 25 May were out of time (unless time could be extended in the exercise of the tribunal's usual discretion).
37. **Romero v Nottingham City Council EAT 0303/17**, in summary, R's employment terminated on 29 September 2016 and he contacted Acas on 25 October 2016 but 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 from 27 December 2016 to 5 January 2017. R contacted Acas through his solicitor for a second time on 15 December 2016 and a second certificate was issued in respect of a second unsuccessful conciliation period on 9 January 2017. Although R's solicitor discovered the existence of the first Acas certificate on or about 10 January 2017, he nonetheless worked on the basis that the limitation period was extended to 9 February 2017 by reference to the second certificate. The claim form, claiming unfair and wrongful dismissal, was filed on 8 February 2017 but it was struck out for being out of time. The EAT held that the tribunal had been entitled to conclude, relying on Garau, that the two certificates both related to the same 'matter' and that the claim was made out of time. The fact that, unlike in Garau, both certificates were issued within or after the limitation period did not assist R. The central conclusion in Garau was that there is one mandatory conciliation process but that there is 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. Once a claimant has embarked on the EC process, the rules on extending time limits apply to the single mandatory process and not in relation to any subsequent process that relates to the



same matter. Since it was reasonably practicable for the claim to have been presented in time, there was no jurisdiction to hear it.

38. **Treska v Master and Fellows of University College Oxford EAT 0298/16**, in summary, T was dismissed in August 2014 and he made an EC notification to Acas on 15 October that year. The EC period therefore ended, after an extension, in November. Before it ended, T made a further EC notification and then issued tribunal proceedings in January. His claim was struck out on the basis that it was made outside the first EC period. T applied to the tribunal to reconsider its decision, arguing that he had named the wrong respondent in the first EC notification so it was not valid. However, the tribunal rejected this submission, and the EAT agreed that the initial notification was valid. Although T had not described the respondent's full title in the EC notification on 15 October, it was evident that all those involved knew who was being referred to. The fact that the parties had agreed an extension to the conciliation period following the first EC notification indicated that all concerned believed there was a reasonable prospect of achieving a settlement. Accordingly, the tribunal had been correct to find that the employee had complied with the necessary formalities. A subsequent EC notification was of no effect and could not serve to further extend the time limit.

### **The Decision**

39. In this case the Claimant's effective date of termination of employment was 20 December 2019. The three-month time limit therefore expired at midnight on 19 March 2020.
40. The grounds relied upon by the Claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that she followed the advice of insurers as to the validity of the first ACAS certificate, believing it to be invalid and therefore acted in all ways as if it were invalid.
41. This is uncontested evidence from the Claimant as to what she was told by the insurers and how she then acted. It is also in the context of an ACAS certificate that does not have the correct legal name and address of the Respondent. The Claimant acts on the same day she is told about the validity issues with the first certificate, initiating the ACAS process on that day (18 March 2020).
42. Claimant's Counsel distinguishes the case authorities of Garau and Romero from this present matter in that in neither of those cases was the identity of the respondent incorrect on one of the certificates. In both cases the second EC Certificate was issued in name of the same prospective respondent.
43. As to Treska he submits that it is distinguishable because it can be argued that there is a substantive error in this present matter, in that the names and addresses are different, (which is correct factually) and there is undisputed evidence that there are numerous entities that trade with the name Noahs

Ark Nurseries and it cannot be said, as it was in the Treska case, as there is no evidence presented to this Tribunal to show what if anything was discussed between the parties and ACAS on either occasion, that there is evidence before me that there was a reasonable prospect of achieving a settlement.

44. It would be with hindsight now that we would need to consider whether a Judge viewing a claim issued on the back of the first ACAS certificate would view it as a minor error or a substantive error at that time. There is argument and facts to support that it was a substantive error and no evidence about the quality of contact between the parties during the ACAS process to say that this is something that should be decided in the same way as Treska on that aspect.
45. I therefore accept the second ACAS certificate as valid.
46. Even if wrong in that, I accept that it was not reasonably practicable (or “reasonably feasible”) for the Claimant to issue before she did as her course was set by her belief on the validity of the first and second certificates. This belief does not appear to be unreasonably held for the reasons set out above. Her claim was then issued in a reasonable period of that based on the believed validity of the second certificate.
47. This means the automatic unfair dismissal and wrongful dismissal complaints have been brought within time.
48. This does not though determine the time limit jurisdictional issues of the detriment complaints and the assertion that they are a series of similar acts or failures. The Claimant asserts that the alleged detriments that occurred prior to the 19 December 2019 are part of a series of similar acts or failures, the last being matters that continued to the Claimant’s resignation on the 20 December 2019. I have had no evidence presented on this matter and I therefore accept that it is best addressed as an issue as part of the consideration of all the evidence which would need to be heard in any event about the automatic unfair dismissal and wrongful dismissal complaints.
49. In conclusion therefore, the judgment of the tribunal is that the Early Conciliation Certificate under reference R129924/20/16 is the applicable certificate for the purposes of these proceedings, and the Claimant’s complaints of unfair dismissal and breach of contract (for notice pay) were presented in time.
50. However, if that determination were incorrect, it is also determined that it was not reasonably practicable for the Claimant to issue her claim in time based on the Early Conciliation Certificate under reference R100259/20/57 as she believed that to be invalid, so her complaints of unfair dismissal and breach of contract were therefore presented within such further time as was reasonable based on Certificate reference R129924/20/16.

51. As to the detriment complaints, their time limit jurisdiction remains to be determined as no evidence was presented on why they are in time pursuant to section 48(3)(a) of the Employment Rights Act 1996, as asserted by the Claimant. This is therefore proportionately addressed as an issue to be determined at the final hearing after all relevant evidence has been heard.
52. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 2; the findings of fact made in relation to those issues are at paragraphs 6 to 19; a concise identification of the relevant law is at paragraphs 20 to 38; how that law has been applied to those findings in order to decide the issues is at paragraphs 39 to 51.

**Employment Judge Gray**  
**Date: 14 May 2021**

Reasons sent to the Parties: 21 May 2021

FOR THE TRIBUNAL OFFICE