



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101735/2023

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Held via Cloud Video Platform (CVP) in Glasgow on 18 May 2023

Employment Judge P Smith

Mr R Haman

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**Claimant
Represented by:
Ms Y Sullivan -
Friend**

15 **Axis Logistics Limited**

**Respondent
Represented by:
Ms J Eatock -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's claim of unfair dismissal is dismissed as the employment tribunal has no jurisdiction to hear it.

REASONS

25 **Introduction**

1. The Claimant was summarily dismissed when the dismissal was communicated to him on 25 October 2022. By a claim form presented to the Glasgow office on 15 February 2023 the Claimant brought a claim of unfair dismissal to the employment tribunal. The claim was certainly presented outside the three-month time limit. The issue in this preliminary hearing concerned the existence of two Acas early conciliation certificates, one apparently issued by Acas on 6 January 2023 and the other on 24 January 2023. The Claimant accepted that it was at all material times following his dismissal reasonably practicable for him to submit his claim to the employment tribunal and, sensibly, did not advance an argument that time

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should be extended in the event that the claim was found to be out of time. His case at this preliminary hearing was that he did not receive the 6 January 2023 certificate and therefore a second had to be obtained, and his having obtained that second certificate meant that his claim was presented in time.

- 5 2. This case therefore turns on a narrow point: whether the first early conciliation certificate was received (or deemed received) by him. With this in mind, I have confined my findings in fact solely to those findings it has been necessary to make in order to determine that point. Those findings have been made according to the applicable standard, namely the balance of probabilities. I have cited the applicable law and applied the law to the facts I have found, referring where necessary to the submissions made by the respective parties. It has not been necessary to recite every submission made, in full.

Findings and analysis

- 15 3. The sole claim pursued by the Claimant is a claim of unfair dismissal, pursuant to **sections 94 and 98** of the **Employment Rights Act 1996**. It is not necessary for me to delve deeper into the detail of that claim for the purposes of deciding this preliminary issue, save to record my finding, by agreement, that the Claimant was dismissed when the decision was communicated to him on 25 October 2022.

- 20 4. **Section 111(1)** of the Act provides that a complaint of unfair dismissal may be presented to an Employment Tribunal, within a certain time limit (**subsection (2)**) which is materially reproduced as follows:

25 (2) *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.

5. The primary time limit for the Claimant to have presented his claim to the employment tribunal was therefore 24 January 2023. However, it was mandatory for the Claimant to obtain an early conciliation certificate from Acas before he could present his claim. Compliance with the early conciliation process operates so as to modify the time limit for presenting a claim of unfair dismissal. The relevant section is **207B** of the Act, which is materially reproduced as follows:

10 (2) *In this section—*

(a) *Day A is the day on which the complainant or applicant concerned complies with the requirement in **subsection (1) of section 18A** of the **Employment Tribunals Act 1996** (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

(b) *Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under **subsection (11)** of that **section**) the certificate issued under **subsection (4)** of that section.*

(3) *In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

(4) *If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

6. The Tribunal was shown an Acas early conciliation certificate at page 39 of the productions file. That certificate bore 19 December 2022 as the date Acas

were contacted for early conciliation. When he was asked about this in evidence the Claimant stated that it was he who had contacted Acas for early conciliation on 19 December 2022. He said he did so with Ms Yvonne Sullivan, who was assisting him at the time and also gave evidence to the Tribunal. Yvonne Sullivan said that she did this alone, on the telephone. Considerable doubt was cast upon both their accounts by Yvonne Sullivan later mentioning, by email on 4 July 2023, that at that material time it was in fact her daughter, Shannon Elizabeth Sullivan, who *“was representing [the Claimant] from the start of the communications with ACAS”*.

7. I did not hear evidence from Shannon Elizabeth Sullivan, but the evidential situation concerned me greatly because in his evidence to the Tribunal the Claimant did not mention the involvement of Shannon Elizabeth Sullivan at all. I found this highly surprising. In addition, whilst in her evidence Yvonne Sullivan did mention that her daughter had spoken to Acas “at first”, this comment seemed to me to unduly minimise Shannon Elizabeth Sullivan’s involvement at the time. Together with her email of 4 July 2023, further emails were forwarded to the Tribunal which revealed that Shannon Elizabeth Sullivan was involved to a much greater degree, particularly in January 2023. Given that the Claimant’s side’s dealings with Acas in January 2023 were of critical importance to the jurisdictional issue to be determined at this preliminary hearing, the late emergence of these emails fundamentally undermined the credibility and reliability of the Claimant and Ms Yvonne Sullivan as witnesses.

8. Whether the Claimant was physically present whilst the telephone call to Acas was taking place is not material. Nor, in reality, is who made that telephone call. An initial email of 28 December 2022 from Acas to Shannon Elizabeth Sullivan strongly suggests it was in fact she who made the initial contact with Acas and not the Claimant or Yvonne Sullivan, despite the evidence they gave me. What is essential is my finding that the telephone call that was made to Acas for early conciliation on 19 December 2022 was made on the Claimant’s behalf and with his full knowledge and consent.

9. Legally, this telephone call on the Claimant's behalf meant that 19 December 2022 was "Day A" within the meaning of **section 207B(2)(a)**, cited above.
10. It further meant that the period beginning on the following day (20 December 2022) and ending on "Day B" (as defined in **section 207B(2)(b)**) was not to be counted for the purposes of the time limit, under **section 207B(3)**. That is, however, unless the primary time limit would have expired during the period not to be counted plus an extra month (section 207B(4)). If it had, by virtue of that section the Claimant would have until a month after Day B to present his claim. The cumulative effect of the **subsections (3) and (4)** extensions was confirmed by the Employment Appeal Tribunal in **Luton Borough Council v Hague [2018] ICR 1388**.
11. The critical question in this case is, what was "Day B"? As **section 207B(2)** makes clear, that day "*is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving... the certificate.*"
12. By virtue of **rule 9 of the Early Conciliation Rules of Procedure 2014**:
- (1) *Where ACAS issues an early conciliation certificate, it must send a copy to the prospective claimant and, if ACAS has had contact with the prospective respondent during the period for early conciliation, to the prospective respondent.*
 - (2) *If the prospective claimant or prospective respondent has provided an email address to ACAS, ACAS must send the early conciliation certificate by email and in any other case must send the early conciliation certificate by post.*
 - (3) *An early conciliation certificate will be deemed received—*
 - (a) *if sent by email, on the day it is sent; or*
 - (b) *if sent by post, on the day on which it would be delivered in the ordinary course of the post.*
13. The scheme of **rule 9** appeared to me, firstly, to place certain obligations on Acas in terms of issuing early conciliation certificates (**rules 9(1) and (2)**).

However, **rule 9(3)** is a deeming provision and creates a presumption that a certificate is received, if sent by email, on the day it was sent. That statutory presumption appeared to me to be a heavy one but one which could, in principle, be rebutted with cogent evidence. There is authority governing how
5 deeming provisions are to be interpreted and in this regard I took account of the speech of Lord Browne-Wilkinson in the case of **Marshall (Inspector of Taxes) v Kerr [1995] AC 148** (House of Lords, at page [164]), approving the earlier *dictum* of Peter Gibson J in the same case:

*“I take the correct approach in construing a deeming provision to be to give
10 the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity,
15 unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.”*

20 14. In his evidence the Claimant denied having received the certificate at page 39. Ms Sullivan, in evidence, also denied having received the same certificate. The parties had provided documents emanating from the early conciliation process in the productions file, including correspondence with Acas surrounding this first certificate. For reasons unknown, neither party appeared
25 to have made the essential request for the email sent by Acas to the Claimant on 6 January 2023 which contained the page 39 certificate (if indeed there was one).

15. It appeared to me that having sight of that email might be of assistance to the Tribunal given the potential evidential value of **rule 9(3)** in determining the
30 outcome of the preliminary issue. Having invited representations from the parties (and noted the Respondent’s objection), I ordered Acas to produce the email in question, under **rule 31** of the **Employment Tribunal Rules 2013**.

Acas duly complied, and I have since read that email. Further, having invited them to comment upon it, I read the parties' respective submissions and took them into account. Neither party wished to reconvene the preliminary hearing for the purposes of giving further evidence on the issue. I therefore proceeded to determine the issue. As it transpired, that email has proved to be decisive.

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16. The email in question was indeed sent by Acas on 6 January 2023, at 10:10 to Shannon Elizabeth Sullivan at the same email address that had been used by her both before and after that date to communicate with Acas on the Claimant's behalf. There were no typographical errors in the email address used by Acas, and the Claimant (through Yvonne Sullivan) sent in other emails between Shannon Elizabeth Sullivan and Acas from around that time indicating the address was correct. Attached to the 6 January 2023 email was the early conciliation certificate at page 39 of the productions file. The email itself informed Shannon Elizabeth Sullivan, on the Claimant's behalf, that "*You can now use this certificate to make a claim to an employment tribunal, if you still want to. Use the full certificate number R283522/22/72 when you're asked for it.*" The email also contained guidance about how to go about making a claim to the employment tribunal.

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17. Returning to **rule 9(1) and (2) of the Early Conciliation Rules**, in this case Acas discharged its duty to send an early conciliation certificate to the Claimant. It did so via email, as it was required to do, because an email address had been provided for him (the address of Shannon Elizabeth Sullivan, acting on the Claimant's behalf). By virtue of **rule 9(3)**, that email would be deemed to have been received on the day it was sent (6 January 2023) but given the email traffic between Shannon Elizabeth Sullivan and Acas that preceded and succeeded this email, and there being no suggestion that the email ended up in her "junk" folder or was otherwise beset by firewall or other technical issues, I found that it was in fact received on that date. Given my positive finding, it is therefore unnecessary for me to go on to determine whether the presumption created by the deeming provision has been rebutted, as *per* **Marshall**.

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18. In this case, “Day B” was therefore 6 January 2023. The period 20 December 2022 (the day after Day A) to 6 January 2023 (Day B) is not to be counted when considering the applicable time limit within which the Claimant had to present his unfair dismissal claim to the tribunal. That period amounted to 18 days. Extended by 18 days (under **section 207B(3)**), the primary time limit for presenting the claim would therefore have expired on 11 February 2023. That time limit was beyond the “*one month after Day B*” provided for by **section 207B(4)** as that period would have ended on 6 February 2023, and as a result the Claimant could not benefit from the extension provided for under that subsection (as *per* Hague). He would, however, benefit from the **section 207B(3)** extension.
19. A second notification to Acas for early conciliation was made on 22 January 2023, this time using the Claimant’s own email address. A certificate was duly issued by Acas on 24 January 2023, a copy of which appeared in the productions file at page 40. Unfortunately for the Claimant, as a matter of law a second early conciliation certificate has no effect in extending time. This has been made clear by the Employment Appeal Tribunal in the case of Revenue and Customs Commissioners v Serra Garau [2017] ICR 1121, a decision which is binding upon me.
20. The Claimant had, at points during the limitation period, taken the advice of a solicitor. His evidence was that he had first consulted a solicitor at an earlier time (in October 2022, much nearer the date of his dismissal), but both he and Yvonne Sullivan confirmed in evidence that they had a meeting with Ms Claire Thomas, a solicitor at Beltrami & Co Solicitors, on 6 February 2023. At that time, the unfair dismissal claim was in time by reason of the **section 207B(3)** extension. That date was the final day within which to present the claim within the extended time limit.
21. The Claimant’s claim was presented to the Tribunal office on 15 February 2023. That was outside the (extended) time limit set by Parliament and therefore, subject to any **section 111** argument that it was not reasonably practicable for him to have presented the claim in time *etc.*, the Tribunal has no jurisdiction to hear the claim. However, the Claimant advanced no

argument that it was not reasonably practicable for him to have presented the claim in time and expressly recognised that, at all material times, it was so practicable. In those circumstances, no extension of time under **section 111(2)** is available to him.

- 5 22. From the reasons set out above it follows that the employment tribunal has no jurisdiction to consider the Claimant's claim and it must necessarily be dismissed.

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Employment Judge: P Smith
Date of Judgment: 07 July 2023
Entered in register: 11 July 2023
15 **and copied to parties**