# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Raison

**Respondents:** (1) DF Capital Bank Limited
(2) Mr Carl D'Ammassa
(3) Ms Karen D'Souza
(4) Ms Nicole Coll
(5) Reality HR Limited

**Heard at:** Manchester Employment Tribunal (by CVP)

**On:** 18 December 2023

**Before:** Employment Judge Dunlop

**Representation**
Claimant: Mr Lee Bronze (Counsel)
Respondent: Mr Jospeh England (Counsel)

**JUDGMENT** having been sent to the parties on 28 December 2023 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:

# WRITTEN REASONS

1. This was a public preliminary hearing to determine various procedural matters arising in this claim. I made a Deposit Order in respect of the claim against the fifth respondent, for which reasons have been provided in the body of that Order. I declined an application to strike out that claim. I also recorded the withdrawal of claims against two of the above-named respondents, who have been dismissed from the proceedings by a separate Judgment. I also determined that the Tribunal did not have jurisdiction, on the basis of limitation, to consider the claimant's claim of unfair dismissal on the ground that she had made a protected disclosure.

2. At the conclusion of the hearing Mr Bronze requested written reasons for my decision on the limitation point. I now provide those reasons.

3. The following key dates were not in dispute between the parties:
   3.1 The claimant commenced Early Conciliation on 13 February 2023 (Day A");
   3.2 Her employment terminated on 17 February 2023;

3.3 Early Conciliation closed on 28 February 2023 ("Day B");
3.4 The claim was presented on 30 May 2023.

4. I was also told by both representatives that the following facts were agreed:
4.1 Ms Raison took legal advice before issuing her claim;
4.2 That included advice as to limitation;
4.3 That advice was from a qualified solicitor instructed by her.

5. As the relevant facts were agreed, Ms Raison did not give evidence.

6. Under the unmodified provisions of s.111 Employment Rights Act 1996 ("ERA"), the final date for presentation of the claim would have been 16 May 2023, in order for it to be presented "*before the end of the period of three months beginning with the effective date of termination*."

7. Section 207B ERA provides as follows:

> **207B**
> **…**
> **(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.**

8. The parties agree that the primary limitation period is extended by s.207B. They disagree as to how far it is extended.

9. The limitation period for the claimant's automatic unfair dismissal claim began to run from 17 February 2023, when her employment ended, a date which is midway through the Early Conciliation period. The question is whether the limitation period is extended, by virtue of s.207B ERA, by the number of days contained in the full Early Conciliation period, or only by the number days which coincide with the period following the termination.

10. For the respondent, Mr England submits that Ms Raison is not entitled to the benefit of the earlier days. He says that period of from the dismissal to the end of conciliation was 11 days. Adding 11 days onto the primary limitation date of 16 May takes us to 27 May. The claim was presented on the 30 May, therefore three days late. Mr Bronze submits that the full 15 days is to be added on, which takes us to 31 May. On that basis the claim is in time.

11. Mr England relies on the EAT decision in **HMRC v Serra Garau 2017 ICR 1121**. That case dealt with a different situation – whether the limitation period could be extended by reliance on a second ACAS certificate, where the parties had already been through conciliation and an earlier certificate had been issued. Mr England contends that the *ratio* of **Serra Garau** applies equally in cases where part of the conciliation period pre-dates the start of the limitation period. The argument is expressed in this way by the Editors of IDS Brief at volume 9, paragraph 3.96:

> In some cases, the EC period may begin before a time limit has actually started to run, such as when an employee who is working out their notice starts EC before their effective date of termination. Any part of the EC period which occurs prior to the relevant limitation period commencing will not count towards an extension of time under S.207B(3) and the equivalent provisions. This follows the EAT's decision in *HM Revenue and Customs v Serra Garau* (see 'Impact of second certificate' above). In that case, the entire EC period had taken place before the time limit had started to run and so there was no extension of time under S.207B. The EAT commented that 'the limitation clock could not stop… because it had never started'.

12. There are inconsistent ET decisions on the point, which are also highlighted in IDS. Mr Bronze submitted several of them for my consideration today, in support of his submission that a purposive approach should be taken, allowing the claimant the benefit of the full Early Conciliaiton period in extending the primary limitation period. This approach emphasises the wording of s.207B, which refers to the whole of the period between Day A and Day B, without suggesting that it can be reduced.

13. Four of the five Judgments pre-dated the decision in **Serra Garau** and, for that reason, I am of the view that it is unhelpful to place reliance on them.

14. The one Judgment post-dating **Serra Garau** was a decision of Employment Judge A James in London Central in the case of **Macken v Skanska UK plc** heard on 26 February 2021. Mr Bronze appeared for the claimant. The Judge found that **Serra Garau** did not assist because of the different factual matrix, and preferred the approach taken in the earlier first instance decisions.

15. I have reached a different conclusion. I consider that **Serra Garrau** establishes the principle that a clock which has not started to run cannot be paused. That principle is effective regardless of whether the start date of the limitation period falls after the closure of EC, as in **Serra Garau** itself, or within the EC period, as in this case. The factual difference does not, in my Judgment, provide a proper basis to distinguish the appellate authority.

16. In this I appreciate I have reached a different conclusion to EJ A James in **Macken**. That is a concern as it is a decision which post-dates **Serra Garau** and in which the key facts are analogous to the ones in this case. However, I am fortified in that view by the unambiguous views expressed by editors on IDS Employment Law Handbooks in the paragraph set out above and the ones subsequent to it. I find that rationale in that passage to be much more cogent than the passage dealing with this point in *Harvey* which was cited in the **Macken** Judgment. That passage does not acknowledge **Serra Garau** and the impact that it must, in my view, have on the first instance decisions cited.

17. For those reasons, I conclude that limitation expired on 27 May 2023, and that the claim was late by three days.

18. I must then consider whether it was reasonably practicable for the claimant to have presented the claim in time. The only explanation advanced for it being not reasonably practicable is that the claimant had obtained professional advice and acted in accordance with it. In normal circumstances, where a claim is presented late due to the mistake of an advisor, the claimant will be bound by that mistake and unable to rely on it in support of an argument around reasonable practicability (**Dedman v British Building and Engineering Appliance Ltd 1974 ICR 53**). The **Dedman** principle operates strictly where professional advisors have been engaged, and will often give rise to results which appear harsh to claimants.

19. There may be a way out for the claimant where the failure to give correct advice was itself reasonable, see e.g. **Northamptonshire County Cuncil v Entwhistle 2010 IRLR 740**, although the example given in that case is where an employer has misled the claimant and her advisor as to the date of dismissal, not a case of reasonable mistake as to the law.

20. I have considerable sympathy with Ms Raison's advisors in this case. Although **Serra Garau** is now a well-known authority, the principle it is primarily known for is that a second EC certificate will be ineffective to extend time. This is not a 'second certificate' case and the effect, as I have found it to be, on a case such as this is less well-known. That much is evident from the commentary in Harvey and, indeed, from the first-instance decision in **Macken**.

21. I would be prepared to find it was reasonable for Ms Raison's advisors not to conclude with certainty that limitation expired on 27 May, as I have found to be the case. However, if they had looked into the position, they would have found, at the very least, the doubt created by the conflicting first instance decisions cited by Mr Bronze. In view of that uncertainty, they could not have reasonably concluded that it was definitely safe to wait until 30 May. The only reasonable stance to adopt – as submitted by Mr England – is that the claim would have to be filed by 27 May at the latest to dispel any risk. In those circumstances I conclude that the **Dedman** principle does apply in this case and the claimant is bound by the advice she received.

22. It follows that I find it was reasonably practicable to present the claim in time, and the Tribunal therefore has no jurisdiction to hear the unfair dismissal complaint.

**Employment Judge Dunlop**

Date: 26 January 2024

WRITTEN REASONS SENT TO THE PARTIES ON

Date: 30 January 2024

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FOR EMPLOYMENT TRIBUNALS