Case Number: 1300798/2017

EMPLOYMENT TRIBUNALS

Claimant | Respondent

Rosalind Walsh -v- **Globe Integrated Solutions Limited**

OPEN PRELIMINARY HEARING

Heard at: Centre City Tower, Birmingham On: 8 June 2017

Before: Employment Judge Perry (sitting alone)

Appearances

For the Claimant: **Mr J Heard (counsel)**

For the Respondent: **Mr S Morley (consultant)**

JUDGMENT

The claimant's complaint of unfair dismissal was presented in time. The tribunal has jurisdiction to hear that claim.

REASONS

1. This is a claim for constructive unfair dismissal only. This Open Preliminary Hearing (OPH) was listed on 7 April 2017 by order of Employment Judge Cocks in substitution for a Final Merits Hearing that was automatically listed at the presentation stage for 8 and 9 June 2017. Employment Judge Cocks' order identified the purpose of the OPH namely to *"determine whether the claim was presented out of time and if it is, whether it should be permitted to go ahead"*.

2. The background to Employment Judge Cocks' order was that on presentation the matter was referred to Employment Judge Broughton who identified that the claim may be out of time and by a letter of 9 March 2017 asked the claimant to particularise her case on time limits by 23 March 2017. The claimant's representative (Mr Andrew Oberholzer) did so by an email of 15 March 2017. He enclosed copies of *Chandler v Thanet District Council ET 2301782/14 2015 WL 4944430* and the ACAS guidance "Conciliation Explained" of May 2015 and argued the ACAS guidance stated that *"the time in Early Conciliation to be added to a limitation date"* and *"as an employee has the right to present a claim before their effective date of termination"* and likewise for early conciliation *"it cannot be parliament's intention*" to limit the extension of the limitation date.

3. A response was lodged on 4 April 2017. The respondent argued that the claimant was not entitled to treat herself as constructively dismissed and that the claim was presented out of time and the tribunal did not have jurisdiction to hear it. It sought a preliminary hearing to determine the timing point.

THE FACTS

4. The facts are not in dispute. They can be briefly stated. It is helpful to do that now as they assist in identifying the issues for determination by me.

4.1 The claimant resigned via an email of 7 October 2016, giving one month's notice. The respondent acknowledged the claimant's resignation on 10 October and stated that as she was required to give four weeks' notice and her leaving date would therefore be 4 November 2016.

4.2 Adopting the terminology of s. 207B(2) Employment Rights Act 1996 as amended (ERA) the claimant conciliated via ACAS between 15 October 2017 (Day A) and 15 November 2016 (Day B). She presented a claim form on 6 March 2017. That was prepared by DAS Law, who continue to represent her.

AGREED MATTERS AND THOSE IN DISPUTE

5. It is agreed the claimant was an employee and had qualifying service to bring a claim of unfair dismissal (she had been employed since 1 April 2001). It was also specifically agreed by the representatives, following an enquiry by me, that the claimant's leaving date was 4 November 2016 and that was her effective date of termination as defined in s. 97 ERA.

6. It is common ground that pursuant to s.111 ERA the time for bringing a claim would have ordinarily expired on 3 February 2017. By virtue of s. 207B ERA (as amended) that period is extended in relation to "relevant provisions". It was agreed that s.111 ERA is such a relevant provision. The extensions concurred by s.207B ERA are thus:-

> *"(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."*

7. Neither party seeks to suggest s.207B(4) applies. The substantive issue for me in relation to the s.207B(3) issue is a discrete one:-

7.1 It was agreed that the "period" beginning with the day after Day A and ending with Day B (see *Tanveer v East London Bus & Coach Company Ltd [2016] UKEAT/0022/16* and *Joshi v Manchester City Council EAT/0235/07* applying the clear date rule*)* is 31 days. The reason for that is as per *Tanveer*:-

> *"24. The rule is simple and it is well established that - when the relevant period is a month or specified number of months after the giving of a notice or other specific event - the relevant time period ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given or the specified*

7.2 Mr Morley accepts that if I determine the "period" is 31 days the ordinary limitation period will be extended to 6 March and thus be in time.

7.3 He argues that because the claimant commenced conciliation before 4 November 2016 limitation had not started to run, only the period of conciliation after the EDT can be counted because limitation had not started to run and thus the "period" for the purposes of s.207B(3) is 11 days.

7.4 Mr Heard accepts that if the "period" is 11 days, then the ordinary limitation period would only be extended to 14 February and the claim will have been presented out of time.

8. A second issue arises concerning s. 111 ERA in that the claimant argues that it was not reasonably practicable to have presented the claim in time.

8.1 If I find that the statutory time limit was extended by 31 days as Mr Heard suggests that is an end to the matter. If not, the questions on reasonable practicability are those identified in *Marley v Anderson [1994] ICR 295 EAT at* [299C]. Whilst that involved s.67(2) of the Employment Protection (Consolidation) Act 1978, it has often been restated with approval since:-

> *"(1) Is [the Tribunal] satisfied that it was not "reasonably practicable" for the complaint to be presented before the end of the period of three months? If the Tribunal is satisfied on that point, it must then ask itself the second question;*
>
> *(2) Was the complaint presented to the Tribunal within such further period as the Tribunal considers reasonable?"*

8.2 I reminded the parties that since the addition of reasonableness to the original test of practicability the issues to be determined in the first question are relayed in *Entwhistle which* refers to the earlier decisions in *Williams Ryan* and *Walls Meats* (see in particular the comments of Brandon LJ that were cited at length in *Williams Ryan*). As to the second question the further reasonable period is a question of fact in each instance.

8.3 Mr Heard pursues that argument on the basis of *Northamptonshire v Entwhistle [2010] IRLR 740* arguing that a skilled adviser's failure to give the correct advice may itself be reasonable and, if so, will not in itself be a bar to a finding that it was not reasonably practicable to bring the claim in time (see *Entwhistle* [9] a point repeated in *Ebay (UK) Ltd v Buzzeo [2013] UKEAT/0159/13* (a case referred to in *Fergusson* at [46] (see (11) & (49) below) where HHJ Richardson also reminded tribunals of the need to make the necessary findings as to the EDT and whether the advice received by the Claimant from solicitors as to the date of expiry of the time limit was or was not negligent).

9. Mr Heard repeated an earlier request for an adjournment so that Mr Oberholzer, the fee earner who had conduct of the claim prior to its presentation, could attend. That application was originally made on 27 April 2017 and was refused by Employment Judge Cocks on 5 May. Her reasons were that the claimant had not set out why it was necessary for Mr Oberholzer to attend and the tribunal needed to be satisfied that his evidence was relevant and necessary to warrant a postponement of the hearing.

9.1 Mr Heard argued that if the application was refused his client would be substantially prejudiced in that :-

9.1.1 she might lose the right to bring the claim,

9.1.2 the overriding objective thus required it,

9.1.3 a short delay would not cause substantial prejudice, and

9.1.4 any prejudice to the respondent could be addressed by other means.

9.2 Mr Morley objected on the basis it was still not clear to his client what the basis for the application was and what evidence it was intended to call. As Mr Morley also points out there is no evidence before me concerning when that advice was given such that the giving of that advice meant that it was not reasonably practical to pursue the claim in time. Nor is there any evidence on the

claimant's behalf setting out what she did and when. Pursuant to *Entwhistle* [11] the burden is on the claimant to bring forward that evidence.

9.3 I specifically canvassed with Mr Heard why the claimant's representatives, having identified that issue over a month ago, did not respond to the Tribunals' request for clarity as to why Mr Oberholzer was relevant or provide that evidence. He told me that was because the claimant's representatives originally formed the view that the respondent had not challenged Mr Oberholzer's assertion that he had an honest belief that the last date for the claim to be presented was 6 March 2017. As a result, it was only later the claimant's representatives concluded that evidence might be required on the s.111 issue.

9.4 That view, even if correct, does not address why nothing was done after 5 May. The respondent was alert to the possible need to call evidence on the reasonable practicability issue by virtue of its request of 27 April 2017. In the absence of an explanation why that was not addressed or what the evidence was (and thus how it was relevant to the reasonable practicability question) I refused the application.

AUTHORITIES

10. Mr Heard provided a skeleton and in addition to *Entwhistle* referred me to :-

10.1 *Compass Group UK & Ireland Ltd v Morgan [2016] IRLR 924*

10.2 *Gisda Cyf v Barratt [2010] IRLR 1073.*

10.3 *HM Revenue & Customs v Garau* [2017] UKEAT 0348/16

11. The reference to *Gisda Cyf* arises because that was discussed in *Chandler* by EJ Kurrein. Mr Morley referred me to *Harvey* at Division PI.1.H.(2).(e) (PI Practice and Procedure - 1. Employment Tribunals - H. Early conciliation - (2) The requirements of the scheme - (e) Extension of limitation periods to allow for early conciliation) which says this:-

> *"[290.02] The fundamental point to note is that, with regard to the time limits for bringing proceedings, claimants will not be disadvantaged by the amount of time taken out of the relevant limitation period whilst complying with the early conciliation requirement. In short, the amount of time spent on early conciliation will not count in calculating the date of expiry of the time limit; the clock will simply stop during the EC period. The precise method of calculation is as follows. The starting point is to ascertain: (i) the date when the claimant complied with the duty to contact ACAS under* ETA 1996 s 18A(1) *(this is known as Day A); and (ii) the date on which the complainant received or is deemed to have received the EC certificate (known as Day B) (see* ERA 1996 s 207B(2)(a), (b)*). For the purpose of working out the expiry date of the relevant limitation period, the period beginning with* the day after *Day A and ending with Day B is not to be counted (s 207B(3)). Thus if, for example, a three-month limitation period would ordinarily have expired on 31 March, and Day A was 16 January and Day B was 6 February, the period that would not be counted would be 21 days (ie 17 January to 6 February inclusive), so that the revised expiry date would be 21 April.*
>
> *[290.03] In the above example, the whole of the conciliation period occurred within the three-month limitation period. If, however, Day A of the conciliation period occurs before, and Day B occurs after, the start of the limitation period, it is only the conciliation days that take place after the start of the limitation period*

and ending with Day B that are not to be counted when calculating the expiry date (see Fergusson v Combat Stress (Case No 4105592/16) (3 March 2017), ET(S); Ullah v Hounslow London Borough Council (Case No 2302599/2015) (28 March 2017), ET). In Fergusson, the overlap was four days, and so the primary expiry date was extended by that number of days. The employment judge pointed out that, as the purpose of ERA 1996 s 207B(3) *is simply to prevent a claimant from being disadvantaged by having the limitation period reduced whilst engaging in the EC process, the subsection is not to be construed as requiring the whole of the conciliation period, regardless of when it occurred, to be added on to the primary expiry date (see para 17)."*

12. I was not provided with copies of

12.1 *Ullah v Hounslow London Borough Council ET 2302599/15* or

12.2 *Fergusson v Combat Stress ET(S) 4105592/16 2017 WL 00956471*

13. ***Harvey*** does not refer to *Chandler* although a copy of it was provided on 15 March 2017 (see (2)). I thus referred the parties to those cases and provided my own unmarked copies together with the only other first instance authority on point of which I was aware:-

Myers (and Wathey) v Nottingham City Council ET 2601136/15 & 2601137/15 2016 WL 686579

14. I reminded the parties (and it was common ground) that whilst those first instance authorities are persuasive they are not binding on me but they highlight many of the issues at hand. I also referred the parties to one of the cases discussed in *Myers* and *Fergusson, HM Prison Service v Barua [2006] UKEAT/0387/06, [2007] IRLR 4* the headnote of which reads as follows:-

"For the purpose of the extension of the time afforded by reg. 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, an employee's grievance is to be treated as lodged 'within the normal time limit' even if it is lodged before the effective date of termination or other date from which time starts to run."

and given the differing views over the statutory interpretation in the first instance authorities another case concerning the Employment Act 2002 (Dispute Resolution) Regulations 2004, *Singh t/a Rainbow International v Taylor EAT/0183/06.*

15. I gave both representatives time to read those authorities before they made submissions. When they returned they indicated their gratitude and did not seek further time.

SUBMISSIONS

16. Mr Morley accepted the problem that EJs Kurrein (*Chandler*) and Britton (*Myers*) identify flows from the stance he suggests I adopt, there will not just be different start dates for limitation but depending on the type of complaint, different early conciliation periods for limitation purposes.

17. However, Mr Morley suggested that is no different to the historic position in that claims have different limitation periods. To reinforce his point he reminds me that parliament not only provides for that but, further, has provided different mechanisms to assess if claims are in time.

18. As to *Barua* he asserts that an analogy between the Dispute Resolution Regulations and Early Conciliation cannot be drawn and further that as per *Fergusson* [21-24] the "cliff edge" does not arise.

19. He reminds me that as the Tribunal stated in *Ullah* it was not the purpose of the early conciliation procedure to extend the length of the ordinary limitation period of three months, save to give a prospective claimant a minimum of one month from Day B within which to present a claim.

20. He thus asks why should a claimant who conciliates straight away when time is not running receive a windfall of additional time to bring the claim when there is no need for it. Essentially he contends that the extension in s.207B(3) is to ensure that a claimant does not suffer a disadvantage and there is no disadvantage to such a claimant if such an extra period is not given. Further, given the vagaries that arise from the various combinations of types of claims and dates to try to legislate for consistency is not possible.

21. As to the s. 111 issue, he reminds me that the burden is on the claimant to bring forward that evidence and there is simply no evidence before me on which I can do so, despite the claimant's representatives being alive to the issue for over a month.

22. Mr Heard reminded me that the statutory words in essence meant that the conciliation period should not be counted and relies upon the ACAS guidance as supporting that argument. He contends the purpose of conciliation was that parliament wanted to encourage parties to resolve cases amicably and, given that it was accepted that the earlier conciliation started the more likely it was to succeed, it was at odds with the intention of parliament for a claimant who conciliates early to be potentially worse off depending on the nature of their claim. He asks on that basis why should a claimant be penalised for commencing conciliation early? He suggests the interpretation contended for by Mr Morley will dissuade parties from conciliating promptly and makes complicated provisions even more complicated.

23. As to the s. 111 issue, Mr Heard stated that I do have evidence, in the form of the email of Mr Oberholzer of 15 March 2017. I pointed out that did not relay when the original advice was given (which may be relevant if, for instance, that occurred after 3 or 14 February for the reasons I give above) nor on the further reasonable period.

24. Given the time taken by the adjournment application I asked the parties if they would be free after lunch so I could give oral judgment. Mr Morley indicated he had family commitments in the latter part of the afternoon. The hearing was only listed for 3 hours so I indicated I would consider reserving my decision. In the event, I sat through lunch, gave a decision but reserved my reasons. I canvassed what case management was required and have issued a separate case management order in that regard. I indicated I was scheduled to start a 6 day case the following day and that I would give priority to the case management order and attempt to issue that later that afternoon given the need to progress the claim (which I did). I indicated that I hoped to be able to issue the judgment and reasons early the following week.

MY CONCLUSIONS

25. Firstly, as to the ordinary and natural meaning of the words there is no reference in s.207B(3) to limitation starting to run, "stop the clock", "the clock stops ticking" (ACAS guidance page 7), limitation being "paused" (ACAS guidance page 6), "the time limitation clock starting again once the early conciliation period is over" (ACAS guidance page 7 at several points), or it being a requirement that Day A falls after limitation starting to run.

26. Secondly, not only is there no reference made in s. 207B to limitation running, the clock stopping etc. but the statutory words require that *"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",* that expressly refers to (the whole) period between the day after Day A and Day B. In my judgment, the statute permits no basis to depart from the whole period. I agree with EJ Britton in *Myers* [12] that is meaning of the sub-section read literally. In my judgment, it is the ordinary and natural meaning of the words.

27. Thirdly, the reference to *"the day after Day A and ending with Day B"* in my judgment reinforces that view; it is an attempt to ensure the calculation of the period is by reference to the clear date rule (see *Joshi* and repeated in r. 4 of the ET Rules 2013); accordingly, either the first or last date is counted but not both.

28. Fourthly, in *Chandler* [10] EJ Kurrein was referred to the Government's response to consultation on Early Conciliation when in relation to a request for an explanation how *"stop the clock"* worked, the response acknowledged it might be difficult for some prospective claimants to understand the *"stop the clock"* provisions and that an explanation would be set out in EC guidance. EJ Kurrein was also referred to, and cited, from the HMCTS booklet T420 "Making a Claim to an Employment Tribunal":

> *"Submission of the Early Conciliation form to Acas will 'stop the clock' on the time period for you to submit your claim. ...*
>
> *In working out the number of days by which the time limit is extended, the period begins on the day following that on which your application for early conciliation was received by Acas and ends on the day on which you are deemed to have received the certificate".*

Likewise, the ACAS guidance, some of the phrases from which I relay at (25) above.

29. Whilst the ACAS guidance and T420 are merely persuasive both, in my judgment, reinforce the view that parliament intended that the whole of the conciliation period was not to be counted when working out when a time limit expires.

30. Fifthly, for "period" to have the effect contended for by Mr Morley requires in my judgment, an assumption on the part of the reader that the clock is running. In *Fergusson* EJ Walker determined *"[14] … the wording of Section 207B is that of a "stop the clock" provision. It states that when working out when a time limit expires, the "period beginning with the day after day A and ending with day B is not to be counted." That, in my view, means that those specific days that fall within the period are not counted. It does not mean that an equivalent number of days is added to the primary time limit. To put it simplistically, a clock cannot be "stopped" if it has not yet started."*

31. In my view the statutory words make no such reference, nor permit that interpretation. I consider that assumption and the source of the ambiguity appears to emanate from the reference to *"stop the clock"* and similar phrases in the ACAS guidance, T420 and elsewhere. The references to *"stop the clock"* and similar phrases are a non-statutory construct and, in so far as they divert attention from the statutory words, rather than assisting their interpretation, in my view they should be ignored.

32. I consider the statutory words are plain and they do not require an assumption the clock is running for the provision to make sense. It is only if that assumption is made that the interpretation suggested by Mr Morley would have any basis.

33. For completeness, the EAT in *HMRC v Garau* referred at [12] to *Tanveer* citing an extract from the ICR digest. The full extract reads:-:

> *7. The purpose of section 207B is undoubtedly to ensure that, with regard to ET time limits, a Claimant is not disadvantaged by the amount of time taken during the relevant limitation period for EC compliance. Thus the amount of time spent on EC will not count in calculating the date of expiry of the time limit; the clock simply stops during the EC period.*
>
> *8. Stopping the clock for the purposes of EC in this case would, on anyone's argument, give rise to a date falling within the period beginning with Day A and ending one month after Day B (section 207B(2)). It thus brought into play section 207B(4). The period in question for subsection 207B(4) purposes started on 18 June 2015 (Day A) and ended one month after Day B, which was 30 June 2015. The issue was: what was "one month after"?*

34. However, both parties accept that the EAT's comments in *Tanveer*, which concerned the question of what was a month and in *HMRC v Garau,* if two certificates could be relied upon, did not concern conciliation commencing before the EDT, are thus obiter and the EAT is unlikely to have had the benefit of argument from counsel (for instance on potential disadvantage and the practical problems this will throw up (see below at (44) following)).

35. Sixthly, I considered with both parties which words would need to be added to permit the meaning contended for by their opponent. Mr Heard suggested that to have the effect contended for by Mr Morley, s.207B(3) would need to provide that *"In working out when a time limit set by a relevant provision expires, from the start of that relevant provision (or limitation period), the period beginning with the day after Day A and ending with Day B is not to be counted."*

36. In *Ullah* at [17] EJ Baron stated that in order to have the effect contended for here by Mr Heard that subsection (3) would need to be amended to refer to the number of days between Day A and Day B being added on to the limitation period, rather than a specified period not being counted. That was because he concluded that ***period*** *"[14] … could refer to specific dates, rather than the number of days between two dates …. [16] … The ordinary limitation period in respect of all claims would have started running on 8 May 2015. … That is a specific period of time between two particular dates which dates are defined in subsection (2). The only part of that conciliation period which is relevant is the period from 8 to 28 May 2015. That period is not counted, and then the limitation clock starts running.".*

37. The meaning of ***"period"*** permits reference to both interpretations. The Oxford English Dictionary (online) definition holds 19 different definitions of the noun (plus various sub definitions) and a single definition each of the adjective and adverb forms**.** They include**:-**

> *"**I.** A length of time, esp. one marked by the occurrence of a phenomenon.*
> ****** A length of time, without the necessary implication of recurrence.*
> *…*
> ***5.***
> *a. A definite portion or division of time; a fixed number of years, etc.*
> *…*
> ***7.***
> ***…***
> *d. Any length of time defined by the regular recurrence of a phenomenon or cyclical process.*
> *…".*

38. I deduce the reference to "not counted" infers that limitation must be running. In my judgment, merely "adding" instead of "not counting" a number of days would not necessarily address the issue he raises because of the other ambiguities concerning the clock stopping. The revised provision in my judgment would need to make clear as Mr Heard points out that limitation had or as the case may be, had not, started to run.

39. I reach a different view to EJ Baron for the reasons I give at (26), concerning the entirety of the conciliation period, (29), regarding the ACAS guidance and T420 and for two further reasons which concern his interpretation of "not counted". Firstly, I consider when working out when a time limit expires "not counted" still allows an interpretation that the whole period of conciliation is not counted and not merely that after the clock starts to run. Thus, the provision is on its face capable of two meanings. Secondly, when s.207B was drawn the possibility that conciliation could be commenced (and concluded) before limitation started to run was something parliament was or should have been aware of. The courts had previously had to address that issue (see *Barua* and an earlier case referred to in it, *Llanelli v Presley* [*1979] ICR 419* which concerned s. 111(3) ERA). It has long been settled law that an employee can in some circumstances commence a claim before limitation starts to run. If parliament had wished to address that issue it could have done so. It did not. The failure to specifically address that issue in my judgment again supports the view that parliament did not intend that only the part of the conciliation period after limitation had started to run would form part of the period (and thus would not be counted).

40. In *Myers* EJ Britton quoted Underhill LJ (as he now is) in *Barua*:-

> *"20. … it would be arbitrary and unsatisfactory that an employee who lodged a grievance the day after the time started to run should be entitled to six months in which to bring tribunal proceedings, while the employee who lodged his grievance the day before time started to run had only three months (and a day). That would indeed…penalise employees who acted promptly to raise a grievance – which is conduct which the tribunal should seek to encourage rather than deter……"*
>
> *21 So in the case before me: surely it is incompatible with the intention of the conciliation provisions to deter employees from seeking ACAS conciliation sooner rather than later?*

41. I relay above at (14) the background to *Barua* as set out in its headnote. EJ Walker in *Fergusson* said when addressing *Barua* *"[24] … The provision being considered [in] Barua had a "cliff edge" effect. Either the claimant got an extra 3 months or he didn't. That is not the case with Section 207B. The number of days will depend on how many days of the three-month period have been taken out for early conciliation."*

42. *Barua* concerned whether raising a grievance prior to limitation staring to run gave rise to the statutory extension of time provided for by the Dispute Resolution Regulations. Underhill J held it did. Fundamentally the issue in this case is the same, should a claimant be disadvantaged by conciliating earlier than later? In my judgment, a claimant should not. I address some of the potential disadvantages a claimant could suffer at (45.2) below.

43. In my judgment, the statutory words permit the meaning contended for by Mr Heard. In order to adopt the construction contended for by Mr Morley, words need to be added or it be assumed the clock has started (and thus only the time spent in conciliation "after the clock has started" are not to be counted for the reasons I give above).

44. My conclusions are reinforced when I consider the other issues as to purpose and practicality raised by the representatives and in the authorities.

45. Whilst in *Fergusson* EJ Walker's rationale was:-

> *"[15] A claimant in the normal course who is making a claim for unfair dismissal will engage in early conciliation after the effective date of termination. This would result in the claimant being unable to present a claim but still having time running against her. This is why Section 207B provides that days spent on EC "do not count'.*
>
> *"[17] … it is not clear to me why a claimant, in those admittedly unusual circumstances, needs an extension of time at all? The clock, in terms of the limitation period, has not yet started running when early conciliation is completed. I do not consider that the purpose of section 207B is to extend the time limit every time a claimant engages in early conciliation. Rather it is to prevent the claimant being disadvantaged by the three month period being reduced by engaging in EC."*

and EJ Baron came to a similar view [18 & 19] in essence, that it would not be right for a claimant to receive a windfall extension of time, I disagree with their conclusions as to windfall/disadvantage for two reasons :-

45.1 A claimant can be placed in a more advantageous position by conciliating; not only will the period of conciliation not count but the claimant can, by s.207B, gain an extra month in certain circumstances (a point EJ Baron acknowledged).

45.2 A number of disadvantages could arise for claimants where the claim includes complaints where an act or omission sets limitation running, yet the same or other acts are relied upon to support complaints where limitation does not start to run. I identify some at (49) below. EJs Kurrein and Baron identify this issue. Both EJs Kurrein and Britton were faced with complaints of (constructive) unfair dismissal and the failure to make reasonable adjustments (s.20 Equality Act 2010). *HMRC v Garau* also involved unfair dismissal and discrimination claims.

46. EJ Walker in *Fergusson* accepted [21] that the most convincing argument against her conclusion was that it would become more difficult to work out when a claim is in time. She identified that this was already the position where a claim includes an allegation of discrimination which may predate the dismissal given that when time starts to run in such cases is not always clear. Before EJ Baron, Mr Toms of counsel, pointed out that excluding days before limitation started to run would also cause there to be different time limits. In my view the problem is wider than that; for example, if a claim includes a complaint about act(s) or omission(s) that are said to be a detriment or discriminatory and end on a given day (X), the claimant resigned on a later date (Y) and gave notice to expire on (Z), the effective date of termination, one can conceive that where :-

46.1 limitation starts to run on X or earlier, the whole EC period (B-A) applies,

46.2 limitation starts to run on Y or earlier, the whole EC period (B-A) applies,

46.3 limitation starts to run on Y or earlier, the EC period (B-Y) applies and

46.4 limitation starts to run on Z or earlier, the EC period (B-Z) applies;

and there are yet further variations dependent on when A & B fall (such that if limitation starts to run after B there would be no "extension" of the conciliation period).

47. Thus, not only is the position less clear if the interpretation in *Ullah* and *Fergusson* is adopted but the effect of that interpretation is that different types of complaints could not only have different limitation start dates but also different early conciliation periods.

48. Mr Morley rightly reminded me that parliament has set up different mechanisms for tribunals to address timing and these vary with the type of complaint. He suggested parliament expressly provided for just that situation. He is unarguably correct. The appellate courts have acknowledged that difficulty and suggested the tribunal exercise its discretion where that arises (for an example concerning the duty to make reasonable adjustments see *Matuszowicz v Kingston upon Hull City Council [2009] IRLR 288* (LLJ Lloyd [24] & Sedley [38])).

49. In cases concerning constructive unfair dismissal the tribunal does not have the flexibility of a just and equitable extension of time. Instead the claimant may decide to adopt a cautious approach with the effect that s/he commences his/her claim while negotiations are continuing thereby incurring a tribunal fee which may not be capable of being recovered in the event of a settlement or take a risk with a reasonable practicability argument (see *Fergusson* at [46] following, referring to arguments based on *Entwhistle* and *Ebay (UK) Ltd v Buzzeo*). In either event, there is uncertainty for the claimant and no incentive to conciliate quickly as parliament intended.

50. Mr Heard also reminded me that the intention of parliament when introducing conciliation was to promote the resolution of disputes and that was best served by conciliating sooner rather than later. The words of Underhill LJ (as he now is) in *Barua* that I quote at (40) reinforce that view.

51. In three of the four first instance cases I refer to above, the judges identified that the issue was finely balanced or the statutory words were unclear. In one, *Ullah*, EJ Baron gave one decision orally and another in the written decision.

52. Given that suggested the statutory words were possibly ambiguous I canvassed with the parties the principles identified in *Singh t/a Rainbow International v Taylor EAT/0183/06* (my emphasis):-

> *"12 Finally, I was mindful of the overriding objective (Regulation 3 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations, which requires tribunals to deal with cases justly, and of recent Employment Appeal Tribunal authorities which remind tribunals that the new dispute resolution mechanisms should not be applied mechanistically, thus debarring parties from bringing legitimate complaints, and should instead be viewed as having the objective of fostering informal resolution of disputes. I was mindful that this claimant had attempted to do just that, before lodging his Claim Form. Bearing those principles in mind**, I considered that any ambiguity that may have arisen as a consequence of the wording of Regulation 15, should be resolved in favour of this claimant proceeding with his complaint**. …."*

53. Whilst the Employment Act 2002 (Dispute Resolution) Regulations 2004 have been repealed and thus if *Singh* is to be applied, that should be borne uppermost in one's mind, in my judgment *Singh* merely restates a general principle of law where a provision is ambiguous.

54. Mr Heard asserts and I accept that there are similarities between the two statutory regimes. The EAT authorities concerning Early Conciliation like those concerning the Employment Act 2002 (Dispute Resolution) Regulations 2004 before them, adopt a flexible approach (for example *"matter"* is a word capable of broad application, see *Science Warehouse v Mills UKEAT/0618/15*, *Drake International Systems Limited v*

Blue Arrow Ltd UKEAT/0282/15, *Mist v Derby Community Health Services NHS Trust [2016] UKEAT/0170/15* and *Compass Group UK & Ireland Ltd v Morgan [2016] IRLR 924*; *TIC International Ltd v Ali [2016] UKEAT/0284/15* and *Mist concerning a "minor error" as to the name of the respondent and Mist concerning amendments to add a party).* Like the Dispute Resolution Regulations, the objective of the Early Conciliation provisions is to foster the informal resolution of disputes. *Singh* thus remains persuasive.

55. If am wrong as to my other conclusions *Singh* in my judgment is a reminder that the overriding objective reinforces that general requirement for Tribunals to do justice and if there is ambiguity in relation to a provision, that requires it be construed in favour of the party who will be otherwise prejudiced. That view is reinforced yet further where, as here, parliament seeks to encourage the parties to attempt to resolve their disputes amicably, and to interpret the provision restrictively would put that party to prejudice or otherwise discourage that party to do so.

56. In any event if I am wrong on any or all of those conclusions, when viewed in aggregate in my judgment the overriding objective is engaged and it requires me to come to the conclusion I reach.

57. The s.111 issue falls away given my conclusions above, but for the avoidance of doubt, I find there was no evidence (merely a submission in the form of the email of 15 March 2017) before me to address what was or was not reasonably practicable or for that matter whether the claim was presented within a further reasonable period. The burden lies upon the claimant to address both issues and, in my judgment, she has not discharged that burden.

58. In summary, in my judgment the approach suggested by Mr Heard is to be preferred, namely the "period" is 31 days and includes time before limitation started "to run". I say that for the following reasons:-

58.1 adopting their ordinary and natural meaning the statutory words fall to be interpreted in the way the claimant suggests,

58.2 that is supported by the statutory guidance which gives an indication of what parliament intended,

58.3 the interpretation contended for by Mr Morley would discourage parties from conciliating at the earliest opportunity and is at odds with intention of parliament,

58.4 if Mr Morley were right, that could result in a party with more than one complaint having not only differing start dates for limitation but also different conciliation periods for the different types of claim; already complex provisions would become the more so,

58.5 that interpretation would appear to be at odds with the flexible approach to Early Conciliation adopted by the EAT,

58.6 in the event of any ambiguity, in my judgment the benefit of the doubt should be given to the claimant, and

58.7 when viewed in aggregate those arguments engage the overriding objective and require me to come to the conclusion I reach.

59. Accordingly, in my judgment s. 207B does not limit the "period" to the time after limitation started to run, the "period" in this case is 31 days, the ordinary limitation period expires on 6 March and thus the claim was presented in time.

Employment Judge Perry

15 June 2017