EMPLOYMENT TRIBUNALS

Claimant: Mr M Evans

Respondent: AMG Super Alloys UK Limited

Heard at: Sheffield **On:** 18 October 2018

Before: Employment Judge Little

REPRESENTATION:

Claimant: In person (accompanied by PSU volunteer)
Respondent: Mr A Tembe (EEF Limited)

JUDGMENT AT PRELIMINARY HEARING

My judgment is that:

1. The claim was presented outside the time limit provided by the Employment Rights Act 1996 s111(2) (taking into account the extension of time properly afforded by Employment Rights Act 1996 section 207B(3).

2. It was reasonably practicable for the claim to have been presented in time.

3. Accordingly the claim is struck out for want of jurisdiction.

REASONS

1. **The Preliminary Issue**

   1.1 The respondent made an application on 24 August 2018 for the determination of what that application described as the "out of time point" at a preliminary hearing. The matter had first been raised in the grounds of resistance (paragraph 27 thereof) but in the application further detail was given. The respondent explained that the claimant had been

dismissed on 27 March 2018 with the result that the primary limitation period would expire on 26 June 2018. The early conciliation certificate indicated that the conciliation period had commenced on 25 April 2018 and ended on 10 May 2018. That meant that the time for presenting a claim would be extended to 12 July 2018. However, the claim had actually been presented on 26 July 2018.

1.2 That application was referred to Employment Judge Maidment who made an order postponing what would have been a case management hearing on 19 September 2018 and replacing it with a public preliminary hearing on 18 October 2018, the purpose of which was described as "to clarify the issues and to determine whether the claimant's complaint was submitted outside the applicable three month time limit, and if so whether it was not reasonably practicable for the claim to be presented in time".

1.3 On 21 September 2018 the claimant wrote to the Tribunal attaching a copy of an ACAS early conciliation certificate. He pointed out that in that certificate the EC period was recorded as commencing on 19 April 2018 and ending on 19 May 2018. In those circumstances the claimant believed that presenting his claim on 26 July 2018 was in time.

1.4 In fact, the early conciliation certificate which the claimant had now provided appeared not to be the certificate the number of which was given in box 2.3 on his claim form. The number there was given as R244223/18/16 whereas the number on the certificate which the claimant subsequently provided to the Tribunal is R241839/18/35.

1.5 No Case Management Orders had been made for today's hearing, but helpfully the respondent's representative had put together a slim bundle of documents which were considered relevant for today. The claimant had not been asked to produce any documents, and as he is representing himself it is understandable why he did not see the need to do so. However, helpfully, he had brought documents with him today and some of those referred to below I have considered.

1.6 It was necessary for me to receive evidence from the claimant, and he has given that evidence under oath. In the absence of a witness statement I have elicited what I considered to be the relevant information from the claimant by asking him my own questions. The claimant has also answered questions by way of cross examination from Mr Tembe.

2. The Facts relevant to the Preliminary Issue

2.1 It is common ground that the claimant's employment with the respondent ended on 27 March 2018. The reason given by the respondent for that dismissal was the claimant's alleged gross misconduct. The alleged conduct was ignoring safety rules by making adjustments to a vertical borer whilst that machine was running, and in the process reaching over a safety guard.

2.2 The claimant considered that this dismissal was unfair. Among other things he thought that there had been inconsistent treatment as between himself and another employee in similar circumstances. He believed that he had followed the respondent's safe working procedure but alleged that he had not been properly trained in the use of the machine. He felt that mitigating factors such as his length of service and clean disciplinary record had not been taken into account. These at least were the grounds of alleged unfairness as set out in the claim which was presented to the Tribunal. The claimant also complained that he had been wrongfully dismissed because the dismissal had been without notice.

2.3 The claimant consulted his union, the GMB, with a view to commencing Employment Tribunal proceedings. Having done some research of his own the claimant was aware of the three month normal time limit for bringing such claims, and he also became aware that it was necessary to approach ACAS first and obtain an early conciliation certificate from them. He says that he got a bit confused by the references to Day A and Day B, but was aware that whilst ACAS conciliation was proceeding the three month clock would be stopped.

2.4 On 19 April 2018 either the claimant or his union sent the required EC notification to ACAS. The certificate which ultimately resulted from that notification was issued on 19 May 2018 under reference number R241839/18/35. A copy is at page 19 in the bundle. During the course of the claimant's evidence to me he said that this notification had been made to ACAS on his behalf by the GMB and he was not aware that his union were going to do that. However, during his closing submissions the claimant appeared to change his account to say that he had made the notification himself. However, also during closing submissions, the claimant produced to me copies of some correspondence between ACAS, himself and the GMB. From this it was clear that a Mr Stephen Morris of the GMB had made this notification because one of the documents was ACAS thanking Mr Morris for it, and that was in ACAS's email of 19 April 2018.

2.5 However somebody, either the claimant or his union, subsequently made another notification to ACAS. That notification was made on 25 April 2018 and that would ultimately result in an ACAS EC certificate being issued on 10 May 2018 under reference number R244223/18/16. That is at page 16 in the bundle. I have not seen any correspondence from ACAS about this certificate, and so there is no documentary proof as to whether the claimant himself or his union made this notification. As there would be no need for the union to make a second notification, and as it seems that communication between the claimant and his union was not all that it could have been, it seems on the balance of probabilities that this notification was made by the claimant himself.

2.6 It now transpires that the claimant prepared a draft ET1 claim form which he sent to his union on his understanding that they would then present it to the Employment Tribunal on his behalf. The claimant has produced to

me this morning a copy of that handwritten draft. Despite my conclusion on balance that the claimant had made the '223' notification – as I will now refer to it – that is not the ACAS early conciliation number which the claimant gives in his handwritten draft. Instead he gives the 839 number.

2.7 The claim which was actually presented to the Tribunal on 26 July 2018 is not the claimant's handwritten draft. The first significant difference between the two documents is that, as I have mentioned, the ACAS early conciliation certificate number is the 223 reference. Another significant difference is that on page 6 of the claimant's draft he has indicated that in addition to unfair dismissal he is making another type of claim which he describes as "I was discriminated against for whistle-blowing". Page 6 of the claim as presented simply ticks the boxes for unfair dismissal and in addition that the claimant is owed notice pay, but makes no reference at all to whistle-blowing. There are also differences in the narrative which the claimant gave in his draft and the narrative which appears as his particulars of claim in the claim as presented. This appears to go beyond "tidying up". The particulars of claim are an edited version of the narrative the claimant himself wrote. Further, on page 12 of the claimant's draft there is a paragraph which begins "I am in need of a form about whistle-blowing…." – this passage then goes on to criticise the respondent's safety procedures, albeit apparently in the period after the claimant ceased to be employed. Page 12 of the claim as presented is blank.

2.8 The claimant's evidence to me was that he understood that his union had simply presented to the Tribunal the handwritten claim which he himself had prepared. The claim form as received by the Tribunal seems not to have had any covering letter or email with it – certainly there is none on the Tribunal file. The claim form does not give any details for a representative in box 11. However, the claimant's draft had set out his representative as Steve Morris of the GMB union.

2.9 It was in those circumstances that the Tribunal wrote directly to the claimant on 31 July 2018 informing him that his claim had been accepted. The claimant understood that to mean that his claim as *he* had drafted it had been accepted. He says that he did not see a copy of the claim form which had actually been presented until relatively recently.

2.10 The claimant's draft ET1 has been date stamped as received 17 May 2018, and that must therefore be the date when the union received it from the claimant. The claimant says that when the time issue arose he asked the union to return all his papers to him. Initially those papers did not include the return of his original draft. The claimant told me that he understood that the delay in his claim actually being presented was because of the ACAS conciliation process. However, as the date which the claimant told me he believed was the deadline for presenting the claim got nearer – that date being 26 July 2018 – he had to chase up the union. He then received a telephone call from Mr Morris on 26 July 2018 in which Mr Morris informed him that the claim had been presented that

day – as indeed it was. The claimant recollects that he received that call whilst he was on the beach on holiday in Turkey. He says that he never received written confirmation from the GMB that the claim had been presented.

3. **The Parties' Submissions and the Relevant Law**

3.1 The Employment Tribunals Act 1996 section 18A(8) provides that, to paraphrase slightly, most people who wish to begin Employment Tribunal proceedings may not present a claim unless they have a certificate issued by an ACAS conciliation officer. The purpose of this legislation is to require a potential claimant to engage with ACAS in the hope that with the assistance of a conciliation officer a settlement can be promoted, thereby avoiding the need for litigation.

3.2 The Employment Rights Act 1996 section 207B permits two potential extensions to the normal time limit so as to facilitate this type of conciliation. One of those is often colloquially referred to as "stopping the clock". It provides that the period beginning with the day after there has been a notification to ACAS and ending with the day when the ACAS EC certificate is issued is not to count in the calculation of the relevant primary limitation period. The first date is referred to as Day A and the second as Day B.

3.3 Mr Tembe has referred me to various cases decided by the Employment Appeal Tribunal where there have been two ACAS certificates issued in respect of the same potential dispute. The first case in this line of authorities is **HMRC v Serra Garau [2017] ICR 1121**. The issue before the Employment Appeal Tribunal in that appeal was, as described in paragraph 15 of the Judgment, whether more than one certificate can be issued by ACAS under the statutory procedures and what effect, if any, a second such certificate has on the running of time for limitation purposes. The conclusion of Kerr J was that:

"Only one mandatory process is enacted by the statutory provisions. The effect of the provision is to prevent the bringing of a claim without first obtaining an early conciliation certificate." (Paragraph 18)

The Judgment continues (paragraph 20):

"The scheme of the legislation is that only one certificate is required for 'proceedings relating to any matter'. A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted."

Paragraph 21 of the Judgment is in these terms:

"It follows, in my judgment, that a second certificate is not a 'certificate' falling within section 18A(4) [of the Employment Tribunals Act 1996]. The certificate referred to in section 18A(4) is the one that a prospective

claimant must obtain by complying with the notification requirements and the Rules of Procedure scheduled to the 2014 Regulations".

The Judgment went on to indicate that the Judge was satisfied that the references in section 207B(2)(a) of the Employment Rights Act 1996 to Day A and Day B referred to the mandatory notification and not what the Judge described as a "purely voluntary second notification".

3.4 Mr Tembe has also referred me to the Judgment of a differently constituted EAT in the case of **Treska** v **University College Oxford** UKEAT/0298/16/BA, a case in which Her Honour Eady QC adopted the reasoning the **Serra Garau** case.

3.5 The third case I have been referred to is that of **Mr M Romero** v **Nottingham City Council**. I have been provided with a copy of the first instance decision of the Employment Judge and the subsequent judgment of the Employment Appeal Tribunal (UKEAT/0303/17/DM) where Mrs Justice Simler, President, was the Judge. She considered that the reasoning in **Garau** was plainly correct. She accepted that while section 18A of the ETA referred to a certificate and the possibility of more than one certificate therefore existed, the words of section 207B ERA indicated that there was only one certificate envisaged as affecting time. That section referred to Day A as being a single day only, and likewise Day B. It did not, for instance, provide for something along the lines of "the day or, if more than one certificate is issued, the latest day". (Paragraph 28) She confirmed that the central conclusion in **Garau** was:

"That there is one mandatory conciliation process but 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 claim has embarked on the EC process, the rules of the process apply in terms of extentions of time limits to the single mandatory process and not in relation to any subsequent process that relates to the same matter". (Paragraph 27)

3.6 Accordingly, Mr Tembe's submission to me was that the relevant ACAS certificate was the one which had been issued on 10 May 2018 because that was the certificate which was issued first. It was also the certificate the reference number of which was given in the claimant's ET1. The second certificate (839) had not been issued until 19 May 2018 and it was therefore irrelevant for present purposes.

3.7 During the course of this hearing I have endeavoured to explain to the claimant the rather complex statutory provisions which are in play. Mr Tembe gave his submissions first and at the end of them I sought to summarise them for the claimant's benefit, and offered him some time to give consideration to anything that he wanted to say on his own behalf. I was told that the **Garau** decision had been sent to him by Mr Tembe in advance. I reviewed with the claimant the relevant sections of the other Judgments to which I had been referred. The claimant felt that he did not need any further time and, as indicated above, his submissions

essentially amounted to giving a slightly different account of who applied for which certificate and referring me to the correspondence between himself, ACAS and the GMB that I have referred to above.

4. **My Conclusions**

4.1 Which ACAS certificate is relevant?

4.1.1 I find that clearly this must be the certificate with reference number R244223/18/16 which was issued on 10 May 2018. That is because it was the first of the two certificates to be issued, and moreover was the certificate which, in the phrase used in **Serra Garau**, had the effect of lifting the prohibition imposed by the Employment Tribunals Act 1996 section 18A(8). It is this certificate number which is given in the ET1 claim form as it was presented to the Tribunal.

4.1.2 For the purposes of this Judgment it does not really matter whether the claimant or the union gave the notification which led to that certificate, or for that matter gave the notification which led to the second certificate. Whilst the notification for the second certificate (R241839/18/35) was given on 19 April 2018 (and therefore prior to the notification that was given for the first certificate which was on 25 April 2018), it is not the date of notification that is relevant but the date when the certificate is issued.

4.2 What extension of time does the first (and only relevant) ACAS certificate give the claimant?

4.2.1 The relevant subsection of the Employment Rights Act 1996 section 207B is subsection (3) – the clock stopping provision. It is common ground that the claimant would not be entitled to any further extension of time under the provisions of subsection 4.

4.2.2 My calculation of the time elapsing between Day A and Day B is 15 days. As the effective date of termination was 27 March 2018 the primary limitation period would expire on 26 June 2018. However, by reason of section 207B(3) on my calculation time was extended to 11 July 2018. I note that the respondent's calculation is slightly more generous and gives 12 July 2018. However, in any event that means that the claim, presented on 27 July 2018, was still presented out of time.

4.3 Was it reasonably practicable for the claimant to have presented his claim in time?

4.3.1 Here I take into account that he claimant through his own research had some knowledge of the applicable time limits and the extension of time permitted during the course of ACAS conciliation. However, over and above this it is clear that at the

material time the claimant was being represented by the GMB and in particular by Mr Stephen Morris. It is well established that trade union representatives are regarded as skilled advisers, and as such assumed to know the time limits and to appreciate the necessity of presenting claims in time. It follows that it will not be a valid ground for extending time on the reasonable practicability ground if a skilled adviser has been fault with the result that claim is presented out of time.

4.3.2 In fact the claimant is not suggesting that there should be an extension of time on this basis. His case has been limited to reliance on the second ACAS certificate. Obviously I have not heard any evidence from the union, and I am not passing judgment on them. I do not have a full picture of what instructions the claimant was giving to his union or for that matter necessarily what advice they were giving to him. All that can be said is that a claim which the union took responsibility for presenting to the Tribunal was presented late with the result that the claimant has lost the opportunity to have a hearing on the merits of his claim.

4.3.3 In these circumstances I have indicated to the claimant that he should take independent advice as to whether he instead has a claim against the GMB. I am not myself advising that he should take that potential course of action.

Employment Judge Little

Date 8th November 2018