Case Numbers: 3201437/2018 &
3200529/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Edmunds**

Respondent: **London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre**

On: **Tuesday 27 November 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: Mr F Hoar (counsel, direct access)

Respondent: Ms A Palmer (counsel, instructed by Ms M Van-Loo, Legal Services, LBTH)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that: -

(1) The claimant's dismissal for redundancy effective on 25 March 2018, was a different "matter" for the purposes of section 18A(1) of the Employment Tribunals Act 1996, and his claim (3201437/2018) presented on 9 July 2018 was not out of time.

(2) The final hearing remains listed for 7 days commencing 23 April 2019 for consideration of all issues raised in both claim forms.

REASONS

1 Mr Edmunds worked for Tower Hamlets from 25 January 2010 as a Project Manager and Youth Service Review and Fraud Investigator until his final dismissal, allegedly by reason of redundancy, which took effect on 25 March 2018. He was given 12 weeks' notice on 14 December 2017.

2 He had brought earlier proceedings to the tribunal, case number 3200529/2017, 8 June 2017 in which he complained of race and sex discrimination. He did so from within employment. In order to bring those proceedings, he had to comply with the procedure for a mandatory early conciliation with ACAS under section 18A of the Employment Tribunals Act 1996. That provides as follows:

> "(1) 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." [Tribunal's emphasis]

The process is that if a case is not settled by way of early conciliation, then subsection (4) will apply which provides:

> "(4) 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,
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> the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant."

3 These provisions have been the subject of a considerable amount of case law to which I shall come. The claimant referred the matter to ACAS on 4 April 2017; an early conciliation certificate was issued on 4 May 2017. The first ET1 claim was presented to the tribunal on 8 June 2017.

4 At a later case management hearing before Judge Moor, on 1 December 2017, the claimant was given permission to add a claim of detriment for making a protected disclosure. Shortly after that on 14 December 2017, the claimant was given 12 weeks' notice of dismissal for redundancy.

5 The claimant would have been entitled to complain of unfair dismissal as soon as he had been given notice on 14 December 2017, but he did not.

6 There was an extra telephone case management hearing before Judge Moor on 26 February. The claimant was asked to advise everyone whether he intended to make a claim of unfair dismissal and if so, it would be heard with the other existing claims. He did not do so then, but after the dismissal became effective on 25 March. After another 2 months he made a second early conciliation reference to ACAS on 5 June; a second certificate was issued on 5 July; the second ET1 claim form was presented on 9 July 2018.

7 If this is not the same "matter" that was the subject of the first early conciliation the previous year, then the second claim is in time. But if it is the same "matter", argues the respondent, it would have to be brought by amendment, not by a fresh claim with a fresh conciliation certificate. Alternatively, they argue, a fresh claim could be brought but it would have to have been brought in time, i.e. within the primary 3-month jurisdictional time limit for unfair dismissal i.e. before 24 June 2018. After 24 June 2018, argues the respondent, the ET1 claim is out of time in circumstances where it

was reasonably practicable to present the claim in time for the purpose of section 111 of the Employment Rights Act 1996.

8 The law has developed in an unusual way on this. The case which most concerns me is one which I had not heard of before this hearing. It is *Commissioners of Revenue and Customs v Serra Garau* [2017] ICR 1121, EAT. It is a judgment of Kerr J.

9 The facts of these precedent cases are instructive because my decision here involves consideration of what subject matter is, or is not, the same "matter".

10 Mr Garau was given notice on 1 October 2015 and it was due to expire on 30 December 2015. On 12 October he made an early conciliation reference to ACAS and on 4 November, the conciliation officer issued a certificate.

11 The employment having come to an end on 30 December, the claimant made a second reference to ACAS just within time on 29 March 2016. The primary 3-month limitation would have expired the next day. A second EC certificate was issued on 25 April and one month later on 25 May, Mr Garau presented an ET1 claim to the Tribunal. If one were to ignore the first reference to ACAS and the first certificate, the claim would have been just in time. This, then, was a case with 2 early conciliation certificates but only 1 ET1 claim form.

12 The Employment Judge by whom it was heard considered that it was legitimate to ignore the first reference and certificate from ACAS. It was sufficient that the claim was in time relative to the second early conciliation process, which was in time relative to the effective date of termination. Personally, I have a good deal of sympathy with the approach of that Employment Judge. It seems in accordance with the general spirit of the legislation and other case law on section 18A which I shall touch on shortly (*Science Warehouse*).

13 However, the EAT overturned the decision of the Employment Judge and held that the claim was out of time. Citing the judgment:

> 20. "I agree with Mr Northall that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" in section 18A(1). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim, that has already been lifted.
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> 21. It follows in my judgment that a second certificate is not a "certificate" falling within section 18A(4). 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.
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> …
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> 25. Therefore, such a voluntary second certificate does not trigger the modified limitation regime in section 207B or its counterpart in the Equality Act section 140B. Such a second voluntary certificate is not required under the mandatory early conciliation provisions and does not generate the *quid pro quo* of a slightly relaxed limitation regime.
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> 26. That does not mean of course that continuing voluntary conciliation under the auspices of ACAS is other than useful and to be encouraged. Voluntary conciliation through ACAS has

> been available for decades since long before the mandatory element was introduced in 2014. Such voluntary conciliation does not of itself modify time limits though it may influence tribunals which have to decide whether to allow amendments grant extensions of time, or make other case management decisions."

14 I made no secret of it at this hearing that I was sceptical of this decision. It ran counter to a trend of generally liberal decisions of the EAT over early conciliation.

15 I considered the case of *Science Warehouse Ltd v Mills* [2016] ICR 252 EAT, a judgment of HHJ Eady QC. In that case, the claimant had resigned from her employment while she was on maternity leave and she referred the matter to ACAS who then issued a certificate and she presented an ET1 to the tribunal. The employers by their ET3 response stated that the claimant would have been subjected to possible disciplinary investigation had she not resigned. The claimant, indignant at this suggestion, applied to amend her claim to add a complaint of victimisation. There was a disputed amendment case management hearing. One of the employer's arguments was that such an amendment related to another "matter" and that the claimant would have to make a second reference to ACAS and get a second certificate.

16 The Employment Judge however allowed the amendment and rejected the employer's argument. The employer then appealed to the EAT. HHJ Eady held in her judgment:

> "The use of the broad terminology "proceedings relating to any matter" in section 18A(1) of the Employment Tribunals Act 1996 rather than "cause of action" or "claim" indicated that the early conciliation process did not require the prospective claimant to set out each proposed claim formally. That further, section 18A in using the term "prospective claimant" did not purport to address the case of an existing claimant, and, for those who were existing claimants seeking to add additional claims to the existing proceedings the employment tribunal, on an application to amend could simply exercise its general case management powers under rule 29 of the Employment Tribunal Rules of Procedure without requiring further notification to ACAS under section 18A…… given the limited requirement on the prospective claimant under section 18A and the voluntary nature of the early conciliation scheme, a tribunal was not necessarily required to refuse an application to amend to add a further claim where it could not have been the subject of the early conciliation process."

17 I note that the case of *Prakash v Wolverhampton City Council* UKEAT/140/06 was cited. That case involved the early termination of Mr Prakash's fixed term contract. He sought to amend much later to include his subsequent unfair dismissal after the internal appeal against the original earlier dismissal was allowed. This involved including, by amendment, an event which had not happened at the time that the original ET1 claim form was presented. HHJ Serota QC stated in the judgment:

> "There is nothing in the rules that expressly prevents such an amendment being allowed. It would obviously make sense in a case such as this to allow an amendment (if considered appropriate) rather than require the claimant to issue a second originating application. We do not see any basis for the technical rule that used to apply at one time under the Rules of the Supreme Court that one could not permit by amendment the raising of the cause of action that had accrued after the issue of the writ…
>
> We see no reason in principle why a cause of action that has accrued, so to speak, after the presentation of the original claim form should not be added by amendment if appropriate. The claim form can still serve as a vehicle for the amendment even if the original cause of action is

> bad. Support for this proposition can be found in the passage we cited from in *Chaudhary v Royal College of Surgeons* [2003] ICR 1512 EAT."

18 This case was widely invoked by claimants during the period when the dispute regulations applied a claimant had not submitted a grievance at the time of the original claim form. They could do so later and amend the original claim form without having to bring another claim, thereby preserving the original presentation date of the claim form and not being out of time.

19 *Prakash* was also widely invoked by claimants when the fees regime was in operation. If there was a subsequent act which the claimant sought to complain about, and if he could add it by amendment, he would not be charged a £250 issue fee by the tribunal. If he brought a fresh claim he would have to pay a second issue, even if the 2 claims were later consolidated, and only one £950 hearing fee was payable, there would still have to be 2 issue fees.

20 In practice, in this tribunal, the scope of *Prakash* has been considered quite narrow. It is not usually used to extend an original claim to include material that was unrelated to the original claim. It is routinely used to "top up" existing ongoing unlawful deductions claims (e.g. holiday pay) because the new claim is simply an extension of the original claim. One can understand, on the facts, how the *Prakash* claim might be viewed an extension of the original dismissal complaint, albeit in an unusual way. I can also understand that the amendment granted in *Science Warehouse Ltd v Mills* arose from the original subject matter of the complaint. In the case of *Garau* it was precisely the same complaint. It was simply a second early conciliation certificate which the claimant thought would give him more time to present his ET1 claim form.

21 I have also noted that HHJ Eady specifically contemplated in *Science Warehouse v Mills* that some matters may be completely unrelated to the subject matter of the claim. In paragraph 29 the Judge expressly stated (apropos of amendments)

> "The fact that it concerns a matter that is entirely new having arisen only after the ET1 was lodged, may well be a relevant factor against allowing an amendment. If such an application to amend were not permitted, it may be that the claimant becomes a "prospective" claimant in respect of that matter and there may then be an obligation to invoke the early conciliation procedure unless one of the section 18A(7) exceptions apply."

22 In the case of *Drake International Systems Ltd and others v Blue Arrow Ltd* [2016] ICR, 445, EAT, Langstaff P in his judgment stated:

> "The word "matter" in section 18A of the ETA 1996 is capable of broad application, and events, different times, dates, and different people all might be sufficiently linked to come within its scope."

23 After I expressed my scepticism about the case of *Garau*, counsel for the respondent did some more research. Counsel then informed me that there were other cases. We all then looked at the later case of *Romero v Nottingham City Council* UKEAT 0303/17, a decision of Simler P. The case was of particular interest because Mr Romero's case was presented by barrister Mr K McNerney who was the same barrister who had lost the argument before Kerr J in the *Garau* case. In the *Romero*

case he is arguing squarely that the *Garau* case was, initially, "per incuriam" (but it was not), and latterly, "wrongly decided". Simler P was in no doubt at all that it was not wrongly decided and stated at para 28:

> "28. I consider that reasoning in Garau is plainly correct. While section 18A ETA refers to a certificate and the possibility of more than one certificate therefore exists. The words of section 207B Employment Rights Act 1996 indicates that there is only one certificate envisaged as affecting time.
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> "29. The arguments advanced in this appeal by Mr McNerney are in reality simply a reformulation of the same or substantially similar arguments advanced by him unsuccessfully in *Garau.* These arguments do not begin to persuade me that the judgment in Garau is manifestly wrong."

24 *Garau* has also been cited without any hint of a misgiving by HH Judge Eady in the case of *Treska v Master and Fellows of University College Oxfor*d UKEAT/0298/16, paras 11 and 27.

25 I note also that that the statement by KerrJ in *Garau* that certificates could extend time "ad infinitum", is clearly wrong because day A has to come within the 3-month primary limitation period following the event complained of. (Simler P also noted this in *Romero*).

26 I was persuaded that *Garau* has to be taken to be an authoritative and binding statement of the law. I still have misgivings because in some cases *Garau* could become a snare for unwary claimants, if they consider that they have to bring a second claim with a second and separate ACAS early conciliation certificate.

27 The line between the case being the same "matter" and a different matter is not sharply defined. The liberal interpretation of the word is now turned on its head in this context, and seems to produce a result which is counter-intuitive and potentially hazardous. The lack of sharp definition worked as a benefit for claimants when it came to making amendments, but it could work as a severe detriment to claimants when bringing secondary claims.

28 I considered the paradigm case, which is common in practice, where a claimant brings a discrimination claim from within employment as an employee, and then subsequently resigns and claims constructive dismissal relying upon the same discrimination as was the subject of complaint in the original claim. That is more borderline than the present case.

29 It has generally been the practice of this tribunal to treat claims brought from within employment and the claim made by an ex-employee who has been dismissed or resign as 2 different claims. We have always urged what we thought was caution on claimants, not to think that they can bring a post termination dismissal complaint by way of amendment to a pre-termination ET1 claim form. The case of *Garau* suggests that this counsel of caution (we thought), may not have been sound.

30 In the present case, I consider that the dismissal initiated by the respondent because of alleged redundancy came from a completely different place than the claimant's original claim. I consider it would be stretching the broad language of

"proceedings relating to any matter" beyond the bounds it can reasonably be stretched.

31 I considered that Ms Palmer's submission partly underlined the artificiality of this analysis. She conceded the point that it is quite unlikely that any tribunal judge would have allowed an amendment to include a redundancy dismissal as a complaint within the original discrimination claim. But she argues nonetheless that the claimant should have simply issued a claim form without going through section 18A early conciliation. That sounds like a contrived and counter-intuitive course of action from a claimant's point of view. It is fraught with procedural risk. The consequences could not be predicted if time had expired.

32 In a later case of *Compass Group v Morgan* [2017] ICR 73 EAT, (Simler P), was an example of a conciliation period taking place and a certificate being issued while the claimant was employed. The claimant resigned and complained of constructive dismissal 2 months after the EC certificate. The employer predictably took the objection that that claim cannot have been about the same "matter" because she was still employed and had not resigned at the time the conciliation certificate was issued. The Employment Judge however found for the claimant. The proceedings related to a sequence of events that were in issue between the parties at the time of the early conciliation process, even if they had not culminated by then in the claimant's resignation. That I find the outcome unsurprising because there was found to be the necessary link between the subject matter of the claim and the later resignation.

33 The tribunal found for the claimant, the employer appealed, the appeal was dismissed by the Employment Appeal Tribunal. That I find unsurprising. It was enough in that case that the single and only claim mentioned something which happened after the certificate was issued. This case is different because it refers to an event which happened after the first ET1 claim was presented to the tribunal.

34 These are 2-claim proceedings with 2 separate early conciliation certificates. However, I have not found in any of these authorities anything which resembles the factual matrix in the case I must decide here.

35 The claimant makes 2 supplementary submissions, both of which I have some sympathy with. The first is the second claim itself should be treated as a late application to amend. As has frequently been stated in the authorities the question of amendment involves the exercise of a judicial discretion under the procedural rules, in which the jurisdictional time limits are only one factor, and not a conclusive factor to be taken into account, not as strictly jurisdictional time limits, but simply as factors affecting the discretion to grant amendments (*Selkent Bus Co v Moore* [1996] IRLR 661 EAT).

36 The judgments of the Employment Appeal Tribunal imply that we have a broad discretion to allow or disallow amendment. In a case where the *Garau* principle may act as a snare for unwary claimants then the balance of fairness prejudice may favour allowing a late amendment application.

37 As I have stated throughout, it is more marginal in a constructive dismissal case arising out of conduct which is already the subject of complaint. I really do not know what result *Garau* would produce. However, I consider in this case that a respondent-

initiated dismissal, apparently for business reasons unrelated to the conduct of which the claimant complained, seems to be not linked to the subject matter of the earlier claim, and therefore is a different "matter".

38 If a second claim is allowed to proceed at all on a new "matter" then the ET1 on the new "matter", may, in my view, also include other material which might include other material which is not the new "matter" but is "updating" the original claim. The important thing in this case is that the redundancy dismissal was a claim that was, in my view, unlinked to the original "matter".

39 Further, I cannot see why if *Garau* prohibits a second early conciliation then justice could only be done by allowing a late amendment. This is similar to the claimant's second submission that the draft of the second ET1 claim form should be treated, instead, as an application to amend, and not just be processed as an ET1.

40 So, for those reasons I hold the *Garau* principle does not apply to the present facts. There is not the necessary element of sequence or linking. The subject matter of the second claim is a second "matter" for which the claimant was a "prospective claimant".

41 But if I was wrong about that, I would exercise my discretion to allow a late amendment to include such a claim (contrary to my usual instincts in these matters) because of the case of *Garau* working an apparently unjust prejudice against the claimant, and securing a windfall for the respondent.

Employment Judge Prichard

11 February 2019