



# EMPLOYMENT TRIBUNALS

**Claimant:** Nicola Thomas

**Respondent:** L'Oreal (U.K.) Limited

**Heard at:** Bristol Employment Tribunal      **On:** Friday, 1<sup>st</sup> March 2019

**Before:** Employment Judge M. Salter

**Representation:**

Claimant: Mr. M. Jackson, counsel.

Respondent: Mr. G. Pollitt, counsel.

**JUDGMENT** having been given to the parties on 1<sup>st</sup> March 2019 and written reasons having been requested by the Respondent on that date in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## REASONS

### INTRODUCTION

1. These are my reasons given orally at the final hearing on Friday, 1<sup>st</sup> March 2019. In accordance with Rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Regulations") written reasons would not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision. If no such request is made, then the tribunal will only provide written reasons if requested to do so by the Employment Appeal Tribunal or a court.
2. These reasons have been prepared at the request of the Respondent.

3. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there.

#### BACKGROUND

##### The Claimant's case as formulated in her ET1

4. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 30<sup>th</sup> October 2018, is in short, she was unfairly dismissed.

##### The Respondent's Response

5. In its Form ET3, dated 11<sup>th</sup> December 2018, the Respondent accepted the Claimant was an employee and that he was dismissed, but denied that that dismissal was unfair, contending it was for a potentially fair reason.

##### Relevant Procedural History

6. After some correspondence between the parties and the tribunal the matter was set down for a Preliminary Hearing to determine whether the Claimant's claim had been presented within time and/or whether the tribunal would exercise its statutory discretion to extend time if it found the claim had been presented out of time, but that it was not reasonably practicable for the Claimant to have presented it in time and that she did thereafter present her claim within a reasonable period and, if so, to case manage the matter to Final Hearing.

#### DOCUMENTS AND EVIDENCE

7. It was agreed by the parties that at the stage of assessing the point of law raised by the ACAS Certificates I could make that determination on the basis of submissions alone. Only if I found that the claim was out of time would I need to hear evidence when considering the exercising of the statutory discretion to extend time on the basis if reasonable practicability of presenting the claim and whether the claim was presented within a reasonable time thereafter.

#### THE LAW

##### Statute

8. So far as is relevant the Employment Tribunals Act 1996 states, at s18A

*“Requirement to contact ACAS before instituting proceedings*

(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.

9. “Prospective claimant”, “prospective respondent” and “respondent” are respectively defined by Regulation 2 of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (“the EC Rules of Procedure”) as:

“ ...

“prospective claimant” means a person who is considering presenting a claim form to an Employment Tribunal in relation to relevant proceedings;

“prospective respondent” means the person who would be the respondent on the claim form which the prospective claimant is considering presenting to an Employment Tribunal;

...

“respondent” means the person against whom proceedings are brought in the Employment Tribunal; ...”

10. The Employment Rights Act 1996, states:

**111 Complaints to employment tribunal**

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months

(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

- (3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.
11. The modification to the primary limitation period is achieved by section 207B Employment Rights Act 1996 (“ERA”). So far as material, this provides:
- (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).
- But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.
- (2) In this section -
- (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
- (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
- (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
- (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
- (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.”

Authorities

12. So far as is relevant to the question of ACAS compliance, the Claimant referred me to the following authorities: Walsh v Globe Integrated Solutions Limited 1300798/2017;
13. The Respondent referred me to Mist v Derby Community Health Services NHS Trust UKEAT/0170/15/MC; Romero v Nottingham City Council UKEAT/0303/17/DM and Giny v SNA Transport Limited UKEAT/0317/16/RN.

14. Both parties referred me to Commissioners for HM Revenue and Customs v Serra Garau UKEAT/0348/16/LA/[2017] ICR 1121.
15. in Mist HHJ Eady QC considered that the requirement under the EC Rules to provide the name and address of the prospective respondent:

“54. ... is not for the precise or full legal title; it seems safe to assume (for example) that a trading name would be sufficient. The requirement is designed to ensure ACAS is provided with sufficient information to be able to make contact with the prospective respondent *if* the claimant agrees such an attempt to conciliate should be made (Early Conciliation Rules, rule 5(2)). I do not read it as setting any higher bar.” (Original emphasis)

#### RELEVANT FACTS

16. The facts are not in dispute: the Claimant was dismissed on notice. Her Effective Date of Termination was 19<sup>th</sup> June 2018; limitation (ignoring the effect of the ACAS Early Conciliation process) would therefore expire on the 18<sup>th</sup> September 2018.
17. The Claimant presented three separate applications for ACAS Early Conciliation. The first resulted in Certificate R251916/18/37 and is referred to here as EC1. It was agreed this was the certificate I had to focus on as its application and effect would determine whether the tribunal had jurisdiction to hear the complaint presented.
18. In EC1 the identity of the Prospective Respondent on EC1 is Lancome, and the address is Loreal, 255 Hammersmith Road, Hammersmith, London, W6 8AZ. Date A of this certificate is 16<sup>th</sup> May 2018 and Date B is 30<sup>th</sup> June 2018. Therefore, the period spent in conciliation straddles the Effective date of termination.
19. The Claimant presented applications for Early Conciliation and received two other certificates, the details of which are not relevant to this matter.
20. The Claimant presented her ET1 on the 20<sup>th</sup> October 2018. In the ET1 the Respondent is identified as Loreal UK Limited, 255 Hammersmith Road, Hammersmith, London W6 8AZ, the same address as on EC1. Throughout the ET1 is reference to “Lancome”.

SUBMISSIONS

21. I had written skeleton arguments from both parties who supplemented their arguments orally. Since the skeletons are in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions. In broad outline the Respondent argued EC1 was an effective certificate and that I was only to count the days of conciliation that fell within the limitation period for an unfair dismissal claim (namely those after the EDT) The Claimant's contentions were that the first Early Conciliation Certificate was not an effective certificate.

CONCLUSIONS ON THE ISSUES

General

22. I consider that I have two questions to answer, firstly whether EC1 was an effective certificate for the purposes of mandatory conciliation and, if it was, what period of time spent in conciliation is to be counted for limitation purposes. I will answer each in turn

Is this an effective Certificate

23. All three certificates apply to the same "matter": the Claimant's dismissal. These are "relevant proceedings" as defined by s18(1)(b).

24. In EC1 the potential Respondent is identified as "lancome" and the correct address given as Loreal and then the Hammersmith Raid address.

25. Here ACAS did not show any concerns over this information, they did not reject the application and, demonstrably were able to deal with someone at the Potential Respondent who was able and willing to conciliate, indeed the full period of six weeks was taken up with conciliation before the Certificate was granted.

26. I am not with Mr. Jackson's argument that s18 renders EC1 ineffective owing to the incorrect name on the form. It seems to me the information on the form applying for conciliation is there to assist ACAS make contact with the Prospective Respondent and be able to consider conciliation, a point addressed by the Appeal Tribunal in Mist. In the matter before me, this was achieved.

27. I therefore find against Mr. Jackson in his argument that s18 renders EC1 ineffective owing to the name in the form.

If so, what is its effect?

28. Having found that EC1 is effective, I then need to ask what is its impact.
29. It was agreed that there is nothing to prevent a conciliation application prior to EDT.
30. I accept that the purpose of what has been called various things, but I will use the terms the “stop the clock provision”, is to prevent a claimant being prejudiced by the time spent trying to resolve the matter via ACAS being lost to them before presenting their claim. This is important in a jurisdiction, such as the employment tribunal, with short timescales to present claims and where, as in the case of unfair dismissal, the tribunal’s discretion to extend time is particularly tightly confined by the relevant Act.
31. The statutory languages does not use words of “prejudice”, “quid pro quo” and the like, those are words ascribed to the effect of the conciliation process and s207 by those having to address its effects in the particular circumstances they have before them (see for instance Garrau)
32. In this matter conciliation was completed (even with 6-week extension) shortly (11-12 days) after the EDT.
33. s111 of the Employment Rights Act 1996 means limitation for Unfair dismissal claims commences with the EDT, albeit claims can be presented prior to that date (s111(3)).
34. The question for me is what part of that period in conciliation is to count for 207B purposes of effecting the s111 limitation period. Is it:
  - a. the entire 44 days (17 May to 30<sup>th</sup> June) between Date A and B of EC1; or
  - b. only that part of the conciliation period that falls within the primary limitation period of s111, i.e. after the EDT (in this case 11 or 12 days).
35. It appears to me that, as was accepted before me, once you have identified that a mandatory certificate can be presented prior to the EDT the language of the s207B(3) of the ERA is clear: the period starting with the day after Date A and ending in Date B is to be discounted when considering the limitation period, here under s111. Section 207B(3) does not say something to the effect of “that part of

the period which falls within the limitation period of s111 (if any) is not to be counted”, which it could easily have done if that was the effect Parliament had desired.

36. Applying the words of the statute to the matter before me it appears to me, therefore, that the claim was presented is in time, when the entire period between Date A and B of EC1 is added to the limitation period, and as such the Claimant’s Form ET1 was presented within the relevant time period in s111 as affected by s207B.
37. I do not, therefore, need to consider the exercise of my discretion under s111.

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Employment Judge Salter

Date 13<sup>th</sup> March 2019