What happens to the ACAS EC period that occurs before limitation starts? The EAT considers 9 different ET cases and settles the debate.

By Joseph England

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Joseph England is the author of NHS Whistleblowing and the Law and successfully represented the Respondent in this appeal, arising out of a claim of unfair dismissal allegedly due to making a protected disclosure.

***Raison v DF Capital Bank Limited & Others* [EA 2024 000292]**

1. In the majority of cases, ACAS Early Conciliation (EC) is conducted after limitation starts (e.g. post dismissal or post a discriminatory event) and practitioners will be comfortable[1] with the common calculation of time limits by essentially 'adding on' the period spent in EC to the end of the limitation period.

2. However, when ACAS EC is conducted prior to limitation starting, there has been a long running debate between different Judges, practitioner's textbooks and practitioners about how the time limit is calculated. The EAT has now settled that debate – holding that time spent in ACAS EC prior to limitation starting is not added on to the end of the limitation period.

3. The appeal arose in the context of the Claimant having issued a claim for unfair dismissal due to having allegedly raised a protected disclosure. However, the EAT's decision is about the ACAS EC regime more generally and therefore is of universal importance as to how time limits are calculated across all claims.

[1] Relatively!

Summary of Facts

References in square brackets are to the EAT judgment's paragraphs

4. The key dates were agreed as [2]:

    a. ACAS EC: 11 February 2023 - 28 February 2023

    b. Termination of employment: 17 February 2023.

    c. Claim issued: 30 May 2023

5. The claims issued were "of automatically unfair dismissal on the ground of having made a protected disclosure, under section 103A ERA; and whistleblowing detriment short of dismissal and whistleblowing detriment amounting to dismissal, pursuant to section 47B ERA**".**

6. At a PH, the Tribunal had struck out the automatic unfair dismissal claim for being out of time.

7. As the EAT summarised, the issue before the ET and on appeal was that, "if the Claimant can rely upon the entire EC period, her claim was presented in time; whereas, if she is only able to rely upon the days after the EDT, as the EJ held, then it was presented three days outside of the prescribed time limit, which expired on 27 May 2023".

8. Representing the Respondent, I was successful in demonstrating that the Tribunal was correct, the days in ACAS EC prior to limitation starting (by termination of employment) are not 'added on' to the end of the limitation period and therefore the appeal was dismissed.

9. As the EAT stated, "For present purposes, the key provision is subsection (3)" [25]. The appeal was about the extension at subsection (3) of the extension provisions (e.g. s.207B(3) ERA 1996 here). Subsection (4) is a different matter but the same principles would apply in working out whether subsection (3) or (4) applies, i.e. calculating how long is left after the expiry of the limitation period.

Analysis

10. The issue of whether to add on days spent in ACAS EC before limitation starts has produced different views for many years. The EAT record the 5 different ET cases relied upon by the Claimant [35] as well as an extract from *Harvey on Industrial Relations and Employment Law*, the 3 different ET cases relied upon by the Respondent [37] as well as an extract from *IDS Employment Law Handbook* [7].

11. The EAT had already considered the issue of time spent in ACAS EC prior to limitation starting in *Revenue and Customs Commissioners v Serra Garau* [2017] ICR 1121.

    a. However, a factual difference was that in *Serra Garau* all of the ACAS EC period occurred prior to limitation starting, whereas in the *Raison* appeal only part of it did.

    b. An issue between the parties was therefore to what extent was *Garau* binding on the EAT in the *Raison* scenario [29].

    c. The EAT's conclusion was in support of the Respondent's argument [71-72]:

> "There is, quite simply, no logical basis, nor anything in the statutory wording that would support drawing a distinction between the two.
>
> Accordingly, the factual difference between the whole EC period occurring before the EDT in **Serra Garau** and the circumstances of the present case is not a material distinction. The reasoning is equally applicable. As Mr England submitted, this conclusion is reinforced by the way that the Respondent argued the limitation point before Kerr J"

    d. Moreover, the EAT also emphasised that the appeal's conclusion applied regardless of precedent because *Serra Garau* was "highly persuasive" even if not technically binding [71; 73].

12. The EAT also considered many more arguments that had arisen in the first instance cases and elsewhere on this issue. Key points include:

    a. The cliff edge effect that Claimants would experience if the calculation was as the Appellant argued. "This is well illustrated by Mr England's well-chosen example" [75; 58], the EAT noted, citing the example in which a Claimant ends their ACAS EC period 2 days early and loses the whole of their ACAS EC 'extension', rather than on the

Respondent's argument in which there is greater consistency between the calculations.

b. The Respondent's argument reflected the purpose of the ACAS EC, applying *Tanveer v East London Bus & Coach Company Ltd* UKEAT/0022/16/RN. As summarised, "Claimants suffer no disadvantage in limitation terms by engaging in conciliation during this pre-EDT time and thus there is no disadvantage to be removed". [69]

c. A HMCTS leaflet explaining how time limits were calculated in light of the ACAS EC regime that had been relied upon by some of the ET decisions was not "a permissible aid to statutory construction; it is not within the established external aids to statutory construction and it is hard to see how a view expressed in such a publication could be a guide to Parliament's objectively ascertained intention" [77].

13. The EAT also dealt with a distinct separate ground of appeal about whether the ET had erred in its assessment about whether it was reasonably practicable to have issued the claim in time [83]:

a. The ET held that it was reasonably practicable to have issued the claim in time because although there was some doubt about the calculation of the time limit, "The only reasonable stance to adopt – as submitted by Mr England – is that the claim would have to be filed by 27 May at the latest to dispel any risk" [13]

b. Emphasising, "it is well-established that a decision that it was reasonably practicable to present an unfair dismissal claim within the primary time limit, is a determination of fact" and therefore one aimed at the first instance ET, the EAT found there had been no error.

c. The Claimant relied upon an argument about what the ET had found but the EAT's view rejected this on the simple basis, "that is plainly not what the EJ said. Indeed, she began her para 21 by saying the very opposite" [84]. Other points were similarly rejected with force on the basis that despite the Claimant's assertion that too high a standard had been set, "quite simply this is not what the EJ said" [85] and in summary, "This was an entirely legitimate conclusion to draw and the proposition that it was perverse is devoid of any merit" [84].

Conclusion

14. This helpful case should hopefully assist practitioners and Tribunals in their calculation of time limits when ACAS EC precedes limitation starting. The EAT has provided a definitive and clear answer that can be applied universally.

15. Based on the EAT's decision, multiple ET cases have been decided wrongly over the years and at least one leading practitioner's textbook needs amending. Hopefully this case is the last of the appellate cases needing to examine the calculation of time limits in the context of the ACAS EC regime...but history tells us this area remains ripe for nuance and debate.

16. In representing the Respondent I was instructed by Herrington Carmichael LLP.

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