Neutral Citation Number: [2025] EAT 86

Case No: EA-2024-000292-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 June 2025

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

- -

Between :

MS C RAISON **Appellant**

- and –

DF CAPITAL BANK LTD and OTHERS **Respondent**

- -
- -

MR LEE BRONZE (instructed by **Pearson Legal LLP**) for the **Appellant**
MR JOSEPH ENGLAND (instructed by **Herrington Carmichael LLP**) for the **Respondent**

Hearing date: 20 May 2025

- -

JUDGMENT

SUMMARY

JURISDICTIONAL / TIME POINTS

The Claimant appealed the Employment Tribunal's (ET") decision that her complaint of unfair dismissal was presented outside of the time limit prescribed by section 111 of the **Employment Rights Act 1996** ("**ERA**").

The Claimant's employment terminated on 17 February 2023. She had already commenced the Early Conciliation ("EC") process on 11 February 2023, which concluded on 28 February 2023 with the issue of the EC certificate. The main question raised by the appeal was whether the effect of section 207B(3) **ERA** is to extend the three months limitation period by the number of days of the entire EC period or only by the number of days in the EC period that occurred after the effective date of termination ("EDT") of the Claimant's employment, as the ET held. If the Claimant could extend the limitation period by the entire EC period, her claim was presented in time; whereas, if she could only rely upon the days after the EDT, then it was presented three days outside of the prescribed time limit. Dismissing the appeal, the Employment Appeal Tribunal ("EAT") held that the effect of section 207B(3) was to stop the limitation clock during a period of EC that would otherwise count towards the three month limitation period; it did not entitle a claimant to extend limitation by a period of EC occurring before the EDT and thus before limitation started running. This was clear from the statutory wording and context, from the statutory purpose of the provision and it followed from the EAT's earlier decision in **Revenue and Customs Commissioners v Serra Garau** [2017] ICR 1121.

The EAT also rejected the challenge to the ET's finding that it was reasonably practicable for the Claimant to have presented her claim within the primary time limit.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE:

Introduction

1. I will refer to the parties as they were known below. The Claimant appeals from the decision of Employment Judge ("EJ") Dunlop sitting in the Manchester Employment Tribunal ("ET"), that the tribunal had no jurisdiction to hear her complaint of unfair dismissal on the grounds of having made a protected disclosure, as it was presented outside of the time limit prescribed by section 111 of the **Employment Rights 1996** ("**ERA**"). Judgment was promulgated on 28 December 2023 and Reasons were provided on 30 January 2024 (the "ET's Reasons").

2. The Claimant was employed as the first Respondent's Chief Commercial Officer from 26 September 2022. Her employment was terminated with effect from 17 February 2023. Prior to that, on 13 February 2023, she commenced the Early Conciliation ("EC") process. This concluded on 28 February 2023 with the issue of the EC certificate. On 30 May 2023, the Claimant brought claims 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**. I am only concerned with the unfair dismissal claim, brought against the First Respondent as the former employer. I will refer to the First Respondent as the Respondent in this judgment.

3. The parties agreed that the primary limitation period was extended by section 207B **ERA**, but disagreed as to how far it was extended. The main question raised by this appeal, as it was below, is whether the effect of section 207B(3) **ERA** is to extend the applicable limitation period by the number of days in the entire EC period or only by the number of days in the EC period that occurred after the effective date of termination ("EDT") of the Claimant's employment. 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. The EJ also rejected an alternative contention that it was not reasonably practicable for her to present the claim within the prescribed period and it was presented

within a reasonable time thereafter.

4. The issue that I have described as "the main question" in this appeal is one that ETs have considered on a number of occasions, with a divergence of views expressed. There is no appellate authority involving the same circumstances as this case (the EDT falling between Day A and Day B), although the Respondent submits that Kerr J's decision in **Revenue and Customs Commissioners v Serra Garau** [2017] ICR 1121 ("**Serra Garau**") requires me to uphold the EJ's conclusion.

5. I set out the grounds of appeal from para 14 below. In summary, Grounds 1 – 3 all relate to the main question and the contention that the ET erred in law in concluding that it was only the number of days in the EC period after the EDT that should be taken into account for the purposes of section 207B(3). Ground 4 challenges the ET's further conclusion that it was reasonably practicable for the Claimant to present the claim within the primary limitation period.

6. By order sealed on 28 May 2024, HHJ James Tayler permitted the appeal to be set down for a full hearing.

The ET's Reasons

7. The EJ briefly summarised the rival submissions. She noted Mr England's contention that the ratio of **Serra Garau** applied to circumstances such as the present. She cited a passage from para 3.96 of the *IDS Employment Law Handbook, Volume 9, Practice and Procedure* (which is at para 40 below), in which the authors observed, "Any part of the EC period which occurs prior to the relevant limitation period commencing will not count towards an extension of time under S.207B(3) and the equivalent provisions".

8. The EJ observed that there were inconsistent tribunal decisions on this point, as highlighted in the extract from the *IDS Employment Law Handbook* that she had cited. She continued:

> "Mr Bronze submitted several of them for my consideration today, in support of his submissions that a purposive approach should be taken, allowing the Claimant the benefit of the full Early Conciliation period in extending the primary limitation period. This approach emphasises the wording of s.207B, which refers to the whole of the period between Day A and Day B, without suggesting it can be reduced".

9. The EJ observed that four of these five judgments cited by Mr Bronze pre-dated **Serra Garau**

and "for that reason, I am of the view that it is unhelpful to place reliance on them". She noted that in the single judgment post-dating **Serra Garau**, EJ A James at London Central had found in **Macken v Skanska UK plc** ET Case No. 2201866/2020 ("**Macken**") that **Serra Garau** did not assist because of the different factual matrix and he had preferred the approach taken in the earlier first instance decisions relied upon by Mr Bronze.

10. The EJ indicated that she had reached a different conclusion. The crux of her reasoning was as follows:

> "15. …I consider that **Serra Garau** establishes the principle that a clock which has not started to run cannot be paused. That principle is effective regardless of whether the start date of the limitation period falls after the closure of EC, as in **Serra Garau** itself, or, within the EC period, as in this case. The factual difference does not, in my Judgment, provide a proper basis to distinguish the appellate authority.
>
> 16. In this I appreciate I have reached a different conclusion to EJ A James in **Macken**. That is a concern as it is a decision which post-dates **Serra Garau** and in which the key facts are analogous to the ones in this case. However, I am fortified in that view by the unambiguous view expressed by the editors on IDS Employment Law Handbooks in the paragraph set out above and the ones subsequent to it. I find that rational in that passage to be much more cogent than the passage dealing with this point in *Harvey* which was cited in the **Macken** Judgment. That passage does not acknowledge **Serra Garau** and the impact that it must, in my view, have on the first instance decisions cited.
>
> 17. For these reasons, I conclude that limitation expired on 27 May 2023 and that the claim was late by three days."

11. Having concluded that the claim was presented three days late, the EJ went on to consider whether it was reasonably practicable for the Claimant to have presented it in time. The EJ noted that the only explanation advanced for it not being reasonably practicable to do so was that the Claimant had obtained professional advice and acted in accordance with it. The following agreed facts were before her: (i) Ms Raison took legal advice before issuing her claim; (ii) this included advice as to limitation; and (iii) that advice was from a qualified solicitor instructed by her. In light of these agreed facts, the Claimant did not give evidence.

12. The EJ set out her understanding of the applicable legal principles as follows:

> "18. …In normal circumstances, where a claim is presented late due to the mistake of an advisor, the Claimant will be bound by that mistake and unable to rely on it in support of an argument around reasonable practicability (**Dedman v British Building and Engineering Appliance Ltd 1974 ICR 53**). The **Dedman** principle operates strictly where professional advisors have been engaged, and will often give rise to results which appear harsh to Claimants.
>
> 19. There may be a way out for the Claimant where the failure to give correct advice was itself reasonable, see e.g. **Northamptonshire County Council v Entwhistle 2010 IRLR 740**,

> although the example given in that case is where an employer has misled the Claimant and her advisor as to the date of dismissal, not a case of reasonable mistake as to the law."

13. The heart of the EJ's reasoning on this issue appeared in the next paragraphs:

> "20. I have considerable sympathy with Ms Raison's advisors in this case. Although **Serra Garau** in now a well-known authority, the principle it is primarily known for is that a second EC certificate will be ineffective to extend time. This is not a 'second certificate' case and the effect, as I have found it to be, on a case such as this is less well-known. That much is evident from the commentary in Harvey and, indeed, from the first-instance decision in **Macken**.
>
> 21. I would be prepared to find it was reasonable for Ms Raison's advisors not to conclude with certainty that limitation expired on 27 May, as I have found to be the case. However, if they had looked into the position , they would have found, at the very least, the doubt created by the conflicting first instance decisions cited by Mr Bronze. In view of that uncertainty, they could not have reasonably concluded that it was definitely safe to wait until 30 May. 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. In those circumstances I conclude that the **Dedman** principle does apply in this case and the Claimant is bound by the advice she received.
>
> 22. It follows that I find it was reasonably practicable to present the claim in time, and the Tribunal therefore had no jurisdiction to hear the unfair dismissal complaint."

The grounds of appeal

14. As HHJ James Tayler noted when sifting this case to a full hearing, the grounds of appeal are "rather longer than necessary and overlap to a considerable degree". Essentially, Grounds 1, 2 and 3 are different expressions of the same central point, namely that the ET erred in law in concluding that where EC is commenced before the EDT, section 207B **ERA** does not have the effect of extending the limitation period by the number of days contained in the full EC period, but only by the number of days in that period that occurred after the EDT. When I put the point to him, Mr Bronze accepted that Grounds 2 and 3 did not identify free-standing grounds for allowing the appeal if I was against him on this central issue. However, he said that I should consider the cumulative impact of Grounds 1 – 3 in answering this central question.

15. Ground 1 contends that the ET misdirected itself by considering it was bound by the decision in **Serra Garau**. The case related to whether an extension of time for presenting the claim can be granted via a second EC certificate, which was "quite removed from the situation here", so that in considering herself bound by this decision, the EJ "misinterpreted the principle it was purported to have laid down". Ground 1 also alleges that the ET "opted not to take note of previous Tribunal decisions it was referred to, which predated" **Serra Garau**.

16. Ground 2 contends that the EJ erred in not acknowledging the persuasive weight of the decision in **Macken**, even though she accepted that the key facts before her were "analogous" to those in **Macken**. The EJ prioritised the view expressed in the *IDS Employment Law Handbook* "whilst in the process disregarding those of the learned authors of *Harvey*". Further, the EJ failed to set out adequately why she disagreed with **Macken**; and, in the alternative, erred "in appearing to infer that the *Macken* Tribunal and/or the learned authors of *Harvey* were unaware of the decision" in **Serra Garau**.

17. Ground 3 alleges that the ET did not deal with a key point in the Claimant's submissions, "namely that a purposive approach should be applied to the Early Conciliation Framework". It was recognised in **Tanveer v East London Bus & Coach Company Ltd** UKEAT/0022/16/RN ("**Tanveer**") that the purpose of the EC provisions was to allow the parties time to resolve their disputes via settlement; and the EJ's failure to explain why she rejected that approach was perverse, a misdirection or not **Meek** compliant.

18. Ground 4 alleges that the ET "strayed into error" in holding that the Claimant was bound by the mistake of her representatives and therefore unable to rely upon the "not reasonably practicable" basis for obtaining an extension of time. The Claimant contends that the EJ erred in failing to afford her the extension envisaged in **Northamptonshire County Council v Entwhistle** [2010] IRLR 740 ("**Entwhistle**"), in circumstances where she had acknowledged that **Serra Garau** was not known in relation to the present situation. Further, the EJ had wrongly held that the Claimant's advisers "should have had knowledge of all of the first instance decisions on the point and also to, in effect, ignore the guidance in Harvey", so that she demanded a "best practice" standard of the Claimant's legal advisers, rather than applying the correct threshold of what they "ought reasonably to have known". It had not been established, as in **North East London NHS Foundation Trust v Zhou** UKEAT/0066/18 ("**Zhou**"), that the Claimant's advisers "had not taken all reasonable steps" and thus "it was impermissible" to deny the Claimant the benefit of the reasonably practicable extension.

The legal framework

The time limit for presenting a claim for unfair dismissal

19. The unmodified time limit for presenting claims of unfair dismissal to the ET is contained in section 111(2) **ERA**:

> "**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."

20. From 6 April 2014, section 18A of the **Employment Tribunals Act 1996** ("**ETA**") requires ET claimants to contact ACAS prior to commencing proceedings (save in certain exceptional circumstances that I am not concerned with). As material, section 18A provides:

> "**18A 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…
>
> (2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.
>
> (3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.
>
> (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, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.
> ……
>
> (8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)."

21. "Prescribed" for these purposes means prescribed in regulations made by the Secretary of State: section 18A(10). "Relevant proceedings" is defined in section 18 **ETA**. It covers the majority of claims that can be pursued before an ET.

22. Provision to enforce the EC requirement is made in the **Employment Tribunal Rules** at

Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. Rules 10 – 12 require the ET to reject a claim in certain circumstances, including where an EC certificate number is not provided. Swift J recently decided in **Abel Estate Agent Ltd & Ors v Reynolds** [2025] EAT 6 ("**Reynolds**") that whilst the intention of these rules is that a claim which is presented without an EC certificate is rejected promptly so that the claimant can engage with ACAS before the claim is commenced, section 18A **ETA** does not provide an absolute bar to the ET having jurisdiction in such circumstances. In so holding, Swift J reached the opposite conclusion to HHJ Shanks, who found in **Pryce v Baxterstorey Ltd** [2022] EAT 61 that the effect of non-compliance with section 18A(8) **ETA** was that the tribunal had no jurisdiction to consider the claim. I understand that the Court of Appeal is due to hear an appeal in **Reynolds** shortly. I mention these authorities for completeness; the question of whether the section 18A(8) requirement creates a jurisdictional bar does not affect the conclusions I reach on the issues before me in the present proceedings.

23. Also from 6 April 2014, the section 111(2) **ERA** time limit for presenting a claim of unfair dismissal was modified to take account of the section 18A **ETA** requirement to obtain an ACAS certificate before commencing proceedings. Section 111(2A) **ERA**, inserted by the **Enterprise and Regulatory Reform Act 2013**, provides that section 207B applies for the purposes of the time limit in subsection 111(2)(a).

24. Section 207B, inserted by the same Act provides:

> "**207B Extension of time limits to facilitate conciliation before institution of proceedings**
>
> (1) This section applies where this Act provides for it apply for the purposes of a provision of this Act (a "relevant provision").
>
> (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."

25. Applying the terminology of section 207B in the present case, the parties are agreed that Day A was 13 February 2023 and Day B was 28 February 2023. Section 207B(4) extends the section 111(2)(a) time limit by a month where it would otherwise expire within a month of Day B. Subsection (4) has no application in the present situation, where the EDT was 17 February 2023. For present purposes, the key provision is subsection (3).

26. As HHJ Eady QC (as she then was) explained in **Tanveer**:

> "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."

27. The specific issue in **Tanveer** was different to the question that arises in the present case. **Tanveer** was concerned with the effect of section 207B(4). The Claimant's EDT was 20 March 2015. The EC period was after the EDT. Day A was 18 June 2015 and Day B, 30 June 2015. The claim was lodged with the ET on 31 July 2015. The Employment Appeal Tribunal ("EAT") held that the ET was correct to find that the claim had been presented out of time; for the purposes of section 207B(4), "month" referred to a calendar month and the corresponding date rule applied.

28. The word "matter" in section 18A(1) **ETA** has been broadly interpreted. In **Compass Group UK & Ireland Ltd v Morgan** [2017] ICR 73 (at para 21), Simler J (President) (as she then was), held that it did not matter that the EC certificate had preceded some of the events relied on in the claim. The word "matter" could embrace a range of events, including events that had not yet happened when the EC process was completed.

The section 207B(3) ERA authorities

29. In light of the disputed significance of **Serra Garau**, it is necessary to address this case in some detail. On 1 October 2015, the Claimant was given notice of dismissal. Before the expiry of his

notice period on 30 December 2015, he obtained an EC certificate from ACAS on 4 November 2015. On 28 March 2016, the day before the expiry of the three month limitation period for bringing a tribunal claim, the Claimant contacted ACAS a second time and on 25 April 2016 he was issued with a second EC certificate. One month later, the Claimant presented claims of unfair dismissal and disability discrimination, relying on the second EC certificate as extending the time for bringing the claims pursuant to section 207B **ERA**. The ET decided that the claim was in time as the second certificate had stopped the clock during the EC period, so that the Claimant could take advantage of section 207B(4). Kerr J allowed the appeal, concluding that the primary time limit had expired on 29 March 2016, meaning that the claim was presented out of time. He characterised the issue before the EAT in the following terms (at para 15):

> "whether more than one certificate can be issued by Acas under the statutory procedures and what effect, if any, a second certificate has on the running of time for limitation purposes."

30. Kerr J concluded that the second certificate did not trigger the modified limitation regime in section 207B **ERA** (or its counterpart in section 140B of the **Equality Act 2010**).

31. In summary, Kerr J's reasoning was as follows. The effect of section 18A(8) **ETA** was to prohibit the bringing of a claim without first obtaining an EC certificate; however, once the certificate had been obtained, the prohibition was lifted (para 18). The quid pro quo for this prohibition was the modification of the limitation regime "so that the certification process does not prejudice the Claimant. That is how section 207B…and its counterpart section 140B of the Equality Act 2010 operate" (para 19). A second certificate was therefore unnecessary and did not impact upon this prohibition, which had already been lifted (para 20). Accordingly, the second certificate was not a "certificate" within the meaning of section 18A(4) **ETA** (para 21); and, in turn, the definition of "Day A" in section 207B(2)(a) **ERA** refers to a mandatory notification under section 18A(1), not to a purely voluntary second notification (para 24). Similarly, the definition of "Day B" in section 207B(2)(b) refers to a mandatory certificate obtained under section 18A(4), not to a voluntary certificate that fell outside of that provision (para 24).

32. During the course of this analysis, Kerr J made the following observations regarding the

impact of section 207B:

> "23. That section modifies the limitation regime by defining "Day A" and "Day B" and discounting for limitation purposes periods falling between them…There is no provision requiring Day A or Day B to fall within a primary limitation period however; either or both may or may not do so.
> …..
> 27. …Under procedural rules, defendants and Respondents are entitled to benefit from the expiry of limitation periods. The entitlement to that benefit is only diluted to a limited extent in return for the obligation on a Claimant, in this particular jurisdiction, to comply with the mandatory early conciliation provisions."

I will return to para 23, as both Mr Bronze and Mr England suggested it supported their submissions.

33. The EJ in **Serra Garau** had observed that **Tanveer** was authority for the proposition that "the amount of time spent on early conciliation will not count in calculating the date of expiry of the time limit". At paras 28 – 30, Kerr J explained that this was a misunderstanding of **Tanveer**:

> "28. …In that case, limitation had already started to run when the Claimant contacted Acas in accordance with the early conciliation requirement. Judge Eady QC correctly identified the statutory purpose [in the first sentence of para 7 of her judgment: see para 26 above].
>
> 29. In the following sentence, she said: "the amount of time spent on early conciliation would not count in calculating the date of expiry of the time limit; the clock simply stopped during the early conciliation period". But she was referring there to the clock stopping during the early conciliation period pursuant to a certificate falling within the regime, and one which operated during a period in which time would otherwise be running for limitation purposes.
>
> 30. The present case is different from the *Tanveer* case on two counts. First the limitation clock could not stop under the first certificate, because it had never started. Secondly, the second certificate was not a certificate falling within the statutory scheme at all; it was a purely voluntary exercise with no impact on the running of time."

Mr England relies upon this passage, which I will return to when setting out my conclusions.

34. As I have indicated, Mr England submits that I am bound by **Serra Garau**. He points out that it is well established that a judge of the EAT should only depart from the ratio of a previous decision of the EAT if one of the exceptions identified by Singh J (as he then was) in **British Gas Trading Ltd v Lock** [2016] 2 CMLR 40 at para 75 applies. Those exceptions are:

> "(1) where the earlier decision was *per incuriam*, in other words where a relevant legislative provision or binding decision of the courts was not considered;
>
> (2) where there are two or more inconsistent decisions of this Appeal Tribunal;
>
> (3) where there are inconsistent decisions of this Appeal Tribunal and another court or tribunal on the same point, at least where they are of co-ordinate jurisdiction, for example the High Court;
>
> (4) where the earlier decision is manifestly wrong;
>
> (5) where there are other exceptional circumstances."

35. Mr Bronze cited five cases where although Day A preceded the EDT, the ET held that the section 111(2) ERA time limit was extended by the whole of EC period: **Chandler v Thanet District Council** ET Case No. 2301782/2014 ("**Chandler**"); **Myers & Wathey v Nottingham City Council** ("**Myers**") ET Case Nos. 2601136/2015 & 2601137/2015; **Walsh v Globe Integrated Solutions Limited** ET Case No. 1300798/2017 ("**Walsh**"); **Macken**; and **Samuel v Salford NHS Foundation Trust** ET Case No. 2413361/2020 ("**Samuel**"). The first four of these cases were factually analogous to the present case, in that Day A occurred before the EDT and Day B after that date. In the fifth case, **Samuel**, both Day A and Day B – that is so say the entire EC period – took place before the employment was terminated. The last three of these cases post-dated **Serra Garau**.

36. I have read each of these decisions in full. In summary, the ET's reasons for concluding that the limitation period was extended by the entirety of the EC period were as follows:

i) The literal wording of section 207B clear; it states that the time limit is extended by the EC period: **Myers** at para 21. The statutory wording is plain it "expressly refers to (the whole) period between the day after Day A and Day B…the statute permits no basis to depart from the whole period": **Walsh** at paras 26 & 32. This is the ordinary and natural meaning of the statutory language: **Macken** at para 46 and **Samuel** at paras 18.2 & 18.7;

ii) There is no reference in section 207B(3) to "stop the clock" or similar phrases and no reference to it being a requirement that Day A falls after limitation starts to run. The statutory words do not require an assumption that the clock is running for the provision to make sense: **Walsh** at paras 25, 31 and 32. For the alternative construction to apply, words would need to be added to section 207B(3), such as "from the start of that relevant provision (or limitation period)" between "a relevant provision expires" and "the period beginning with": **Walsh** at para 35;

iii) This approach results in greater clarity and less uncertainty: **Chandler** at para 15.1. The alternative approach makes it more difficult to work out when a claim is in time and in cases where, for example, the claim includes pre-dismissal acts and pre-dismissal omissions

too, there would be multiple start dates for limitation running and different extents to which the EC period would extend the running of limitation: **Walsh** at paras 45 - 47;

iv) It accords with the presumed intention of Parliament, in light of the then wording of the HM Courts and Tribunal Service booklet *T420 Making a Claim to an Employment Tribunal*, which said "This means the time limit for all claims to which Early Conciliation applies will be three months plus the time during which Acas conciliates": **Chandler** at para 15.2; **Myers** at paras 15 – 16; and **Walsh** at para 28 – 29;

v) The rival approach would lead to arbitrary results, equivalent to the concerns expressed by Underhill J (as he then was) at paras 10 and 11 in **Prison Service v Barua** [2007] ICR 671 ("**Barua**") in respect of the then in force **Dispute Resolution Regulations 2004**: **Myers** at para 18 – 21; and **Walsh** at paras 41 – 42;

vi) The rival approach would deter employees from seeking ACAS conciliation sooner rather than later: **Myers** at para 21; and **Walsh** at paras 49 – 50;

vii) **Serra Garau** was concerned with a different issue, namely whether a second certificate could be relied upon for time limit purposes, Kerr J's observations about stopping the clock were obiter dicta and in any event concerned a different factual situation: **Walsh** at para 34; **Macken** at para 46 and **Samuel** at paras 16 & 18.1 (the EJ in the later case going so far as to say "I do no read the decision in **Serra Garau** above guiding me in any direction on this point");

viii) Any ambiguity in the statutory wording should be construed in favour of the Claimant: **Walsh** at para 55; and

ix) The view of the authors of *Harvey on Industrial Relations and Employment Law* (at para 39 below) was persuasive on this point: **Samuel** at paras 17 – 18.

37. Mr England referred me to three cases where the ET held that the effect of section 207B(3) **ERA** was that the section 111(2) time limit was only extended by the part of the EC period that occurred during the running of the relevant limitation period: **Ullah v London Borough of Hounslow**

ET Case No. 2302599/2015 ("**Ullah**"); **Ferguson v Combat Stress** ET Case No. 4105592/2016 ("**Ferguson**"); and **Wadsworth v Wipac Technology Ltd** ET Case No. 3303426/2021 ("**Wadsworth**"). The first two of these cases were factually analogous to the present case, in that Day A occurred before the EDT and Day B after that date. In the third case, **Wadsworth**, both Day A and Day B – that is so say the entire EC period – took place before the employment was terminated. The last of these three decisions post-dated **Serra Garau**.

38. Again, I have read these cases in full. In summary, the ET's reasons for concluding that the section 111(2) limitation period was not extended by the days of EC conciliation that came before the EDT were as follows:

i) The wording of section 207B(3) 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". This means that those specific days that fall within that period are not counted; it does not mean that an equivalent number of days are added to the primary time limit. "A clock cannot be 'stopped' if it has not yet started": **Ferguson** at para 14;

ii) This construction does not involve adding words to the statutory language of section 207B(3), whereas the alternative construction would require it 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 to a specified period not counted: **Ullah** at paras 16 – 17. The wording "not to be counted" is not the same as saying the Claimant can transfer the entire EC period on to the end of the limitation period: **Wadsworth** at para 23;

iii) **Serra Garau** supports the proposition that the effect of section 207B(3) is to stop the clock during the limitation period: **Wadsworth** at para 23;

iv) The purposes of section 207B is to ensure that claimants are not disadvantaged by engaging in EC. In the normal course, claimants who are making claims for unfair dismissal will engage in EC after the EDT. Absent section 207B(3), this would result in Claimants being

unable to present their claims during that time, but still having time running against them. The purposes of section 207B is not to extend the time limit every time a Claimant engages in EC, rather it is to prevent them from being disadvantaged by the three month period being reduced whilst they are engaging in EC: **Ferguson** at paras 16 – 17. The claimant is not disadvantaged by this interpretation, which is consistent with the observations in **Tanveer** and in **Serra Garau**: **Wadsworth** at paras 18 & 24;

v) The purpose of these provisions is not to afford a bonus to the claimant in terms of an extension to the limitation period: **Ullah** at paras 18 & 19;

vi) Days before the EDT would not in any event be "counted" towards the three month time limit: **Ferguson** at para 17;

vii) The EDT is usually clear and the EC certificate sets out the relevant EC dates. Accordingly, it should be straightforward to work out the effect of section 207B(3): **Ferguson** at para 21;

viii) Contrary to the reasoning in **Myers** and in **Walsh**, **Barua** does not concern an analogous situation; the process under consideration in **Barua** had a "cliff edge" effect, which is not the case with section 207B: **Ferguson** at paras 22 - 24; and **Wadsworth** at para 22; and

ix) Contrary to the reasoning in **Chandler**, **Myers** and **Walsh**, the HMCTS Guidance does not have statutory force and should not impact on how the legislation is interpreted: **Ferguson** at para 20.

39. The material passage in *Harvey* appears at para 290.01 of *Division P Practice and Procedure*. The authors acknowledge the "fundamental point to note is that with regard to the time limits for bringing proceedings, claimants will not be disadvantaged by engaging with the EC process. There are two separate but related mechanisms which guarantee this: one in **ERA** 1996 s 207B(3) and one in s 207B(4)". The authors explain the effect of section 207B(3) as follows:

> "In relation to s 207B(3), 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. [An example is then set out.]
>
> In the above example, the whole of the conciliation period occurred within the ordinary three-

> month limitation period for the claim. If, however, Day A of the conciliation period occurs before, and Day B occurs after, the start of the limitation period, the question arises as to whether the days that are not to be counted under ERA 1996 s 207B(3) consist only of those days spent conciliating within the three-month ordinary limitation period or whether it includes all days between the day after Day A and Day B, even those which are after the three-month time limit. In the absence of any authority from the EAT, there has been a difference of opinion in the employment tribunals as to which is the correct interpretation of subsection (3)… [Reference is then made to **Ferguson** and to **Ullah**]…Whilst the central purpose of s 207B(3) is to extend time limits where days are lost during the limitation period through participation in the compulsory conciliation process, the statutory provisions have not been phrased in a way which orients the calculation around this. Instead, the extension is fixed around Day A and Day B, irrespective of whether any or all of that period occurs during the limitation period. As such, a number of tribunals have disagreed with the *Ferguson* approach and have held that, based on the natural and ordinary meaning of the statutory words, the period that is not to be counted is not confined to the days lost through participation in the conciliation process following the start of the limitation period…[Reference is then made to **Walsh**, **Myers** and **Chandler**]…It is suggested that this construction is to be preferred over that adopted in [**Ferguson** and **Ullah**]."

40. The contrary view is expressed in the *IDS Employment Law Handbook* as the EJ indicated in the present case (para 8 above). The relevant text at para 3.96 says:

> "In some cases, the EC period may begin before a time limit has actually started to run, such as when an employee who is working out their notice starts EC before their effective date of termination. Any part of the EC period which occurs prior to the relevant limitation period commencing will not count towards an extension of time under S.207B(3) and the equivalent provisions. This follows the EAT's decision in [**Serra Garau**]…In that case, the entire EC period had taken place before the time limit had started to run and so there was no extension of time under S.207B. The EAT commented that "the limitation clock could not stop…because it had never started"

The text then refers to the decisions in **Chandler**, **Myers**, **Ferguson** and **Ullah** and comments that in light of the **Serra Garau** decision, the approach in **Chandler** and **Myers** should now be regarded as incorrect.

Whether "reasonably practicable" to present the claim within the primary time limit

41. In **Northamptonshire County Council v Entwhistle** UKEAT/0540/09/ZT ("**Entwhistle**") (at para 5), Underhill J (President) (as he then was) reviewed the authorities and identified the principles regarding the operation of the "not reasonably practicable" test in section 111(2)(b) where a Claimant had consulted skilled advisers who failed to give proper advice about the applicable time limit for presenting a claim. The cases that he referred to included: **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53 ("**Dedman**"), **Walls Meat Company Ltd v Khan** [1979] ICR 52 ("**Walls**"), **Riley v Tesco Stores Ltd** [1980] ICR 323 ("**Riley**") and **Palmer and**

Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 ("**Palmer**"). Underhill J's summary included the following points:

i) Section 111(2)(b) should be given a liberal construction in favour of the employee;

ii) In accordance with this approach, it has been held that it is not reasonably practicable for an employee to present a claim within the primary time limit, if they were, reasonably, in ignorance of that time limit; and

iii) In **Dedman** the Court of Appeal, (particularly Lord Denning MR at page 61E-G), appeared to hold that an applicant could not claim to be in reasonable ignorance of the time limit if they had consulted a skilled adviser, even if that adviser had failed to advise them correctly. However, the trend of the post-**Dedman** authorities had been to emphasise that the question of reasonable practicability is one of fact for the Tribunal that falls to be decided by close attention to the particular circumstances of the particular case: see, for example, the judgment of May LJ in **Palmer** at page 385B-F.

42. Underhill J went on to observe (at para 9) that it was incorrect to treat **Dedman** as meaning that in no case where a claimant had consulted a skilled adviser and received wrong advice about the time limit, could they claim that it was not reasonably practicable to present the claim in time. He continued:

> "It is perfectly possible to conceive of circumstances where the adviser's failure to give the correct advice is itself reasonable. Waller LJ made this very point in **Riley**: see at page 336B. The paradigm case, though not the only example, of such circumstances would be where both the claimant and the adviser had been misled by the employer as to some material factual matter (for example something bearing on the date of dismissal, which is not always straightforward). I note indeed that May LJ referred to "misrepresentation about any relevant matter" as a potentially relevant factor in paragraph 35 of his judgment in **Palmer**. He was not referring specifically to a case where the adviser as well as the employee was misled but I can see no difference in principle."

43. In **Zhou**, HHJ Eady QC (as she then was) emphasised that it was "trite law that the question of what is or is not reasonably practicable is a question of fact for the ET" (paras 37 & 40). After referring to the authorities on this issue, she indicated, by way of summary, that if the Claimant's legal advisers had failed to lodge a properly constituted claim in time, application of the **Dedman** principle meant she would not be able to simply rely on her confidence in what her advisers had done

and would be bound by their unreasonable conduct, so that the "question therefore became whether the Claimant's solicitors had acted reasonably" (para 40). If the Claimant's solicitors had acted unreasonably, then, in accordance with **Dedman**, it would have been reasonably practicable for the claim to have been presented in time (para 48).

The submissions of the parties

The Claimant's submissions

44. Without repeating them at this stage, I take into account the contentions I have already described in setting out the Claimant's grounds of appeal at para 14 – 18 above.

45. Mr Bronze relied upon the reasoning expressed in the ET decisions I have summarised at paras 35 – 36 above. The plain and ordinary meaning of the statutory words was clear; section 207B(3) **ERA** expressly referred to the whole of the period between Day A and Day B and there was nothing in the statutory wording indicating this period could be dissected. Mr Bronze placed particular emphasis upon EJ Perry's analysis in **Walsh**, including as to the words that would need to be added to section 207B(3) if the Respondent's interpretation was correct.

46. Mr Bronze said that because the EJ had wrongly considered herself bound by **Serra Garau**, she had not properly considered these ET cases. He said that **Serra Garau** was quite different, as it was concerned with the effect of the second EC certificate. He also derived support from para 23 of **Serra Garau** (para 32 above), as Kerr J had there acknowledged that section 207B(3) only referred to "Day A" and to "Day B". When I put the point to Mr Bronze, he accepted it was at least implicit in the EAT's decision in **Serra Garau**, that Kerr J had concluded that the period of the first EC certificate (all of which pre-dated the EDT in that case) did not extend the limitation period under section 207B(3). He said there was a material distinction between that situation and the present case, where the EC period straddled the termination of the employment, and once the EDT engaged the operation of section 207B(3), the extension applied for the whole of the conciliation period.

47. Mr Bronze suggested that Kerr J's comments regarding "stopping the clock" (para 33 above)

were obiter and, citing the analysis in **Walsh**, he described the Respondent's reliance upon the references to "stopping the clock" as "misplaced".

48. Mr Bronze submitted that the reasoning in **Macken**, a directly analogous case, could not be criticised; and was fully supported by the authors of *Harvey*. **Macken** also highlighted the need to avoid satellite litigation and undue formality in the operation of the time limits provisions. His approach had the considerable advantage of simplicity, whereas if the Respondent's construction was adopted, the position would be unduly complicated where there were multiple claims, as the portion of the EC period that was taken into account would vary depending upon when limitation started to run in respect of each cause of action.

49. Mr Bronze said the various first instance decisions had rightly recognised that the intention of the EC regime was to encourage the settlement of claim. Relying on the reasoning at para 18 in **Samuel**, he suggested that if a Claimant could not take advantage of an extension related to time spent in EC, the statutory purpose was "thwarted". Although he also contended that the Respondent's construction penalised and prejudiced Claimants, when I asked him to identify what he meant by this, Mr Bronze said he was referring to the complexity point and the thwarting of the statutory purpose, rather than to further factors I should take into account.

50. Mr Bronze suggested that EJ Barron in **Ullah** was wrong to conclude that the construction advanced by the Claimant afforded an undue bonus, which could not have been Parliament's intention. The uncontentious operation of section 207B(3) and 207B(4) in instances where Day A post-dated the EDT frequently resulted in substantial extensions to the limitation period of up to six weeks.

51. Mr Bronze maintained that although the *HMCTS T420 Guidance* had since been amended to remove the sentence that had been relied upon in **Chandler**, **Myers** and **Walsh**, it was still an indicator as to Parliament's intention, given that it had not been replaced by a passage indicating the contrary position.

52. In relation to Ground 4, Mr Bronze accepted that the EJ had set out a correct self-direction at

paras 18 – 19 of the ET's Reasons. However, he contended that her reference to "definitely safe" at para 21 indicated she had imposed too high a test, effectively saying that the Claimant's advisers had been negligent because they had not taken a correct stance as what was definitely the law. He also drew support from the extension of time that granted in **Ferguson** on what, he said, were almost identical facts.

The Respondent's submissions

53. Mr England submitted the EJ had rightly concluded that **Serra Garau** was binding authority for the proposition, that any time in an EC period prior to limitation starting to run is not to be added on to the end of the expiry date. There was no logical, rational or permissible basis for holding that Kerr J's reasoning did not apply to the present case. It was clear from the first of the two reasons he identified in para 30 for why the ET's interpretation of **Tanveer** was erroneous (para 33 above), that the clock not having started to run was integral to Kerr J's reasoning in that case. The factual differences between the two cases were not material and did not alter this position.

54. Mr England also drew my attention to various passages in Kerr J's summary of counsel's submissions in **Serra Garau**, as showing that he had the benefit of argument on the limitation implications (rather than simply on the effect of the second certificate) and he had adopted the Respondent's arguments in that regard. In particular, paras 16(5) and (7) recorded that Mr Northall (counsel for the Respondent) contended: "The policy of the legislation was not to extend limitation periods as such, it was to facilitate settlement by discounting periods of conciliation falling within limitation periods and modify the regime to the limited extent provided"; and "The policy of the provisions was only to stop limitation running to the extent that conciliation under the mandatory procedure took place during a time when limitation would otherwise run and, where applicable, for an additional month after the end of Day B".

55. If I did not accept that **Serra Garau** was binding authority on the point in issue before me, it was, on any view, highly persuasive authority in favour of the Respondent's construction.

56. Mr England also emphasised the statutory language, "not to be counted". He said the Respondent's construction was consistent with this wording; the period prior to the EDT would not, in any event, be counted as part of the limitation period; and an expiry date did not even exist until limitation started to run. The period after limitation started to run would usually be counted, but the effect of section 207B(3) was that it was not counted, as the three months limitation period was extended by this amount. Accordingly, this approach did not require any words to be added to subsection (3). By contrast, the Claimant's approach would require words to be added, since, as matters stood, the period between Day A and the EDT did not count for time limits purposes.

57. Mr England relied upon the reasoning in the ET decisions I have summarised at paras 37 – 38 above, particularly the analysis of EJ Walker (as she then was) in **Ferguson**. There was no obligation on the EJ in the present case to explain why she disagreed with **Macken** in any greater detail than she had done; her reasoning was proportionate to the case before her. The EJ did not ignore the Claimant's authorities; she considered them, but preferred the alternative construction for the reasons she gave.

58. Mr England did not accept that the Respondent's approach created a deterrent effect; a Claimant would still obtain the full three months limitation period. He maintained that Mr Bronze's construction involved the greater complexity and uncertainty for Claimants, given he accepted that section 207B(3) was not engaged unless or until there was an EDT, so that it did not apply to an EC period that all occurred before a dismissal took effect. The date of dismissal was largely within the control of the employer; and an employee who started EC pre-dismissal would not know at that stage whether the conciliation period would conclude before the EDT or not, and thus be taken into account or not, although this could have considerable implications for the length of the limitation period. Mr England gave an example in which Day A was 1 March and the EDT was 11 April. If Day B was 10 April (1 day before the EDT), the parties agreed that the limitation period would not be extended at all. However, if Day B was 12 April (one day after the EDT), then on the Claimant's argument the employee would get the entire six weeks of the EC period added to the limitation period; whereas on the Respondent's argument, the employee would get a one day extension. This showed that the

Claimant's approach created a "cliff edge" depending on when the EC ended, a date which employers could manipulate and it led to a wildly disparate effect on limitation.

59. Mr England also disputed that his approach resulted in greater complexity. Whichever of the approaches was adopted, limitation periods could run from different dates in respect of different causes of action and on the Claimant's construction, the employee in the multiple claims' scenario would still have to work out the various dates from which limitation ran.

60. Mr England said that different parts to the EC regime had different purposes behind them. Whilst the purpose of section 18A **ETA** was to force parties to try and settle before instituting proceedings, the purpose of section 207B(3) **ERA** was to remove the disadvantage that could arise in terms of the running of limitation during a period of EC compliance.

61. As regards Ground 4, Mr England emphasised that the assessment of what was reasonably practicable was a question of fact for the ET, so that the Claimant could only succeed if she could show that the EJ's decision was perverse or based on a misdirection of law. The ET's Reasons showed the EJ had arrived at a balanced, reasoned and considered analysis, having correctly directed herself as to the law. She did not demand "best practice" of the Claimant's solicitors and she was quite entitled to find that they should have issued the claim earlier given the conflicting authorities and uncertainty as to the impact of section 207B(3). The decisions in **Zhou** and in **Ferguson** were based on the circumstances in those cases. Mr England also took issue with the specific complaints made in Ground 4 itself, which were a distortion of what the ET's Reasons actually said.

Analysis and conclusions

Grounds 1 – 3

Construction of section 207B(3)

62. For reasons I have already explained, I will focus on the main issue that underlies Grounds 1 - 3, namely whether the ET erred in law in concluding that it was only the number of days in the EC period after the EDT, as opposed to the whole EC period, that should be taken into account for the

purposes of section 207B(3) **ERA**. After doing so, I will turn more briefly to Mr Bronze's subsidiary contentions.

63. The starting point must be the statutory wording itself. I remind myself of Lord Hodge's summary of the well established principles at paras 29 – 31 in **R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department; R (O) v Secretary of State for the Home Department** [2022] UKSC 3, [2022] 2 WLR 343. The court or tribunal's task is to determine the meaning borne by the words in question in their particular context, which is to say, having regard to the section as a whole, the other provisions of the statute and the statute as a whole. This involves an objective assessment of Parliament's intention. Reference may be made to external aids, such as Explanatory Notes and/or Government White Papers, but these are secondary materials that do not displace the meaning of the words if the meaning is clear and unambiguous after consideration of the statutory context.

64. In my judgment, the statutory wording is clear and unambiguous in this instance. It is important to keep in mind the opening words of section 207B(3), "In working out when a time limit set by a relevant provision expires…" as identifying the exercise that this provision is directed to. Absent any statutory indication to the contrary, the invariable approach to limitation is that the expiry date is calculated by identifying the date from when limitation started to run and then adding the prescribed limitation period going forwards, to work out the end date. There is no question of including a period before the date when limitation started to run in this computation; in other words, such a period does not "count" for this purpose. Accordingly, there is no need to have a specific statutory provision stating that a period prior to the EDT does not count for limitation purposes, as this is unambiguously the position in any event.

65. By contrast, the period after the date when time starts to run (here the EDT) *would count* towards the running of the limitation period *unless* a statutory provision provided to the contrary. Hence the role played by section 207B(3), which states that in working out when limitation expires the period beginning with Day A and ending with Day B "is not to be counted" in undertaking the

exercise I have identified. The reference to Day A and Day B is expressed in the way that it is to allow for both the situation where all of that period comes after the EDT and the situation where only a portion of it does. Whilst the statutory provision *could* have included some additional wording of the kind discussed in **Walsh** (para 36(ii) above); as I have already indicated, there was no need to do so as the pre-EDT period does not count towards the limitation period in any event. To use Mr Bronze's terminology; there is no need for section 207B(3) to "dissect" the period between Day A and Day B; the usual operation of the running of limitation does that in any event in circumstances where Day A precedes the EDT.

66. I agree that it is the Claimant's approach, rather than the Respondent's approach, which would require wording to be added to section 207B(3). If the usual limitation position were to be changed so radically that a period of time occurring before limitation started to run was to be added on to the length of the limitation period, I would expect the statute to say that in the plainest of terms.

67. Kerr J's summary of how section 207B(3) operates at para 23 in **Serra Garau** (para 32 above) does not assist Mr Bronze's argument. The key phrase in Kerr J's sentence which his submission overlooks is "for limitation purposes". For the reason I have highlighted, the only part of a period between Day A and Day B which falls to be discounted "for limitation purposes" is the period after limitation starts to run. This is further supported by the second sentence of the passage from para 27 of Kerr J's judgment in **Serra Garau** which I have set out at para 32 above.

68. The references by Eady J in **Tanveer** and by Kerr J in **Serra Garau** to the provision "stopping the clock" (paras 26 and 33 above) are correct descriptions of the *effect* of section 207B(3). It is misconceived to suggest, as Mr Bronze maintained in reliance upon **Walsh**, that section 207B(3) could only operate in a "stop the clock" way if the statutory wording in terms used that expression or the equivalent.

69. Furthermore, I am quite satisfied that Eady J and Kerr J both correctly identified the purpose of section 207B(3). As Eady J observed in **Tanveer**, it 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" (para 26 above). Similarly, in **Serra Garau**, Kerr J noted that the quid pro quo for requiring a Claimant to undertake EC before issuing a claim was the modification of the limitation regime "so that the certification process does not prejudice" them (para 31 above). This is perfectly logical; as EJ Walker noted in **Ferguson**, absent section 207B(3), Claimants would still have time running against them post the EDT, even if they were unable to present their claims at that stage because EC had yet to conclude. On the other hand, there is no logical reason why a Claimant who engages in EC should receive an enlarged limitation period that is extended by days that occurred before time started to run for limitation purposes. 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. Indeed, to construe section 207B(3) in the way Mr Bronze suggests would provide Claimants with an inexplicable advantage or bonus. I note that *Harvey* too, acknowledges that the "central purpose" of section 207B(3) is "to extend time limits where days are lost during the limitation period through participation in the compulsory conciliation process" (para 39 above).

70. Mr Bronze's only answer to the "bonus" point, was to note that the uncontentious operation of section 207B(3) and (4) can result in substantially extended limitation periods (para 50 above). In this regard, he placed particular reliance upon the effect of section 207B(4). However, I do not see any parallel between the effect of subsection (4) and the Claimant's interpretation of section 207B(3). There is a readily apparent reason why section 207B(4) operates as it does, given that, absent this provision, claimants would be disadvantaged, as in circumstances where EC concluded close to what would otherwise be the expiry of the limitation period, they would be left with little time before the limitation period expired to seek legal advice / research the law, obtain the necessary evidential material and then formulate and present their claim.

71. Given the parties' dispute as to whether **Serra Garau** is binding authority in favour of the Respondent's construction, I have begun by setting out the conclusions that I would in any event draw based on the statutory wording, the context and the statutory purpose, before I turn to what was

decided in **Serra Garau**. Whilst the ineffectiveness of the second certificate was integral to Kerr J's decision, there was another aspect that also formed a necessary part of his reasoning. As Mr Bronze acknowledged, in concluding that the claim was presented out of time in **Serra Garau**, Kerr J accepted that the period of the first EC certificate (all of which predated the EDT) did not extend the limitation period under section 207B(3). For present purposes, it is his reasons for so concluding that are significant. As he explained at his paras 28 – 30 (para 33 above), the ET in **Serra Garau** had been wrong to treat **Tanveer** as establishing that time spent on EC "will not count in calculating the date of expiry of the time limit"; rather, the statutory provisions stopped the clock in **Tanveer** because the EC certificate "operated during a period in which time would otherwise be running for limitation purposes", whereas, the position was different in the case before him because the limitation clock was not running during the EC period. In my judgment, that is a distinction of principle, derived from the statutory wording and context, which applies just as much where a portion of an EC period occurs before the EDT as it does to where the whole EC period pre-dates the EDT. There is, quite simply, no logical basis, nor anything in the statutory wording that would support drawing a distinction between the two.

72. 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 (para 54 above); paras 29 – 30 of his decision are in keeping with his acceptance of this position.

73. In the circumstances, **Serra Garau** is, at the very least, highly persuasive authority in support of the conclusion that I in any event arrive at on the basis of the statutory wording, context and statutory purpose. Indeed, for the reasons I have just explained, it is likely that it is binding authority on the main issue before me. However, given that the Respondent's construction is clearly the correct one even without **Serra Garau**, I make clear that my decision is not dependant upon the precedent status of this aspect of **Serra Garau**.

74. It follows that I consider that the *IDS Employment Law Handbook* is correct in stating, "Any part of the EC period which occurs prior to the relevant limitation period commencing will not count towards an extension of time" under section 207B(3) and that this follows from **Serra Garau**. I have, of course, had regard to the alternative view expressed in *Harvey*, but, as I have already explained, I do not agree with the authors' observations about the statutory wording and I note that this part of the text contains no reference to **Serra Garau** at all (as opposed, for example, to a convincing analysis as to why this case does not indicate that a period prior to the EDT does not count towards an extension of time under section 207B(3)).

75. Whilst I do not consider that there is any ambiguity in the statutory wording, I will address Mr Bronze's supporting points. I do not accept that his favoured construction would have a deterrent effect or penalise those employees who embark on EC at an early stage. As Mr England submitted, a Claimant will still obtain the full three months limitation period. Nor do I accept that the Claimant's interpretation would result in greater predictability. This is well illustrated by Mr England's well chosen example that I have set out at para 58 above and need not repeat here. In short, the Claimant's approach leads to striking variations in the length of the limitation period, depending upon whether the EC concludes shortly before or shortly after the EDT, in circumstances where this is a matter over which a Claimant may have little control. Mr Bronze's point that an employer can chose to bring EC to an end, merely underscores the somewhat arbitrary nature of these differing effects, were his construction to be adopted. Furthermore, the EC certificate itself provides the relevant EC dates and identifying the date when limitation starts to run, or dates where there are multiple causes of action, will involve the same exercise whichever construction of section 207B(3) is adopted. Once the dates of the EC period and the date/s when time started to run are known, the expiry of the limitation period/s can be calculated by simple mathematics.

76. There is no true analogy with **Barua** where Underhill J's concern was that a particular construction of the **Dispute Resolution Regulations** would mean that an employee who lodged a grievance the day after time started to run would get six months to bring a claim, whereas one who

lodged their grievance earlier would receive three months and a day. Not only would such an interpretation penalise employees who acted promptly, but as EJ Walker explained at para 24 in **Ferguson**, this would create "a 'cliff edge' effect. Either the claimant got an extra 3 months or he didn't." That is not the case with the construction of section 207B(3) that I have indicated. There is no arbitrary cliff edge. The effect of the provision will be situation-specific; as I have explained, the limitation period will be extended by the number of days of the three month limitation period that have been used up by EC. To the contrary, it is Mr Bronze's construction, as shown by Mr England's example at para 58 that creates an arbitrary cliff edge effect.

77. I do not accept that the HMCTS T420 booklet was 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. In any event, the amendment of this guidance to remove the very passage that the earlier ET authorities placed reliance upon (para 36(iv) above) clearly undermines the significance that was previously attached to this point, despite Mr Bronze's rather optimistic attempt to suggest otherwise.

78. For all these reasons, I conclude that the EJ was correct to decide that the effect of section 207B(3) is to extend the limitation period by the number of days in the EC period that occurred after the EDT of the Claimant's employment, so that her claim was presented three days after the expiry of the prescribed time limit.

Subsidiary grounds of challenge

79. I deal with these matters for completeness. I do so briefly as Mr Bronze accepts that they do not give rise to free-standing grounds for overturning the ET's decision if I am against him on the main construction issue, as I have indicated.

80. The assertion in Ground 1 that the EJ "opted not to take note of previous Tribunal decisions" is absurd. The EJ took these decisions into account, but, quite rightly, concluded that their reasoning was inconsistent with **Serra Garau** (and, I would add, inconsistent with the statutory wording and

statutory scheme). In this regard, I refer back to the aspects of the EJ's reasoning that I have set out at paras 8 – 10 above.

81. As regards Ground 2, the EJ was right not to follow **Macken**, for the reasons I have identified. Her reasoning on the material points was concise, but adequate. Similarly, the EJ did not "disregard" the view expressed in *Harvey*; she weighed that in the balance, but, rightly, preferred the competing view expressed in the *IDS Employment Law Handbook*, for the reason she indicated. The EJ did not say that the authors of *Harvey* or the EJ in **Macken** were unaware of **Serra Garau**; and the case is expressly discussed in **Macken**.

82. In terms of Ground 3, I have already addressed the purpose of section 207B(3) at para 69 above.

Ground 4

83. As I have noted, Mr Bronze accepted that the EJ gave a correct self-direction as to the test she should apply (para 12 above), namely whether the failure on the part of the Claimant's advisers was a reasonable one. He was right to do so, the EJ's approach is consistent with the principles derived from the case law that I have summarised at paras 41 – 43 above. Although Mr Bronze tried to argue to the contrary, 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 (paras 41 and 42 above). Accordingly, it is not enough for the Claimant to disagree with the EJ's conclusion in this regard; it must be shown that there was a material misdirection as to the law or that the conclusion on the facts was perverse.

84. Mr Bronze submitted that the EJ had misdirected herself in law by imposing an unduly high standard of "best practice" in respect of the Claimant's legal advisers. When asked to clarify where she had done this in her reasoning, Mr Bronze identified her reference to "definitely safe" in para 21 of her Reasons (para 13 above), saying that the EJ had there concluded that the Claimant's advisers were negligent because "they had not taken a stance as to what was definitely the law" in this difficult

area of inconsistent decisions. However, that is plainly not what the EJ said. Indeed, she began her para 21 by saying the very opposite, "I would be prepared to find it was reasonable for Ms Raison's advisors not to conclude with certainty that limitation expired on 27 May". The sentence that Mr Bronze relied upon in fact makes the point that "in view of the uncertainty" as to the correct interpretation of section 207B(3), it was not reasonable for the Claimant's advisers to decide it was safe to lodge the claim after limitation would already have expired on one of the two potential interpretations. As the EJ found, given the legally uncertain situation, the only reasonable course would have been to present the claim before limitation expired on either interpretation of the statutory provision. This was an entirely legitimate conclusion to draw and the proposition that it was perverse is devoid of any merit.

85. Equally, the EJ did not reason that the Claimant's advisers were negligent in not knowing about all of the ET decisions or in not "ignoring" the view expressed in *Harvey*, as Ground 4 asserts (para x 18 above); quite simply this is not what the EJ said.

86. The attempted parallel with the decision in **Zhou** does not assist the Claimant. In that case, the EAT allowed the appeal because the ET had failed to ask itself the correct question, or, to the extent that it had done so, it failed to properly explain its reasoning: para 51. In the present case, the EJ did ask the correct question and did explain her reasoning.

87. The attempted parallel with **Ferguson** does not assist the Claimant either. It was a fact sensitive decision. By way of example, in concluding that it was reasonable for the Claimant's solicitors to have interpreted section 207B(3) in the way that they did, EJ Walker noted that: it was the first time the issue had been raised in Scotland; the balance of ET authority was in favour of the Claimant's interpretation of section 207B(3) at the time; and the earlier version of the T420 Guidance was in existence. I also observe that it was before the EAT's decision in **Serra Garau**.

Outcome

88. For the reasons I have identified above, the grounds of appeal fail and the appeal is dismissed.