THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	*AND*	*Respondent*
Mr S Kaddu		**London United Busways Limited**

Dates of Preliminary Hearing: 15 March 2019

Employment Judge: Mr N Deol

Appearances

For the Claimant: **Mr D Kalazi (Representative)**
For the Respondent: **Mr E Nuttman (Solicitor)**

JUDGMENT

1. **The Claimant's unfair dismissal claim was presented within time and will proceed to a full merits hearing to be considered by an Employment Judge sitting alone.**

2. **The Claimant's claims for harassment and discrimination on the grounds of race/age, holiday pay and for breach of contract are all dismissed upon withdrawal.**

REASONS

Background

1. The Claimant is pursuing a claim for unfair dismissal. His claims for harassment and discrimination on the grounds of race/age, holiday pay and for contractual payments are all dismissed upon withdrawal.

2. The only issue at this Preliminary Hearing is whether the Claimant's unfair dismissal claim was pursued within the statutory time limit of 3 months.

Facts

3. The Claimant was dismissed from employment on 6 June 2018, although at this hearing a dispute remains as to whether he was dismissed with notice or summarily. The Claimant gave evidence on this issue with the Respondent relying on the written correspondence to the Claimant and the pleadings rather than any live witness evidence. For the reasons set out below, the Claimant's evidence is preferred – he was dismissed on 6 June 2018 with the 12 weeks' of statutory notice that he was entitled to.

4. The Claimant accepted that when he was invited to the disciplinary hearing on 6 June 2018 he had been warned of the risk of termination. At the end of this disciplinary hearing his understanding was that he would be dismissed but was entitled to 12 weeks' notice, his statutory entitlement.

5. The Claimant was cross examined as to what his obligations were to the Respondent after 6 June 2018. His response was clear; that he didn't need to come to work during his notice period but that he nevertheless believed that he had been dismissed with notice. The fact that he had been paid his outstanding notice pay on or around 20 June 2018 did not change his view or understanding that he was entitled to his notice period of 12 weeks.

6. The Respondent referred to the ET1 Claim Form in which the Claimant indicated that he has been dismissed on 6 June 2018 and that he had not been dismissed with notice. It was suggested that this was a concession from the Claimant that he had been dismissed on 6 June 2018, a suggestion that that the Claimant roundly and convincingly rejected. The Claimant could have been clearer, that he believed that he was entitled to notice but not required to work it, but it was unlikely that he was anticipating a dispute on a limitation issue or that he fully understood the significance of this detail.

7. The Respondent relied upon the letter of dismissal of 6 June 2018 which said that: *"my decision is to statutory dismiss you from the employ of London United Busways. Statutory dismissal means that you* ***are entitled to notification under your contract of employment****. All monies due to you will be paid by cheque of Friday 15th June 2018." (emphasis added)*

8. The appeal letter confirms the decision to dismiss – *"at the end of the hearing it was decided to uphold the decision to statutorily dismiss you. The dismissal is final."*

9. The Respondent's representative suggests that the reference to statutory dismissal was unfortunate and what it had intended was to dismiss with effect from 6 June 2018 and pay out the Claimant's notice period. It argued that any doubt about this would have been resolved at the appeal stage, where the

dismissal was confirmed, and the outstanding notice pay was paid to the Claimant. There was no evidence from the Respondent to support this argument, other than the correspondence referred to above.

10. Having considered the evidence presented the Tribunal accepts that the Claimant had not been dismissed with effect from 6 June 2018. That date was the date on which the Claimant was notified of his dismissal that would take effect after his notice period, which was the 12 weeks of statutory notice that he was entitled to.

11. In support of this view:

    (i) the Respondent referred to "statutory" dismissal in both letters and defines this as "notification under your contract of employment" in the first letter yet offered no evidence as to what that may mean if it wasn't a reference to statutory notice.

    (ii) the Respondent's letters do not specifically spell out what the EDT is, nor make refer to a payment "in lieu" of notice.

    (iii) the Respondent adduced no evidence about the Claimant's dismissal other than the termination letter and appeal outcome letter.

    (iv) there is no inconsistency with being paid notice in advance for a notice period that has yet to run its course.

    (v) the Claimant's own explanation that although he wasn't required to perform any duties he was still employed throughout.

12. The Respondent suggested that the Claimant's argument that he was dismissed with statutory notice was one advanced by the Claimant only after receiving legal advice. The Claimant convincingly dismissed this argument in his evidence.

13. On this basis the Claimant's effective date of termination was 12 weeks from 6 June 2018, which is 30th August 2018.

14. The Respondent's case at its best was that the Claim was submitted on 11 October 2018, the date on which the claim was eventually accepted by the Employment Tribunal, or in the Respondent's words, the defect in the original claim was rectified. Based on this the Claimant's claim for unfair dismissal was presented within the statutory time limit.

15. Given the argument in this preliminary hearing it may also be useful to set out a short summary of the Claimant's interaction with ACAS. The Claimant contacted ACAS and obtained a ACAS early conciliation certificate (Reference Number R271781/18/23) against Shepherds Bush Garage/Well Road Garage. The notification date was recorded as 19 June 2019 and the certificate date was 20 June 2018.

16. The Claimant was contacted by ACAS to advise him that the name of the Respondent was wrong. The Claimant corrected that name. On 4th July ACAS sent the Claimant another ACAS certificate and the Claimant submitted his claim the following day, albeit with the original ACAS certificate number.

17. On 19th July 2018 a further certificate was issued with the correct name for the Respondent but without the registered address. The Claimant did not notify the Employment Tribunal of this new certificate or update his claim accordingly.

18. There was no evidence from the Respondent as to whether any contact from ACAS was received at this time.

19. The Claimant subsequently submitted his claim on 5 July 2018. On 26 September 2018 the claim was rejected by the Employment Tribunal given the discrepancy between the name on the EC certificate and the Claim Form.

20. On 28 September the Claimant contacted ACAS again. A further ACAS conciliation certificate was issued against London Busways Limited on the same day.

21. On 11 October 2018 the Tribunal claim was accepted after reconsideration given that "the defect of absence of match between the name of the Respondent on the ACAS certificate on the ET1 having been remedied" but "without prejudice to arguments on whether the claim is out of time."

The Law

22. The focus of the argument on the law at this preliminary hearing assumed that the claim was out of time.

23. In assessing whether a claim is out of time the first step is to establish the effective date of termination and the date of the claim. The effective date of termination (EDT) is:

    (i) If either the employer or employee gives notice to terminate the employment, the date on which the notice expires **(section 97(1)(a), ERA 1996).**

    (ii) If the employment terminates summarily (that is, without notice), the date on which that termination takes effect **(section 97(1)(b), ERA 1996).**

24. Where notice is given, the EDT is the date on which the notice expires **(section 97(1)(a), ERA 1996)**. The Respondent makes much of the argument that if there was some ambiguity as to whether the Claimant had been dismissed with notice, that would have been resolved when payment of outstanding notice pay was made at or around the time of the Claimant's appeal hearing.

25. In **Secretary of State for Employment v Staffordshire County Council [1989] IRLR 117** the Court of Appeal held that, where the notice period had been shortened at the behest of the employer, this did not bring forward the EDT; the employer had simply waived the obligation for the employee to present himself for work. In **TBA Industrial Products Ltd v Morland [1982] ICR 686** the Court of Appeal held that an agreement to leave early (at the behest of the employee) did not bring forward the EDT but was merely a waiver of the employee's obligation to work out their notice.

26. In **Palfrey v Transco plc [2004] IRLR 916**, a case in which the EDT was held to have been brought forward, following the employee's request to leave early. The EAT had regard to the Court of Appeal's decision in **Fitzgerald v University of Kent at Canterbury [2004] EWCA Civ 143** and held that it was necessary to look, in a common-sense way, at what had happened between the parties over time and decide whether there had been an agreed variation of the original notice which brought forward the EDT.

27. The Court of Appeal in Fitzgerald held that the parties could not agree an EDT retrospectively (in Fitzgerald the parties agreed that after employment had terminated on 2 March, the employee would be treated as having accepted retirement from 28 February).

28. **Section 111(2) of the Employment Rights Act 1996** provides that a Tribunal "shall not consider" an unfair dismissal claim unless it is presented in time.

    A Tribunal may only extend time for presenting a claim where it is satisfied:

    (a) it was not "reasonably practicable" for the claim to be presented in time.
    (b) the claim was nevertheless presented within such further period as the Tribunal considers reasonable.

29. Time limits should be strictly enforced, and the exercise of discretion should be the exception, and not the rule. **(Bexley Community Centre (t/a Leisure Link) v Robertson).**

30. Mere ignorance of the right to bring a claim, or the time limit or a procedure for making a claim, will not satisfy the reasonable practicability test. The Tribunal will need to be satisfied that the Claimant's ignorance of the relevant time limit was reasonable. **(Walls Meat Company Ltd v Khan 1979 ICR 52)**. A Claimant's ignorance will not be reasonable if he ought reasonably to have made enquiries about how to bring a Tribunal claim before the relevant time limit expired.

31. In **Porter v Bandridge Ltd (1978) ICR 943** it was held that even though the Claimant did not in fact know of their right to bring a claim, they ought to have known of it and it had therefore been reasonably practicable for a claim to be submitted in time. The Respondent also referred to the EAT decision in **Reed In Partnership Ltd v Fraine UKEAT/0520/10.**

32. The Respondent says that the current hearing was not a reconsideration of the Tribunal's decision of 26 September 2019. Therefore, it was not open to the Employment Tribunal to say that this is a minor error. This Tribunal was, it argued, stuck with the position that the Claimant's claim had previously been rejected by the Employment Tribunal and only accepted once the defect had been rectified, with effect from 11 October 2018.

33. There was nevertheless a useful summary of the strict requirements placed on the Claimant to provide certain "prescribed" information to ACAS before a claim could be instituted properly and what should happen where that prescribed information was incorrect, in this case a mismatch between the name of the Respondent. There was less focus on the following authorities, presumably because the Respondent considered that this Tribunal was not seized with this issue. They are nevertheless set out given their relevance to the alternative conclusions that have been reached below.

34. In **Mist v Derby Community Health Services NHS Trust UKEAT/0170/15**, the EAT observed, albeit in obiter comments, that a discrepancy between the name of a prospective respondent given on an EC certificate and the name given on an ET1 should not ordinarily prevent the tribunal from accepting the claim.

35. In **Giny v SNA Transport Limited UKEAT/0317/16**, the EAT held that an employment tribunal had no jurisdiction to allow a claim against a limited company to proceed where the prospective respondent had wrongly been identified on the EC certificate as a named individual (the sole director). The tribunal had been entitled to conclude that the discrepancy was not minor.

36. However, in **Chard v Trowbridge Office Cleaning Services Ltd UKEAT/0254/16**, a differently constituted EAT reached the opposite conclusion on essentially the same facts. The EC certificate named the controlling shareholder and managing director of the respondent, rather than the limited company which employed the claimant. While the EAT agreed with the analysis in Giny that determining whether an error is "minor" should be one of fact and judgement for the tribunal, it found that it would not have been in the interests of justice to reject the claim. The EAT emphasised the importance of the overriding objective when considering issues of this kind; in the employment tribunal, this includes avoiding unnecessary formality and seeking flexibility in the proceedings.

37. In the case of **Savage v JC 1991 LLP T/A John Campbell, Messengers at Arms and Sheriff Officers and others UKEATS/0002/17** a difference in name was overlooked by the tribunal. Rule 12(2A) was not explicitly considered in that case but the EAT adopted a forgiving interpretation to a disparity between the name of the respondent on the EC certificate and the name of the respondent on the ET1. The EAT found that an employment tribunal had erred when it refused to accept jurisdiction as a result of a difference between a trading name (John Campbell Messengers At Arms and Sheriff Officers) and a named individual (John Campbell).

Conclusions

38. Given the findings of fact, the Claimant's unfair dismissal claim was comfortably submitted within the statutory time of three months and should be allowed to continue to a full hearing.

39. The authorities, although not necessarily on the same facts as this case, illustrate that the fact the Respondent did not wish the Claimant to work his notice period was not inconsistent with the fact that the Claimant was dismissed with notice. They also support the proposition that once an employee has been dismissed with notice, its not for the employer to unilaterally bring the EDT forward, or as the Respondent suggested in this case, make it obvious that that was what the Respondent had intended all along simply by paying out the Claimant's notice pay entitlement.

40. The Tribunal accepts the Respondent's position that it was not to review the original decision to reject the Claim. This was simply a question of whether the claim had been presented in time, based on the date that the Claim was ultimately accepted by the Tribunal.

41. Given the findings of fact, and the fact that the Claimant had had contact with ACAS to remedy the incorrect certificate before his claim was submitted, but simply omitted to inform the Tribunal of the new certificate number, one would expect that the Claimant would have had a strong tail wind with a review application. The Judge considering the matter would have had to consider the overriding objective, the purpose of early conciliation and the absence of any evidence from the Respondent.

42. The lack of evidence from the Respondent on the primary issue of the date of termination or even indication as to whether any contact had been made via ACAS was notable and played a significant part in this Tribunal's reasoning. The Respondent did not make out any case that the Claimant's error had deprived it of the opportunity to resolve a dispute before litigation, with the assistance of ACAS or otherwise, accepting of course that this is not necessarily determinative of the issue.

43. The factual scenario also supports the Claimant in the alternative, if for instance the Respondent was correct that the original claim was out of time.

44. The Respondent's best argument that Claimant's claim should have been submitted by 5 September 2019 to be within time. It argues that by this point the Claimant had a correct ACAS conciliation certificate dated 19 July 2019 and could have submitted a claim with this number or presumably updated his original claim.

45. The Claimant however had no reason to believe that his original claim was potentially flawed. He had submitted it after he had clarified the correct name with ACAS and was not to find out about the procedural error until the Tribunal notified him of this, almost three months later. His only failure was not to write to the Tribunal with an updated conciliation certificate number at an earlier point

and his evidence as to why he didn't do this was both genuine and reasonable, particularly that he had received a certificate after he had given ACAS the correct information and he wasn't someone who checked e-mail regularly.

46. This is precisely the type of case where the overriding objective must save the day. As soon as the Claimant was notified of the error he contacted ACAS and rectified the issue promptly. The reason it took the Claimant so long was because it took the Tribunal a significant amount of time to confirm that his claim had been rejected by which point, on the Respondent's case, his claim was already out of time. Had the Tribunal processed his claim sooner we perhaps would not have needed this hearing at all.

47. It is quite likely that by this stage the Respondent would have been notified of the claim given that a certificate against the correct Respondent had been issued over 10 weeks earlier, although there was no evidence or indication either way on this issue from the Respondent.

48. The Claimant failed to notify the Employment Tribunal of the correct ACAS certificate number, not out of ignorance or some failure to understand what his obligations were but because he had mistakenly believed that the defect had been remedied.

49. Had the Respondent been correct, that the EDT was 6 June 2019, the Tribunal would have concluded that it was not reasonably practicable for the Claimant to submit a claim in time given the obvious confusion about his EDT, the fact that ACAS reissued the certificate after the claim had been lodged and/or the delay in the Employment Tribunal informing him that his claim was dismissed, which meant that the primary time limit had already passed. The claim was then submitted promptly after the Claimant became aware of the issue, and certainly within a reasonable period thereafter.

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EMPLOYMENT JUDGE DEOL

SIGNED ON

31 May 2019

REASONS SENT TO THE PARTIES ON
17 Jun. 19

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FOR SECRETARY OF THE TRIBUNALS