EMPLOYMENT TRIBUNALS

Claimant: Mr G Quaye

Respondent: Santoro Ltd

HELD AT: Sheffield **ON:** 29th January 2020 (and in chambers 26th February 2020)

BEFORE: Employment Judge Eeley (sitting alone)

REPRESENTATION:

Claimant: Respondent: Mr I Cartwright, counsel
Mr J Boyd, counsel

RESERVED JUDGMENT

1. The claimant's claims are dismissed for lack of jurisdiction on the basis that they were presented outside the relevant time limits.

REASONS

Background

1. By a claim form presented on 28th June 2019 the claimant presented claims of unfair dismissal, disability discrimination and for holiday pay and other arrears of pay.

2. The matter was listed for a preliminary hearing to determine whether the Tribunal has jurisdiction to hear any of the claimant's claims. It was contended by the respondent that all of the claims have been presented out of time. The hearing was initially listed to determine whether the Tribunal had jurisdiction to hear the respondent's contract claim on the basis that the claimant's claim contained no complaint of breach of contract. However, upon the provision of further clarification, the

respondent withdrew its contract claim. The respondent objects to the contract claim being dismissed as it has been withdrawn with a view to it being pursued in the county court. Therefore, it is said, it would be inappropriate to dismiss the claim as it may lead to issues of estoppel in subsequent county court proceedings. I agree with that view and therefore decline to issue a judgment dismissing the respondent's contract claim upon withdrawal.

3. At the preliminary hearing the parties presented an agreed bundle of documents running to 172 pages and I read the documents to which I was specifically referred by the parties. I received witness statements and heard oral evidence from the claimant and from Mr Lucio Santoro. There was insufficient time to complete closing submissions at the hearing and so both parties presented me with written submissions, for which I am grateful. The representatives were permitted to reply to each other's written submissions on issues of law and I have taken into account any replies within that permitted scope.

Findings of fact

4. The respondent is a gift retailer selling items such as greeting cards, diaries, stationery and other gift items. It sells its products to retailers and distributors worldwide. The claimant was employed as a director of the company with responsibility for operations and sales. His employment commenced on 10th February 1988.

5. Originally the respondent company did not produce greetings cards or other products to commemorate birthdays, Christmas or other occasions. In 2015 the respondent considered changing this policy. The claimant objected on religious grounds as he is a Jehovah's witness. He does not celebrate birthdays, Christmas etc on religious grounds. On 31st October 2017 the respondent's board ratified a decision to change policy and start producing Christmas, birthday and other occasions products. The claimant did not feel comfortable with this strategy and stated that he would have to retire as the selling of products celebrating such occasions would be in conflict with his religious beliefs and his position within his religious community.

6. In November 2017 the respondent commenced production of its first collections of such occasions cards.

7. In March 2018 the claimant confirmed to Mr Santoro that he would be able to support the change in the respondent's business and would be able to justify this to his religious community.

8. The respondent booked a stand at the PG Live Trade Show which is a trade exhibition for the greetings card industry. On 5th and 6th June 2018 the claimant and members of the respondent's sales team attended the show with a view to promoting and selling the respondent's new collection of birthday cards. It was reported to Mr Santoro that the claimant had failed to present or sell the new occasions collections to customers at the show.

9. On or about 22nd June 2018 Mr Santoro spoke to the claimant about the allegations that he had failed to promote the new collection at the Trade show. The claimant was asked to consider whether he felt able to support the commercial direction of the respondent.

10. On or about 7th August 2018 the claimant was diagnosed with lung cancer. On or about 9th August 2018 the claimant informed Mr Santoro that he was undergoing tests for suspected lung cancer.

11. On 10th August 2018 the claimant and Mr Santoro met. They discussed the claimant's health. Mr Santoro said he should wait for the test results but the claimant informed Mr Santoro that because of his health concerns and also his concerns about the new occasions products, he wished to make arrangements to retire from the business. This would deal with both his health issues and his concerns about the new products.

12. Following this meeting the claimant took some time off to focus on his health. He did not present fit notes but it was evident that he was away from work for health reasons. He continued to receive full pay until 30th November 2018.

13. The claimant had a number of scans and tests and underwent surgery on 24th September 2018.

14. On 17th October 2018 the claimant and Mr Santoro met again at Fischer's Baslow Hall restaurant. The respondent asserts that at this meeting the claimant confirmed his intention to retire from the respondent. I accept this, particularly as his diagnosis had already been confirmed and he had undergone surgery. An exit package needed to be negotiated and the two men met again on 26th October and 8th November for further discussions. It is understandable that the early discussions and negotiations were oral with no written confirmation or documentation following the meetings. The two men had been friends for years and it is therefore understandable that written documentation would not have been thought necessary in those circumstances until the parties were close to a formal agreement.

15. The claimant asserted that on 18th October he went into the office and was told by staff that in his absence they had been questioned by Mr Santoro and Meera (Mr Santoro's wife). He asserted that they were trying to 'dig up dirt' about him whilst he was not present. However, the claimant accepted in cross examination that despite his close and brotherly relationship with Mr Santoro he did not raise this issue with him in the weeks which followed in order to question what was going on or to have his mind put at rest about it. Whilst the claimant was clearly ill during this period he felt able to talk to Mr Santoro about other matters and so I do not find his explanation in this regard at all credible. Had he been aware that Mr Santoro was questioning staff in this way I consider that he would have raised it with Mr Santoro soon afterwards. Therefore, on balance, I do not accept that the claimant was told that the Santoros had been trying to "dig up dirt" on him in his absence.

16. On 8th November the two men met again. On balance I find that they discussed the claimant leaving the business altogether, not just a proposal that he should step back or reduce his work during treatment. The 3 to 6 month handover period which the claimant referred to at the hearing is more consistent with the claimant leaving the business altogether rather than just reducing his role. On cross examination even the claimant accepted that his discussions meant that he would be leaving the business at some point between February and May 2019 if there was a 3 to 6 month handover period. This is also consistent with the claimant's evidence that he did discuss an exit strategy at the subsequent meeting on 20th November which was only a matter of days later.

17. On 20th November the claimant met with Mr Santoro and his partner to finalise the exit package. The respondent contended that it was agreed between all parties that the claimant would leave the employment of the respondent and retire with immediate effect, relinquish his directorship and company secretarial role and the respondent would pay the sum of £100,000 as an exit package. The terms were to be agreed in writing. There was no further breakdown of what the £100k represented. It was not apportioned as between the cost of the shares and the price of the exit package. It was a global sum in connection with the claimant leaving the business. I accept this account.

18. Following the meeting on 26th November Mr Santoro messaged the claimant to confirm the email address to which he should send confirmation of the agreed amount and terms (page 133). He stated "*following on from our call, I need to send you an email about the amount and terms. Shall I send it to your g……@me.com? Please note that it may come across as very business like, but for the purposes of clarity, I am sure you will understand it has to be as such."* This was consistent with an agreement having been reached orally at the meeting of 20th November.

19. On 27th November 2018 Mr Santoro emailed the claimant to confirm the exit package agreement which included a payment of £100,000 (p113). The figure was to be paid in stages to the claimant following his retirement from the respondent. The terms of the email indicated that the settlement was in full and final settlement and the payment included any payment needed for the sale and transfer of shares which the claimant held in Santoro Ltd, Santorus Ltd and Santoro Retail Ltd. It was proposed that the claimant would relinquish his directorships and company secretary roles for the respondent and the other two named companies. Santorus Ltd would repay the sum of £1000 to the claimant which he had given on 26th April 2016. The terms of the email also stated:

    "You agree to sign all necessary paperwork now and in the future in order to ensure a smooth transition.

    Payment of the £100k to be as follows: £50k now upon completion of the necessary paperwork, £25k in 3 months' time and £25k in 6 months' time.
    ……
    Please confirm your acceptance of the above in writing by email and please let me have as agreed the draft narrative you propose we use to inform everyone about your situation."

20. On 27th November 2018 the respondent's payroll was due to be processed and approved on the respondent's bankline system. On review of the figures Mr Santoro queried a matter in respect of Rotherham. He discovered that an employee appeared to have an arrangement to work from home on matters relating to the claimant's affairs during her working hours for the respondent. Mr Santoro needed to investigate this and other matters at Rotherham.

21. On 29th November the claimant responded to Mr Santoro's email about the settlement agreement. He commented on the original email in red (p113-114). He agreed the payment of £100,000 and that his would include payment for transfer of shares in the three named companies. He agreed to relinquish the directorships and company secretary roles. He agreed to sign necessary paperwork to ensure a smooth transition. He queried why the £100,000 should be paid in instalments and indicated that in the circumstances of his health the staggering of payments added further anxiety for him. He indicated that he wanted the settlement to be a tax effective nett figure. He indicated that the draft narrative to announce his exit from the company could be brief: *"Goddie Quaye is leaving the business to focus on his current health situation and future well-being."* It is notable that the claimant's proposed announcement wording did not refer to a handover period and did not suggest that the claimant would not be leaving until February or May. No gap was left to insert a leaving date.

One might have anticipated the claimant including this if he did not think he was going to leave immediately.

22. Mr Santoro responded the same day and stated that the reason for the payment being made in tranches was to ensure that everything ran smoothly. He stated: *"As I mentioned by phone, due to your health situation I believe it would be in your best interests to not have to address numerous very disappointing issues that we have uncovered and continue to uncover. The payment proposed takes that into account and will be subject to the relevant due diligence and accountability. As for the position with HMRC, I cannot guarantee that the payment will be tax free. Payment of any taxes will be deducted as per HMRC rules. Please let me have your written confirmation that you now agree with all the items, in order to move things swiftly forward."* Mr Santoro says that the context of this email was the discovery of the account discrepancies at Rotherham. He meant that the payment would be subject to a smooth transition being effected and the claimant co-operating with any enquiries or queries which might arise.

23. The claimant responded at 22.57 the same day with an email confirming that he agreed with all the terms in the email dated 27th November 2018 (p111-112).

24. Mr Santoro's case was that his investigations at Rotherham uncovered the claimant's practice of concealing staff time being spent on the claimant's own personal matters. Staff suggested that he should also investigate expenses and car sales made by the claimant.

25. On 30th November 2018 Mr Santoro emailed the claimant in the following terms: "*following further very, very disappointing information that has now come to our knowledge and been confirmed, we are withdrawing our previous proposal. If you wish me to outline our findings thus far I am willing to discuss them with you, although giving regards to your current situation, and as you are fully aware of what the issues are, I am sure you will wish to avoid discussing them with me. Our revised proposal is as follows which will be open till the close of business today is as follows: we are now offering to pay you an ex gratia payment of £75,000…… as full and final settlement subject to full co-operation and a smooth transition, due diligence and accountability. Any payments found that have been paid to you by the company that are personal expenses and not a business expense will be deducted from the ex gratia payment. The amount includes any proportion of the amount needed for the sale and or transfer of all shares you hold back to Meera or the company which include: all shares held in Santoro Ltd; all shares held in Santorus Ltd; all shares held in Santoro Retail limited."* It went on to state*: "all company property in your possession will be returned to the company. You undertake not to destroy*

any documents or files in any format whether an electronic or otherwise. Payment of the £75K to be as follows: £50 K now upon completion of the necessary paperwork, £25K in six months' time……. You will not attend the Manvers office/Warehouse without approval from myself and myself being present. The payments will be subject to a confidentiality clause. We agreed that we will announce that "Goddie Quaye is leaving the business to focus on his current health situation and future well-being". Please confirm your acceptance of the revised proposal in writing by email by close of business today."

The remainder of the email mirrored the terms of the previous offer. I pause to note that the instruction that the claimant should not attend the premises without approval/accompaniment further undermines the assertion that the claimant's employment was expected to continue for some sort of handover period.

26. Mr Santoro asserted that he followed up the email with a telephone call to the claimant and that he challenged him on the information discovered to date. The claimant apparently did not wish to discuss the matter with him, stating that they should "keep things on a positive note" and that there were no other matters to be concerned about. Mr Santoro asserted that he and the claimant agreed that the termination of his employment and his retirement from the respondent would be effective immediately, that day i.e. 30 November 2018. The claimant accepted in cross examination that he did not ask what he was alleged to have done wrong even when he was on the phone call with Mr Santoro. On the same date following the call, the claimant agreed to the revised terms of the offer and agreement by email page 110.

27. In relation to this telephone conversation I find that the parties did in fact agree that the claimant was to leave employment immediately. The upshot of this conversation was that the claimant's employment would not be continuing further and that the only steps left now were those which were required to formalise the end of his employment.

28. On 4th December the claimant's access to company email was cut off at Mr Santoro's instruction. The claimant says that at this stage he did not think that Mr Santoro was ending his employment but he was unable to say exactly what his ongoing employment within the company meant in practical terms after this date. The only steps to be taken, as set out below, were the handover of company property etc. The claimant was unable to point to any documents in the bundle evidencing what work he was doing for the company remotely prior to his email being cut off on 4th December. On balance, I find that the ending of email access was part and parcel of the termination of employment.

29. An email announcement was sent out internally to staff on 5th December 2018. The recipients included the claimant's daughter who was living with him at the time. The email stated:

"Dear all, please excuse the formality of this notice. Meera and I wish to inform you all that whilst Goddie had been taking time out from the business as you all know, he will now be leaving Santoro with immediate effect to focus on his current health situation and future well-being. Goddie has been with Santoro for an incredible 30 years, and I know that many of you have worked together for a vast number of those years, and I'm sure that you will join us in wishing Goddie well. If anyone have any questions or concerns please feel free to direct these to your line managers or Meera/myself at any time."

Whilst Mr Santoro asserted that the announcement was in the terms agreed with the claimant, it is evident that he had inserted reference to the claimant leaving the company with immediate effect. This was additional to the wording agreed with the claimant. The claimant accepted that when his daughter saw the email she discussed it with him. She told him that an announcement had been made that he had left the business with immediate effect. He felt that Mr Santoro had made the announcement prematurely without agreeing it formally with him first. However, the claimant did not contact to Mr Santoro following the announcement to query why it was made or assert that he had not, in fact, left with immediate effect. Had the confirmation of his immediate departure genuinely come as a surprise to him I would have expected him to contact Mr Santoro to at least query the accuracy of the announcement or to argue that a different agreement had been made. The claimant's lack of reaction to, or action upon, hearing of this email strengthens my conclusion that by this point in time, at the very latest, the claimant was aware that his employment had been terminated.

30. In addition to the above, selected clients, suppliers and customers who had worked with the claimant during his time with the respondent were contacted and informed of his exit (Page 140, 145). These communications seem to have taken place on 11 December and 19 December. Page 145 refers to arrangements for a leaving present for the claimant. Pages 157-158 indicate that leaving gifts were received and were due to be delivered to the claimant in January 2019.

31. A P45 was issued giving a leaving date off 5th December 2018 (page 155). Mr Santoro's case is that the leaving date on the P45 was incorrectly listed as 5th December by payroll as they had taken the date of the internal announcement as the claimant's last day. This may be correct. Mr Santoro felt that the claimant's last day was in fact 30th November.

32. The claimant and Mr Santoro arranged for the claimant to attend Rotherham to return company property and collect any belongings that he had left there. The claimant collected the contents of a locked filing cabinet and returned his company property i.e. company car, car keys, laptop, iPad, iPhone and storage backup. He is also said to have deleted the entire contents of his email folder and diary. Photographs appear at page p136 which seem to include a list of items removed and which clearly show an iPhone and Apple storage device. The claimant did not challenge Mr Santoro about the contents of the announcement email that had already been sent out. This meeting on 9th December was effectively the handover following termination of his employment. It effectively severed all remaining employment links between the parties.

33. On or about 11th December 2018 the claimant arranged for the collection of 24 pallets of personal goods which had been stored at the respondent's warehouse unbeknown to the respondent (p138-139). This, again, is consistent with the claimant's employment already having ended.

34. On 12th December 2018 TM01 and TM02 forms were filed to effect the termination of the claimant's appointment as a director and company secretary at Companies House. The date of termination was stated as 29th November 2018 in respect of both appointments. These forms were not filed by the claimant. They were completed by Mr Santoro and were not shown to the claimant before they were submitted.

35. The claimant executed the transfer of his shares to the respondent on 21st December 2018 (p146-154).

36. Mr Santoro claims that following the claimant's exit from the business his investigations continued and he uncovered various abuses of the claimant's position. He wrote to the claimant on 15th January 2019 setting out a number of allegations against the claimant which were said to amount to gross misconduct and fraud. The letter put the claimant on notice that a claim was being brought against him for losses and damages that the company had suffered as a result of his actions. He also sought confirmation that the claimant had handed over all company property and that he no longer had in his possession any company property of any nature.

37. The claimant sent a letter dated 5th February 2019 (p126). He expressed shock and disbelief at his treatment at the hands of Mr Santoro. He asserted that he was being victimised and that this was a cynical attempt to pay nothing for the claimant's shares in the company. He noted that he had not been paid salary or even SSP for the previous two months. He alleged that the respondent had simply written him off because of his cancer and wanted to pay nothing more to him. The penultimate

paragraph of the letter stated: *with everything you have said and done against me to discredit my business reputation, you have given me no choice but to resign. I do so with immediate effect. It therefore follows that all required documents including my P45, be sent to me together with any properties owing to me."*

38. Mr Santoro wrote to the claimant by letter dated 7th March 2019 (page 127) essentially making the point that, from the respondent's point of view, the claimant's employment had already terminated following the agreement of 30th November 2018.

39. The claimant had not queried the fact that no payslips had been received nor had there been any payment of wages to him for the months of December or January 2019.

The law

40. The issue for determination is whether the claimant's claim was presented within the relevant time limit. It is understood that the time limit in respect of all elements of the claim runs from the effective date of termination of the claimant's employment (the "EDT").

41. The claimant contends that the EDT was 5th February 2019 as a result of his letter of resignation. It is asserted that it was a constructive dismissal. By contrast the respondent asserts that the EDT was 30th November 2018 and that the contract terminated by mutual agreement. Alternatively, the termination date may have been 5th December given the evidence heard by the Tribunal.

42. Section 111(2)(a) of the Employment Rights Act ("ERA") 1996 specifies that a Tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination.

43. Section 123 of the Equality Act ("EA") 2010 specifies that a claim of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates.

44. The primary limitation periods under EA 2010 and ERA 1996 are subject to modification pursuant to the ACAS Early Conciliation procedure.

45. Section 207(B) ERA 1996 sets out how the time limit should be extended:

"(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 initiating 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 …. 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 the day after 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."

Sections 140B(2)-(4) of EA 2010 set out corresponding provisions for Equality Act claims.

46. The Tribunal further has discretion to extend time to hear complaints which are otherwise presented out of time:

a. Section 111(2)(b) ERA 1996 states that the claim may be brought "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."
b. In relation to s123(1)(b) EA 2010 if the claim is brought out of time then it may be pursued if it is brought before the end of such other period as the employment tribunal thinks just and equitable.

47. When considering whether to exercise jurisdiction and hear a claim out of time pursuant to s111(2)(b) ERA the Tribunal must consider whether it was reasonably practicable for the claimant to present the claim within time. What is reasonably practicable is a question of fact (Wall's Meat Co Ltd v Khan [1979] ICR 52). The onus of proving that timeous presentation was not reasonably practicable lies on the claimant. He must show precisely why he did not present his complaint (Porter v Bandridge Ltd [1978] ICR 943) Reasonable practicability can be said to be akin to "reasonable feasibility" (Palmer and anor v Southend-on-Sea Borough Council [1984] ICR 372).

48. When considering whether to hear a claim out of time under s123(1)(b) EA 2010 the Tribunal should carry out a balancing exercise. It must consider the balance of prejudice between the parties. There is no presumption that the Tribunal should exercise its discretion in favour of the claimant (Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434.) There is no strict list of factors to be considered it may be useful to consider similar factors to those under section 33 Limitation Act 1980 (British Coal Corporation v Keeble and ors [1997] IRLR 336). Those factors include: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. The list need not be followed slavishly (Southwark London Borough Council v Afolabi [2003] ICR 800).

49. Parties to a contract are free to agree between themselves to terminate it. Both sides are then released from further performance of their obligations under the contract and the contract is discharged by mutual consent.

50. It is important to note at this point that the date of termination and the mode of termination are two separate issues. For the purposes of the preliminary jurisdictional issue I need only concern myself with the date of termination. It is not strictly necessary for me to determine whether it was a termination by agreement or by dismissal (constructive or otherwise). All the Tribunal needs to know is when the termination became effective. If the termination was carried into effect by a breach of contract or an unfair dismissal on the part of the respondent this does not render it ineffective from a time limit, and therefore a jurisdictional, point of view.

51. Thus, in this case, the respondent contends that the EDT was by agreement on 30th November. If the Tribunal were to find, as the claimant contends, that no concluded agreement to terminate was reached on that date this would not preclude the Tribunal from finding that 30th November 2018 was the EDT but that the termination was effected by a dismissal on the respondent's part. Furthermore, the fact that the more detailed or subsidiary terms of any agreement were not finalised would not prevent the parties from agreeing the date on which the termination should come into effect.

52. The date of the EDT is also a separate and distinct issue from whether there was a concluded settlement agreement in which the claimant validly contracted out of his employment rights pursuant to section 203 ERA 1996, for example. Whilst the presence of such a settlement agreement would also remove the Tribunal's jurisdiction it would do so on quite separate grounds. The existence or otherwise of a compliant settlement

agreement between the parties forms no part of the issues to be determined by the Tribunal following this preliminary hearing.

53. I have been referred to the case of Asamoah-Boakye v Walter Rodney Housing Association Ltd [2001] EWCA Civ 851. It seems to me that the issue in that case was the mode of termination. Was there a concluded agreement (in that case a binding settlement agreement) so that the claimant left by agreement? Or was there no concluded agreement such that he left by dismissal (the idea of a resignation having been set aside)? This case would therefore assist in determining the mode of termination but not the date of termination. In that case when it was decided that the agreement was not effective to terminate employment, the mode of termination was instead found to be a dismissal and the fairness of the dismissal remitted for consideration by a Tribunal.

Conclusions

54. Taking into account the findings of fact above it can be seen that from some point in August 2018 the claimant had a settled intention to leave his employment in the relatively short term because of his health and also because of the difficulties posed by promoting the respondent's new range of celebration cards. The claimant did not continue in work beyond August 2018.

55. The parties entered a process of negotiating an agreed termination. By the conclusion of the email exchanges on 29th November 2018 they had essentially agreed the terms on which the claimant would leave the business.

56. On 30th November 2018 the respondent sought to vary the terms of the agreement, most importantly to reduce the sum of money payable to the claimant. The claimant agreed that variation. The documents do not specify the termination date. The respondent asserts that this was agreed during the phone conversation of 30th November. This is not accepted by the claimant. On balance I have accepted the respondent's account that immediate termination was agreed.

57. In any event, the respondent issued its email of 5th December confirming that the claimant was leaving with immediate effect. Even if the agreed termination had not taken effect on 30th November, the termination certainly took effect on 5th December. The email could be viewed either as communication of a dismissal or the implementation of an earlier agreement to terminate. Either way, it was effective and the employment relationship ended by this date at the latest.

58. The surrounding findings of fact in the case also support the conclusion that the termination took effect on 30th November:

a. The claimant remained off work.
b. The claimant was not paid past the 30th November but did not complain about this for at least two months.
c. The claimant's access to work emails was cut off on 4th December. He would not have been able to carry out his job from home in those circumstances even if he had been fit to do so. The email disconnection also occurred prior to the email of 5th December.
d. The claimant handed back work property on 9th December. Again, this severed the ties between the parties and effectively disabled the claimant from doing his job for the respondent.
e. The claimant ceased to be director and company secretary from 29th November.
f. A P45 was issued with a termination date of 5th December albeit the termination date was taken from the email announcement rather than the contents of the discussions between the claimant and Mr Santoro.
g. There was an indication that leaving presents were sent by clients from December onwards.
h. The claimant's share transfer was executed in December 2018.

59. There is nothing in the available documentation and evidence between the 5th December and 5th February to indicate that the claimant considered himself to be in continued employment. His failure to chase his salary payments for December and January is inexplicable save in circumstances where he realised he was no longer in employment.

60. The claimant's letter of 5th February purports to be a resignation: it is not. The contract had long since terminated. The claimant is effectively trying to resurrect his contract so that he can resign from it in that letter.

61. As stated above I have been referred to the case of Asamoah-Boakye v Walter Rodney Housing Association Ltd [2001] EWCA Civ 851.I conclude that the case deals more with the mode of termination than the date of it, which is the central question in the instant case. In any event, given my findings of fact I conclude that in Mr Quaye's case there was no condition precedent to the formation of a concluded agreement to terminate that such agreement be encapsulated in a binding settlement agreement for the purposes of s203 ERA 1996. There could be a full agreement to terminate the contract without the existence of a settlement agreement. The contract would end as intended but the respondent would not have the comfort of knowing that the Tribunal's jurisdiction had been ousted by a compliant settlement agreement (s203 ERA). In any event, in this case all the essential terms were agreed between the parties as a matter of fact. This was not merely an agreement in principle. The parties had agreed when termination would take effect.

62. I have also been referred to the case of Chivas Brothers Ltd v Millar 2010 EATS 0032/10. That was an ill health retirement case where after the

alleged date of termination by agreement, the claimant asked for notice pay. It seemed to the EAT that the Employment Tribunal's approach was to regard the Claimant's query about notice pay as amounting to a condition which he required to be fulfilled before he would agree to take ill health retirement (paragraph 11). I refer to paragraphs 23 to 29 of the judgment. The claimant was found to be incorrect in this submission. His enquiry about notice pay did not resurrect a contract which had already terminated. Similarly, in Mr Quaye's case, his resignation letter does not resurrect a contract which had already been terminated.

63. The claimant, in submissions, refers me to the language used in the respondent's letter of 15th January 2019 (p116) where Mr Santoro states: *"your proposed termination settlement was subject, amongst other requirements, subject to due diligence and accountability."* Read objectively, this sentence refers to the 'termination settlement' being 'proposed' rather than the termination itself. It is entirely consistent with the employment having come to an end by the date of the letter, the termination "settlement" being shorthand for the agreed payment of monies. It is the payment which is still outstanding.

64. Claimant's counsel asserts that the termination agreement was subject to various conditions being met. He points out that the claimant had complied with those conditions but the respondent had not, so that the respondent itself had treated the agreement as not binding. However, even assuming that the claimant complied with his obligations and the respondent did not, this does not mean that the employment is ongoing, merely that the terms of agreement have not all been complied with. The respondent may well be criticised for this but it does not mean that the employment relationship was continuing at this point in time.

65. The claimant's closing submissions made other observations about the respondent's unilateral decision to reduce the payment sum from £100,000 to £75,000 and the fact that the claimant was not treated in the same way as a previous director of the company, a Mr Freeman. These may be legitimate criticisms of the way that the respondent has acted. The respondent may have treated the claimant very shabbily but that is not the issue currently before the Tribunal. The Tribunal must determine whether it has jurisdiction to hear the claim before it can proceed to consider the motives of the respondent, the impact of the claimant's disability on the way he was treated, the lack of any disciplinary procedure or the sufficiency of any evidence of misconduct on the claimant's part etc. I therefore make no findings about whether the respondent has treated the claimant well or badly in all the circumstances.

66. If, contrary to my view, the agreement and discussions between the parties were not sufficient to terminate the contract by mutual agreement then they, and the surrounding circumstances and actions of the parties

were sufficient to terminate the contract by dismissal on 30th November. It is clear from all the available evidence that the employment contract had ended by 5th December at the latest.

67. Given a termination date of 30th November the primary 3 month limitation period would expire on 28th February 2019. The effect of early conciliation is to extend this to 31st March 2019. The claim was presented on 28th June 2019 and was therefore presented nearly 3 months out of time.

68. In closing submissions, it was submitted on the claimant's behalf that if the claim were not brought in time the Tribunal has a wide discretion to permit the claims to be pursued. Claimant's counsel prays in aid the "Claimant's justifiable and reasonable understanding of the employment relationship existing until 5th February 2019" and asserts that it was not reasonably practicable for him to bring a claim until he did.

69. In light of my findings above I do not consider that the claimant was subject to a justifiable misunderstanding that his employment continued until 5th February. It cannot be said that it was not reasonably practicable for the claimant to bring his claim in time. He might have thought that the "agreement" had not been properly implemented by the respondent but he cannot reasonably have considered himself to still be in employment, particularly as his daughter had received and communicated the email of 5th December to him, he had returned all his company property and had not received salary payments for December or January. It is apparent from the claimant's closing submissions that the claimant sought preliminary legal advice after receipt of the letter dated 15th January 2019. He put in his "resignation letter" on 5th February and yet did not contact ACAS until 1st May. There is no explanation for this delay. I find that the "not reasonably practicable" limb of the extension test is not made out.

70. Claimant's counsel's second submission is that it would be just and equitable to extend time to hear the claim on the basis that there is an inference that the claimant was treated differently by Mr Santoro because of his disability. I have considered all the surrounding circumstances in this case. I do not consider the assertion that the disability affected the respondent's treatment of the claimant (i.e. that there is some prima facie discrimination claim) is a matter which renders it just and equitable to extend the time limit in this case. The delay in submitting the claim is not insignificant and there is, in my view, no good reason for the delay. No submissions have been made by either party as to the impact of the delay upon the cogency of the evidence. This is not a case where the respondent has refused to co-operate with any requests for information, as far as I am aware. The claimant did not act particularly promptly even once he was aware of the relevant facts if, on his account, the determinative information is that surrounding his resignation letter of 5th February 2019. It appears that the claimant did take some preliminary legal advice around the time of his resignation letter so I cannot infer that he was ignorant of the necessary steps to bring a claim.

71. As a consequence of the above I conclude that the claimant's claims were presented outside the relevant time limits and I decline to exercise discretion to hear the complaints out of time. The claims are therefore dismissed for lack of jurisdiction.

Employment Judge Eeley

Date: 28th February 2020.