EMPLOYMENT TRIBUNALS

Claimant Mr S Booth

Respondent: Total Dilapidations Service Limited

HELD AT: Leeds **ON:** 5 and 6 March 2020

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Mr Brien of Counsel
Respondent: Mr F Jaffier, Consultant

JUDGMENT

1. It is the Judgment of the Tribunal that the Claimant was not continuously employed for a period of two years prior to his dismissal by the Respondent on 1 April 2019, and the Tribunal accordingly has no jurisdiction to consider his complaint of unfair dismissal.
2. The Claimant's complaint of automatically unfair dismissal for assertion of a statutory right is unaffected by this Judgment, and this claim and any other remaining claims will be determined by the Employment Tribunal on a date to be notified.

REASONS

1. By a claim form presented to the Tribunal on 19 July 2019, the Claimant brought a number of claims including unfair dismissal, breach of contract, failure to pay holiday pay, arrears of pay and other matters, the unfair dismissal being pleaded on the basis of, what could be termed, ordinary unfair dismissal, and also automatically unfair dismissal, on the grounds that the Claimant was dismissed for having asserted a statutory right.

2. The Respondent replied to the claims, and in due course, by grounds of resistance, which were drafted by legal advisors. The response was submitted to the claims in which no issue was taken with the Claimant's length of service, which had been stated in the claim form to have been from 2013 until the dismissal on 1 April 2019. The response did not dispute that, and the grounds of resistance as originally filed with the Tribunal raised no issues in relation to continuity of employment.

3. There was a hearing, it was to have been in fact a final hearing, on 13 November 2019 before Employment Judge Cox, when the matter did not proceed and was postponed for a further hearing, two day, hearing, at that time no point was taken either by the Respondent upon the issue of continuity of service.

4. By an application of 14 January 2020, however, the Respondent's legal representative did make an application to amend the response to plead that the Claimant lacked the necessary two year's continuity of service to present his claim of ordinary unfair dismissal. The respondent contended that there had been a break in his service in 2018, so that as at the date of his dismissal in April 2019 he lacked the necessary two year qualifying service. That amendment application was made, there was no response from the Claimant to it, and consequently Employment Judge Wade gave permission on 24 January 2020 for the response to be amended to add that particular plea.

5. The hearing then came on before myself on 5 March 2020, with that additional ground of response now included in the Respondent's response. There was a discussion as to how that issue should be dealt with. It appeared to me that the issue was one which was a separate and discreet issue, and would potentially take (as has proved to be the case) a considerable amount of time in itself, and was of some complexity. It would therefore be appropriate to be determined as a preliminary issue, as, if it was determined against the Claimant the scope of the Tribunal's enquiry into the unfair dismissal would then be limited solely to the automatically unfair dismissal claim, which would focus upon the reason for dismissal, and whether that was or was not related to any alleged assertion of a statutory right. For those reasons it seemed appropriate that this issue should be dealt with first, and consequently it has been, with the Claimant giving evidence relating solely to this topic, not of course in relation to his claims in general. Mr Christopher Lee of the Respondent also gave evidence on behalf of the Respondent about it.

6. The relevant parts of the bundle, as it existed, have been considered in relation to this preliminary issue, but during the course of the hearing it emerged that the Claimant had failed to give disclosure of all the documents from his previous solicitor acting for him in the summer of 2018, he having waived privilege in respect of all of that communication because he had disclosed a letter of advice from his previous solicitors of 5 September 2018 at page 215 of the bundle. It was observed, and accepted during the course of the hearing that, having waived privilege in respect of one piece of privileged communication of that nature, the Claimant was obliged to waive privilege, or would be taken to have waived privilege in respect of other communications as well. Hence it has been during the course of today that other documents from the Claimant's then solicitor's file have been disclosed to the Respondent, and some of them have then been put before the Tribunal. The Claimant has been further cross-examined upon the contents of those documents as well. Equally, and on the other side, the Respondent has produced further documentation particularly in relation to

payments made to the Claimant, and about payslips, and Mr Lee has had further cross-examination today as well.

7. Having heard all that evidence, and considered the documents in the bundle and indeed as now put before the Tribunal, the Respondent's and the Claimant's legal representatives made their submissions, and this is the Judgment of the Tribunal upon the preliminary issue.

8. The facts are relatively straightforward, and emerge very much from the documentation. Whilst much has been made of issues of "credibility" on both sides, as I observed in the course of the argument, it seemed to me that very little would turn on credibility, this not being an issue where the Tribunal is being asked to determine what a person actually said in a purely oral conversation, but rather is being asked to determine what the effect of the various actions taken by each of the parties would in fact be. And so, although there are credibility issues on both sides, those did not seem to me to be terribly germane, and have not really been central to the determination that I have had to make today.

The Facts.

9. The facts therefore that I have found are as follows. The events with which I am concerned start off with a letter to the Claimant which is at page 138 of the bundle, and is a letter to him of 23 April 2018 from Mr Lee, who is the managing director of the Respondent, which is a small company employing some two people or so at the time. In this letter the Claimant was advised in relation to his work that there were some issues in relation to it, and in particular that there was a project that was incomplete. Consequently, in the third paragraph of that letter the Respondent told the Claimant this: "*I regret therefore that your position is no longer tenable and I must make you redundant with immediate effect. Please will you arrange to return all your TDS equipment etc"* and the Claimant was required to take certain actions as a result of that decision.

10. The letter goes on to say: "*Your contract has provision for a redundancy payment and Siaf will calculate the figure due"*. That is a reference to the gentleman whom the Respondent engaged as effectively its bookkeeper. Mr Lee has in fact has two other companies, and that person, Siaf Miller, carries out that function for certainly one of those as well, and assists Mr Lee in relation to TDS as the Respondent is known. That is who is being referred to in that letter.

11. The Claimant at that time however was off work sick, and indeed there is a fit note dated 23 April for some 11 days to 3 May covering his sickness absence at that time. So, the Claimant was in fact not in work at the time that the letter I have just referred to was provided to him, and it was indeed given to him by hand. There is reference in the subsequent communications to that exchange.

12. That is what gives rise to this issue in terms of the suggestion that the Claimant's employment, which had started in 2013, it is agreed, then subsequently in 2018 came to an end. Notwithstanding that the term "with immediate effect" is used in that letter, that was not, it would seem, what Mr Lee meant, because the employment did not end there and then, rather there continued to be a relationship between the Claimant and the Respondent. The next stage in fact was a letter from the Claimant back to Mr Lee on 24 April (page 142 of the bundle) in which he makes reference first of all to submitting his sick notes, but then asking this: "*please can you confirm the date of termination to my employment and as I understand it by your letter there is no notice period. As*

for Siaf working out my redundancy package I will be taking legal advice as only last week he claimed I owed TDS money when quite clearly I didn't".

13. That issue I should mention, because it features throughout the communications in this case, but is not really relevant to what has to be decided. It relates to a dispute that had arisen, and is ongoing in fact, as to whether the Respondent owes the Claimant anything in respect of various tools and other equipment that he has provided, for which he had arranged servicing and other things of that nature. This forms part of another part of his claim in this case, but is not an issue currently before me. But there is throughout the communications that then follow reference to that issue, and negotiations and discussions as to how the Respondent was to deal with the Claimant's claims as he saw them as being in respect of what he contended the Respondent owed him for those items or for service or repair to them.

14. So that is the reference that was made there. The document is dated 25 April 2018 (page 142B of the bundle) where in fact that is probably out of sequence in that the Claimant had actually written earlier that day, it would seem it is not very clear from the chronology, but basically there was an exchange between the Claimant and the Respondent on 25 April. The Claimant's letter is at pages 143 to 144, in which there is further discussion about the redundancy and indeed the notice, and in Mr Lee's letter of 25 April he says this:

    You were given notice verbally in January 2018 that it would be wise to seek alternative employment to maintain an income. You are made redundant in accordance with the terms of your contract.

15. Pausing there the contract in question is in the bundle at pages 71 onwards, and is the only contract of employment that relates to the Claimant's employment at this, or indeed any subsequent, time. It is dated 1 July 2013 and in terms of the terms of the contract nothing that I can see actually relates to redundancy, other than paragraphs 22 which relate to statutory redundancy pay, which is really a recital of what the relevant statutory provisions would be. Paragraph 17 is the clause that relates to notice the provisions, that the Claimant would be entitled to during his probationary period (which of course had long gone by) then to a week's notice, but thereafter it would be a month. Of course, thereafter it would, statutorily, increase after four years of employment by a week every year as well, but the contractual provision is set out there. But to the extent that there is a reference in the correspondence to entitlements in accordance with the contract, they were in fact no greater than the statutory entitlements would have been.

16. The Claimant, as I have indicated, was off work sick at the time and that continued to be the case. He submitted the relevant sick notes or fit notes, as they are now known, and the next one was on 4 May 2018 taking him to 2 June. That was submitted.

17. Getting into May, then there was further communication between the Claimant and Mr Lee, and in particular on 10 May, and those emails are pages 157 and 158 of the bundle. In relation to what the Claimant was saying at that time just before 8.50 that night he wrote to Mr Lee saying this: "*I don't want to go down the legal route but should you give me no option then that's where we will go. How you have gone about this whole situation has been traumatic and just wrong. As clever as you are the evidence is clear that I have a strong wrongful dismissal case and I am sure you are aware carries a compensation plus legal costs".* He then goes on to say that he doesn't want to as he puts it "screw Mr

Lee", and this is a last resort. He goes on then to make a number of claims particularly relating to the unit that was rented and indeed the tools and equipment that were also in issue between the parties.

18. Then he says, in relation to the redundancy issue, at paragraph 3: "*claiming you visited my home and then changed to ringing me is so it is proved. Bottom line there are clear procedures to follow when firing someone on the sick. Getting your secretary to email my redundancy letter is again low then backtracking and visiting of my home is desperate at best*". He then goes on to refer to what is being referred to as the "pond" incident which again has not featured in the evidence before me, because it goes back to an incident that clearly caused difficulty between the Claimant and the Respondent, and indeed led to his arrest. There is reference to that and the Claimant goes on to say: "*It is clear from your lack of support after the pond incident and the hurry to have a disciplinary you wanted to sack me to avoid redundancy. I have your emails from early hours after I got home from the police station*".

19. So that is what the Claimant was saying in his email at that time, and the reply Mr Lee sent to him a little later the very same night, at 23:11, was to say that he was away from work and that the Claimant was confusing his arrest at the pond and his redundancy as the same thing. He said that these were completely unrelated, and he did still need to do a formal review following the Claimant's arrest. He went on to say that he would ask Siaf to calculate the redundancy pay so that matters could be concluded.

20. Moving on to 14 May, the Claimant in the meantime had been calculating the sums that he considered he was due in respect of missing and broken tools, and had indeed prepared an invoice type document dated 7 May 2018 in which he set out the various amounts that he would be expecting for those. That is the background against which there is then further email traffic, and on 14 May he wrote again to Mr Lee referring to this issue but saying in the first paragraph: "*you haven't spoken to me at all but told Andres (that is Mr Broadbent also known as Brodie who worked for the Respondent as well) that TDS paid for my mitre saw. This is an accusation of theft. Your previous accusation is on me receiving £1,500 of TDS money for no reason of which I have only explained but sent proof of receipts/invoices submitted that you have insinuated the £1,000 paid into my account for these invoices was a request for me for an advance of my severance pay even before I was made redundant*".

21. The Claimant there is apparently recognising that he had at that point been made redundant. There is further mention then of issues in relation to skips and other items of equipment and tools.

22. Moving back to the issue that I am concerned with, the Claimant then says towards the end of this email "*I think given your accusations and the way things are progressing we are heading to a Tribunal of which I am completely comfortable with. This is certainly not my intention, I will leave with a heavy heart but I find you completely unreasonable and quite frankly bonkers"*. So there the Claimant was clearly contemplating Tribunal proceedings.

23. The response from Mr Lee the following day was a brief one, on page 163 where he tells the Claimant he is not out to screw anybody, that he is managing a business that was losing money, that the Claimant was taking things personally, but went on to say that Danielle (and that is a reference to the office manager)

will confirm the holidays that the Claimant was making for holiday pay and Siaf would confirm the figures, that being a reference to the redundancy calculation.

24. Also, then, on 15 May, later on that day in fact following Mr Lee's email that I have just referred to, the Claimant wrote to Mr Lee (this is page 169 of the bundle) referring again to items of repair and invoices and things of that nature which are not relevant to this determination, but this email ends with the following:

"*This is my last communication with you until you sort out my redundancy. I am not very well at the moment and can't handle your accusations and stress. By the way it is 11 days holiday including bank holidays"*.

The Claimant was indeed still covered by the fit note at that time.

25. Thereafter, on 31 May, there was further email communication between the Claimant and Mr Lee, and it is a little hard to follow the sequence in the bundle. It appears to have started at 13:21, which is on page 174 of the bundle and this records Mr Booth writing to Mr Lee say that day "*it appears I haven't had any redundancy or offer of redundancy making my financial planning impossible*." He goes on to say he needs to plan for the future and to complain effectively how Mr Lee was going about things, and then went on to say this:

"If I don't hear from you by close tomorrow I'm going legal. You have been warned".

There was then a response from Mr Lee at 3 o'clock that afternoon on page 173 of the bundle in which he says this:

"You will appreciate that your redundancy notice period has only just passed this month and you are currently employed. Please rest assured the financial position TDS finds itself, it's certainly not a joke it is something I take very seriously." He then went to say, "*I now have figures from Siaf to allow me to make an offer of £4,000 in respect of redundancy if you choose to accept termination of your contract"*. But the Claimant replied to that email at 17:37 first of all asking for a breakdown as to how that figure was arrived at. The reply was at 16:29 from Mr Lee in which he told him it was based on the statutory amount and asked if the Claimant was minded to accept and the Claimant replied at 17:19 that day: "*no way need breakdown and confirmation of my current employment status*". Mr Lee replied later that day at 21:08 going back on to page 171, that that was noted, and the relevant figures would be put together. The following day, at the top of page 171, there is then a short email in which the redundancy calculation and holiday calculation is set out by Mr Lee.

26. Pausing there the Tribunal has to observe that the statement in Mr Lee's email at 3 o'clock on 31 May might have been read to suggest that there was something that the Claimant could accept. The Respondent's position however is that notice of redundancy had been given, and so when Mr Lee said in respect of redundancy "if you choose to accept termination of your contract" that is somewhat at odds with the Respondent's position that notice of termination had been given. The only thing that was to be agreed at that point it would appear was the amount of the redundancy pay, but the Respondent's case is there was nothing for the Claimant to accept at that point, other than the calculation he had already been given notice of redundancy. And indeed, by that time, on Mr Lee's evidence, which I accept and is clear from the documents, the Claimant was still being paid SSP and was submitting fit notes. Consequently, whatever had been said in the letter of 23 April as to "immediate effect" both parties worked on the

basis that there had not been an immediate effect, and the Claimant remained employed certainly at that time.

27. That is the way in which things progressed as up to 31 May, and on the same day at 21:07 (page 175 of the bundle) Mr Lee said this: "*given TDS' current financial position you were given notice last month of intention to make you redundant in accordance with the terms of your contract. You are employed through the period of your notice. I'm now asking if you'll accept £4,000 redundancy money following your notice period*". The Claimant, of course, did not do so.

28. So that is how matters were as at 31 May. There was then a further email exchange on 1 June, and the initial contact that day was by Mr Booth. He wrote to Mr Lee making reference to the contract, and the contract in question was the one that is at page 71 of the bundle. In relation to the redundancy position, in the third paragraph Mr Booth says this: "*on 23 April you made me redundant with immediate effect and I asked you to confirm if there was a notice period and you didn't respond at all. It was about two weeks later you informed me I was on notice and now you tell me I'm still employed until I accept your offer. You have continued to mess me around and I find this totally unacceptable. Please supply me with this month and last month's wage slips*".

29. There was then a discussion about what the offer meant, and in particular what part of it was in relation to the tools issue. Mr Booth sought clarification from Mr Lee of the position, and what he actually was offering. Mr Lee replied (page 176) that he thought that he had answered all the questions Mr Booth had, but in some 12 paragraphs he sets out in that email a number of points answering points that the Claimant had made, many of which related to the tools issues and other complaints the Claimant was making.

30. In particular at paragraph 5 on page 177 he says this: "*I hand delivered your redundancy notice. That notice was for one month and was effective immediately. I have clarified this to you when you asked"*. Pausing there that might have been what Mr Lee intended, but it is not what the letter said. Of course, as lawyers appreciate, but many lay people may not, saying something is effective immediately, but then saying it is notice for a month, are contradictory, but that is what Mr Lee said in this part of this letter.

31. At paragraph 6 he says this: "*Once the notice period has expired it is our intention to make you redundant and we wish to agree a settlement figure for this. Until your contract is terminated you are employed*." He continues at paragraph 7: *"you've been paid fully for the period of your employment and payslips issued by post".* At paragraph 8 he says: "*your contract entitles you to statutory sick pay only*" and he then goes on to refer to that, and that of course is what was happening. The Claimant was still at that point in receipt of statutory sick pay, and there are other matters I will discuss, but at paragraph 12 he says this: "*at this time we wish to agree your redundancy pay only to avoid confusion and I will respond to you on this point separately as I promised yesterday*.

32. That was the position as at 1 June at 15:27, when that was sent. Mr Booth then replied to it on 1 June at 17:48, going through the numbered paragraphs that Mr Lee had set out. In relation to paragraph 5 where there was discussion of the redundancy notice. Mr Booth said this: *"you hand delivered my notice the day after Danielle emailed it to me. Your letter gave no mention of a notice period*

and you provide me with no clarity since. I would like for you to point out which correspondence informs me of this". In relation to 6 where the original paragraph from Mr Lee said, *"until your contract is terminated you are employed*" Mr Booth said, *"I accepted until we have an agreement"*. There was then a discussion about payslips and other matters, but in relation to paragraph 12, Mr Booth said this: *"you have to pay me redundancy as you have made me redundant and this is the law"*.

33. That was the exchange on 1 June, and things then continued. The Claimant still being off work sick, and still receiving statutory sick pay until 19 June. There is a next significant exchange between the Claimant and the respondent and this is at page 197 of the bundle, where Mr Lee writes to Mr Booth saying this: "*further to our settlement offer below I am disappointed you have not given me an indication of the figures you believe are due. You will appreciate that we can't afford to let the matter drag on indefinitely so your contract will come to an end at the end of this month 30 June 2018. We have recalculated the figures accordingly and then the redundancy payment calculation is set out and the holiday entitlement is set out to give a revised figure".*

34. Mr Booth's reply later that same day at 19:06 is as follows: "*Chris I accept your leaving date of 30 6 18 and this now allows me to hopefully move forward. However, this gives us a serious issue with regard to your offer of redundancy*". He then goes on to say how he had completed five years' service at that point and then sets out his calculation of his redundancy entitlement, his holiday entitlement, his proposal for the tools that are lost and broken, and the June wage, producing a figure that he would have accepted. Indeed, he reduced that figure for a settlement to £6,900 and he said, "*this offer will settle my claim including everything with guarantees of no further action even after proving my case against Paul*", which may be with some reference to the somewhat notorious, perhaps now, "pond incident". He goes on, over the page, however to say this:

    "Should you wish not to accept my offer I will have no choice but to initiate legal action and I have been advised I have a rock solid case for unfair dismissal. This is absolutely last resort as I'd rather settle now. I don't wish to incumber you with vast legal fees, a claim for sick pay due to incidents at pond and compensation on top of everything".

35. He then goes on to make some further comments which do not really advance the matter any further, but clearly at that point the Claimant has accepted the leaving date of 30 June 2018, and is then seeking to negotiate not only his redundancy entitlement, his holiday entitlement but also whatever he considered appropriate in respect of the tools issue that he was also claiming for, and he is clearly claiming at that point, or threatening that he will bring a claim for, unfair dismissal.

36. So that is how things stood as at 19 June. On 25 June however, Mr Lee wrote to Mr Booth following what Mr Lee anticipated would be an upturn in work, because he believed that there was some work that the Claimant could be employed to do, and consequently he wrote, on 25 June, this:

    "*I'm pleased to report that we are on the verge of winning a contract which was due to be let at the beginning of the year. To this end we no longer have the requirement to make you redundant and your contract will not be terminated this month. I'm sure this will be a relief to you and look forward to hearing from you*

when you have recovered from your ill-health and agreeing dates for your return to work".

37. That was also sent again by recorded delivery on 26 June, but it is the same letter. The Claimant's response (on page 201 of the bundle) on 27 June was this:

"Chris I've received both your email and letter with regard to your requirement for me to return to work. I detail below the reasons as to why I have to reject your request. Since being made redundant twice by yourself and giving a final termination date of 30 June 2018 I have been approached by a company and accepted the position of site manager due to start 1 September 2018. Proof of this can be submitted to your solicitor. Based on your "on the verge" of securing a new contract I cannot accept your offer of a return as this guarantees absolutely nothing. Just the same as I am on the verge of winning the lottery! I haven't filled in a ticket so it's not going to happen. The way you have accused me of various breaches of trust and the incidents at the pond make my position with both yourself and TDS untenable. I accept your redundancy date of 30 June 2018 and this is what I expect to happen. No more communication will be forthcoming from myself and if matters are not resolved on 30 June 2018 my next communication will be via my solicitor".

38. Mr Lee responded to that on 29 June, where he says that he received the email and says that the Respondent's position is this:

    1. *Verbal advice of redundancy given in January 2018.*
    2. *One month of notice of redundancy given in accordance with your contract on 23 April 2018 and we entered into a period of negotiation to come to an amicable agreement.*
    3. *Having been unable to agree a settlement figure we advised you that we wished to terminate your contract by way of redundancy on 30 June 2018.*
    4. *On 25 June we were invited to undertake a job as soon as possible from an existing client and I wrote to you immediately to tell you that subsequently your job was now safe.*

39. He then went on to say *"you have been employed throughout this period and we have not reached the suggested termination date so you remain employed unless you wish to terminate your contract with TDS?* Then there is a reference to allegations, and remarks which do not really take the matter any further and that really is how the matter is left, save that in the final paragraph he says this:

"You must appreciate that this is entirely necessary after such an incident to make sure that the company has been diligent to protect not only TDS but you as an employee against complaint from the other party involved and also their employer. Sadly the complaint against TDS can only be met with employee reviews to attend meeting to discuss the matter and is currently on long-term sick.

That is a reference to the previous incident, and the attempts that have been made to have a meeting about it. But the next sentence says this:

` *"Again this matter is not a fact for redundancy which is entirely driven by the volume of work on our books".*

40. Thereafter the Claimant continued to submit sick notes, and did so on 4 July and that one took him up to 14 August. Indeed on 14 August he submitted a further

one that day which has been provided to the Tribunal. In the meantime, it is not entirely clear when, and does not greatly matter when, but the Claimant certainly by 10 August, from other documents the Tribunal has seen, had consulted Pinkney Grunwell's solicitors and they wrote to the Respondent on 22 August (pages 208 to 209 of the bundle). In that letter they inform Mr Lee that they have been instructed on behalf of the Claimant say, in the third paragraph:

"On 23 April 2018 you advised that our client was redundant with immediate effect. Since that time there had been numerous communication between yourself and our client which are confusing at best and contradictory at worst. We know that at the present time you state our client is not redundant. However in order for this to be the case you would have to retract the previous redundancy and offer our client a new contract. As this has not been done our client is due his redundancy payment of £3,810 together with outstanding holiday pay including bank holidays together with a day's wage for work he undertook on your behalf".

They go through the figures thereafter.

"*In addition we understand our client attempted to negotiate with you in respect of settlement payment for his tools which were lost and broken".*

And again there is reference to figures there. But the letter continues:

"*Clearly this matter has been ongoing for some time and this is in everybody's mutual benefit that the matter be clearly resolved in early course now. Can you please confirm acceptance of our figures as calculated and confirm whether or not you intend to ensure this agreement is binding by way of a settlement agreement or whether you are simply satisfied to transfer the money to our client account in full and final settlement".*

They go on to say however:

"If you are unable to resolve this matter we have advised our client that he has a valid claim against you in the Employment Tribunal. Should such an application have to be made it would also include a request for further compensation in respect of the manor (presumably meaning "manner" and not some reference to baronial matters) *of the dismissal and the way our client has been treated since April of this year which would only serve to increase the monies awarded to our client*."

They go on to point out that the limitation was due to expire very shortly, and they wanted a reply by close of business on 24 August. They ended again saying that if they did not get some sort of indication from Mr Lee by this time, Mr Booth as their client would have no option but to begin his claim in the Employment Tribunal.

41. Mr Lee replied on behalf of the Respondent to that solicitor's letter on 28 August 2018 (pages 210 of the bundle), and in that Mr Lee says in the first substantive paragraph:

"It is clear from reading your letter that you have not been party to all correspondence on the matter. We acknowledge that on 23 April 2018 we gave your client notice to be made redundant in accordance with the terms of his contract and that notice period was to be effective immediately. At the point of which your client sought clarification and there is open correspondence which

shows that your client has no misapprehension that it was the start of his notice period not his redundancy date. Further your client appears to acknowledge this fact by both issuing sick notes for the time he has had off ill and accepting a salary during this period. It is fair to say that we have had protected negotiations in terms of the agreed settlement figure and we do not see that the cost of any tools which may or may not belong to Mr Booth are relevant to a redundancy settlement……"

He goes on to refer to the "tools issue", if I can put it that way, and he ends this paragraph saying:

"However as previously stated that this is not something to be considered in the context of a redundancy settlement".

He then goes on to say this:

"We are extremely pleased to report that during the period of Mr Booth's redundancy notice we were fortunate enough to win a new contract which negated Mr Booth's redundancy. We immediately notified him of the same and look forward to receiving a date when he will be able to return to work to undertake his usual role"

with Mr Lee saying that that clarified the matter but said that they should contact him again if they needed any further details.

42. So that is how matters were left on 28 August, and there appears to have been no further open communications between the Claimant's then solicitor and the Respondent.

43. From the additionally disclosed documents, however, it is clear that the Claimant was instructing his solicitors, and giving them advice as to what had taken place and seeking advice from them as to how we should proceed with matters. The Tribunal has been provided with emails between himself and his solicitor of 10 August, and indeed in particular 23 August. In the course of those emails there is again repeated Mr Booth's belief , as he expressed it, that he had not actually been dismissed. In terms of the position that was taken he was seeking advice from the solicitor, and he is advised that he needs to contact ACAS if he intends to bring an Employment Tribunal claim. He did so on 23 August and he got a certificate on 23 August. It seems most likely that that was on the basis that ACAS were not to contact his employers at that time, albeit it seems subsequently that his solicitors suggested that they in fact did so. They apparently believed that this might stop the clock which, prior to the early conciliation certificate might have done, but afterwards would not.

44. There was clearly a discussion then, but in terms of what Mr Booth was telling his solicitors, much is made of an email of 10 August, which is in the middle of the second page of the first batch of emails. There, having been asked by his solicitor what he wanted to obtain, and what she was to try to seek he said this:

"Just redundancy please as I am still employed (his decision) I presume my holiday entitlement will still accrue. I have asked for four previous bank holidays to be taken as lieu days. Do we have a possible unfair dismissal claim?"

45. The advice that was then given by Ms Garnett, in reply to that later the same day was:

"As you haven't been dismissed you cannot claim unfair dismissal"

And she goes on to give advice as to how the Claimant may go on subsequently, but on that basis the advice was "*well if you haven't been dismissed you can't bring an unfair dismissal claim".*

46. So, the Claimant was telling his solicitor at that time that Mr Lee was saying that he was still employed, and was getting advice as to the consequences of that position. But by 22 August, however, clearly the solicitors were proceeding and were writing to the Respondent on the basis that the Claimant would be seeking a redundancy payment, and would be doing so through the Employment Tribunal. Indeed the Claimant was also, and had previously threatened unfair dismissal claims as well.

47. So there things remained, and there was no further communication between the solicitors and the Respondent, but sometime in late August (and the details of this are a little hazy, but probably do not greatly matter) the Claimant decided he would go back to work for the Respondent. There is nothing documented about that, prior to it happening and the earliest documentation appears to be an email of 6 September, at page 217 of the bundle, where there is a discussion of a conversation that had taken place in relation to this. That sets out conversations that had been had, more negotiations in relation to the tools issue, what the Claimant would accept about that, and the possibility of him actually having a pay rise, and a slightly different role. That is how things remained. The Claimant's sick note expired on or about 12 September, but he continued to get sick pay up until he resumed working for the Respondent, and at that time the terms were the same. No new contract was issued, his pay was the same, his duties were the same and so things carried on until early 2019 when the events giving rise to the other claims the claims before the Tribunal then arose.

Discussion and Findings.

48. So those, in summary, are the facts, with apologies for the length, but it is important to rehearse exactly the factual basis of the Tribunal's findings, and what is before it, as the relevant documents. As I indicated before, there is not much more that either party has said, because neither party alleges that anything happened verbally or orally. It is all, in effect, in the documents.

49. In terms of the submissions that were then made, for the Claimant Mr Brien submits that the Claimant's employment clearly did not cease, that whatever happened in 2018, and reminding the Tribunal that presumption is in favour of continuity, that the Respondent has not shown that the employment ended during that period. There is ambiguity, and the Respondent's case that there was a termination, either by resignation or actual dismissal, has not been made out. Relying particularly as the Claimant does upon the fact that the Claimant continued to submit, and the Respondent continued to pay for the fit notes, SSP, and that throughout this time whilst Mr Lee could quite easily, as the person effectively signed off the payments, have stopped them. He allowed them to go through, and that is inconsistent with his position that the Claimant's employment in fact ceased on 30 June. He relies upon that very heavily in support of his contention that the employment did not end. All that happened, effectively, was that there was an agreement that it would end, if and when they reached an agreement about redundancy payments, but that was never made. No agreement was made, no payment was made, and consequently in those circumstances, whilst there was a potential termination, it never actually took place. The Claimant's employment continued uninterrupted throughout that period.

50. In the alternative, he has advanced an argument based on section 138(1a) of the Employment Rights Act 1996, which does provide that in redundancy cases if an employee's contract of employment is renewed or he is reengaged under a new contract within a period of a month of the termination of a previous one then the renewal or reengagement shall take effect immediately. If that happens immediately, or after an interval of no more than four weeks' time, then it will be regarded that there was no dismissal. That is the alternative basis upon which he submits that the Claimant's employment was continuous.

51. For the Respondent, Mr Jaffier's first position is that the Claimant actually resigned by the email he sent on 26 June, but that if that was not right then there was a dismissal for redundancy that the Respondent gave notice which was not, in fact, and could not be. Revoked. The Claimant did not accept its revocation, and in particular he relies upon the Claimant's email of 27 June, if not as a resignation, then as a rejection of any variation of the notice that had already been given. Any payments that were made by the Respondent were effectively made in error, and do not show that the Respondent, and particularly Mr Lee with his limited experience of these matters, intended or accepted that the Claimant's employment was in fact continuing beyond 30 June. He invites the Tribunal to find that the continuity was in fact broken.

52. Those are the relevant facts, and the submissions, in summary. In terms of the Tribunal's task, it is a sole issue and that is whether there was break in continuity. Did the employment end any time between 30 June 2018 and 4 or 6 September 2019, because if it did the Claimant, through Mr Brien does not seek any of the other exemptions in the Employment Rights Act whereby certain gaps in employment can be jumped. It is accepted that, if there was a break in the continuity, then the Claimant has no other grounds upon which (save for s.138, of course) to jump any gap.

53. To some extent whether there was a resignation, a consensual termination or an actual dismissal does not matter. The first question, and the only question is: was there a break? How the employment ended therefore does not matter in determining whether it did, but, of course, in order to determine whether it did end, the Tribunal is likely to have to ask, if it did, how did it? Any one of the possible reasons that it terminated, however, would suffice if in fact it terminated.

54. As between parties, there are only three ways in which an employment contract can end. The Respondent employer can end it, which is a dismissal, the Claimant employee can end it, which is a resignation or they can end it by mutual agreement. Those are the only ways in which parties can end employment contracts. The law can do so by other means, but parties can only do it that way. As it is suggested in this case that any termination was effected by the actions of the parties, then it has to be one of those three things.

55. The test that is to be applied, of course, is an objective one and the presumption is, as Mr Brien rightly submits, that that continuity is established unless the Respondent can show to the contrary, the effect of s.210(5) of the Employment Rights Act 1996.

56. Further, although this was not raised, but in case it is something that may arise later, I will deal with it now, and that is that the question of continuity for these purposes is statutory continuity, for the purposes of unfair dismissal. That is a statutory concept, and cannot be conferred by agreement, and therefore cannot be denied by an agreement as it were. Whilst estoppel has not been raised

specifically by Mr Brien, there is clear authority in ***Secretary of State for Employment v Globe Elastic Thread [1997] IRLR 327*** that neither a contractual agreement between the parties, or any form of estoppel against the employer , can create statutory continuity.

57. So if that were to be advanced (and I know it is not, but just for completeness) these are entirely matters of statutory provenance, and consequently the parties cannot alter that position in terms of statutory continuity.

58. That does not mean, of course, that the parties cannot then be found to have terminated the employment on a certain date, and that is the issue that I have to consider. It is an objective test. What the parties believed at the time is obviously relevant, but ultimately their belief is subjective I have to judge the matter objectively, as a matter of fact and law.

59. As I observed in the course of argument, both parties have effectively taken positions which are contradictory to positions that they took in 2018. We have the Claimant effectively saying "I did not have any break in my service. My contract did not terminate for any reason in 2018, notwithstanding that I sought a redundancy payment on the basis that it had. If I did so in 2018, then that was wrong. I was only trying to get a payment by an agreement, but my case is that there was no such termination at that time, and consequently my continuity is preserved". That is the inconsistency on his part.

60. On the respondent's part, having taken the position before me that there was termination, the termination taking effect on 30 June 2018, which was not varied or revoked or any otherwise modified, and that was a termination. Having taken that position, however, that was not the position they took in the response to the claim letter of 22 August 2018, from the Claimant's solicitors. In effect in the response of 28 August 2018 the respondent said the opposite. Effectively saying that the terms that they offered to Mr Booth "negated", as they put it, his redundancy. So, they were trying, in effect, to say, "well, there was no termination, he has still got a job, he should come back to it, and therefore we should not have to pay a redundancy payment"

61. In relation to the fit notes and the sick pay issues, of course, again the Respondents, in continuing to pay the statutory sick pay, can be said to have acted inconsistently with the position that the Claimant's employment ended on 30 June 2018. Why, it is asked, was it that those payments kept getting made, and sick notes accepted if there was no longer a contractual relationship between the parties? Mr Lee's answer was that that was really something that he signed off because he thought he had to, when Mr Siaf Miller or Danielle told him to do so, he did so, and he did not appear to give much thought as to whether or not he should continue to do so.

62. It is, however, I consider, not without significance that this was statutory sick pay, and not the normal contractual pay, or indeed contractual sick pay. The argument may have greater force in those circumstances, but Mr Lee seems to have been very much affected by the fact that the Claimant was on statutory sick pay, and believed, I accept, that there was something different about that, and he has an obligation to continue paying it.

63. So, the question for me is what does this all mean, and what actually as a matter of fact and law, occurred in 2018? The starting point it seems to me is the letter of 23 April 2018, because that is what effectively set this particular ball rolling. There can be no doubt but that that was a letter of termination. As I hope Mr Lee

appreciates, I am not being critical of him, it was an unfortunately worded one , because it purported to dismiss the Claimant with "immediate effect" but was not, and was meant to dismiss him within weeks, probably as a result of the advice from payroll or others.

64. That was not the true position, and Mr Lee did not intend to dismiss the Claimant with immediate effect at all. He intended, and indeed as was subsequently said in the course of the correspondence that followed, that this was effectively the immediate effect of the start of his notice period in accordance with the contract. That was believed to be (although probably would not have been) one month, but clearly it was not only one month because matters continued into June.

65. So, the question then is what happened in the intervening period? Well, it seems to me that what happened was that notice had indeed been given on 23 April 2018, but that that notice did not have an end date. It should have done, but it did not, and the parties, as it were, then carried on, the Claimant being under notice, but the period of notice not being specified. It did, however, I am satisfied, then get specified. It got specified when Mr Lee wrote to the Claimant telling him, on 19 June 2018, that the matter could not drag on indefinitely, and that the contract would come to an end at the end of the month, on 30 June 2018. There was nothing equivocal about that, and indeed the Claimant was not even being asked to agree to that. He was told that was what would happen, and consequently, the email of 19 June 2018, was, even if the April letter was not, clearly was either a dismissal, or confirmation of the end of the notice period that had begun in April. Whilst that did not require the Claimant's agreement, the fact then is that the Claimant accepted it. He accepted it by return email on that day (page 197 of the bundle) where he says, "I accept your leaving date of 30 June".

66. He then goes on to say, "this now allows me hopefully to move forward and gives us a serious issue in relation to the offer of redundancy". But there is a difference, and a clear distinction, the Tribunal is satisfied between accepting a date of termination i.e. the date of the end of the notice period, and then negotiating about the amount of redundancy payment, as opposed to still negotiating whether there is a termination for redundancy at all. I cannot read the words "I accept your leaving date of 30 June 2018" as anything other than the Claimant agreeing that was the end of his notice period. So, whatever notice had been given before, the Claimant was accepting it. He could, of course, have turned round and said "I do not regard that previous notice has been given yet, and so I will not accept that. I want another four or five whatever weeks". But he did not. He accepted that date, and then went on to negotiate. The main negotiation, of course, was not only about his redundancy pay. He was trying to negotiate in relation to redundancy, and the other matters in relation to the tools that have been lost or broken. But I am quite satisfied that there was at that point a termination. In terms of the termination date being 30 June, and the reason for the termination, it matters not for these purposes whether it was redundancy. That was the date upon which the employment came to an end.

67. That was not a consensual termination in my view. It was actually a dismissal and it would have entitled the Claimant to pursue a redundancy payment, as indeed he then set about doing in August of that year. What happened in the intervening period, of course, was on 25 June 2018, the Respondent had a change of heart and wrote to the Claimant telling him that his contract would not be terminated that month. That was an attempt at a unilateral revocation of notice that had been given, and accepted, to expire on 30 June. The Respondent

could not do that as a matter of law of law, as I cited during argument on the authority of ***Willoughby v C F Capital plc [2011] IRLR 985***.

68. That is not something that a Respondent can pick and choose about. It might be surprising that a Respondent can, as it were, be allowed to rely upon its own attempt to unilaterally withdraw notice, but the law applies both ways and whether the Respondent wants to withdraw it or not is another matter. Very often this argument is raised by respondents seeking to avoid a redundancy payment and to deny a dismissal. This is the other way around. This is a Respondent now saying that there was a dismissal, and seeking to rely then upon what the Claimant then did, but, if there was any doubt about the matter the Claimant's response of 27 June 2018, puts it beyond doubt because the Respondent did, in the letter of 25 June 2018, seek to withdraw the notice it had clearly given the Claimant. He, however, by his email of 27 2018, June clearly was having none of it. He expressly, and for reasons in fact which he embellished to make more credible, although there was no need to do so, but even he went so far as he accepts that to lie about the reason. He said that he had another job when he did not, but he makes it categorically clear that he will not accept the withdrawal of the notice. He accepted the redundancy notice of 30 June 2018, and that he says that is what he expected to happen. What he then did, and sets about with his solicitors, was to seek to obtain the redundancy payment to which he was doubtless then entitled. And indeed, the notice pay to which he would then doubtless have been entitled.

69. But thereafter matters got rather hazy, because the Respondent in the reply of 28 August 2018, instead of saying "well ok we attempted to withdraw the notice but the Claimant has not accepted that and therefore we accept now that we have to pay the redundancy payment and the notice pay" the Respondent did not do that. The Respondent instead said "well, we've withdrawn the notice and therefore we expect the Claimant back at work, and he does not get a redundancy payment. He should just return to work and that's how things should continue".

70. So, the Respondent, one can appreciate, faced with this rejection on the part of the Claimant, in respect of this was taking a completely different stance from that which it takes today. It was saying "oh well we have unilaterally withdrawn the notice notwithstanding that we can't legally do so, and therefore there is no entitlement to redundancy pay". That, of course, left the claimant in a dilemma.

71. That is what he sought advice from the solicitors upon, and they initially, of course, on 22 August 2018 proceeded on the basis that the Claimant had this redundancy entitlement. They too, however, appear to have been somewhat nonplussed by the Respondent's response of 28 August 2018, and have raised with the Claimant, when he has asked them what the effect of that argument may be. They rightly said that if there has been no dismissal he could not claim unfair dismissal. Similarly, of course, he could not claim a redundancy payment either, but at that stage it was really a case of "put up or shut up". If the Claimant was to pursue the application for redundancy payment he had to accept, as indeed was right, that he had been dismissed. He did not do so, for reasons one can well understand, preferring not to chance his arm in an Employment Tribunal at that stage for a redundancy payment and other payments, when having the prospect of going back to the Respondent. But that was his choice.

72. That cannot, I am afraid, affect my view as to the proper analysis of this sequence of events, which is, as I indicated, that the employment was indeed terminated

by the Respondent. The respondent purported to withdraw the notice. The Claimant could have accepted that, but he did not, in which case the notice could not be withdrawn. It took effect on 30 June 2018, and he was dismissed on that day.

73. That the Respondent continued to pay statutory sick pay in these circumstances, I appreciate, is a complicating and difficult factor, but I do accept that that was a mistake. It is, with respect to both parties, clear that neither had much experience or sophistication in matters of employment law. Whilst the Respondent has arguably had more employees that have left than was first suggested , and Mr Brien cross-examined Mr Lee today further about that, I do accept his evidence that he is , on any view, a small employer with little experience of this sort of thing, no HR backup and very limited experience of how to deal with someone in this situation , which was unique , in that this was someone who was off on long-term sick in receipt of SSP at the time his employment was about to end. I do not regard the continued payment of the SSP in those circumstances as being fatal, although obviously it was a matter that troubled the Claimant's then solicitors.

74. For all those reasons, I am satisfied that there was a break in the Claimant's employment. He did not resign. I am satisfied that his letter of 27 June 2018 was not a resignation letter. It was a refusal to accept the Respondent's purported withdrawal of his notice, but that is not a resignation. The effective cause of the termination was the Respondent giving him that notice and it dismissed in those circumstances. He did not resign, I am satisfied, nor was there, nor could there have been in these circumstances, a consensual termination so the employment did come to an end, but it came to an end because the Respondent dismissed the Claimant at that stage. There was therefore a break in continuity and the Claimant lacks the necessary continuity of service to bring the claim of ordinary unfair dismissal and that will be dismissed.

75. I will deal finally, though, with this additional point which is that the Respondent amended to bring this particular contention into the response late in the day and I accept that and there may be other consequences of that. That though seems to me has little effect upon my decision making process. Were it the case that this was a purely oral matter, where there was going to be conflicting oral evidence about who said what, and whether there was a termination in certain circumstances, then the fact that there is a late application to amend that may have some bearing upon that, and indeed the reliability of the evidence. But there is no getting away from the fact that, pleaded or not, clearly on the documents there was material upon which such a plea could be maintained. It should have been maintained earlier of course, but it was a perfectly proper plea to make, as the Tribunal's Judgment shows.

76. I do not think the fact the point was taken by way of late amendment in any way detracts from the facts, which are not actually sensitive to when that particular claim was made, so the mere fact it is a late amendment does not seem to me alter the position, and has not had a bearing on my decision. The fact is that this would have been the position, whenever this matter was raised, unfortunate though it is that it was raised at a late stage.

77. For all those reasons my determination is that the Claimant cannot proceed with the ordinary unfair dismissal claim and it will be dismissed.

Postscript.

78. For completeness, it follows that the Claimant's alternative argument under s.138(1) of the ERA cannot succeed, on these findings succeed, as there was no renewal or re-engagement falling within those provisions.

79. It also follows that the claimant was, in fact, on the face of matters, entitled to a redundancy payment and other payments upon his dismissal in 2018, but was not paid one, nor did he pursue such a claim then. He would be out of time to do so now, of course, but issues as to amendment of these proceeding to make such claims now may arise. Taking a wider view, the respondent, whatever the strict legal position, may consider that logic of its successful position adopted in this hearing means that the claimant was entitled to receive a redundancy payment, notice and holiday pay, back in mid 2018. Whatever the position as to his ability to recover those items now before the Employment Tribunal, or elsewhere, those entitlements may afford a basis for negotiations that arise from the considerations below.

80. Finally, having expended two days on this matter, on the second time it has been listed for a final hearing, with both sides incurring legal costs, the Employment Judge does exhort the parties to take stock and consider the financial viability of these proceedings. Whilst feelings have clearly run high, the complexity of the issues involved, and those which remain to be determined, and the costs being incurred are surely reaching disproportionate levels.

Employment Judge Holmes

Date: 5 May 2020