Case No: 2204181/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Potts	**v**	The Salad Kitchen Limited

Heard at: Central London Employment Tribunal On: 11 August 2020
Before: Employment Judge Norris, sitting alone (via CVP)

Appearances
For the Claimant: In person
For the Respondent: Mr F Currie, Counsel

RESERVED JUDGMENT

The Claimant's claim was presented out of time and time is not extended. Accordingly, it is struck out because the Tribunal does not have jurisdiction to hear it.

REASONS

Background

1. The Claimant worked for the Respondent between March 2018 and June 2019 as a sales assistant. There is a dispute as to his status in the initial months, during which it appears he worked up to 20 ad hoc hours each week, but it is common ground that he was supplied, in late summer 2018, with a contract of employment which stated that his role was permanent, with a 20-hour working week; he worked, however, more hours as the business developed.

2. On 24 January 2019, the Claimant went off sick and did not return to work.

3. It is also common ground that on a day in June 2019, the Respondent dismissed the Claimant by letter, although there is a dispute as to the date on which that letter was sent and the date on which it was received. The Respondent says that the letter was placed in a postbox on the morning of Monday, 10 June 2019 but the envelope bears a postmark of the evening of Wednesday, 12 June 2019.

4. The Respondent asserts that the deemed date of delivery at the Claimant's address, given that first class post was used, is Friday, 14 June 2019 at the latest. The Claimant's evidence is that he did not receive the letter until Monday, 17 June 2019.

5. The Claimant entered early conciliation with ACAS on two occasions that are relevant for these purposes. On the first occasion, the date of notification is given on the EC certificate as 11 June 2019, with the certificate being issued on 11 July 2019. The Claimant submitted a claim on 10 August 2019 giving that certificate number. This claim ("first claim") was subsequently rejected by the Tribunal. It contained complaints of a failure to pay holiday pay, arrears of pay and other

payments.

6. The second occasion when the Claimant went to ACAS was recorded as 9 September 2019 and the certificate was issued the following day, 10 September 2019. The Claimant's second claim form ("second claim"), raising complaints of unfair dismissal, disability discrimination, notice pay, holiday pay, arrears of pay and other payments (and "another type of claim which the Employment Tribunal can deal with", said to be "wrongful dismissal" and "automatically unfair dismissal") was received by the Tribunal on 16 October 2019. The Respondent submitted a response on 25 November 2019. It is the second claim with which this decision is concerned.

Preliminary Hearings (Case Management)

7. On 3 February 2020, the parties appeared in front of Employment Judge Stout at Central London Employment Tribunal. As before me, the Claimant was in person and the Respondent was represented by Mr Currie. It was agreed that the chronology that I have set out briefly above gives rise to questions of jurisdiction for the Tribunal, in other words was the second claim, submitted on 16 October 2019, presented outside the applicable time limits and if so, should time be extended? Further, the Respondent contended that the claim should be struck out or a deposit paid in respect of each of the complaints, in that they stood little or no reasonable prospect of success.

8. The issues were identified more fully in the case management summary and directions issued by Employment Judge Stout and sent to the parties the following day. A preliminary hearing to determine the jurisdiction points was listed for 26 March 2020. Unfortunately, of course, by that date movement restrictions as a result of COVID-19 had meant that in-person hearings were no longer taking place and indeed from around 23 March 2020 the Employment Tribunal had been closed to the public. Instead, on 15 May 2020, the parties appeared by telephone before Employment Judge Quill for a further preliminary hearing (case management). The outcome of that hearing was that an open preliminary hearing ("PH") was listed for 11 August 2020, which duly took place before me via CVP.

Conduct of the Preliminary Hearing

9. The PH was supposed to start at 10 AM but the parties experienced some considerable difficulty in accessing the CVP room and we did not start until around 10.35. During the afternoon sessions, the hearing was also attended by Mr Ross Cannon and Mr Sam Cole, directors of the Respondent, although they were present in an observational capacity only and did not speak or give evidence.

10. The parties had compiled a virtual bundle comprising 181 pages, with some additional documents, and we each had access to those. The bundle incorporated a witness statement for the Claimant along the lines that Employment Judge Stout had ordered him to produce, as well as a statement from Mrs Barbara Cannon who performs the administration for the Respondent (and is the mother of Mr Ross Cannon).

11. The Respondent was represented throughout by Mr Currie again and the Claimant represented himself. The day was exceptionally warm and the Claimant sought and was granted on each occasion several breaks in order to be able to cool down. The Claimant gave evidence on oath in the morning and was cross-examined by Mr Currie about his evidence on his contractual notice period and his receipt of the letter of termination. Cross-examination resumed after we had taken around an hour for lunch, with the Claimant giving evidence about the complaints he is pursuing and his state of knowledge on time limits. He answered occasional

questions from me. He confirmed at the end of his cross-examination that there was nothing he wished to add or clarify in relation to the evidence that he had given.

12. Following a further break, the Claimant cross-examined Mrs Cannon. She gave evidence as to the posting of the letter of termination and the circumstances in which it was drawn up, and then she answered questions from the Claimant and from me as to a particular passage in her witness statement in which she said that the Claimant had refused to sign his contract of employment. I return to the evidence in the case below.

13. I then explained to the Claimant the legal framework for an application to strike out the claim or make a deposit order. Since it was now just after 4 o'clock, there was no time to make a decision, which I indicated would therefore be reserved. I asked the Claimant questions about his means so that I would not have to recall the parties if I was minded to make a deposit order.

14. Mr Currie then addressed me by reference to his written skeleton argument and finally the Claimant noted a point which he particularly wanted me to bear in mind about the evidence given by Mrs Cannon.

15. Before we concluded, I was informed by the parties that the Claimant has submitted at least one further claim against the Respondent and four named staff members in relation to an alleged incident on 3 February 2020, which the Claimant says amounts to post-termination victimisation. I gather that that matter has been listed for a Preliminary Hearing (Case Management) on the afternoon of 23 June 2021. We touched on the possibility of consolidating the cases. However, in light of my findings and decision below, that hearing will proceed as listed unless the case is withdrawn or settled before that date and/or unless further restrictions on the conduct of hearings means it cannot go ahead.

The law relating to the preliminary issues

The following is a summary of the provisions relevant to the issues before me.

16. The case law in relation to the effective date of termination of employment contract confirms that if a Claimant is told that they are dismissed by letter, notice is not effective until they receive the letter (or reasonably have the chance to read it) and is not determined by the date on which the letter is drafted or indeed posted (see e.g. *Brown v Southall & Knight [1980] IRLR 130*, *McMaster v Manchester Airport plc UKEAT/49/97* and *Gisda Cyf v Barratt [2010] IRLR 1073*).

17. The Civil Procedure Rules ("CPR") deal with the question of deemed service at Rule 6.26, which states that a document is deemed to have been served on the second business day after it was posted by first class post.

18. In relation to time limits, a claim should be presented within three months of the date of the act complained of (for discrimination claims – section 123 Equality Act 2010 ("EqA")), within three months of the effective date of termination (for dismissal claims - section 111 Employment Rights Act ("ERA") 1996), or within three months of the date of the last in a series of deductions from wages (section 23 ERA). These time limits, however, are all extended by the requirement first to approach ACAS with an early conciliation request. Time may then be extended either by stopping the clock for the period of any conciliation that is undertaken between the parties or, where there is less than a month remaining before the deadline for submitting a claim, there is an automatic extension of one month.

19. The Tribunal may extend time in discrimination cases if it considers it just and

equitable to do so; and in non-discrimination cases, broadly speaking, it may do so only where it is satisfied that it was not reasonably practicable for the Claimant to comply with the time limit (taking into account the applicable ACAS early conciliation extension) **and** the claim was submitted within a reasonable time thereafter. There is no presumption in favour of extending time, and the burden is on the Claimant to show that it would be just and equitable to do so, with consideration of multiple factors under section 33 Limitation Act 1980, including the length of and reasons for the delay. Extensions of time remain the exception and not the rule.

20. For any claims that proceed, either because they were in time in the first place or because time has been extended under any of the provisions in paragraph 15 above, if the Tribunal considers that all or any part of the claim has no reasonable prospect of success, it may strike out that part of the claim under rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("Rules). Where the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring the Claimant to pay deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument, having first made reasonable enquiries into their ability to pay the deposit and having regard to such information when setting the amount (Rule 39).

Findings of fact on the preliminary issues

I make the following findings of fact relevant to the preliminary issue of whether the claim was presented in time and, if not, whether time should be extended.

21. It is common ground that the Respondent issued the Claimant with a contract of employment which the Claimant did not sign. For the purposes of this PH, nothing turns on when the contract was issued, although I note that it gives a commencement date for the Claimant's permanent employment of 1 July 2018. Although the contract purports to be one for "permanent full-time employment", clause 19 gives the Claimant's normal hours of work as 11.30 to 15.30. Other potentially relevant clauses are an entitlement to paid annual leave which is in line with the statutory minimum, sick pay for up to one month at full pay and (in two separate places) a contractual notice of one month either way.

22. I also note for completeness that the document in the bundle appears to be two different versions of a pro forma contract that have been spliced together, although it appears that this is in fact how it was supplied to the Claimant. Certainly, he has not suggested that this is a different document from the one supplied to him in 2018.

23. Mrs Cannon's witness statement says that the contract was supplied in August 2018 in anticipation of the Claimant working full-time with effect from 1 September 2018. She says that when he was working "full-time", he was employed for five hours a day, five days a week. It appears that the Claimant agreed with this, because he said in evidence that he works 24 or 25 hours a week from September onwards. I record that whilst Mrs Cannon's statement also says that the Claimant was handed two copies, the Claimant was adamant that he was given only one, and in cross-examination, Mrs Cannon accepted that he was given one copy and he was asked to sign it so that a second copy could be made and kept on the Respondent's file. I prefer the Claimant's evidence on this point.

24. Mrs Cannon's witness statement also asserted on more than one occasion that the Claimant "refused" to sign the contract that he had been given. I asked Mrs Cannon the basis for saying that the Claimant had refused. She told me that in October 2018, when she had not received the signed copy back from the Claimant,

she went into the shop and spoke to the Claimant, who replied that he would bring it in the following week. I find that this was not indicative of someone refusing to sign. I asked Mrs Cannon if there was any other reason why she was saying that he had refused. Mrs Cannon replied that she had not had any further discussion personally with the Claimant on the matter, but she believed that the Claimant had had a discussion with Mr Cannon, during which the Claimant had refused to sign the contract. Further, Mrs Cannon said she was aware of the Claimant's exchange of messages with Ms Kanella Kansolaki, the shop manager, though she could not say when or precisely how she became aware of them.

25. Regrettably, Mrs Cannon had failed to comply with EJ Stout's direction to set out in her witness statement the source of any information not acquired at first hand, despite having legal representation throughout. Mr Cannon did not himself give evidence. This was the point on which the Claimant wished to rely in his short submission at the end of the PH: that, contrary to Mrs Cannon's assertion that the Claimant had repeatedly refused to sign, she could give no evidence from her own knowledge that this was so. I have therefore had to consider whether the evidence nonetheless supports the Respondent's case that the Claimant refused, rather than merely failed (e.g. because he had overlooked it or was too busy) to do so.

26. The Claimant was asked in cross-examination why he did not sign the contract. His explanation was that his partner had just had a baby and was on maternity leave that was due to end in December 2018, and that he, the Claimant, had spoken to Mr Cannon to see if there was any flexibility around the hours he could work. Mr Cannon had said that he would get back to the Claimant but had not done so. The Claimant repeatedly denied having refused to sign the contract.

27. Whilst I found Mrs Cannon's written evidence to be unsatisfactory in that she was unable personally to give any instance when the Claimant had refused to sign the contract, and on the contrary, the evidence she could give suggested, as I have found, that the failure to do so was an oversight on the Claimant's part rather than because of any intention not to sign, I found that the Claimant's explanation for the failure to sign was even more unsatisfactory.

28. My reason for so finding is that the Claimant's exchange of messages with Ms Kansolaki indicates clearly that he is dissatisfied with the contents of some of the clauses in the contract, and in particular those that purport to restrict work elsewhere during employment and after termination from the Respondent, i.e. the clauses commonly termed "restrictive covenants". On considering those messages, to which I return below, I do not accept that the Claimant had not fully read the contract until late January and that the only reason he had not signed it was because of his partner's maternity situation, not least because on his own account she would have returned to work by that date and the point about varying hours after her maternity leave would have been moot.

29. One clause in the contract imposes a duty to devote full-time efforts to the employment duties and obligations set out, another prohibits direct or indirect engagement or participation in any other business activities that the employer reasonably determines to be in conflict with the best interests of the Respondent, and there is a one-year non-compete clause prohibiting involvement in any capacity with any competing business "within any geographic area in or around London, in which the Employer conducts its business".

30. I make no finding as to the reasonableness, enforceability or otherwise of these clauses. I do however find that the Claimant found them objectionable and, on balance of probabilities, I find that they led to his decision not to sign the contract. This is because in the messages with Ms Kansolaki, the Claimant said, among other points, on 26 January 2019 that he had, "…worked out how to get out of at

least all post-termination clauses including "cannot work for any competition in London or surrounding areas" and "cannot run related business" clauses". He continued, "Those clauses suck. They do not know what they're doing. … Ross and Sam do not have any intellect to turn into property worth protecting or stealing really! Not like me…".

31. He continued, "I think this has inspired me to fight for every bodies rights also! You would laugh how limp babs carrot [sic] actually is! I broke it 3 times on my own just to empower myself while waiting to go over with lawyer! They must have a SHIT contracts lawyer! I'll find out this evening…". He told Ms Kansolaki, "I will also fight just as hard for your rights".

32. I asked the Claimant about this reference to a carrot, which is also mentioned elsewhere in his exchanges with Ms Kansolaki. The Claimant explained that someone had brought in a large artificial carrot (I gather for display purposes), and he was using it to refer to the contracts that he and Ms Kansolaki had been given. He accepted that he had been openly discussing another business idea for months, although he asserted that this would not have been a competitor to the Respondent. He denied that he had in fact broken the terms in the draft contract given to him by the Respondent, and said that he was messaging Ms Kansolaki from the pub, where he was intending to meet somebody to get legal advice on it. He said that he had "probably had a beer and was extremely stressed, googling post-termination clauses in unsigned contracts".

33. While Claimant denied that he had not only refused to sign his contract but was also encouraging others to do likewise, and notwithstanding that I find the assertion he had breached the clauses three times to be little more than braggadocio, I find that his comments in relation to these clauses leave little room for any other interpretation than that he had deliberately chosen not to sign it.

34. At the same time as he was engaging in these virtual conversations with Ms Kansolaki, it is clear that the Claimant had also told Mr Cannon of his potential interest in starting his own business, because on 29 January 2019, when the Claimant told Mr Cannon in a text message that he had been signed off sick for two weeks, Mr Cannon asked him "Are you staying at [the Respondent] or you leaving to do your other thing? Let me know…", and having received no response, messaged the Claimant again on 5 February 2019: "Hi mate can you respond to my last message bud. I have had to get another member of staff while your off. Can you let me know if you intend on coming back to the salad kitchen or if you doing your own thing. Im left a bit confused as to what to do…[sic]". The Claimant did reply to this message, though not for another week, saying, "… I cannot really say either way at the moment and it isn't making it any better having to answer, in fact worse. As soon as anything develops I will let you know."

35. I find on balance of probabilities that the Claimant took the decision not to sign the contract because he did not want to be bound by the terms of the post-termination restrictions. I make no criticism of him for that decision, but it means that the contractual terms that were more generous than his statutory entitlements, and in particular the right to a month's notice even though he had been employed for less than 18 months, were not engaged.

36. In fact, however, the question of the Claimant's notice entitlement is not one on which anything turns in relation to the preliminary issues, for reasons which I now go on to address. The Claimant did not return to work in the weeks or indeed months after the exchanges of which I have set out extracts above. I make no findings of fact in connection with either party's conduct during that period. Instead, I go on to consider the circumstances leading up to the Claimant issuing the first claim on 10 August 2019 (that was subsequently rejected) and the second claim

on 16 October 2019 that was before me.

37. The documentation in the bundle shows that in the middle of April 2019, the Claimant had an appointment with Citizens Advice in Hackney, as a result of which he was given information about sanctions that might be imposed under the Universal Credit scheme if he left or was dismissed from his job. At the same time, it appears that the Claimant also approached Toynbee Hall, who describe themselves as a free legal advice centre, because on 17 April 2019, Toynbee Hall drafted a letter to the Respondent on the Claimant's behalf raising concerns about the Claimant's wages and potential unlawful deductions. Toynbee Hall emphasised that they were not solicitors and that any response should be given to the Claimant direct and not to them. The following day, the Claimant drafted a subject access request and, it appears, took in copies of those letters and some fit notes (there is no list of the dates of the fit notes) and handed them over to Mr Cole, who signed for receipt.

38. On 26 April 2019, Mr Cannon replied to the Claimant with the Respondent's position, and on 17 May, he sent a further letter to the Claimant asking for the originals of all his footnotes and enclosing a stamped addressed envelope for him to send them to the Respondent. Mr Cannon said that the Respondent would return the originals to the Claimant once they had seen them. On 25 May 2019, Mr Cannon wrote again, repeating the request that the Claimant send the originals of the fit notes in the stamped addressed envelope. He concluded the letter by saying," We can then pay you any sick pay that is owed to you. Unfortunately, failure to do this within the next week, will mean that we will terminate your contract of employment."

39. The Claimant says that he contacted ACAS and also HMRC in relation to what he perceived to be underpayments, including of holiday and sick pay. His evidence was that he rang HMRC on 11 June 2019 and that they rang him back later that day and said they had spoken to the Respondent, thus alerting the directors to the fact of the dispute. I also had in the bundle before me a copy of the early conciliation certificate which shows that ACAS received notification of early conciliation from the Claimant on 11 June 2019.

40. It seems entirely likely that the Claimant did both things on the same date. By the same token however, it appears entirely unlikely that the Respondent would have been aware of the Claimant having done them on that date. The HMRC letter makes no reference at all to the Claimant and the HMRC officer having spoken, nor that the officer had spoken to anyone at the Respondent. Instead, it says that HMRC are sending the Claimant a form to fill in because they have been asked to look into his right to receive statutory sick pay, and that they have sent a similar form to his employer to fill in and return.

41. Further, I am aware that when ACAS receive notification of early conciliation, the prospective Claimant is contacted by an administrator who takes down the details of the prospective claim before passing those details on to a conciliator who will then make further contact with the prospective Claimant. If the prospective Claimant agrees, the conciliator will then get in touch with the prospective Respondent. The Claimant says in his witness statement that he filled out the form "later" in the day during 10th June and had to have several calls with the conciliator to understand the process. Therefore, the chances that the ACAS conciliator had already spoken to the Respondent by close of business on 11 June 2019 appear to me very small indeed. I note that in paragraph 82 of his statement, the Claimant indeed says that even on 20 June, the ACAS Conciliator had "not got hold of the Respondent". However, it is unclear whether this was in relation to ongoing aspects of the first claim or in relation to the potential second claim.

42. I also need to determine the likely date when the Claimant received the termination letter, and in order to make findings on that, I need to determine the date it was drafted and sent.

43. The letter itself bears the date of 10 June 2019. Mrs Cannon's witness statement is silent on how the letter came to be sent, but she elaborated on this in her oral evidence during cross examination. She said that she had gone on Sunday, 9 June 2019 to her son's house with the draft letter for his signature. She knew that the directors were keen to get the letter in the post early on the Monday morning. She said that she went on the morning of Monday 10 June to Crowborough, where she placed the letter bearing a first-class stamp in the post box outside the post office. She believed there was a lunchtime collection and definitely one in the evening.

44. I have difficulty in accepting this evidence, because the Claimant has kept the envelope in which the termination letter arrived, and it was franked by the Gatwick Mail Centre at 17.40 on 12 June 2019. I can see no reason why, if Mrs Cannon had placed the letter in the post box on the morning of 10 June, it would not have reached the Mail Centre for a further day and a half. I find on balance of probability that Mrs Cannon did not post the letter on 10th June as she suggests, but late on 11 June or on 12 June 2019. To that extent, and though I make no positive finding in this regard, it does appear possible that the Respondent did know of the Claimant's contact with either HMRC and/or ACAS by the time the letter dismissing him was sent.

45. In any event however, the most significant date is the date on which the Claimant received the letter. The Claimant says that he received it on 17 June 2019, i.e. the following Monday. I have had regard to the CPR in this connection, and in particular rule 6.26. The (rebuttable) presumption would be that if Mrs Cannon posted the letter, in accordance with my finding, on 12 June, it would have arrived at the Claimant's home address on Friday, 14 June 2019.

46. I have then considered whether I accept the Claimant's evidence that he did not receive it on the deemed date of delivery but instead the following Monday. There are two potential sources of support for the Claimant's contention. The Claimant said that on receipt of the letter, he had conducted Google searches in light of the fact that the letter bore one date and the envelope another, to see if he could establish which of the two might be the effective date of termination. Further, he said that he contacted HMRC in order to inform them of his dismissal because of the impact that he knew this would have on his Universal Credit.

47. I asked the Claimant whether he had retained his Google search history and/or if he had accessed his Universal Credit record to be able to pinpoint the date more precisely. He informed me that he had neither piece of evidence available.

48. In any event, the Claimant's oral evidence before me was that the post is delivered to a box which he or his partner have to check. The Claimant says that he has been unable to discuss his claims with his partner and he says that at the time, she was preparing for their daughter's birthday party on 15 June 2019, although his condition meant he was unable to participate fully in those preparations. He attended the party on 15 June, and he says that they did very little on 16 June as they were exhausted. He says that only he saw the letter in his post box at some point after lunch on 17 June when he took his dog out for walk.

49. I find therefore that the letter did arrive at the Claimant's home on 14 June 2019. It is quite possible that neither he nor his partner checked the letterbox until after the weekend and it may well be, in light of the concluding sentence of the letter of 25 May 2019, that the Claimant and his partner were anticipating a communication

dismissing him. If his partner had seen a letter from the Respondent in the post box, she might not have told the Claimant about it. In any event, I find on balance of probabilities that he did not read it until 17 June although he could reasonably have done so three days earlier.

50. On 9 September 2019, the Claimant entered early conciliation for a second time, with the certificate being issued the following day.

51. On 14 October 2019, the Claimant had another appointment with Toynbee Hall, according to his appointment card, a copy of which is in the bundle. He submitted the claim which is the subject of these proceedings two days later, on 16 October 2019.

The Claimant's evidence in relation to time limits

52. In his written witness statement, the Claimant describes events early in 2019 including, apparently on a date sometime in late January, a call to ACAS in which he states he was given advice about "rules regarding time limits which were very strict". He has also described receiving an email from Toynbee Hall in late February 2019 in which he was advised to contact ACAS for early conciliation before submitting any claim and alerted to the existence of a "ticking clock".

53. Notwithstanding the Claimant's mental health challenges, which I accept have caused him difficulties during this period, I note that he has also completed education up to two years into a degree and has plans to teach at post-16 and higher education level. He has not suggested, and I do not find, therefore, that his mental health challenges prevented him from understanding the advice he was given at that time or subsequently about time limits. He notes in his statement that he was aware after his visit to Toynbee Hall on 24 June 2019 that there were three months from his termination date to "decide, research and then make the claim".

54. The Claimant refers in his written witness statement to the circumstances in which he submitted the first claim following assistance from the Personal Support Unit and describes an ongoing viral condition from which he says he suffered for several weeks after 10 August 2019. However, he confirmed in oral evidence that he was not relying on this medical condition in relation to his submission of the second claim.

55. On 5 September 2019, the Claimant says, he received an appointment from Toynbee Hall for 7 October 2019. He states that he believed that would give him two further days within which to submit the second claim after he had seen them. This suggests that he was erring on the side of caution in taking 10 June as the date from which his notice would run and assuming that he was entitled to a month's notice in line with the contract which he had not signed. By that thinking, his EDT would have been 10 July and therefore a three-month time limit would take him to 9 October. As I have noted above, he called ACAS on 9 September 2019 and (he says on advice from the conciliator) did not engage in further early conciliation with the Respondent, so that the certificate was issued the following day. As I have found however, he was not entitled to a month's notice, and in any case, the Respondent did not give him any notice. Accordingly, his employment terminated on the date he received the dismissal letter: 14 June 2019.

56. Of significance however is the Claimant's written and oral evidence as to what he knew about submission of the claim thereafter. In his witness statement he says that he was unable to see Toynbee Hall on 7 October 2019 as scheduled because they were double-booked, and his appointment was postponed until 14 October 2019. He says that he remembers raising a concern that he had to complete the ET1 "before the ACAS certificate expired". I asked him what he meant by this and

he said that he thought it expired a month after it was issued and that he was concerned when his appointment was postponed, because he had really wanted to take advice from them before issuing the second claim. He said that he was assured by Toynbee Hall that this was not an issue, but he does not say when this assurance was given and nor does he rely on it as causing him to miss the deadline.

57. This is borne out by the fact that in his witness statement the Claimant says in relation to the rejected first claim that he believed the deadline for submission was 10 August 2019, one month after the ACAS certificate "expired". That certificate was issued on 11 July 2019, and accordingly if the Claimant had applied the same logic to the second certificate, he would have been in time by one day. However, as I have noted, he says that Toynbee Hall told him not to worry about this issue. I did not see any confirmation from Toynbee Hall of advice given in this regard.

Conclusions on the preliminary issues

58. In light of my findings above in relation to the draft contract of employment provided to the Claimant but not signed by him, the Claimant's notice period was his statutory entitlement of one week.

59. While I do accept that the Claimant may no longer have access to his Google history if he has changed his device since receiving his dismissal letter, I find it difficult to accept that he could not have searched his Universal Credit record so as to be able to see the date on which he notified HMRC of the change in his circumstances and produce that in evidence. In any event, I conclude that the Claimant has not rebutted the presumption that the letter arrived on 14 June 2019. While I have found that he may well not have read it until 17 June 2019, I conclude therefore that he had the reasonable opportunity to do so on 14 June.

60. In the circumstances, the Claimant would have had to enter Early Conciliation ("EC") in relation to his dismissal (which he says was because he had asserted a statutory right and/or was an act of direct discrimination because of disability) by 13 September 2019. I have found that he did so on 9 September 2019 and hence that was in time. It is therefore of little importance to this issue if I am wrong in my findings as to receipt and the Claimant either did not receive the letter until 17 June or did not have the reasonable opportunity to read it until that date; he approached ACAS for EC within the prescribed time limit either way.

61. It will be clear from the findings and the evidence as I have set out above, that the Claimant was aware of the correct time limit for submitting a claim in relation to his dismissal. He knew the significance of the issue of the EC certificate and that this gave him a month from issue within which to submit the claim. He knew that time limits are strict, having been told this very early on.

62. So far as the unfair dismissal claim is concerned, then, I conclude that the effective date of termination was 14 June 2019 when the Claimant received the letter notifying him that the Respondent had terminated his employment. The Claimant having entered EC between 9 and 10 September 2019, he had until 10 October 2019 to submit his claim.

63. I conclude that the Claimant submitted the second claim six days late and that it was reasonably practicable for him to submit it in time. To the extent that he received advice to the effect that he should not be concerned about the expiry of the time limit, that was mistaken, but can have had no effect on his decision not to follow what he knew to be the correct path, i.e. to submit the claim on or before 10 October. He was already out of time by the time he saw Toynbee Hall, and if he received the mistaken advice earlier than that – which he did not suggest - his

remedy would be against them as skilled advisers (albeit they are a charitable organization). Accordingly, the claim for unfair dismissal is out of time and time is not extended.

64. The same time limits and the same considerations apply in relation to the other complaints that are not concerned with discrimination, i.e. I conclude that time runs from the date (14 June) when the Claimant had the reasonable opportunity to read the letter of dismissal, that he entered EC within the prescribed period on 9 September and the ACAS certificate was issued the following day, and that he had until 10 October to submit the claim but did not do so until six days later and accordingly the complaints of unlawful deductions of wages (the last in the series of which is said to be in June 2019) and wrongful dismissal are similarly out of time and time is not extended.

65. Finally, the Claimant brings complaints of direct disability discrimination and a failure to make reasonable adjustments. The alleged acts of discrimination include the deductions from his wages, a number of incidents in January 2019 and his dismissal. The failure to make reasonable adjustments is an allegation that the Respondent applied a provision, criterion or practice that the Claimant should lift heavy items on 22/23 January 2019, but this put him at a disadvantage compared to those who did not have his disability (a back condition) and the Respondent should have taken steps to avoid that disadvantage.

66. The same time limits are, of course, applicable as for the non-discrimination complaints. However, time may be extended under the Tribunal's just and equitable powers where appropriate. In the case of the failure to make reasonable adjustments complaint, this cannot be said to be a continuing act. The Claimant was not at work after 23 January to be put at a disadvantage as a result of being required to lift heavy items. It was not a continuing act. Therefore, he had until 22 April 2019 at the latest to enter EC, but did not commence it until 9 September 2019.

67. Further, this complaint at least was known to the Claimant at the date of the first claim (at a time when he had taken legal advice) and hence the date of the first EC period, but was not raised by him at all at that stage. I find that it would not be just and equitable to extend time on this point, regardless of any merits in the complaint.

68. So far as the direct discrimination in relation to the deductions from wages is concerned, I note that the Claimant relies on a series of deductions said to start in November 2018 and conclude in June 2019. Again, the Claimant had the opportunity to raise the assertion that the deductions were made because of a disability (or more than one) in both the first and second EC periods and could have included it in the first claim but did not. Further, the Claimant confirmed that he had not raised issues of disability discrimination with the Respondent contemporaneously. On this point, the Claimant is however only out of time if he is correct that the whole of a series of deductions up to and including those in June 2019 was influenced by direct discrimination.

69. Whilst I note that it was decided by Employment Judge Stout that I would not deal with the question of whether or not the Claimant had a disability (or more than one) at this hearing, and therefore I assume for these purposes that he did have both a mental and physical impairment that would constitute a disability within the meaning of the EqA, it is clear that the Claimant believes the reason for his wages deductions to have been because he asserted a statutory right. It was Ms Konsalaki who asked the Claimant, according to the claim form, in January 2019, whether or not he had Asperger's syndrome, but the Claimant makes no complaint about that, and Ms Konsalaki was not responsible for paying the Claimant.

70. The Claimant says in the claim form that he has no doubt his stress-related conditions were discussed and that the Respondent discriminated against him "because of his long-standing back condition". However his back condition did not emerge until after November 2018 (it is said to have become an issue some time in the middle of December), and therefore the suggestion that the Respondent would have commenced making unlawful deductions (if it did at all) in November because of a disability or disabilities of which it was unaware would, if permitted, be a claim that I would consider to stand no reasonable prospects of success. I therefore do not extend time on this point because it would not be just and equitable to do so.

71. Finally, I consider the assertion that the Claimant's dismissal was because of his disability. Again taking his case at its highest that he does have either or both of the disabilities relied on, I have to consider whether it will be just and equitable to extend time for the necessary six days in order to bring this element of the claim before a full panel hearing. I remind myself that the authorities are clear that the time limits are not merely guidelines for when claims must be lodged, but deadlines which are to be applied unless there is an exception to the rule (see e.g. *Robertson -v- Bexley Community Centre [2003] EWCA Civ 576).*

72. I have noted above that the Claimant himself appears to believe that his dismissal was at least in part because he had asserted his statutory right not to have unlawful deductions made to his wages, and that certainly was the principal, if not the only, reason on which he relied before me. The Claimant did not raise an assertion of disability discrimination (or, on the evidence before me, even suggest he had a disability, whether mental or physical) at any stage during his employment, and he was very vague when he was asked by the Respondent's Counsel during the PH if he believed his dismissal was because of disability. He suggested that EJ Stout had written this down at the earlier PHCM but that he was confused during that hearing because he had been unable to secure legal representation. I note EJ Stout has recorded in her Summary and Orders that she spent time explaining the different types of complaint for disability discrimination. However, the suggestion that the Claimant's dismissal constituted direct discrimination is encapsulated within a single sentence and is limited to a bare assertion.

73. Similarly, when the Claimant was asked in evidence before me about the list of alleged unlawful deductions, he was asked whether they amounted to direct disability discrimination and he replied that he believed so, but then said that he was trying to get money that the Respondent did not want to pay him. There appears to be nothing linking the conduct relied on – either in relation to unlawful deductions or in relation to dismissal - with the protected characteristic of disability.

74. Dealing with the Limitation Act factors, it is fair to say that the length of the delay – six days – is not huge and hence the cogency of any evidence is unlikely to be affected by the delay itself (as distinguished from the general delays now engendered by the pandemic restrictions).

75. The reasons for the delay are unclear. The Claimant does not rely on incorrect advice from an adviser, or on ill-health. He knew the deadline. He wished to receive legal advice before he submitted the second claim, and I understand that desire. However, given that he knew what the deadline was, and knowing from what he had been told that it was strictly applied, it would have been open to him to submit the claim himself and then make enquiries about amending it. He has not suggested that he believed he was entitled to an extension just because Toynbee Hall could not see him until after the time limit expired. Turning to another Limitation Act factor, I can see no request from the Claimant to the Respondent for information (or any delay on the Respondent's part) that might have explained or

contributed to the delay.

76. I have also considered whether the Claimant acted promptly in relation to the dismissal discrimination complaint and/or took steps to obtain professional advice once he knew of the possibility of taking action. He had already been to ACAS and put in a claim on a previous occasion. He told me that when he originally tried to contact Toynbee Hall, they were "closed for the summer". He did not stipulate the dates of that closure, nor the date of his initial attempt to make contact, and nor was there any supporting evidence showing that the Centre is closed throughout the summer months. The Claimant did not suggest that, having found out about the closure, he tried to contact any other free source of legal advice, e.g. by returning to Citizens Advice who had seen him on a previous occasion.

77. I have to ascertain whether it would be fair, on balance, to the parties to permit the Claimant to proceed. I am drawn to the conclusion that while the Claimant is inevitably to some extent prejudiced by not being able to pursue this claim, the prejudice to the Respondent in having to defend a claim of this nature when it was clear that even the Claimant is very unsure whether it has any merit is far greater. I understand that the Claimant has another claims or claims on foot against the Respondent and whilst the second claim will not proceed, it does not bar him from continuing in that litigation. He is, therefore, not left without a potential remedy for any claim against the Respondent. As with the complaint in relation to the discrimination by way of unlawful deductions, I therefore do not extend time.

78. Had I extended time, I should in any event have found that the complaint stood no reasonable prospect of success. I am mindful that such claims are usually nuanced rather than obvious and accordingly, Tribunals should be extremely cautious about striking out discrimination claims without hearing full evidence. However, I consider the Claimant's assertion that his dismissal was because of disability to be fanciful and indeed, as I have noted above, I am not persuaded that he believes it himself or will be able to adduce any evidence to substantiate it (or even to shift the burden of proof).

79. In the circumstances, I do not go on to consider whether any of the complaints should be the subject of a deposit order, since the Tribunal does not have jurisdiction to hear them as they were presented out of time and time has not been extended.

Employment Judge Norris
Date: 18 August 2020

JUDGMENT SENT TO THE PARTIES ON

18/08/2020

FOR THE TRIBUNAL OFFICE