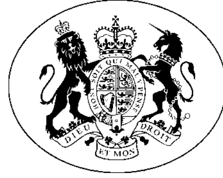

EMPLOYMENT TRIBUNALS

Claimant: Mr S Taylor

Respondent: Commonwealth Telecommunications Organisation

Heard at: London Central Employment Tribunal (in public; by video)

On: **16 July 2020**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: Mr R Roberts, counsel
For the respondent: Mr N Siddal QC

This was a remote hearing with the consent of the parties. The form of remote hearing was [V: video fully (all remote)]. A face to face hearing was not held because it was not practicable. The documents that I was referred to are in a bundle of 729 pages, the contents of which I have recorded. The decisions made are described below.

RESERVED JUDGMENT

(1) The complaint of unfair dismissal was not presented within the time limit set out in the Employment Rights Act 1996 and is therefore dismissed.
(2) The complaint of unauthorised deduction from wages was not presented within the time limit set out in the Employment Rights Act 1996 and is therefore dismissed.
(3) The complaint of breach of contract was not presented within the time limit set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and is therefore dismissed.
(4) The complaint of failure to make a payment required by the Working Time Regulations was not presented within the time limit set out in those regulation and is therefore dismissed.
(5) These were the only complaints, and therefore the whole of the claim has been dismissed.

REASONS

Introduction

1. I apologise to the parties for the lateness of this judgment and reasons, which was caused partly by dealing with other matters, and partly by a desire to thoroughly consider all aspects of the facts and law.

2. This was a public preliminary hearing, which was arranged at a case management hearing on 11 May 2020. The purpose was to consider certain preliminary issues, and then to make case management decisions.

The Claims

3. As set out in the claim form, the claims are Unfair Dismissal, Breach of Contract, Unauthorised Deduction from Wages and Holiday Pay.

4. The unauthorised deduction claim asserts that the Claimant's performance met certain criteria and that, therefore, he had become entitled to a pay rise which had not been implemented.

5. The breach of contract claim asserts entitlement to damages under various heads, and the right to bring a claim in relation to notice entitlement in the civil courts. Paragraph 19 refers to "the unilateral decision to terminate my contract" by the Chairperson and some other alleged breaches of contract (and constitutional irregularities) are described in paragraph 21.

The Preliminary Issues

6. To determine, as a preliminary issue, what was the "effective date of termination"? Was it, for example, any of the following, or was it some other date:
   - 6.1 20 November 2018? (The date on which a summary dismissal took effect), according to the Respondent)
   - 6.2 30 April 2019? (A date mentioned in the Claimant's claim form)
   - 6.3 16 September 2019? (The date on which the Claimant's fixed-term employment contract was due to expire if there was no prior termination).

7. To consider, to the extent that it is necessary to do so, whether the Claimant complied with his obligations in relation to early conciliation and, if not, to decide what relevance (if any) that has to the validity of the claim.

8. To determine, as a preliminary issue,
   - 8.1 Was each complaint submitted within the relevant time limit?
   - 8.2 If not, is the tribunal satisfied that it was not reasonably practicable to do so, and, if so, was the claim presented within such further period as the tribunal considers reasonable?

9. Does the tribunal give permission for the Claimant to amend his claim?

The Evidence

10. The parties had agreed a 729 bundle, with a separate index. I was also supplied with some videos, but the parties agreed that I did not need to watch those prior to hearing the evidence and submissions. I have viewed them as part of my deliberations.

11. There were written statements from Shivnesh Prasad on behalf of the Respondent and from the Claimant on his own behalf. Each of those witnesses gave evidence on oath and answered questions from the other side and from me.

The Hearing

12. The hearing took place fully remotely via video and there were no significant technology problems. By agreement, I heard Mr Prasad's evidence first due to his time zone. Both Mr Prasad and the Claimant were outside the UK. In addition to the evidence, I had written skeleton arguments from each side, including references to relevant cases, and I heard oral submissions.

13. A potentially significant matter related to whether the Claimant could amend his claim so as to allege that he had not been dismissed as of 30 April 2019 (a date mentioned in the ET1) because any purported dismissal before September 2019 was not valid. However, it was accepted that regardless of the merits of amendment application – or the substantive allegations contained within it – I was in any event going to have to decide the effective date of termination as a matter of law, which, in turn, would require me to consider the Claimant's argument that the purported actual dismissal was ineffective.

14. The hearing finished around 3.50pm and I reserved my judgment.

The findings of fact

15. The Claimant is a former employee of the Respondent. The Respondent is an inter-governmental treaty organisation. It has headquarters in London.

16. The staff handbook refers to The Commonwealth Telecommunications Organisation (Immunities and Privileges) Order 1983. That order states that the Respondent will have "the legal capacities of a body corporate".

17. The Claimant began working for the Respondent, as Secretary General, on 17 September 2015. He was appointed on a 4-year fixed term contract which was potentially renewable.

18. The employer was described in the contract as "Commonwealth Telecommunications Organisation ('the CTO') 64-66 Glenthorne Road, London W6 0LR". His contract stated that he would report to "Commonwealth Telecommunications Council ('The Council') through its chairperson". At clause 2, it was stated that he would be "responsible to" the Council through its chairperson. "CTO" was the shorthand for the body (treated as having the capacity of a corporate body by UK law) which employed the Claimant, and CTO was regarded as distinct from "the Council".

19. Clause 16 of the contract states:

    Your appointment may be terminated by six months notice given by you in writing to the Chairperson of Council. Council can give you six months notice in writing by the Chairperson of Council after consultation and acting in conjunction with the Vice Chairpersons for continued poor performance and inefficiency or without notice on the grounds of gross misconduct. Failing an extension or renewal of this contract being agreed by 16 September 2019. the appointment will terminate on 16 September of 2019.

20. Clause 19 states:

    The rules and provisions relating to the other members of stall in the Commonwealth Telecommunications Organisation as contained in the Staff Handbook as amended from time to time will apply to you except in so far as the terms of this appointment. or any amendment thereof are in conflict therewith. in which case the terms of this appointment will be upheld.

21. The version of the Respondent's constitution which is relevant for these proceedings was adopted on 25 October 2012. It describes itself as "Commonwealth Telecommunications Organisation ('CTO')". At paragraph 5, it states:

    The main instruments of the CTO shall be:
    a. this Constitution, which shall be referred to as the CTO Constitution;
    b. the Rules of Procedure adopted from time to time by the Council in accordance with paragraph 7.9(i); and
    c. the Headquarters Agreement between the CTO and its Host Government.

22. Paragraph 6 of the constitution stated that "*the main organs of the CTO shall be*": the CTO Council; the Executive Committee; the CTO Forum; the PDT Management Committee or its successor; and the Secretariat. Each of these, and their functions, are then described in paragraphs 7 to 11 respectively.

    22.1 The Council is the supreme decision-making body. Each member state can appoint one representative (at any given time) to the Council and each representative can have one vote at meetings, and these representatives (at any given time) are the only people entitled to vote on Council decisions. Quorum is 51%. The Council makes decisions at its annual meetings, and it can potentially make decisions at other times of year by electronic voting. The Council has a chairperson, a first vice chairperson and a second vice chairperson. References to chairperson or vice chairpersons are a reference to the member state holding that office at the time.

    22.2 The Executive Committee (also referred to as 'ExCo') consisted of, amongst other members the Council's chairperson, and two vice chairpersons and the Secretary General.

    22.3 The CTO's legal capacity is decided by the law of each member state in which it operates. In other words, in the UK it is determined by UK law.

22.4 ExCo's role includes (paragraph 8.3.4) interviewing for candidates for Secretary General, and recommending, to the Council, who should be appointed. The Council's role included (paragraph 7.9h) appointing the Secretary General having considered ExCo's recommendations.

23. The constitution does not expressly refer to a process for terminating the employment of a Secretary General prior to the end of the fixed term. The rules of procedure (paragraph 13.5) do envisage that the role might become vacant prior to the expiry of the fixed term and discuss the process for arranging for a replacement. The rules of procedure state, at 4.1, "*decisions of the Council shall normally be taken by consensus, but voting must take place on*", and then lists several specific issues. Item (c) is "*any proposal to appoint the Secretary General*", but there is no specific mention of a vote to terminate the contract of a holder of that office. Item (f) states: "*any other circumstances in which consensus cannot be achieved*".

24. The contract issued to the Claimant was in standard form and was, as far as the witnesses are aware, based on the same template as used for the Claimant's predecessors. The draft contract was issued to the Claimant in 2015 prior to the Council approving his appointment. It was signed by him. On behalf of the Respondent, it was signed on behalf of the then chairperson of the Council.

25. Paragraph 11.8 of the constitution states:

    The Executive Committee, without the Secretary General, may suspend the Secretary General, if the Secretary General is considered by them to be in breach of the terms of their contract. Such action shall be referred to the Council within three (3) months of being taken, which the Council may either ratify or reject

26. The rules of procedure specify that the chairperson is to preside at and conduct the meetings of the Council and Executive Committee and "*shall undertake such other functions as are determined by the Council and/or the Executive Committee*".

27. In June 2018, the executive committee suspended the Claimant, and informed him of this suspension by letter dated 7 June 2018, stating there would be a disciplinary investigation. By letter dated 13 June 2018, the then chairperson, Trinidad & Tobago (Gilbert Peterson), wrote to the Council to inform Council members of the Claimant's suspension. The letter did not specifically seek express ratification but referred to the interim arrangements for his absence. The decision to suspend the Claimant was not rejected by the Council.

28. The Claimant had his solicitors write to the Respondent (to the chairperson) on 13 June 2018, stating that the suspension was not justified (given the Claimant denied wrongdoing, and given that he had been working for several months since the allegations were first made) and breached his contract. It was not alleged that the suspension was contrary to the Respondent's constitution.

29. In due course, an investigation report was sent to the Claimant, and, in August 2018, his solicitors wrote asking for time to consider the contents.

30. At the annual Council meeting in October 2018, in Trinidad and Tobago, the outgoing chairperson gave a report in relation to the investigation regarding the Claimant. He informed the Council that ExCo had agreed that an independent disciplinary panel be appointed. The meeting agreed that resolution of the matter should not wait until the next Council meeting, because that would be a year later, and that was too far away. It was discussed that the panel should hold a hearing within the month of October 2018. The minutes record the chair as stating:

   the panel is to determine whether there is guilt or innocence, if there is guilt what the penalty should be, would be subject to ratification or ramification from the wider Council and this can be done electronically.

   My finding is that this is a reasonably accurate (though not necessarily verbatim) record of what he said.

31. At the meeting, the 3 panel members were selected and it was agreed that "*ExCo should reach a conclusion by 9 November 2018*". My finding is that this is a reference to ExCo reaching a decision as to what decision the Respondent should make following the outcome of the disciplinary hearing.

   31.1 It was not a reference to the time by which the disciplinary panel was to make its findings, because that panel was to be representatives from Mauritius, Trinidad and Tobago and Botswana, rather than all of ExCo.

   31.2 It was not a reference to selection of disciplinary panel members, because that was done during the 4 October 2018 gathering, and the panel was to hold the hearing within October 2018.

32. Terms of reference for the disciplinary panel were discussed. The final written version was produced after the October 2018 gathering and reflected what had been agreed by those present. The document included:

   Under the heading "frequency of meetings"

      4.1. The disciplinary panel of the CTO must meet until 2 November 2018 as agreed by the CTO Council on 4 October 2018.

      4.2. Where necessary, the disciplinary panel may be asked by the Chairperson of the ExCo to meet again online to address some key issues as a result of the ExCo discussion.

   Under the heading "6 Duties"

      6.5 To make a decision on the matter and communicate to the Chairperson of the ExCo in a summarised page with the investigator's report, correspondence, and any other documents that are deemed necessary, attached as an annex

   Under the heading "7 Authority"

      7.3. Where the Complaint is upheld, to decide on the appropriate disciplinary action (s) against a Respondent.

7.4. Where the Complaint is justified, to decide on the appropriate disciplinary action (s) against the Defendant

Under the heading “definitions”

"Defendant shall mean" the Secretary General of the CTO

"Respondent" shall mean the person who raised the issues in the case

33. Thus, both the Council minutes (by its reference to ExCo reaching a conclusion by 9 November 2018) and the terms of reference (see 4.2 above) envisaged that there would be some meeting of ExCo subsequent to the disciplinary panel decision. That being said, as 7.4 makes clear, the disciplinary panel was informed that it was authorised to decide on a sanction. Furthermore, and in any event, subject to the comment about ratification, those present at the October 2018 gathering made clear that they were not expecting that full Council would either conduct the disciplinary hearing or make a decision on sanction.

34. By the time of the October 2018 meeting, Gisa Fuatai Purcell (“Ms Purcell”) had been appointed as Acting Secretary-General. At that same meeting in Trinidad, in October 2018, Fiji became chairperson. By virtue of being the Council representative for Fiji at the time, Mr Shivnesh Prasad (“Mr Prasad”) served in the role of chairperson. He had previously served as a vice chairperson in 2015. Fiji did, in fact, act as chair starting with effect from October 2018.

35. At the time of the October 2018 meeting, the participants treated the decisions as being valid and binding. Minutes were subsequently circulated to all members (both those who had attended, and those who had not) in February 2019. About 18 months later, in March 2020, the Acting Secretary General formed the view that October 2018 meeting had not been quorate and wrote to members to say so.

36. In due course, the disciplinary panel held a hearing on 31 October 2018, and the Claimant participated. A letter dated 7 November 2018 was sent by the panel to Mr Prasad in his capacity as chairperson. It was a lengthy letter and included the following:

The four allegations that we upheld amount to gross misconduct under CTO's disciplinary policy and so the normal outcome is dismissal without notice. We have thought about if this should be the outcome in these specific circumstances …

… The decision of the panel is therefore that Mr Taylor should be summarily dismissed.

The panel understands that the CTO, as Mr Taylor`s employer, will now take responsibility for communicating this outcome to him and dealing with any related matters

37. Mr Prasad decided that he would not convene a meeting of ExCo (or a subcommittee of ExCo) and that he would not confer with the vice chairpersons. He decided (having taken legal advice on the matter) that

37.1 having a vote by ExCo might be undesirable as it would cloud the issue that it was the disciplinary panel (of representatives from Mauritius, Trinidad and Tobago and Botswana) who had held the hearing and heard from the Claimant and made a decision; and

37.2 consulting the vice chairs might be undesirable as it would potentially rule them out of sitting on an appeal panel.

38. Mr Prasad decided that he had the authority as chairperson to take action on behalf of the Respondent based on the disciplinary panel's decision as per the 7 November 2018 letter. He therefore sent a letter to the Claimant on 20 November 2018, including a copy of the panel's 7 November letter. The letter was on the Respondent's headed notepaper and included the Respondent's name, address and contact details. The signature line was "Shivnesh Prasad, chair". The letter said (amongst other things):

> *This panel acted with the delegated authority of the CTO to reach findings on whether you had been responsible for misconduct, and if so, what sanction should be imposed …*
>
> *… its conclusion is that your employment should be summarily terminated. In keeping with the authority granted to the panel, the CTO adopts this decision.*
>
> *Your last day of employment will be today and you will be issued with a P45 in due course…*

39. The Claimant received this letter by email and read it on 20 November 2018. That day, he sent a response shortly before midnight. He cc'ed various ExCo members and asked that implementation of the decision be delayed. As of the sending of that email, the Claimant believed that Mr Prasad had communicated a decision of ExCo (based on the disciplinary panel). His email commenced:

> *Dear ExCo members*
>
> *I have just received the report of the panel and the decision of ExCo to uphold some of the allegations made against me.*

40. Each of the vicechairs (Tanzania and Mozambique) contacted Mr Prasad, querying what had been done, and why, and when. Mr Prasad replied, stating that he had deliberately not involved ExCo so as to keep members free to hear an appeal. Mozambique replied on 21 November 2018 and was satisfied with Mr Prasad's response. The correspondence with Tanzania continued into December, possibly because of confusion over email addresses. In December, Mr Prasad replied stating that he had thought the documents had previously been sent to Tanzania's correct email address, but re-sending them in any event.

41. On 30 November 2018, Mr Prasad replied to the Claimant, refusing his request to defer the dismissal pending an appeal, but stating that if the appeal was successful the Claimant would be reinstated. As with the 20 November 2018 letter, this was on the Respondent's notepaper and signed "Mr Shivnesh Prasad, Chairman".

42. On 4 December 2018, the Claimant's solicitors wrote to "Mr Shivnesh Prasad, Chairman, CTO Executive Committee" stating that the letter was for ExCo's attention and that it "forms part of his appeal against dismissal". It gave some grounds for appealing against dismissal and also asserted that the purported dismissal was ultra vires and not effective. Mr Prasad replied (on the Respondent's headed paper) on 10 December, stating, amongst other things: "*It is not accepted that your client's dismissal is ineffective and you do not explain why this is so, however the CTO's position is that Mr Taylor's employment has been terminated. If he wishes to argue to the contrary, this is a matter for the appeal and will be considered at that stage*."

43. It was Mr Prasad's intention that the Claimant's pay be stopped from 20 November 2018, and he gave instructions to Ms Purcell to that effect on 5 December 2018. In part, his email stated as follows. The words in square brackets are my findings as to what the typos / abbreviations meant:

    … *the latest on this as of yesterday is that Shola has appealed* [through] *his lawyers. Nathan is now preparing the TOR to guide the appeals process.*

    On the matter of his termination letter and date. [That is] *still valid. Has* [the Claimant's] *pay etc been stopped in that regard as it should per my thinking*. [please] *have a call with Nathan to verify how to proceed.*

44. Ms Purcell's reply of 6 December 2018 stated, in part, as follows:

    I shall email Nathan to confirm that we should stop Shola's pay effective from the date of your letter. That is the norm, but I am not too sure of the UK law. So will talk to Nathan.

45. "Nathan" was an employee of the Respondent who provided legal and HR advice internally. Mr Prasad's interpretation was that Ms Purcell was going to act on his instruction to stop pay. He did not hear anything back from her, and so he assumed that she had carried out the instruction. In fact, unbeknownst to Mr Prasad at the time, the pay continued. Mr Prasad does not know the precise reasons, but assumes it was an administrative error. He knows that it was not the result of a decision by him to continue to pay salary (pending appeal, or at all) and he is not aware that it was the result of a decision by anyone else. Nobody came back to him to disagree with, or ask any questions about, his instruction that pay should be stopped. His reply to the solicitors dated 10 December shows that he had not changed his mind since writing to Ms Purcell on 5 December to state that (as far as he was concerned) the dismissal was valid and effective.

46. My finding is that there was not a decision by the Council (or by any members thereof) or by ExCo (or by any members thereof) or by the chairperson that the Respondent should continue to pay salary. Furthermore, no-one suggested to Mr Prasad that there should be a decision by the Respondent to continue to pay salary. Given Mr Prasad's position as chair of both the Council and ExCo, if any employee of the Respondent's Secretariat had made a specific decision to refuse to follow Mr Prasad's instructions, my finding – on the balance of probabilities – is that the employee would have informed Mr Prasad. My finding is that the failure to cease payment of salary in December 2018 was the result of an oversight (or

some other error or miscommunication) rather than the result of an employee purporting to make a decision on behalf of the Respondent (in contradiction to the decision which Mr Prasad had taken) that salary should continue.

47. Furthermore, and in any event, the Respondent did not write to the Claimant or his solicitors to say that pay was to be continued, and/or that the 20 November 2018 should not be treated as effective

48. On 17 December, the Claimant's solicitors sent some further arguments as to why they said the dismissal was ultra vires. They concluded the letter by stating: "*You have requested Mr Taylor to provide the full grounds of appeal as quickly as possible and in that light, Mr Taylor will now be submitting his appeal by close of business 21 December 2018. We would appreciate to be advised with a reasonable period of notice of the proposed date of the appeal hearing.*"

49. On 21 December 2018, lengthier grounds of appeal were submitted. Amongst other things, it was alleged that the annual meeting in Trinidad had decided that the disciplinary panel would report to ExCo and that it would be ExCo which took the decision as to the outcome of the disciplinary proceedings. The requested actions included that ExCo should "*Revoke the letter of dismissal of 20 November 2018*".

50. There were further exchanges of correspondence. The Respondent also appointed solicitors (Cater Leydon Millard) who liaised with the Claimant's solicitors in relation to arrangements for an appeal hearing. On 18 February 2019, the Claimant's solicitors wrote directly to Mr Prasad (cc'ed to other members of ExCo), rather than to the Respondent's solicitors. At the end of a two page letter dealing with several issues, about the appeal hearing due to take place imminently, the Claimant's solicitors included the following: "*We note that there was no response to our letter of 21 December 2018 and assume therefore that the decision regarding the effectiveness of any dismissal of our client in this matter has been set aside given that our client continues to receive his salary*." In fact, the letter of 21 December 2018 letter had simply been a short letter introducing the various attachments which were the appeal documents. Given how the case is now put by the Claimant, it is possible that this date was a mistake, and the intention had been to refer to the 17 December letter. However, the mistake (if that is indeed the correct interpretation) would not have been obvious to a reader of the 18 February 2019 letter.

51. Mr Prasad was not directly involved in the appeal arrangements, and it was left to the Respondent's solicitors (who, as mentioned, had already written to Hodge Jones and Allen) to deal with the 18 February letter. It was not brought to Mr Prasad's attention that the Claimant's solicitors were, somewhat obliquely, stating that the Claimant's salary was still in payment. The Respondent's solicitors wrote a short reply on 19 February 2019 addressing two of the points raised about the appeal hearing that was to take place the next day, but not addressing the sentence cited above.

52. On 20 February 2019, the appeal was heard by a panel of five ExCo members. The Claimant had legal representation. The Claimant and his lawyer took part in the hearing, including asking questions to the chair of the disciplinary panel and

making representations to the appeal panel. The decision was not given on the day. After the meeting, the Claimant’s solicitors wrote to Mr Prasad objecting to the fairness of the hearing and stating, amongst other things:

> *Our client attended the hearing convened by ExCo on 20 February 2019 to defend himself against the allegations made against him, the findings of the disciplinary panel and the unilateral decision of the Chairman to terminate his contract. The focus of his presentation was on the significant contradictions in the complainant's statements and the departure from due process.*

53. As well as objecting to the make up of the appeal panel (on the grounds that some of the individuals were from member states which had been involved at earlier stages, including Fiji), the letter stated:

> *In the event that ExCo adopts the unilateral decision that had earlier been taken by the ExCo Chairman, then we would have to raise a formal complaint at Council, followed by a formal suit if necessary at the UK employment tribunal. This would include a suit for libel for the damage to his character, written evidence of which is already before ExCo*

54. The appeal outcome was described in a letter dated 2 April 2019. The letter was from the chair of the appeal panel. Amongst other things, the letter stated:

> *… This was a meeting to hear your appeal against the decision to terminate your employment as Secretary General that had been communicated to you, with reasons, in a letter dated 20 November 2018 …*
>
> *… Peter Tladinyane, Chair of the disciplinary panel that concluded you should be dismissed, also attended by Skype for part of the meeting …*
>
> *… It was not the purpose of the appeal for there to be a re-hearing of the matters raised at the disciplinary meeting, but instead to consider whether the conclusions reached by the disciplinary panel were reasonable. …*
>
> *… The Investigation Report prepared by Mr Thomas Kibling an independent barrister at Matrix Chambers, concluded that there was a case to answer in respect of the allegations raised by* [redacted]. *Mr Gilbert Peterson as the Chair of EXCO, then made the decision to proceed to a disciplinary hearing based on the findings of the Investigation Report, namely that there was a case to answer which was not a finding that you had acted in the way alleged. The appeal panel believes this was an appropriate way of proceeding and it was right to separate out the process of the investigation, the review of that investigation, the disciplinary hearing and now the appeal. This is as opposed to your suggestion that EXCO should have been materially involved at all stages, which we think would be more likely to be a basis for complaint. As to the representations made by Avesta Weekes QC, these were considered by Mr Peterson and Mr Tladinyane also confirmed that the disciplinary panel considered them. …*
>
> *… You have put forward an argument that the decision to dismiss you, following on from the disciplinary meeting is void as the proper process has not been followed. The CTO Staff Handbook does not state that EXCO must meet to discuss the contents of an investigatory report in disciplinary*

proceedings. It is the opinion of the appeal panel that the decision to terminate your employment was valid and was the conclusion of a fair and transparent process. …

… The appeal panel also believes the decision to terminate your employment, as communicated to you on 20 November 2018, was valid. …

… This concludes the CTO's procedures to consider this matter

55. Notably, the Claimant was not seen as arguing before the appeal panel that full Council should make the decision. This is consistent with the fact that from 20 November until the appeal, he and his solicitors were addressing letters to ExCo. In any event, the appeal panel was satisfied that the procedure had been appropriate, and it did not base that opinion on things that had been said and done in Trinidad in October 2018.

56. The Claimant accepted in evidence that he was aware that the appeal panel had decided, amongst other things, (i) that the decision to terminate his employment had been validly made in November 2018, and (ii) that the decision had been properly communicated to him by the 20 November 2018 letter. He also accepted that he was aware that his appeal was rejected by the appeal panel, albeit he disputes the validity of the appeal panel's decision for several reasons.

57. As part of the disclosure for these proceedings, the Claimant has received copies of correspondence between appeal panel members, reflecting that the decision to reject his appeal had been by a majority of three (Trinidad & Tobago, Fiji, Mozambique) to two (Tanzania and Cameroon), confirming that the contents of outcome letter were approved by the appeal panel, that ExCo had, on 19 February 2019, approved the appeal panel and the procedure to be adopted for the next day's appeal hearing, and that the appeal panel members were informed that the outcome letter had been sent to the Claimant on 2 April 2019.

58. Fiji's representative at the appeal hearing, and the chair of the appeal panel was Mr Sharma. On his behalf, communications were sent by a lawyer, Tupoutua'h Baravilala ("Ms Baravilala"). On 3 April 2019, as well as sending a copy of the the appeal outcome letter, Ms Baravilala asked Ms Purcell: "*Please ensure that* ***all the necessary administrative procedures regarding dismissed staff are complied with***." The bolding and underlining are in the original. My inference is that Ms Baravilala and/or Mr Sharma had become aware (whether as a result of the comments made by the Claimant's solicitors or otherwise) that the Claimant's salary may not have been stopped. I do not infer that Mr Sharma (or Ms Baravilala or Mr Prasad) had agreed that it had been appropriate to continue paying the Claimant's salary from November 2018 until the publication of the appeal outcome.

59. On 15 April 2019, the Claimant sent a letter and attachment to Council members. The letter alleged that there had potentially been some financial irregularities by other people, which he had been attempting to put a stop to prior to his suspension. Amongst other things the documents included the following:

… The Chairman of the disciplinary panel confirmed that the panel's recommendations will be sent to ExCo for consideration. However, the

> *representative of Fiji in his capacity as the new ExCo Chairperson failed to submit the panel's report to ExCo and instead simply took a unilateral decision on 20 November 2018 to terminate my contract. The CTO Secretary-General is appointed by Council on the recommendation of ExCo, and therefore it is only the appointing authority (Council) that can discipline the appointee or take such a decision as suspension or termination of his or her contract. My attorney has since written to the ExCo Chairperson that such a unilateral decision is legally ineffective. …*
>
> *… The minutes of the disciplinary panel quote the Chairman of the disciplinary panel as stating that the panel will submit recommendations to ExCo for consideration and decision. Unfortunately, the representative from Fiji in his capacity as the new ExCo Chairperson failed to submit the panel's report to ExCo neither did he convene any meeting to consider the panel's report. He simply took a unilateral decision on 20 November 2018 to terminate my contract. I am not aware that Council nor ExCo had empowered the ExCo Chairperson to take such a unilateral decision. The CTO Secretary-General is appointed by Council on the recommendation of ExCo, and therefore it is only the appointing authority (Council) that can discipline the appointee or take such a decision as suspension or termination of his or her contract. …*
>
> *… The representative of Fiji acting as the ExCo Chairperson eventually convened an ExCo meeting on 20 February 2019 to hear and chair an appeal against the unilateral decision the representative of Fiji had itself taken. Given the provision of Art 7.3 of the CTO Constitution, it is inconceivable that a member government that has unilaterally taken a decision on behalf of CTO even if that decision was void, should be the same member government to chair an appeal against the decision taken by the same member government*

60. On 16 April 2019, Ms Baravilala wrote again to Ms Purcell, on behalf of Mr Sharma, stating (amongst other things): "*Please also confirm whether the administrative procedures have been undertaken and what is the status of this and given that the dismissal is effective from 20 November 2018*." I infer from this that Ms Baravilala and Mr Sharma had not received any specific answer to the 3 April queries, and suspected that it was possible that the previous instructions to cease salary had not been implemented.

61. Ms Sharma also arranged for a letter dated 16 April 2019 to be sent to all Council members, stating that the Claimant had been summarily dismissed as a result of the disciplinary panel meeting and that an appeal had been heard on 20 February, and that the appeal panel had upheld the decision and confirmed that the dismissal decision of 20 November 2018 was valid. The letter also discussed arrangements for appointing a new permanent Secretary-General.

62. Some members requested an extraordinary general meeting in order to discuss, amongst other things, the contents of the Claimant's 15 April 2019 communication. The Claimant was aware on this, and, on 6 June 2019, via his solicitors, asked if such a meeting would be held, and also asked if the decision in relation to the misconduct allegations had been ratified by Council, referring to the minutes of the October 2018 meeting.

63. The Claimant's pay was stopped by Ms Purcell. He received his salary up to and including April 2019, and received a P60 which suggested that he had been employed throughout the tax year 18/19 (ie that he was still being treated as on the payroll as of 5 April 2019). He had not received a P45 either. The Claimant wrote to Ms Purcell on 5 June 2019 (after he noted that no pay for May 2019 had been received) and asserted that his pay could not be stopped until after Council had ratified his dismissal. The Claimant's monthly salary payments were made towards the end of each month, and he checked promptly to see that they had been received. His payment for November 2018 was made towards the end of that month, and he would have been aware of the receipt in late November or early December. The payslip for that month was dated 30 November 2018.

64. Ms Purcell sent an initial response to the Claimant's query which said "I now await word from the Chair". On 10 June 2019, Ms Purcell wrote to Ms Baravilala, cc'ing both Mr Sharma and Mr Prasad. The letter included a paragraph stating:

    Furthermore, Article 11.4 of the Constitution states that the SG shall act as the legal representative of the CTO. In this regard, I need written confirmation from the Chair instructing the Secretariat to stop paying the Salary of Mr. Taylor, so as to cover our backs. I have stopped the salary based on the letter that was sent out by the Chair to all Council members and email from Tupou to do the needful for the administrative issues concerning Shola's dismissal. But reading the Constitution and Rules of procedures as well as minutes of the Council 2018, I am not in a legal position to stop the salary since Uganda requested an extraordinary meeting. And why I have been asking for written advice to stop the salary.

65. Later that day, Ms Purcell wrote to the Claimant stating:

    Thank you for your letter. The decision of ExCo was to upheld the result of the Disciplinary panel and that you were summarily dismissed as you are aware.

    The Secretariat acted on instructions from the Chairman of ExCo based on the letter he sent out to all Councillors in April. I shall come back to you as soon as possible where there is a change in the decision of the ExCo Chair and Exco members. Should I not come back to you within this week, it means that there is no change in the decision to stop your salary.

66. Ms Purcell did not, at any stage, give a written explanation to Mr Prasad or to Mr Sharma or to anyone else stating that she did not consider Mr Prasad's December 2018 to be "*written confirmation from the Chair instructing the Secretariat to stop paying the Salary of Mr. Taylor*". Given that Mr Prasad's written instructions on 5 December 2018 were in apparently clear terms, my inference is that by April / May / June 2019, Ms Purcell must have forgotten about that 5 December email. Otherwise, she would have explained to Mr Sharma/Ms Baravilala why she needed something different/additional to that earlier written instruction from the chair.

67. The Claimant's photograph had remained on the Respondent's website even after 20 November 2018. It was removed at a similar time to the eventual cessation of payments.

68. In June 2019, the chair wrote to council members in relation to the procedure for formally seeking approval for an extraordinary general meeting, and in July wrote to say that he did not believe the requirements had been met, and no such meeting would take place.

69. On 8 July 2019 (so that was Day A), the Claimant commenced early conciliation and a certificate was issued dated 22 August 2019 (so that was Day B).

70. The claim was presented on 20 September 2019. In Box 5 of the claim form, the Claimant gave 30 April 2019 as his date of dismissal. In his particulars, he wrote:

> *During the first few months in office, I discovered various financial and administrative lapses and irregularities which I sought to correct. These anomalies included overpayment of invoices, double payments, use of correcting fluid on invoices and vouchers, the shrouding of the activities and finances of the Programme for Development and Training (PD'S") in somewhat secrecy, incorrect calculation of salaries, payment of large amounts of cash to PDT suppliers and inconsistent financial reporting. These actions can easily lead to fraud. 'There were also anomalies in staff contracts {some staff did not have a valid contract) etc.*

71. Later in the particulars, having discussed the correspondence between his lawyers and Mr Prasad, it is stated:

> *Under normal circumstances, if the dismissal was not set aside, the Secretariat would have taken appropriate administrative action to discontinue the payment of my salary as well as other actions as expected.*

72. There is an inconsistency between these extracts. If the Claimant was aware of inefficiencies and errors and poor practice within the Secretariat, then he was on notice that the failure to terminate salary payments did not necessarily reflect an intentional decision by the Respondent. The Claimant was aware that it was at least a possibility that the reason that his salary had not been stopped was due to some error or oversight or inefficiency on the part of the Respondent. In his own correspondence with the Respondent on other matters, he had referred to issues in relation to the way in which the Respondent had handled some administrative and financial issues.

73. The Claimant was aware of the right to bring unfair dismissal proceedings (and other complaints) before an employment tribunal, and he was aware that there are time limits for so doing. The Claimant's stated reason for not issuing proceedings sooner than he did is that - in or around December 2018 - his then lawyers advised him:

> *that since I was still being paid and the Respondent had not challenged the arguments my lawyer had put forward, then I could wait until Council made a decision (as per decision of Council 2018 meeting) or my salary stopped before I took any action at the Employment Tribunal.*

74. He also suggests that he unequivocally believed that a decision by full Council was the only method by which his contract could be terminated (prior to the September 2019 expiry date) and that there was therefore no need to commence unfair

dismissal proceedings unless and until such a Council decision was made. However, the Claimant also states:

> *My lawyers even 'tested the waters' to make sure of the position of the Respondent, by writing a letter on 18 February 2019 (see R/461-462) to the Respondent stating that it was assumed the "dismissal" had been set aside, and that was why my salary was still being paid. In the email reply of the Respondent's lawyer dated 19 February 2019 (see R/463), the Respondent failed to challenge this. If the Respondent had confirmed in its response that the salary payment was in error (as it now falsely claims) and/or that Mr Prasad's supposed termination had not in fact been set aside, then we could have contacted ACAS. We would have been within the time limit, if 20 November 2018 was considered to be the EDT. But we were led to believe by the various aspects of the Respondent's conduct that this was unnecessary. After all, the Council is the only competent authority that can terminate my appointment in accordance with my employment contract.*

75. My inference is that the reference to "testing the waters" means that the Claimant and/or his lawyers were not unequivocal in their opinion that, in the absence of a Council decision, the Claimant's employment contract was continuing. They were certainly aware that: nobody from the Respondent had said that the 20 November 2018 letter was retracted; the Respondent was treating the February hearing as an appeal against dismissal; Mr Prasad had expressly stated that the dismissal decision was not withdrawn; there was a possibility that that "*ExCo adopts the unilateral decision that had earlier been taken by the ExCo Chairman*" (as stated in the Claimant's solicitors' letter dated 24 February 2019).

76. It seems likely to me that the Claimant and/or his solicitors considered the tactical advantages and disadvantages of issuing unfair dismissal proceedings within 3 months (plus the early conciliation period) of 20 November 2018. This is what the Claimant means when he refers to testing the waters; he means that there had been a discussion about whether to issue or not. I am satisfied that it is more likely than not that the Claimant and/or his solicitors considered the possibility that if an unfair dismissal claim was issued then that might undermine the arguments that the Claimant might wish to deploy if he pursued other claims or benefits based on a theory that the employment contract continued after 20 November, notwithstanding the 20 November letter. The Claimant has not satisfied me that the reason for not issuing proceedings sooner is that he was sure that he was still an employee, or that his solicitors told him that it was a safe strategy to delay. On the balance of probabilities, the Claimant knew that not treating 20 November 2018 as the effective date of termination, and not commencing early conciliation by 19 February 2019 was a risk; the reason that he did not commence proceedings (or start early conciliation) sooner than he did is that he decided to run that risk.

77. The Claimant had assistance from a QC in around August/September 2019 (that is prior to the disciplinary hearing). The QC drafted submissions in relation to the disciplinary allegations. He had the services of junior counsel at the 20 February hearing. He formally had the services of solicitors, Hodge Jones & Allen, between approximately June 2018 and approximately June 2019. At other times, he had informal advice from friends and acquaintances. He first contacted ACAS to commence early conciliation after his formal advice from Hodge Jones & Allen had

ceased. The Claimant is an educated professional person whose career has familiarised him with legal issues, including contractual issues and potential litigation.

78. In October 2019, it was intended that the annual meeting of the full Council would take place. In the event, it was deemed that the meeting - attended by 16 members (plus one late arrival) - did not meet the quorum requirements, and so the meeting proceeded by way of an informal discussion with the intention being that there would subsequently be electronic voting on relevant matters. During the informal meeting, there was a discussion that the Claimant's employment had been terminated and that he might be about to commence litigation (advice from the Respondent's solicitors reported being aware of early conciliation having been completed, but not whether a claim had been presented).

79. In December 2019, the Respondent served its response in these proceedings. Amongst other things, the response asserted that the 20 November 2018 letter validly terminated the Claimant's employment with effect from 20 November 2018.

The Law

Legislation

80. Insofar as it is relevant, section 95 of the Employment Rights Act 1996 ("ERA") states:

> **95.— Circumstances in which an employee is dismissed.**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or …

81. Section 97 ERA states:

> **97.— Effective date of termination.**
>
> (1) Subject to the following provisions of this section, in this Part "the effective date of termination"—
>
> (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
>
> (c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.
>
> (2) Where—
>
> (a) the contract of employment is terminated by the employer, and
>
> (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
>
> (3) In subsection (2)(b) "the material date" means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) Where—

(a) the contract of employment is terminated by the employee,

(b) the material date does not fall during a period of notice given by the employer to terminate that contract, and

(c) had the contract been terminated not by the employee but by notice given on the material date by the employer, that notice would have been required by section 86 to expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(5) In subsection (4) "the material date" means—

(a) the date when notice of termination was given by the employee, or

(b) where no notice was given, the date when the contract of employment was terminated by the employee.

82. Insofar as it is relevant, section 23 ERA states:

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, …

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments …

… the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

83. Section 111 ERA states, in part

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

84. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") states:

Subject to articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or …

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

85. Regulation 14 of the Working Time Regulations 1998 ("WTR") says, in part:

14.— Compensation related to entitlement to leave

(1) This regulation applies where–

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

86. Paragraph 3 of Regulation 14 sets out the means of deciding what sum is due in lieu of holiday on termination of employment. Regulation 30 says, in part:

30.— Remedies

(1) A worker may present a complaint to an employment tribunal that his employer– …

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) ...

(2) Subject to regulations … 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented–

(a) before the end of the period of three months … beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

87. Section 207B of ERA and Article 8B of the Order and Regulation 30B of WTR are worded similarly, and each describes how time limits are affected by early conciliation. In summary:

87.1 Where early conciliation commences after the time limit has expired, then the time limit is not extended.

87.2 Where early conciliation commences before the time limit expires, then the Claimant will have at least a calendar month from then end of the conciliation ("Day B") to present the claim.

87.3 In some cases, they might have longer than one month from Day B (the period from the day after conciliation starts until Day B is ignored when calculating the time limit).

Effective Date of Termination ("EDT")

88. The effective date of termination ("EDT") has to be determined in accordance with the statutory definition. An employer and employee cannot simply agree between themselves what the EDT is. See the Court of Appeal decision in *Fitzgerald v University of Kent at Canterbury 2004 ICR 737, CA*.

89. Similarly, the mistaken belief of one or both parties as to the correct EDT is not binding on an employment tribunal. In *TB Turbos Ltd v Davies EAT 0231/04*, the EAT considered the agreed facts as determined by the tribunal, which included

> *3. Having considered the oral and written evidence and heard the submissions made on behalf of the parties the Tribunal makes the following findings of fact:*
>
> *a) The applicant commenced employment with the respondent on 4 May 1999 as a vehicle technician.*
>
> *b) On 28 January 2003 the respondent posted a notice advising of changes to the start time of employees from 8.30 am to 8 am. The applicant objected to this and correspondence between the parties followed.*
>
> *c) By a letter of 28 April 2003 (1) the respondent gave the applicant notice of termination of his present contract of employment with effect from 27 May 2003. A new contract would start on 28 May 2003.*
>
> *d) The applicant did not sign the new contract and wrote on 20 May 2003. At this time he was signed off work sick by his GP and produced a sick note. In this letter he also outlined why he would not accept the proposed changes and stated "It would be duly deemed that as from May 28 2003, I will not be resigning from the company but reporting for duty without formal contract of employment".*
>
> *e) On 21 May the respondent replied reiterating that the old contract would end on 27 May and the new contract would start on 28 May.*
>
> *f) On 27 May the applicant who was still on the sick, wrote to clarify the situation and continued to try to negotiate about the variation to his contract of employment. In letters of 29 May and 12 June the respondent replied to the "applicant about this question. Neither party had changed their position.*
>
> *g) The applicant continued to receive wages throughout May including a small amount of statutory sick pay and received his pay slip (33) in the letter of 29 May (7).*
>
> *h) On 17 June 2003 the respondent wrote to the applicant inviting him to attend a disciplinary heating on 20 June to face an allegation of gross misconduct for unauthorised absence from work from 10 June 2003.*
>
> *i) The applicant then submitted a further sick note and disciplinary action was withdrawn. In the letter of 19 June (12) dealing with this, the respondent stated that the issues raised by the applicant on 10 June would "be dealt with at the appropriate time on his return to work".*
>
> *j) The applicant replied on 20 June and tended his resignation giving one month's notice from 24 June.*
>
> *k) On 23 June the respondent replied accepting his resignation. His final wage slip and P45 were also sent (32 and 33). The wage slip showed payment of SSP from 27 May 2003 to 23 June 2003. The letter was also the date of termination shown on the P45. Mr Appleton was unable to say how the 23 June had been arrived at. In his final wage slip there was also included "one month's gross pay in lieu of notice". He was also given 51/2 days' holiday pay.*

l) The applicant then sent a fax on 24 June (16) stating that he was now able to return to work and would do so on 25 June and gave two contact telephone numbers. He stated that if the respondent did not accept his return he would expect payment in lieu of his notice period.

m) Mr Appleton gave evidence that as he had already accepted the applicant's resignation and paid the monies due he did not reply.

n) The applicant never returned to work. His Originating Application for unfair dismissal was presented to the Manchester Employment Tribunals on 23 September 2003. "

4. The Tribunal were satisfied that the applicant continued to be employed until he resigned with one month's notice which took effect on 23 July 2003.

5. The evidence heard and read by the Tribunal supported this finding. In particular the applicant continued to receive wages and a wage slip after 27 May 2003. He was treated as an employee by the respondent in correspondence and in particular he was subject to aborted disciplinary action. The respondent also referred to his returning to work to discuss the issues in dispute (12) and by letter the respondent also stated (page 15) "we accept your resignation as tendered"

6. The respondent also clearly treated the applicant as an employee for purposes of statutory sick pay.

7. The applicant was actually paid up until 24 July (although the final amount was paid gross and referred to as wages in lieu of notice).

90. The tribunal rejected the employer's contention that the effective date of termination was 27 May 2003. In its analysis, the EAT noted

There is in law no generalised concept of an "employment relationship" not governed by a contract of employment which can exist for the purposes of the Employment Rights Act 1996. "Employment" is defined in section 230 (5) of the Act as "employment under a contract of employment". "Contract of employment" is defined in the Act as "a contract of service or apprenticeship"

91. Having discussed the Court of Appeal's analysis in ***Fitzgerald***, the EAT went on to say:

17.. [employer] submits that if the parties cannot, by deliberate agreement, change the effective date of termination for the purposes of the Act, it is difficult to see how they can do so accidentally, or in circumstances where the parties are both mistaken as to the true legal position. We agree. Payment of wages and accumulation of other benefits up to the mistaken date cannot change the legally effective date of termination which is determined pursuant to the legislation.

18.. It seems to us that the crucial issue which this Tribunal had to determine, but failed to, was the effect of the notice to terminate served by the Appellants on 28 April 2003. Further, there was no evidence before the Tribunal and no finding to the effect that a new contract of employment between the parties was created after 27 May.

19.. In our judgment, having regard to the undisputed facts, the only conclusion which this Tribunal could properly come to was that no contract of employment existed after 27 May 2003 and that that date was therefore the effective date of termination for the purposes of the 1996 Act and the Applicant's complaint of unfair dismissal.

92. Where one party gives notice to the other, stating that the employment contract will come to an end on a given date, then it is possible for employer and employee to mutually agree, before the contract ends, to extend that notice period. If that happens, then the effective date of termination can be the end of the extended notice period. Similarly, before the notice period ends, the parties might mutually agree an earlier termination date. See *Palfrey v Transco plc [2004] IRLR 916*.

93. Where a contract has already ended, then it is possible, in principle, for the contract to be revived such that the contractual relationship is the same as if there had been no dismissal. This is what happens, for example, when an employer upholds an employee's appeal against dismissal. See the Court of Appeal decision in *Roberts v West Coast Trains Ltd 2005 ICR 254, CA*, which analysed a situation where there was a particular contractual provision which meant that a successful appeal revived - retrospectively - the employment contract terminated by a prior dismissal. The Court of Appeal went further in *Patel v Folkestone Nursing Home Ltd 2019 ICR 273, CA* in which it was confirmed that there did not need to be express contractual wording for a successful appeal to have the effect that the employee was reinstated; on the contrary, the court held:

> *26. I consider that the short answer to this ground of appeal is that it is clearly implicit in a term in an employment contract conferring a contractual right to appeal against disciplinary action taking the form of dismissal that, if an appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout. This is not a matter of implying terms, but simply the meaning to be given to the words of the relevant contract, reading them objectively.*
>
> *27. By including a contractual right of appeal in the employment contract, the employer makes available to the employee a facility to seek to overturn the disciplinary decision made against him and to have the dismissal treated as being of no effect. If the appeal is successful, then subject to any other contractual provisions, the employee is entitled to be treated as having never been dismissed, to be paid all back pay and to have the benefit of all other terms of his contract of employment through the relevant period and into the future. Those terms include the usual implied duty of an employer to maintain trust and confidence.*
>
> *28. Conversely, if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not.*
>
> *29. If an appeal is brought pursuant to such a term and is successful, the employer is contractually bound to treat the previous dismissal as having no effect and the employee is bound in the same way. That is inherent in the very concept of an appeal in respect of a disciplinary dismissal.*

94. However, the mere fact alone that there are circumstances in which a contractual relationship can be revived does not mean that it should be lightly assumed that

that is what, in fact, has happened. For example, in _Cosmeceuticals Ltd v Parkin UKEAT/0049/17_, the EAT was satisfied that the contract had been terminated on (and therefore the EDT was) 1 September. The fact that the employer had later said it was placing the employee on garden leave, and later still said that it was issuing notice to terminate on 23 October, did not change the EDT from 1 September. Amongst other things, the EAT rejected any suggestion that the fact that – up to the commencement of the final hearing - both parties had treated the EDT as 23 October prevented a finding that the correct date was 1 September, and the EAT overturned the tribunal's decision as to EDT, while remitting so that there could be a decision as to whether events subsequent to the EDT meant that it had not been reasonably practicable to submit the claim within the time limit.

95. In _Horwood v Lincolnshire County Council EAT 0462/11_, the EAT had to consider a situation in which an employee had sent a letter stating that she was resigning with immediate effect. The date on which that letter had been received by the employer was established by the evidence. In response the employer wrote, a few days later, 2 February, stating: "*Your resignation will commence from the date of this letter, 2 February*". In considering the correct EDT, the EAT commented:

> *63. On the evidence in this case the Claimant's contract had come to an end on 29 January. Mrs Potter could not therefore unilaterally alter the termination date of a contract which had already ceased to exist. Further, the notion that on the facts of this case the correct legal analysis is that there was acceptance by silence or implied consent by the Claimant to her employer's subsequent "offer" to reinstate the contract and vary the EDT is in my judgment entirely misconceived. Such an analysis has no place in the statutory regime governing the determination of an employee's effective date of termination of employment, where the need for clarity and certainty is paramount, as the authorities make clear. This is not to adopt what Mr Capek criticises as an overly legalistic approach. Rather it reflects the sound public policy considerations underpinning the decisions in the cases to which I have referred, and the inescapable fact that on 29 January this Claimant's contract came to an end following the communication of her resignation with immediate effect.*
>
> *64. The Employment Judge was correct, in my view, to conclude that there was no subsequent variation of the EDT in this case.*

96. The employee in that case had continued to receive salary after the date which was found to have been the actual date of the effective date of termination. Neither the tribunal nor the EAT decided that the effective date of termination should be the date on which these payments came to an end. Having disposed of the appeal in relation to unfair dismissal, the EAT also had to consider a complaint about unauthorised deductions from wages. It said:

> *69. I can deal with this point very shortly in the circumstances, given my conclusions on the constructive unfair dismissal claim.*
>
> *70. Mr Capek submits that, even if the EDT was 29 January, the Claimant continued to receive salary up to 2 February even though this four day period extended beyond the EDT. The time limit for this claim was therefore 1 May and the ET1 was within time. Alternatively, he submits that since the Claimant did not actually receive her wages for the period up to 2 February until 23 February, when the final shortfall alleged occurred, the final date for submitting the unlawful deductions claim was 22 May and her ET1 was well within time.*

> *71. I do not accept either of these analyses. Since the EDT was and always remained 29 January, I accept Mr Pallo's submission that the payments made to the Claimant by the Respondent, up to and including 2 February, constituted ex gratia payments by the Respondent and cannot form the basis of a contractual relationship between employer and employee in the circumstances. The unlawful deductions claim could not therefore survive and, although the Employment Judge gave no reasons specifically in respect of this point, his decision that this claim should also be dismissed was correct.*

97. The mere fact alone that an appeal has been lodged does not necessarily revive the contract of somebody who has been summarily dismissed. The mere fact alone that an employer gives an appeal outcome which rejects an appeal does not necessarily mean that the end of the contract (and thus the effective date of termination) is based on the date of the appeal decision rather than the original dismissal decision. It is possible for an employment contract (or the employer's decision in a particular instance) to make clear that the consequences of lodging an appeal are that the termination date of the employment contract is deferred pending the outcome of the appeal, but that is not the default position: see, for example, *J Sainsbury Ltd v Savage 1981 ICR 1, CA* and *West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL*

98. As per *Drage v Governing Body of Greenford High School 2000 ICR 899, CA*, in a case where the employee has appealed against summary dismissal, it is necessary to examine the wording of the contract, the letter of dismissal and other surrounding circumstances in order to determine the effective date of termination. On the facts of that case, the combination of the wording of the various documents (including the express wording of the appeal outcome letter), and the fact that the employee was paid until the date of the appeal outcome, meant that the correct decision was that the effective date of termination was the date of the appeal outcome, not the original summary dismissal decision.

99. The fact that the employee believes that employment is continuing does not postpone the EDT if the termination of employment was objectively clear at an earlier date. *Avuru v Favernmead Ltd and anor EAT 0312/19*.

Validity of purported dismissal

100. In *Newman v Polytechnic of Wales Students Union [1995] IRLR 72,* the EAT stated that the effective date of termination has to be determined in a "practical and common sense manner", which must take account – in particular – of what the parties understood at the time of the purported dismissal. Accordingly, on the facts of that case, a dismissal was effective from the original date even though the meeting which had taken the decision to dismiss from that date had not been properly convened. In reaching its decision, the EAT's analysis included:

> *5. … In the present case, not only did Mr Newman hand over the keys and leave on 28 February 1992, and also accept a redundancy payment calculated as at that date, but his solicitors in the solicitors' correspondence referred to that date as the date of dismissal, and in his originating application his employment is stated to have ended on that date. It was not until the Tribunal hearing that any suggestion was made that Mr Newman's employment had not ended on that date. Any finding that his employment continued after that date would be*

highly artificial and contrary to the understanding of both parties and to common sense.

8. In our view, the Warnes *[1993] IRLR 58 case is, at least in one important respect, contrary to Mr Jones's argument, for it illustrates that a dismissal pursuant to a void resolution is not a nullity, but may well affect the contract between employer and employee: see particularly the first and last sentences of the passage cited above…*

9. There is, in our view, a problem facing Mr Jones in his contention that Mr Newman's employment did not terminate on 28 February 1992, because it is difficult to see what other date could have been the 'effective date of termination'. Mr Jones suggested that it would be the date of receipt of a letter dated 5 March 1992 sent on behalf of the executive committee. But the opening paragraph of that letter reads … That paragraph confirms that the dismissal took place on 28 February 1992 and is totally inconsistent with any other date. The letter cannot itself be read as a letter of dismissal. Moreover, there had been no further meeting of the executive committee in the meantime. The writer of the letter had no more authority than the three members of the executive committee at the redundancy meeting on 28 February 1992.

101. The EAT rejected the suggestion that an employer could not rely on its own wrongdoing (or its own previous ultra vires purported decision) if doing so would prejudice the employee; however, it did accept that that an employer cannot deny his own wrongdoing if it has been relied on by the employee.

102. As an additional and alternative ground for the finding that the EDT was that originally communicated, the EAT also found that there had been a subsequent ratification by the properly constituted body. The EAT said:

It was argued by Mr Jones that this was insufficient to ratify the decision and the dismissal, being merely approval of minutes. In our judgment, this is a far too narrow and legalistic view of the matter, particularly as ratification may be implied by the conduct or even the mere acquiescence of the principal: see Bowstead on Agency *(15th edn) Article 17(3). We consider that the executive committee on 9 March was plainly accepting and approving the decision and the dismissal of Mr Newman. Further, we accept the argument of Mr Bowers that ratification is retroactive, and relates back to and validates the act ratified. A good illustration of this is to be found in* Harper v Kerr Stuart Ltd *[1901] 83 LT 729. In that case, the secretary of a company had, without authority, sent out a notice convening an extraordinary general meeting of the company, but the board of directors subsequently ratified his action. Cozens-Hardy J said:*

> 'The question is whether, although the notice was not authorised beforehand, it has been so ratified now as to make it a good and valid notice. In my opinion, it has. The principle of the case, which I do not propose to go through, is that the ratification of an act purporting to be done by an agent on your behalf dates back to the performance of the act.'

103. The reference to Warnes was to Warnes v The Trustees Of Cheriton Oddfellows Social Club - [1993] IRLR 58. In that case, the employee had resigned (and claimed constructive dismissal) after he had been told that some of his duties were being removed. The employer sought to argue that the purported decision to remove the duties had not been validly made, meaning that the duties had not

been removed, meaning that there had been no breach of the employment contract. In rejecting that argument, the EAT stated (my emphasis):

> *In our view this is too narrow a view of the effect of the resolution upon the contractual relationship between the club and Mr Warnes. An employer is not entitled to rely upon the lack of power under its constitution of an officer or organ of the employer in acting in a way which if valid would constitute a dismissal.* ***We exclude any case where it is appreciated on both sides that what is done is of no practical effect or significance****. Although Mr Warnes did take legal advice before writing his letter on 25 April 1989 claiming that he had been constructively dismissed, and although in that letter he referred to 'the alleged valid resolution',* ***there is no finding by the Industrial Tribunal that he knew the resolution had no practical effect or significance****. We know from the Industrial Tribunal's own decision what the quality of the act contained in the resolution was, namely that it purported to be what amounted to a fundamental breach of Mr Warnes's contract with the club which included his right and duty to perform the functions of the secretary.* ***There are doubtless occasions when a superior officer of an employer organisation dismisses his inferior where, so far as that superior officer's powers as a matter of contract between him and the employer are concerned, he is not entitled to dismiss. It is not in general open to the employer to rely on that abuse of power. Regard has to be had to the nature of the act of dismissal on the contract between the employer and the employee thus dismissed in breach of contract by the dismissing officer****.*

104. Commenting on the case, Harvey on Industrial Relations and Employment Law suggests:

> This is consistent with the principle in company law that a company will be bound by the actions of any officer who has either actual or ostensible authority, ie either has the authority or is held out as having the authority by someone capable of binding the company (see eg *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480*, *[1964] 1 All ER 630, CA*, and *Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549*, *[1967] 3 All ER 98, CA*). As the EAT noted, the position would be otherwise if both sides appreciated that what was done was of no practical effect or significance. This would cover, for example, a purported dismissal by someone with no actual or ostensible power to dismiss. But in such circumstances one would expect the employer speedily to restore the employee to full status on becoming aware of the action wrongfully taken in his name.

105. In Newman, the EAT took account of the contents of Bowstead on Agency (15th edn). Bowstead and Reynolds (21st edition) deals with ratification in Chapter 2, Section 3, Articles 13 to 20. The following bullet points can be extracted:

- Where an act is done purportedly in the name or on behalf of another by a person who has no actual authority to do that act, the person in whose name or on whose behalf the act is done may, if the third party had believed the act to be authorised, by ratifying the act, make it as valid and effectual as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all.

- The general principle of ratification is that it is equivalent to an antecedent authority. There a lack of reciprocity: the third party may be in the power of the principal while the latter decides whether or not to ratify.

- Ratification need not be communicated to anyone if it can be established by probative material

- Express ratification is not necessary, and a ratification may be implied from words or conduct
- Any unauthorised act at all might be ratified by the person in whose name it was done
- Ratification only applies where the person whose act is in question purported at the time of acting to do so as agent and to have authority to bind the principal
- Ratification will be implied whenever the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to amount to clear evidence that he adopts or recognises such act or transaction: and may be implied from the mere acquiescence or inactivity of the principal
- The effect of ratification is to invest the person on whose behalf the act ratified was done, the person who did the act, and third parties, with the same rights, duties, immunities and liabilities in all respects as if the act had been done with the previous authority of the person on whose behalf it was done.

106. So, if a decision is made which is not – without ratification – binding on a principal and a third party, then it follows that there are two possible outcomes: either the decision is later validly ratified in such a way as to become binding on both principal and third, and treated as if validly made in the first place; or, alternatively, it is not. Therefore, there will be a period of time during which it is not yet known what the principal's eventual decision will be.

107. In *Robert Cort & Son Ltd v Charman [1981] I.C.R. 816* (a case decided under the predecessor to the Employment Rights Act 1996), the EAT considered the correct effective date of termination where an employer, in breach of contract, had purported to terminate the contract summarily (and had made a payment in lieu of notice). The EAT noted that the employer had been contractually obliged to give proper notice (and had not done so) and that the employee had stated that he did not accept that termination without notice was valid. For several reasons, including the need for certainty about when time limits expired, the EAT decided that the statutory definition of "effective date of termination" required the tribunal to treat the EDT as being the date on which the employer had unambiguously stated to the employee that it had summarily terminated the contract.

108. This case was approved by the Court of Appeal in *Radecki v Kirklees MBC [2009] I.C.R. 1244:*

> *37. Mr Cornwell referred us to Dedman's case, a decision of the Court of Appeal, and Cort's case, a decision of the Employment Appeal Tribunal (Browne-Wilkinson J presiding). The latter case applied the former and both are authority for the proposition that where an employee is dismissed summarily, the EDT of his employment for the purposes of what is now section 111 of the ERA is the date of the summary dismissal; and it makes no difference that the dismissal might have amounted to a repudiatory breach of the employment contract such that the employee might be entitled to bring a claim for damages in respect of such dismissal. It is worth quoting part of Browne-Wilkinson J's judgment in the Cort case, at [1981] ICR, 816 , 821:*
>
> *49. The jurisprudence cited by Rimer LJ indicates that the effective date of termination should be freed of the niceties and uncertainties of contract law and its general requirement that, where there is a repudiatory breach, the contract nevertheless continues until that breach is accepted: see the discussion at*

Chitty on Contracts , 30th ed, 2008, Vol II , at paras 39-185 and 39-213/4. Thus, the effective date of termination will be the date of summary dismissal, as long as that is known to the employee.

109. In other words, the Court of Appeal made clear that if an employee did not know that he had been summarily dismissed (or purportedly so), then that would potentially be relevant to the EDT.

110. In *Rabess v London Fire and Emergency Planning Authority [2017] IRLR 147*, the tribunal, EAT and Court of Appeal had to consider a case where an employee had been summarily dismissed on the basis that he was considered to have committed misconduct which meant that he was not entitled to notice. The internal appeal decision was that his conduct was such that (a) he had been entitled to notice, but (b) still merited dismissal. His notice period would have been 6 weeks, and the employer paid him a sum in lieu of that notice and continued to treat him as if his contract terminated on the original summary dismissal date. The Court of Appeal decided that that date was the EDT. In reaching that conclusion, it reviewed recent Supreme Court decisions, but was satisfied that the reasoning in *Robert Cort* remained sound:

20. Moreover, it is clear, in my judgment, that the conclusion of the tribunals below was entirely correct given the law as it stands. Robert Cort [1981] ICR 816, a decision of the EAT, is, as Rimer LJ stated in Kirklees v Radecki [2009] ICR 1244 at paragraph 37:

> "authority for the proposition that where an employee is dismissed summarily the EDT of his employment for the purposes of what is now section 111 of the 1996 Act is the date of the summary dismissal and it makes no difference that the dismissal might have amounted to a repudiatory breach of the employment contract such that the employee might be entitled to bring a claim for damages in respect of such dismissal."

21. Robert Cort was approved by this court in Stapp [1982] IRLR 326 as well as in Radecki. Substantial passages of the judgment of Browne-Wilkinson J (as he then was) presiding over the EAT in Cort are set out by Judge Richardson in the EAT in the present case at paragraph 26. I will not, with respect, repeat them at this stage. Robert Cort precisely covers this case and it has stood, as I have said, with this court's approval since it was decided.

22. This aspect of course engages Mr Williams' second ground of appeal, namely that the Appellant's contract was revived by the internal appeal with the consequence that the EDT is postponed. Gisda Cyf does not drive such a result. Mr Williams says that the result of the Cort decision is that employees' rights are denied. I cannot see that that is so, certainly on the present facts. The identification of the EDT is a question of fact. It did not in the circumstances of this case shift by reason of anything that occurred on the internal appeal; quite the contrary.

23. Mr Williams has suggested that the Supreme Court decisions in Gisda Cyf and Geys show that Robert Cort was wrongly decided or that issues have arisen such that we are not obliged to follow it, but Gisda Cyf is wholly consonant with Robert Cort. It leaves the interpretation of section 97 as an autonomous issue unchallenged by the conventional or general principles of law of contract. It allowed for the possibility that the date of an employment contract's

termination for the purpose of a common law wrongful dismissal claim might be different in some circumstances from the EDT under section 97.

24. Geys was wholly concerned with common law contractual questions. There was no issue there as to the application of the EDT under section 97; indeed, no issue under the Employment Rights Act 1996 at all. Robert Cort was simply not considered. That was so in Geys where the Supreme Court held that a repudiatory breach of an employment contract would not terminate the contract unless and until the innocent party elected to accept the repudiation. This does not bear at all on the interpretation of statutory rights arising under the 1996 Act.

25. We should therefore, in my judgment, follow the reasoning in Robert Cort, given not least its approval in this court. In those circumstances, it seems to me inevitable that given the result of the internal appeal 24 August 2012 remains the EDT for the purposes of the Appellant's tribunal claim.

26. It is in the end a question of fact and the facts are, with respect to Mr Williams, all one way. The EAT said this at paragraph 30:

> "Nothing happened to change the date of dismissal. The employment judge's finding to this effect at paragraph 7 of his reasons was, in my view, plainly correct. The internal appeal was not allowed. The dismissal was expressly confirmed. The decision on appeal did nothing to alter the date of dismissal. … the letter is explicit. The last day of service was to remain at 24 August. The date of dismissal remained the same."

Reasonable Practicability

111. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving it was not is on the claimant. When doing so, the phrase “not reasonably practicable” should be given a liberal interpretation in favour of the Claimant.

112. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. This does not necessarily mean that the Claimant has to act as fast as would be reasonably practicable.

113. The fact that an employee pursued an internal appeals procedure is a relevant circumstance which can, and should, be considered by the tribunal. However, generally speaking, it is not usually enough by itself to make it "not reasonably practicable" for the complaint to be presented within the prescribed period, even if the employer is slow to announce the outcome. See the Court of Appeal’s review in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*.

114. In *Porter v Bandridge Ltd 1978 ICR 943, CA*, the Court of Appeal held that the correct test is not whether the claimant knew of his rights but whether he ought to have known of them.

115. Similarly, when a claimant is ignorant about (or makes a mistake about) a fact which is relevant to the calculation of time limit, the question is whether that ignorance (or that mistake) is reasonable. The assessment of reasonableness has to take into account that a potential claimant ought to be aware of the importance

of not missing a time limit. Put another way, even if it is true that the claimant did not know the true facts at the time of the dismissal, then that does not necessarily mean that it was not reasonably practicable to issue the claim in time. The claimant must also show that the ignorance was reasonable and that he could not reasonably have been expected to have discovered the true situation during the limitation period. Furthermore, ignorance of the true facts must be the actual reason for failing to issue the claim sooner.

116. Fault on the part of the claimant's adviser may be a relevant factor when determining whether it was reasonably practicable for the claimant to present the claim within the prescribed time limit. It is important to consider all the circumstances and the type of adviser involved. A mistake made by a solicitor or barrister acting for the claimant is likely to deemed to be a mistake made by the claimant. As per *Wall's Meat Co Ltd v Khan 1979 ICR 52, CA*, ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the claimant or from the fault of his solicitors in not giving him such information as they should reasonably have given him. In *Northamptonshire County Council v Entwhistle 2010 IRLR 740, EAT*, Underhill P noted that there could be some circumstances where – despite having used solicitors to advise him on the matter – a claimant might show that it had not been reasonably practicable to issue the claim on time. In other words, there might be cases where the adviser's failure to give the correct advice was itself reasonable, such as where the employee and his or her solicitor had both been misled by the employer on some factual matter, such as the date of dismissal.

Early Conciliation

117. The issue of whether a claim should be rejected under rule 10 or rule 12 does not just fall to be considered before the claim is served on the respondent, but can potentially be reviewed at a later stage, including by a judge at a preliminary hearing: *E.ON Control Solutions Ltd v Caspall EAT 0003/19*.

118. As per the EAT in *Compass Group UK and Ireland Ltd v Morgan 2017 ICR 73, EAT*, an Early Conciliation Certificate is not necessarily limited to events that pre-date it. Parliament could have specifically required that the matters complained of in proceedings pre-dated any certificate relied upon, or provided for a time limit on the validity of a certificate, or required that a claimant set out – to ACAS or the respondent – the specific details of the potential complaints that would be brought to the tribunal, but Parliament chose not to do so. It is a question of fact for the tribunal to decide whether proceedings instituted by an individual relate to a "matter" in respect of which the individual has provided the requisite information (the name and address of claimant and respondent(s)) to ACAS.

Amendment

119. A tribunal has discretion to allow a claimant or respondent to amend their claim or response. This is a discretion to be exercised judicially. The key principle is that in exercising the discretion, tribunals must have regard to all the circumstances, and must balance any injustice or hardship which would result from the amendment or a refusal to make it. In *Selkent Bus Co Ltd v Moore 1996 ICR 836,* the EAT set out some particular matters which must always be analysed (nature

of the proposed amendment, time limits, timing and manner of the application to amend) when weighing up the decision, but that is not an exhaustive list.

Analysis and conclusions

120. I will address the topics in the following order:

120.1 What is the significance of the 20 November 2018 letter, including what powers did Mr Prasad have, and what was the Claimant's perception.

120.2 What happened after 20 November 2018, and what was the effective date of termination.

120.3 Given that effective date of termination, should the claim form be rejected under rule 10 or rule 12 of the rules of procedure?

120.4 If the claim is not rejected, should the amendment request be allowed?

120.5 Have the various complaints been submitted within the appropriate time limits, and, if not, do they benefit from an "escape clause"?

Effective Date of Termination

121. The Claimant (and his advisers) knew that the 20 November 2018 letter said in clear and unambiguous terms that his employment was terminated with effect from 20 November 2018. He knew all that on 20 November 2018.

122. The Claimant argues that the letter of 20 November 2018 should not be treated as a dismissal letter. Amongst other things, he argues that *Newman* should be distinguished because, in *Newman*, the correct decision-maker purported to communicate the dismissal decision and the only problem was that the meeting of that decision-making committee had not been properly convened in accordance with its rules of procedure. More generally, he argues that nothing short of a full Council decision could terminate his contract. As well as reliance on the fact that the October 2019 intended full Council meeting was not quorate (and could not, he argues, validly ratify any prior decisions), he also seeks to argue that the October 2018 meeting in Trinidad was not quorate either.

123. As far as the contract is concerned, the most relevant sentences are in Clause 16: "*Your appointment may be terminated by six months notice given by you in writing to the Chairperson of Council. Council can give you six months notice in writing by the Chairperson of Council after consultation and acting in conjunction with the vice Chairpersons for continued poor performance and inefficiency or without notice on the grounds of gross misconduct.*"

123.1 Taken in isolation, the first sentence implies that where notice is given in writing by the chairperson, then that can be for any reason at all, and not (just) poor performance, inefficiency or gross misconduct. That first sentence (in isolation) would not necessarily be inconsistent with a constitutional requirement that some other person or body (not the chairperson acting alone) had to be the decision-maker. However, that first sentence mentions no such requirement.

123.2 Taken in isolation, the second sentence implies that there are limited circumstances in which the fixed term contract can be terminated prior to the expiry of the fixed term. Ie that only poor performance or inefficiency can lead to termination by 6 months' notice.

123.3 However, the more important issue about the second sentence is whether it should be interpreted as meaning that only the full Council of the organisation can make a decision to terminate the contract. In my judgment, that is not the correct interpretation of the second sentence, or of Clause 16 as a whole. The vice chairpersons are, by definition, members of the full Council. So a suggested interpretation that the full Council (which includes the vicechairpersons) can make a decision, but only after "consultation with and acting in conjunction with" the vice chairpersons makes no logical sense. Nor would there be any obvious reason why there should be consultation by full Council with the vice chairpersons, and not with the chairperson. Similarly, a meaning that full Council make the decision to dismiss, but then the chairperson must consult with, and act in conjunction with, the vice chairpersons about the dismissal letter also does not make logical sense.

123.4 Therefore, my interpretation of the meaning of the clause agreed between the Claimant and the Respondent is that the <u>chairperson</u> can, after consultation and acting in conjunction with the vice Chairpersons, terminate the contract on behalf of the Respondent, provided the reason is poor performance or inefficiency or gross misconduct. Furthermore, in the latter case, the contract does not require notice.

123.5 If full Council had not been content with this contractual wording in the Secretary General's contract, it could have required different wording to be used at the time that it approved the Claimant's appointment (or that of his predecessors).

124. The Respondent's constitution does not compel a different interpretation of the contract. For one thing, the constitution and rules of procedure do not expressly specify any specific mechanism for early termination of the Secretary General's contract but do envisage that early termination is possible.

125. On his own admission, prior to sending the 20 November 2018 letter, Mr Prasad had not consulted the vice chairpersons at all. Therefore, irrespective of any niceties about what "acting in conjunction with" is intended to convey, the letter of 20 November 2018 was not one sent in conjunction with those vicechairpersons.

126. The Claimant suggests that decisions made at the meeting in Trinidad in October 2018 are not valid as the meeting was not quorate. He relies, in part, on the Acting Secretary General's assessment made in March 2020. In my judgment, the Claimant is not necessarily in a stronger position if the decisions made at the October 2018 meeting were invalid. For completeness, I will consider both hypothetical scenarios:

126.1 If, as the Claimant alleges, the Council's October 2018 decisions should be ignored, then it follows that the only authority (if any) for the creation of the disciplinary panel, and the ensuing actions of Mr Prasad, ExCo and the appeal

panel would have to be found in constitutional documents or general principle. In my judgment, the chairperson, acting in conjunction with, the vicechairpersons did, in fact, have authority to terminate the Secretary General's employment contract, and full Council did not need to meet/vote to authorise an individual dismissal decision given that approval of the Claimant's contract of employment already delegated authority to dismiss to the chairperson and vice chairpersons.

126.2 If, contrary to the Claimant's arguments, the Council's October 2018 decisions should be treated as effective, then the Council made a decision about the mechanism by which a decision would be made in relation to the specific disciplinary allegations in question. The Council is the supreme decision-making body, and the fact that certain functions might have been delegated to other persons or bodies does not deprive the Council of the ability to carry out those functions. My finding of fact was that the October 2018 decision was that the disciplinary panel would make a decision on liability and (if appropriate) sanction, then report to the chairperson. It was envisaged that there would be a meeting of ExCo who would convene a meeting, and, by 9 November 2018, make a decision on behalf of the Respondent. It seems to have been contemplated (based on the terms of reference for the disciplinary panel) that ExCo might decide that the disciplinary panel's findings and/or recommendations were insufficiently clear, and that ExCo might ask the panel to do more work before a final decision was made. I do not interpret the minutes and the terms of reference as showing that the Council authorised ExCo to flat out decline to follow the disciplinary panel's decision. However, that is academic in relation to the 20 November 2018 letter given that by the time that letter was sent, ExCo had not met at all, and, other than Mr Prasad, its members had not received the disciplinary panel's report.

126.3 Thus, either way (whether the 2018 meeting was quorate or not), Mr Prasad was not duly authorised by the Respondent, as of 20 November 2018, to act alone to dismiss the Claimant on its behalf. If the meeting was not quorate, then he exceeded his authority by sending the 20 November 2018 letter without consulting, and acting in conjunction with, the two vicechairpersons. If the meeting was quorate, then he exceeded his authority by sending the 20 November 2018 letter without convening a meeting of ExCo to discuss the disciplinary panel's decision.

127. As mentioned in the findings of fact, when the Claimant received the 20 November letter, he believed that it had been sent with the authority of all of ExCo, and his reply sent to ExCo that same day acknowledges that belief. If he thought it was a decision of all of ExCo, then he thought that the chairperson had consulted, and was acting in conjunction with the two vicechairpersons (given they are ExCo members). The 20 November letter is unambiguously clear in communicating that the intended last day of employment was 20 November 2018.

128. Therefore, applying the decision in Warnes, the effective date of termination was 20 November 2018. A dismissal decision was clearly communicated to the Claimant and this was not a situation where both sides (or even one side) appreciated that what was done was of no practical effect or significance.

129. As made clear in _Robert Cort_, in passages endorsed by the Court of Appeal, the purpose of defining the EDT by statute is to ensure that there is certainty about a person's statutory rights (including continuity of service) and about time limits. The identification of the effective date of termination should not depend upon subtle legalities. While in _Robert Cort_, the court was specifically referring to the subtle legalities in relation to whether an employment contract continues if an employee tries to refuse to accept the employer's repudiatory breach, the comments about the need for certainty and clarity are applicable in other situations too, such as a consideration of the subtleties of the interpretation of an employer's system for delegating decision-making to officers, employees, directors, etc.

130. Subsequent events also point to the EDT being 20 November 2018. The Respondent did not reinstate the Claimant later. Analysis of the contract of employment (and, to the extent that it is relevant, the staff handbook) and the letters of 20 & 30 November 2018, and the appeal outcome letter of 2 April 2019, and other relevant documents shows that this was not a situation where the fact of an appeal being lodged served to delay the dismissal date. On the contrary, correspondence sent to the Claimant and his solicitors on the Respondent's headed paper made clear that that was not the case. His specific request for deferral of the dismissal date was specifically and expressly rejected.

131. The fact that payments were made after 20 November 2018 was not an indication that there had been reinstatement and/or that the Respondent did not intend to implement the termination with effect from 20 November. My finding of fact was that these salary payments were simply some sort of administrative error. As in _TB Turbos_, the fact that an employer makes payments after a particular date does not necessarily prevent that date being the EDT. As illustrated by _Horwood_, even a conscious decision by an employer to pay after the actual EDT does not delay the EDT to the date by which the salary payments cease. Furthermore, in this case, unlike the employer in _Cosmeceuticals,_ there was nothing said by the Respondent to contradict the 20 November letter or to imply that there might have been a change of heart. The only conduct that the Claimant relies on (other than the continuation of payments) is the failure to contradict the assertion, in its solicitors' letter of 18 February 2019 that they "assumed" that the "*the decision regarding the effectiveness of any dismissal of our client in this matter has been set aside given that our client continues to receive his salary*". Quite apart from the fact that the sender of a letter cannot deem that silence on the part of a recipient implies consent, the meaning of the passage in the 18 February letter was somewhat obscure, especially, but not only, because it referred to a lack of response to their "21 December" letter. That was the letter submitting the grounds of appeal and the response to that appeal was going to be provided after the appeal was heard on 20 February 2019. While it can be said, in retrospect, that the Respondent and/or its solicitors should have been more proactive to investigate the comment that the salary payments were still being made, their failure to do so does not extend the EDT.

132. So, for the above-mentioned reasons, the 20 November 2018 letter does establish the EDT as being 20 November 2018. However, additionally and alternatively, my decision is that the Respondent subsequently ratified the decision in the 20 November 2018 letter.

132.1 By the time of the 30 November 2018 letter (refusing the Claimant's request to defer implementation of the dismissal request), the other ExCo members, including vicechair Mozambique, were aware of the full contents of the 20 November 2018 letter. Although some questions were asked, the committee members did not convene a meeting to retract the 20 November 2018 letter, and did not purport to instruct Mr Prasad to retract it. (Nor did Tanzania following the discussions between that vicechair and the chair which continued into December.)

132.2 In all the circumstances, including the Claimant's requests sent to committee members, ExCo's (and the vicechairs') failure to seek to countermand the 20 November decision amounts to ratification of the 20 November 2018 decision. In my judgment, the ratification occurred during November and December 2018 when the committee members were made aware of the Claimant's proposed appeal. However, at the very latest, the ratification occurred on 19 February 2019 when ExCo, including the vicechairpersons, approved the procedure for the following day's hearing. The fact that they approved a procedure which was to be an appeal against dismissal showed that they were adopting the 20 November 2018 letter which implemented dismissal. The effect of ExCo's (and the vicechairpersons') ratification was that the 20 November 2018 decision was adopted by the Respondent, and the Respondent and the Claimant had the same rights and liabilities as if it had been sent with the previous authority of the Respondent.

132.3 In other words, the subsequent ratification of the 20 November decision is an alternative reason that the EDT was 20 November 2018.

<u>Should the claim be rejected</u>

133. In short, the answer is "no". The claim form correctly cites the Early Conciliation Certificate number and I do not reject the claim under rule 10 or rule 12.

134. Since my decision is that the EDT pre-dated the commencement of Early Conciliation, the Respondent's objection falls away. However, in the counterfactual situation of the Claimant's fixed term contract continuing until 16 September 2019, and then not being renewed, and the Claimant seeking to bring an unfair dismissal claim based on the non-renewal, I think that it is unlikely that I would have made a finding of fact that the "matter" about which the Claimant contacted ACAS was something different to the "matter" about which he subsequently lodged his claim. In the particular circumstances of a July early conciliation, 16 September 2019 termination and 20 September 2019 presentation of claim form, there would be no reason under rule 10 or rule 12 to reject the claim.

<u>Amendment</u>

135. To the extent that the Claimant seeks to amend his claim to rely on the Respondent's 11 March 2020 letter (which stated that the October 2018 meeting was not quorate), I allow that amendment. The nature of the amendment is simply to add another string to his bow: another reason for arguing that the 20 November 2018 decision was not a valid termination. It does not, in itself, add any new head of claim, and therefore the issue of whether any new claim is in time or out of time

does not arise. The application was made promptly after the 11 March letter came to his attention, and the nature of it is that his document sets out clearly and concisely what the amendment is. It is possible that some additional evidence might be required to deal with the point (eg evidence about whether the decisions made at the meeting, if inquorate, were ever later ratified). However, the hardship to the Claimant of not being able to argue this point (because, if a good one, it would potentially be relevant to time limits and fairness) outweighs the hardship to the Respondent of potentially having to adduce some additional evidence.

136. Had I agreed with the Claimant that the EDT was actually 16 September 2019, the expiry of his fixed term contract, then I would have allowed his amendment. He would not have been adding a new claim (just a different set of allegations to support his existing claims) and his existing unfair dismissal claim would have been in time. The Claimant's delay in raising this argument, and formally submitting the amendment request, counts against him. However, the documents and witness evidence would be largely the same regardless of whether the dispute was terminating his fixed term contract early was an unfair dismissal, or that failing to renew his contract was an unfair dismissal. In the latter scenario, potentially the Respondent might wish to rely on some additional arguments and evidence, but the Respondent's "conduct" argument (and therefore the documents and evidence on that issue) would still feature. The hardship and injustice caused to the Claimant by refusing to allow the amendment would outweigh the hardship and injustice caused to the Respondent by allowing it. That being said, given that I have decided that the EDT is 20 November 2018, exercising my discretion, I do not allow this amendment. As per the original claim, therefore, the allegation is that the Respondent terminated the Claimant's contract of employment (a dismissal defined by section 95(1)(a) ERA) rather than that it was not renewed on expiry (a dismissal defined by section 95(1)(b) ERA).

<u>Were the claims submitted before the time limit expired</u>

137. The unfair dismissal claim is out of time. Given that the EDT was 20 November 2018, the effect of s111 ERA is that the Claimant had until 19 February 2019 to commence early conciliation, or to submit a claim for which early conciliation was not required. He did neither of those things, and therefore it will be necessary to consider whether that is because it was not reasonably practicable to do so.

138. The breach of contract claim is out of time. Given that the EDT was 20 November 2018, the effect of Article 7 of the Order is that the Claimant had until 19 February 2019 to commence early conciliation, or to submit a claim for which early conciliation was not required. He did neither of those things, and therefore it will be necessary to consider whether that is because it was not reasonably practicable to do so. for the same reason.

139. A claim based on Regulation 14 WTR is out of time. Regulation 30 WTR gave him 3 months to commence early conciliation from the date on which his right to the payment in lieu crystallised, namely the end of his employment. Thus, since the Claimant neither brought a claim, nor commenced early conciliation, by 19 February 2019, it is necessary to consider whether the reason for that is that it was not reasonably practicable for him to do so.

140. A claim for unauthorised deduction from wages must be made within the time limit described by section 23 ERA. The Claimant received a payment of his November 2018 salary on 30 November (according to the date on the payslip). The Claimant was entitled to receive salary payment for the period 1 to 20 November 2018. Subject to the Claimant's argument that he was being underpaid each month, he did receive, on 30 November 2018, a payment for 1 to 20 November 2018. In fact, he received more than that, because the Respondent did not just calculate what it thought was due for 1 to 20 November, but made no adjustment to take account of the (purported) 20 November 2018 termination. In other words, the Respondent neither purported to withhold payment in relation to 21 to 30 November, and nor did it specify that it was making payment in lieu of accrued holiday entitlement (if any). The Claimant received further payments from the Respondent at the end of each month, up to and including 30 April 2019. However, the payments made December 2018 to April 2019 were administrative errors, not deliberate payments of an acknowledged entitlement. As per *Horwood* (especially paragraph 71), these payments are not to be treated as payments of wages, and therefore the dates of those payments are not dates on which deductions were made. The last date on which an actual payment of wages was made was 30 November 2018, and that is therefore the date from which time started to run. The Claimant had until 28 February 2019. Since the Claimant neither brought a claim, nor commenced early conciliation, by 28 February 2019, it is necessary to consider whether it was not reasonably practicable for him to do so.

"Not reasonably practicable"

141. The Claimant relies on two overlapping arguments to suggest that it was not reasonably practicable: that he thought he was still employed from 21 November 2018 until (at least) 30 April 2019; that his legal advisers told him that the time limit clock did not start running from 20 November 2018.

142. He says that his own belief was based on a combination of: (a) believing that the 20 November letter was Mr Prasad acting alone, and that this, therefore, was not a decision properly made by his employer; (b) the fact that no P45 was received, payments were made and payslips were issued, and a P60 received; (c) the employer did not do enough, he says, to refute the comments made by his solicitors that it was being assumed that the Respondent had agreed the 20 November letter was ineffective.

143. He says that the legal advice that he received was that, for those same reasons, it was not necessary to present a claim to the tribunal. In other words, the advice was that by waiting to see what would happen he was not at risk of losing the right to claim unfair dismissal (and the other complaints) in the future.

144. As per my findings of fact, I am not satisfied that these things were the reason that the claim was not commenced within the appropriate time limits. The Claimant knew that there might be a judicial decision that the EDT was 20 November 2018, but decided to take that risk. Therefore, it was reasonably practicable for him to issue proceedings in time. He had solicitors acting for him in December 2018, January 2019 and February 2019 (they had been acting for him from June 2018, and had corresponded with the Respondent about the disciplinary investigation). Other than tactical considerations in relation to arguments that his employment

contract had not been validly terminated, there was nothing to prevent the Claimant and/or his solicitors commencing early conciliation on or before 19 February 2019 (or 28 February, for the deduction claim) and nothing to stop them issuing proceedings within the time limit calculated by reference to the end of such early conciliation. Those tactical considerations do not mean that it was not reasonably practicable to commence employment tribunal proceedings, they just mean that there were pros and cons to doing so.

145. However, I will also analyse the position as it would be if my findings of fact are wrong, and the Claimant believed that he was still being treated as an employee by the Respondent after 20 November 2018, and if the reason for not issuing proceedings sooner was that Claimant was told by his solicitors that the time limit clock had not yet started running by February 2019.

146. The Claimant's hypothetical error in thinking that he was still being treated as an employee is not a reasonable one. He was told in unequivocal terms by the letter of 30 November that that was not the case. The point was reiterated in the letter of 10 December to the Claimant's solicitors. It was not reasonable for the Claimant to assume that the non-cessation of payments meant that – contrary to the express words of these two letters, as well as the wording of the 20 November letter – the Respondent had decided to retain him as an employee; the Claimant was aware that the Respondent's administrative staff sometimes made errors in relation to financial issues and staffing issues.

147. The Claimant's solicitors' hypothetical error in thinking that 20 November 2018 was not the EDT was not a reasonable one. For one thing, they had access to the same letters just mentioned (20 November, 30 November and 10 December 2018). They should also be deemed to be aware of the case law (including *Robert Cort*) to the effect that even if, for some purposes, a contract continues beyond the date which the Respondent has clearly said is the termination date, then the EDT is not necessarily deferred. Likewise, they ought to have been aware that, as per *Newman* and *Wharnes*, the act of an employer's representative which hypothetically was done without proper authority, does not necessarily prevent that act being used to establish the EDT. Furthermore, they ought to have been aware that the concept of ratification (discussed in *Newman*, and by reference there to Bowstead) meant that even if, as of 20 November itself (and the period immediately afterwards) the decision was not yet authorised, a later adoption by the Respondent might have the effect of treating the decision as if validly made on 20 November itself. The solicitors were aware that the appeal panel might make a decision that the 20 November decision had been validly made and that is what, in fact, did happen. In this case, it is appropriate to attribute the solicitors' (hypothetical) error to the Claimant. The letters on the Respondent's headed paper did not mislead anyone; those letters asserted that the dismissal date was 20 November 2018. Given the case law (including *Horwood* and *TB Turbos*) it would not have been reasonable to assume that payments made after 20 November necessarily deferred the EDT. Furthermore, it would not have been reasonable for the Claimant's solicitors to assume that the Respondent's failure, after 10 December 2018, to send further points of dispute in relation to the ultra vires allegation meant that the Respondent had accepted their arguments and reinstated the Claimant and/or decided to treat the 20 November letter as

ineffective. Like the Claimant, they were on notice that the payments made in December and later might simply have been an error or oversight by staff.

148. Finally, if I had decided that it had not been reasonably practicable to lodge the claims within the appropriate time limits, I would have had to decide if they were presented within a reasonable further period. The Claimant waited more than a month (from early June to 8 July 2019) from discovering that his May salary had not been paid to contacting ACAS. It was not reasonable to delay that long, given that, according to him, he had operated (and so had his solicitors) on the assumption that continued salary payments meant that the time limit clock had not started to run. Once early conciliation ended, he then waited a further 29 days (from 22 August to 20 September 2019) to present his claim. That was also not a reasonable time to wait. He had had since 20 November to begin work preparing his claim, and – even on his case – he had had since the start of June to be working on finalising it. Even if I were to discount the 6 weeks (8 July to 22 August) of early conciliation, the time which elapsed from knowing the salary payments had ceased to issuing the claim was in excess of such further period as I consider reasonable.

149. For these reasons, the Claimant does not benefit from the "escape clause" in any of Sections 23 or 111 ERA, Regulation 30 WTR or Article 7 of the Order.

Conclusion

150. Although the procedural requirements in relation to early conciliation were met, the claim was not presented within the appropriate time limits in relation to any of the complaints. It would have been reasonably practicable for the claim to have been presented in time. Therefore, all the complaints are dismissed.

Employment Judge Quill

Date: 14 DECEMBER 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

14/12/2020

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FOR EMPLOYMENT TRIBUNALS- OLU