THE EMPLOYMENT TRIBUNAL

SITTING AT: **SOUTHAMPTON (by telephone)**

BEFORE: **EMPLOYMENT JUDGE EMERTON (sitting alone)**

BETWEEN: **Mr T Mahmood**

Claimant

AND

Securitas Security Services (UK) Ltd

Respondent

ON: **25 June 2020**

APPEARANCES:

For the Claimant: In person
For the Respondent: Ms J Young (In-house Counsel)

JUDGMENT having been sent to the parties on 1 July 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary of the case

1. The claim of unfair dismissal was listed for a preliminary hearing to determine time jurisdiction. There were no other claims before the tribunal.

2. The tribunal dismissed the claim for want of jurisdiction, having found that the claim was out of time and that it was reasonably practicable for the claim to have been presented within time. There was also a preliminary issue as to whether the claimant (a Security Officer) was an employee of the respondent, or alternatively a casual worker. But the case was listed, by agreement, to determine the time-jurisdiction point first.

3. The tribunal found that the effective date of termination was 15 July 2019, and the claimant did not commence early conciliation until 21 October 2019, more than three months later. It accepted the respondent's case that the claimant knew, or can reasonably be expected to have understood, that his engagement had terminated on 15 July 2019, when he received his P45, and spoke to HR and the dismissing manager. This was based on the tribunal's findings of fact, after receiving oral and documentary evidence as to the surrounding circumstances. The claimant was unable to show that it was not reasonably practicable to present his claim within the applicable time limits. The tribunal also considered, in the alternative, what the position would have been if it had accepted the claimant's arguments as to practicability; it concluded that in any event the claim was not presented within such further time as is reasonable.

Background to the hearing

4. This case received rather more case management than would be expected in an unfair dismissal case approaching a preliminary hearing. In the circumstances, the claimant (a litigant in person) therefore received rather more guidance on presenting his case, and time to prepare, than would usually have been the case. But it would be appropriate to set out the background to the hearing, especially as it helped to inform the tribunal's approach to the evidence at that hearing.

5. The claimant presented a claim for unfair dismissal (section 98 of the Employment Rights Act 1996) on 22 November 2019. ACAS early conciliation had commenced on 21 October 2019 and a certificate was issued on 23 October 2019. This means that the claim would be in time if the effective date of termination was on or after 22 July 2019.

6. The claim form explained that the claimant had seven years' employed service as a Security Officer, having transferred to the respondent under TUPE, and that his employment had ended on 25 October 2019. In the

text, he explained that, "*I was never informed anytime before 15th July 2019 when they sent me with form P45*". In an attached document he set out a narrative, explaining how the P45 stated that his employment had ended on 31 March 2019, but he had challenged that with HR, who told him that the Branch Manager had told then that he had left the Company. He was informed by email on 25 October that that his employment had ended, with a copy of a letter dated 11 July 2019 which he had not seen before. He was also told he was a "casual worker", which he disputes.

7. The respondent's ET3 response resisted the claim, asserting that the claimant was a zero-hours casual worker rather than having a contract of employment, and that "employment" ended on 31 March 2019 (*although it was later accepted that any termination could not take effect until it was communicated to the claimant*). He had worked his last shift on 1 March 2019, and did not accept shifts after that date. By letter of 11 July 2019 the respondent accepted the claimant's resignation and confirmed that employment had ended. He was sent his P45 on 12 April 2019. The claimant emailed on 6 September 2019 complaining that he did not resign. The respondent looked into the matter and emailed the claimant on 25 October 2019 confirming that employment had ended in July. At paragraph 7 of the Grounds of Resistance, the respondent pointed out that the claimant's resignation had been accepted on 11 July 2019, and he was sent his P45 on 12 July; the claim was out of time and the tribunal had no jurisdiction to hear the claim. (*It should be noted that, in taking further instructions and preparing the case further, the respondent's position was clarified*). The claimant was not an employee, but if he was, unfair dismissal was denied.

8. Before listing the case (and in order to inform a decision as to whether a preliminary hearing be listed to deal with jurisdiction points), the tribunal asked the claimant to comment on paragraph 7 of the Grounds of Resistance. On 14 January 2020, the claimant emailed the tribunal, explaining (in essence) that he had only received his P45 in July 2019, and the respondent's position had only been confirmed by email on 24th or 25th October 2019. He had not received the job termination letter of 11 July. He had not resigned. The respondent's response was that the claimant's version of events was disputed, noting that he had contacted ACAS on 21 October 2019, whilst also maintaining that he was arguing that he did not know he was dismissed until 25 October 2019.

9. The claim was listed for a three-hour preliminary hearing in public, on 7 May 2020, to deal with time jurisdiction, and it was also listed to determine employment status [*albeit it would have been unlikely that the latter could realistically have been determined in the time, especially as no case management orders were issued at this point*].

10. On 1 May 2020 the tribunal notified the parties that in view of the Covid-19 pandemic, the preliminary hearing in public was converted to a telephone preliminary hearing for case management, to discuss how the matter be progressed.

11. The preliminary hearing for case management was heard by Employment Judge Emerton (who was also the judge at the later preliminary hearing when the claim was dismissed).

12. In a hearing lasting over an hour, Employment Judge Emerton confirmed that employment status and time-jurisdiction both remained in issue, but it was agreed (after discussion) that employment status would better be left for the final hearing (which had not yet been listed), as it might require a significant amount of documentary and oral evidence, including as to the TUPE transfer arrangements, and overlapped with the circumstances of, and justification for, bringing the contractual relationship to an end. It was agreed that it should be simpler to deal with the time jurisdiction point at a preliminary hearing, and that in the current situation, the time issues were of a type which could be dealt with at a telephone or video hearing without unfairness to either party. It would help both parties to know, very soon, whether the tribunal had jurisdiction to hear the case, especially as a final hearing would listed be something like a year later.

13. Employment Judge Emerton confirmed that the claimant's case was that the effective date of termination was 25 October 2019, when he had been informed by email that his employment had ended, although he also confirmed that he had received his P45 on Monday 15 July 2019 (but not the letter dated 11 July 2019). He was asked to confirm his case as to why he contacted ACAS on 21 October 2019, and replied that that was "*because he had received the P45*".

14. Employment Judge Emerton confirmed that the respondent's case was that although the end-date for employment (on the P45) was 31 March 2019, it accepted as a matter of law that knowledge of the employment ending was also necessary. The respondent's case was that the claimant would have received the letter of 11 July 2019, but that in any event he had accepted that he received the P45 on 15 July. The respondent did not dispute that the P45 would have been received on 15 July 2019, the final date that the respondent might accept as the effective date of termination. The respondent would argue that the claim was out of time, and it did not accept that the claimant could show that it was not reasonably practicable to have presented in time.

15. There was some discussion as to the identity of likely witnesses and scope of documentary evidence, including exchanges of emails. Because of the likely need to include email chains and other documents, the bundle would be slightly larger than might otherwise be the case, but the respondent proposed that the list of contents refer only to the specific emails/documents relied upon. The tribunal agreed.

16. The Judge explained that the postponed preliminary hearing (in public) would be listed to be heard before himself, over the telephone, using the BT "Meet-Me" telephone conferencing system, whereby each party supplied the tribunal with contact telephone numbers, and they (and any

witness) would be contacted by the tribunal on the morning of the hearing to take part. Both parties confirmed that they would be able, as an alternative, to take part in on-line video-conferencing, and the judge left it that there was a *possibility* that the tribunal would later convert the hearing to a video hearing. Both parties would be content with either a telephone or a video hearing.

17. The parties agreed to a one-day preliminary hearing being listed on 25 June 2020, which would be assigned a hearing room but dealt with over the telephone, with participants who had supplied their telephone number in advance being joined to the hearing by telephone. Case management orders were agreed, which included disclosure of documents by 15 May 2020, an agreed bundle by 29 May 2020, exchange of witness statements by 5 June 2020, and lodging of all documents electronically with the tribunal by 19 June 2020.

18. On 29 May 2020 (the date for a bundle to be agreed), the respondent emailed the tribunal and claimant, with the electronic bundle attached, but also asking for voice recordings to be considered by the tribunal as part of the evidence (which had already been sent to the claimant). The claimant did not object at this stage. The voice recordings were also supplied. The respondent was directed on 16 June 2020 to produce a transcript of the recordings, which should be agreed of possible, to be supplied on 19 June with the other documents, although the judge would also be able to listen to the recordings. The respondent had one call transcribed, upon which they relied, and informed the tribunal and the claimant accordingly on 17 June 2020. As directed, on 19 June 2020 the respondent provided the final bundle (with transcript), and all witness statements (including the claimant's).

19. On 19 June 2020 the claimant also sent four emails to the tribunal and to the respondent, enclosing a large number of individual documents, most of which appeared to be in the bundle already, and also his witness statement.

20. On 22 June 2020 the claimant emailed the tribunal (without copying his email to the respondent), objecting to the transcript of the telephone conversation being included. The claimant argued, in essence, that this was a late addition in breach of directions, and made some unclear references to the data protection act.

The hearing

21. The hearing commenced, by telephone, at 10:00am. Taking part were the claimant (who called no other witnesses and was not assisted or accompanied by any other person), Ms J Young (in-house Counsel for the respondent), and the respondent's three witnesses. This was a public preliminary hearing, although in the event no member of the public had requested dial-in details to join the listed case.

22. The judge explained the procedures, and the issues to determine (as set out in the previous case management order). He also indicated that he had received the documents referred to above, and asked the claimant why he had sent a large number of additional documents. The judge pointed out that he had made very clear case management orders, to ensure that at the start of the hearing the judge, both parties and all the witnesses should have a copy of the agreed bundle in electronic or paper format so that they could all refer to the same documents.

23. The claimant admitted that he had not troubled to read the case management orders. He was asked whether the relevant documents were in the bundle, and it was clear that at least some of them were. He was unsure. The judge confirmed that the parties and the witnesses would rely upon the paginated bundle which had been produced in accordance with the tribunal's directions, but he gave the claimant permission to refer to the additional during oral evidence or in his closing submissions, if it turned out that there was a relevant document which was not already in the bundle.

24. The parties were content with this arrangement, and in the event the claimant made no further reference during the hearing to any of the documents which he had submitted by email.

25. The claimant objected to the admission transcript of the telephone call of 15 July 2019, for the sole stated reason that it had not originally been in the bundle. The tribunal ruled that the transcript could be relied upon (*see below*).

26. The claimant then announced that he wished to bring to the tribunal's knowledge the fact of his zero-hours contract. The judge indicated that he was not expecting to deal with any more preliminary points unless they were essential to the purpose of the preliminary hearing. To the extent that there may be relevant evidence as to the claimant's contract, the vehicle for presenting such evidence was in witness evidence and by reference to documents in the bundle. But the claimant could cross-examine on the point.

27. The hearing was then timetabled, with the claimant giving oral evidence first (as had been envisaged in the case management order), followed by the three respondent witnesses.

28. The claimant was sworn and adopted his witness statement. He was cross-examined and also asked questions by the judge. In lieu of re-examination, the judge asked the claimant if there were any matters which he wished to clarify in his evidence. He did so. His oral evidence lasted a little under an hour. After a break, the respondent called Mr Lewis Willsher ("University Account Manager" for the respondent), followed by Mr Ben Austin (HR and TUPE Adviser) and Mr Jason Doyle (Service Delivery Manager). Their oral evidence totalled some 50 minutes, and the claimant was permitted to continue questioning as long as he wished. After a very

short break, the parties were happy to go on to go on to make closing submissions.

29. After adjourning for two hours, the tribunal delivered oral judgment and reasons, dismissing the claim of unfair dismissal.

30. A judgment was signed the same day and sent to the parties shortly afterwards. Within the specified 14 days, the claimant requested written reasons. Although the judge had recorded his reasoning at the time, it has unfortunately taken a considerable period of time to finalise the written reasons, due to unforeseen circumstances, for which the judge apologises.

31. The claimant also made an **application for reconsideration** on 16 July 2020, albeit it did not appear to raise any valid new argument in relation to the judgment on whether the tribunal had jurisdiction to hear the unfair dismissal claim (which was the only claim before the tribunal). This application was received outside the 14-day time limit specified in rule 71 of the 2013 Rules of Procedure, and the claimant provided no explanation as to why the application could not have been presented within the specified 14 days. In the circumstances the tribunal refuses to extend time as it is not in the interests of justice to do so.

Application at the hearing

32. On 19 May 2020 the respondent had supplied to the tribunal voice files of recordings of telephone calls which the claimant had made to the respondent, of which only one (on 15 July 2019) was relied upon. The claimant having made no objection, on 16 June 2020 the tribunal had directed that a transcript be added to the bundle. The claimant objected to the inclusion of the transcript.

33. The tribunal noted the chronology of events set out above. On 7 May 2020 conventional case management orders were given regarding preparation for the preliminary hearing. It was made clear that the parties were to agree a bundle, and that the respondent was responsible for preparing that bundle and for sending a fully paginated and indexed PDF bundle to the tribunal on 19 June 2020. The tribunal also noted that disclosure of documents relevant to the primary hearing was due to complete by Friday, 15 May 2020, albeit there is an ongoing duty of disclosure. Neither party indicated that there had been any difficulty in agreeing the bundle and the tribunal had no reason to doubt that the bundle prepared by the respondent was with the agreement of the claimant.

34. The date for the bundle to be agreed by the parties was 29 May 2020. On the morning of that day the respondent emailed the tribunal, explaining that the respondent would like to add the evidence of voice recordings of the claimant's claimant telephone calls to the respondent on 15 July 2019. Copies of a number of voice recordings were attached in an easily readable format, with one particular recording (1420 on 15 July 2019) that

was relied upon. The respondent confirmed that these recordings had been sent to the claimant, and indeed he was copied on that email.

35. As indicated, the claimant made no objection to these voice recordings being adduced, or to the judge listening to them.

36. In the absence of any objection to playing the voice recordings, the judge had listened to the vice recordings before the hearing (which the tribunal's letter of 16 June 2020 had suggested he would do). The judge noted that the person making the calls had identified himself and was plainly the claimant (this was not in dispute), and that each recording was prefaced by a recorded message explaining that this telephone call would be recorded for a number of purposes including "dispute resolution". The subject-matter of the calls was plainly relevant to the subject-matter of the preliminary hearing, and the claimant himself had referred to the calls – it was not some private or unrelated matter.

37. On 16 June 2020 the tribunal directed that a transcript should be included in the bundle, which would be the normal procedure if a party wished to rely upon a recording. The respondent was reminded that the final agreed bundle was due to be supplied to the tribunal on 19 June 2020.

38. On 19 June 2020 the respondents supplied the agreed bundle and its witness statements, as directed. The claimant objected to that late addition of the transcript (although such an addition was directed by the judge)

39. Again, the claimant said nothing in his written objection indicating any difficulty with the transcript of the telephone conversation itself, and there has been no suggestion that it is inaccurate. The claimant did not object to the recording itself (which the judge had in any event listed to well in advance of the hearing). It is plain that the transcript, produced by a commercial transcription company, is an accurate transcription of what was said on the telephone. It is also noteworthy that there is nothing in that conversation which contradicts the claimant's witness statement. It does, however, provide a fuller picture as to the concerns raised by the claimant during a telephone call on 15 July 2019, and sheds light on the state of his understanding and confirms his explanation as to which documents he had at that stage received. If the claimant had previous not had a compete recollection of what was said during this relatively short telephone conversation, from 29 May onwards (perhaps earlier) he has had the opportunity to listen to the recording to refresh his memory.

40. The claimant's initial objection, by email, of 22 June 2020, appears not to have been copied to the respondent (as directed in the case management orders). He argued that this was a late addition in breach of directions, and made comments about the Data Protection Act which take matters no further. At the preliminary hearing, the claimant having had ample time to consider the recordings and the short transcript in advance, the judge invited the claimant to explain any remaining objection to the transcript.

41. The claimant confirmed that he still wished to object. The judge asked him what the reasons were for his objection. The answer was simply because the transcript had not been included in in the bundle before it was agreed. He confirmed that there was no other reason. Ms Young agreed that it was not in the bundle in advance, although the recordings had already been disclosed the claimant. It was added to the bundle because the tribunal had ordered that it be included, rather than just rely on an audio recording, and the respondent had taken immediate steps to pay for a commercial transcription, and they did wish to rely on recordings.

42. The tribunal considered the evidence in question, and what the parties had to say about it, in the overall context of the overriding objective to deal with cases fairly and justly.

43. It was in the interests of justice for this transcript to be included.

44. The judge expressly noted that in the recording itself, it had been clear to the claimant that it would be recorded, and might be used for dispute resolution. It was also clear that the contents of it appeared to be consistent with the claimant's own evidence, and the claimant had not given any indication at all as to why it might be prejudicial. The tribunal considered that although it would have been better had this matter been disclosed by the respondent previously, the recordings having come to light, it was plainly appropriate that a conversation relied on by both parties (and referred to in witness statements) should be provided, and for the bundle to contain a transcript. The claimant had not raised any material data protection or privacy-related argument as to why a recorded phone conversation should not be adduced. He wished to refer in his own evidence as to the contents of telephone conversations, but was now objecting to a transcript of those conversations which had been recorded. This was plainly relevant evidence, and the mere fact that the transcript was not included in the bundle until it had been typed, after the claimant had listened to the recording, and the claimant having made no objection as to the accuracy of that transcript, militated strongly in favour of its inclusion.

45. The transcript should remain in the bundle and could be referred to by the parties as appropriate.

The Issues

46. As set out in the earlier case management order at paragraph 5,

> "5. The primary purpose of the preliminary hearing will be to determine the following (without dealing with employment status – for the purposes of time jurisdiction, it will be assumed that the claimant was an employee):
>
> 5.1. What was the claimant's effective date of termination?

5.2. Was the claim of unfair dismissal presented out of time?

5.3. If the claim was out of time, can the claimant show that it was not reasonably practicable to have presented it in time?

5.4. If it was not reasonably practicable to present the claim in time, was it presented within such further time as is reasonable?"

47. Before oral evidence was called the judge had explained the operation of section 111 of the Employment Rights Act 1996. If the tribunal had jurisdiction to hear the claim, the judge would go on and manage the case and fix a final hearing date.

The parties' submissions

48. Neither party provided written submissions. Ms Young was invited to make oral submissions first, followed by the claimant. Ms Young would be permitted to reply to matters raised by the claimant. What appears below is not a word-by-word note of all the submissions made, but a general overview of the more salient points.

49. Ms Young read out the questions which had been set out in the earlier case management order, and invited the tribunal to conclude that it had no jurisdiction to hear the single claim of unfair dismissal. The first issue was to identify the claimant's effective date of termination. Employment was terminated by the letter of 11 July 2019 and the P 45 of 12 July 2014, and the claimant had confirmed that he received the latter on 15 July 2019. The respondent relied on the latter date as the effective date of termination. The claimant had asserted he did not receive the letter and it was possible he had not read it. But the P45 stated that the engagement had ended 31 March. The claimant had not worked since. The transcript of the telephone call on 15 July showed that the claimant's understanding was that the engagement had been terminated. The respondent accepted that it was established law that a dismissal must be communicated to the employee, and that happened on 15 July 2019. That being the case, and addressing the second question, the claim of unfair dismissal was presented out of time, noting that the claimant did not commence ACAS early conciliation until more than three months later. The clock would not stop, as he was out of time when he approached ACAS. He would need to have contacted ACAS and commence early conciliation by 14 October 2019, but did not do so until 21 October 2019. The case law confirmed the position that this should be treated as an out of time case.

50. As for whether it was not reasonably practicable to present the claim in time, Ms Young reiterated that the burden of proof was upon the claimant. The claimant had provided no evidence as to why he waited until 21 October. The claimant had disputed that he had received the 11 July letter, but this was a red herring as it did not tell him anything that he did not in any event know by 15 July. Furthermore, the claimant was seeking

to rely upon what he was told on 25 October 2019 as communicating his dismissal for the first time, but this was inconsistent with his already having commenced early conciliation in respect of his unfair dismissal claim four days previously. Take it is highest, the claimant knew he had been dismissed and was not happy; he wanted the decision changed: this was not the same as not knowing that he had been dismissed. His knowledge that he was no longer engaged by the respondent, and his knowledge that he could bring an unfair dismissal claim, is supported by the contents of email exchanges over the summer. It was reasonably practicable to have presented the claim in time. Even if it had not been reasonably practicable, the claimant (on his own version) had all the information he needed by 25 October 2019 and should have quickly put in his claim. He unreasonably delayed for another four weeks.

51. The claimant was permitted to make his submissions in his own way. The judge listened carefully and made a note. It is difficult to summarise the claimant's arguments, which were at times, and perhaps unsurprisingly, a little discursive.

52. The claimant complained that the ET3 had said that he had verbally resigned, but this was wrong. His job had not in reality ended on 31 March 2019. In May 2019 he could not work a shift because he had no telephone and could not communicate. He had been surprised to receive the P45 on 15 July, because had did not believed his job had ended. (*At this point the claimant started to address the judge as to what he perceived to be the unfairness of his dismissal, but was reminded of the importance in addressing the out of time issues which had been identified*). He had the right to be given notice of dismissal. He could not be retrospectively dismissed. He had not been told of the dismissal on 31 March 2019. In the middle of July he was supposed to have been dismissed three and a half months earlier, and the respondent had not followed this up. A dismissal letter was needed, but was never written or sent to him. He had read the P45 and was waiting for a dismissal letter. He went to ACAS to start proceedings on 23 October, and was then notified of his dismissal. If he had been dismissed technically on 15 July 2019, then he had appealed against this. He had appealed to the employment tribunal. He believed that the respondent needed to have followed a dismissal procedure. He was an employee. The respondent had misled the tribunal over the date of dismissal. He believed the dismissal to be invalid and unfair. It had deprived him of his livelihood.

53. Ms Young was permitted a brief reply. She referred to the case law and suggested that the claimant's argument querying that there was a dismissal letter, and suggesting that the respondent should provide it, was countered by the fact that it had been sent to the claimant on 11 July 2019.

<u>The facts</u>

54. This is a case which very much turns upon its facts. Although the claimant

had apparently indicated that many facts were in dispute, in reality very little disputed evidence was referred to during the course of the claimant cross-examining the respondent witnesses. Most of the claimant's dispute appeared to be around the appropriateness and fairness of procedures, and the way he had been treated. There is a dispute as to alleged telephone conversations with Mr Jason Doyle on 15 July 2019, albeit the key underlying evidential issue was whether the respondent had communicated dismissal to the claimant, and whether the claimant did or not reasonably believe that he had in fact been dismissed. (*It should be noted that the respondent continues to deny that the claimant was in fact an employee, and terms such as "dismissed" should not be read as indicating any preliminary view as to the claimant's employment status*). The points about communicating the dismissal is considered below.

55. One of the issues in the background to the evidence, albeit not a matter to be resolved at this hearing, related to the type of contract that the claimant was engaged on, having transferred under TUPE to the respondent in 2018.

56. The claimant's case is that he was on a full contract of employment, albeit a zero-hours one. The respondent's case is that there was a zero-hours contract, but as a casual worker, not an employee. Although the tribunal did not need to resolve that position, it was however relevant background to the approach taken by management and HR, which was plainly taken in the belief (erroneous or not) that the claimant was a casual worker and should be treated as such, which was reflected in how he was recorded on the HR system. This is referred to in the summary of evidence below.

57. The main factual dispute in the primary evidence, as it turned out, related to whether or not Mr Doyle (service delivery manager) had spoken to the claimant by telephone on 15 July 2019. This is certainly generally relevant, and is a matter which the tribunal considers it should consider.

58. It is not in dispute that Mr Doyle and the claimant had never met. It is also not in dispute that it was Mr Doyle who signed a letter dated 11 July 2019 confirming the termination of the claimant's employment (*using the term neutrally*), said to be on the basis of the claimant having resigned.

59. Although the claimant had evidently doubted whether this letter was genuinely written, or had been concocted to bolster the respondent's case, he never in fact put to Mr Doyle that he was not telling the truth when he said he had signed the letter. The tribunal is content to accept, on a balance of probabilities, that the letter was not received by the claimant, for whatever reason. However, it does not follow that Mr Doyle was lying or mistaken. The tribunal found Mr Doyle's evidence to be plausible and credible, and accepts that that he did sign the letter, and cause it to be posted to the claimant. What happened after his having signed the letter remains unclear, but in the circumstances it is not material. Mr Doyle made his decision, and made sure that the letter would be posted to the claimant.

60. In those circumstances, the matter which did, however, remain in dispute is whether the claimant spoke to Mr Doyle, the same day that he received his P45 on 15 July 2019.

61. The claimant accepts that he spoke to HR the same day, but asserts that he had never spoken to Mr Doyle, although he explained to the tribunal that he believed he had had missed calls from Mr Doyle.

62. Mr Doyle, however, explains that when HR raised with him that the claimant disputed having resigned, he telephoned the claimant immediately on 15 July 2019, and although his first telephone call was not answered, and there was no voicemail, he telephoned again later in the day and did speak to the claimant. His account was that he told the claimant he was carrying out the instructions he had been given by the claimant's manager in signing the letter, and he explained that the claimant had in reply advised him that "*he was not currently working for us due to personal issues*". He could not recall the precise words used. The claimant denied there was any such phone call. Mr Doyle explained that he followed up the call with an email to HR (page 55 of the bundle).

63. The tribunal notes that having received the emailed query from HR at 1509 on 15 July 2019, Mr Doyle, as one would expect, emailed back to HR. The email which has been adduced appears to be genuine (and no credible evidence suggesting that might be the case) and is consistent with Mr Doyle's account. Mr Doyle said in the email, "*I have just spoken to Tahir, and as you said he never spoke to Lewis*". The tribunal accepts that the email is genuine, and considers that it is highly improbable that Mr Doyle would make up the email, and indeed sees no reason why he should do so. The tribunal would expect that if he had not got through to the claimant, he would have sent an email back to HR saying something like, "*I have tried to get through but he did not answer his phone*". The claimant's suggestion that this somehow involves forgery and lying under oath, is one which is not borne out by the facts. It is clear and logical that immediately after the alleged call in July 2019 Mr Doyle sent an email, consistent with the sworn account he now gives. Other than the fact that the claimant denies it, the conversation is in fact broadly consistent with the claimant's case. The tribunal found Mr Doyle's evidence to be credible and accepts that the facts were indeed as he stated.

64. The claimant has, overall, displayed a degree of confusion over the events, and the tribunal considers that, on balance, he is simply mistaken in asserting that this call never took place. Indeed, in the same email Mr Doyle is seeking, with HR, to find a way to resolve the situation to help the claimant be "*reinstated as a casual worker as he had a few months off due to a family issue*". The tribunal draws the clear inference, firstly, that Mr Doyle was clear in his mind at the time that he believed the claimant to be a casual worker, and secondly that they had indeed discussed the claimant having had a few months off (which was plainly the case) and the claimant had given an explanation as to why he had not been working. This telephone conversation was clearly in the context that the respondent

had communicated that the engagement had come to an end.

65. The tribunal has also accepted that there was, as Mr Doyle stated in his sworn evidence, a second telephone conversation. Although the claimant continued to deny that there had been any conversations at all with Mr Doyle, the tribunal prefers Mr Doyle's evidence on the point.

66. The other factual matters, save for some which are more a question of drawing inferences and conclusions, are set out in the findings of fact below.

67. Against the analysis above, and having taken into account all the oral and documentary evidence, and the parties' submissions, the tribunal makes the following findings of fact on a balance of probabilities.

    a. The background, in a nutshell, is that the claimant had been working for some years as a security officer, and whatever his previous status as an employee or as a worker, and whether or not TUPE strictly applied, he was taken on by the respondent (the claimant says that it was in September 2017), after the respondent took on a contract to provide security services to Southampton University.

    b. The claimant asserts that he was not given a new contract of employment, but nevertheless believes that he was, and remained, an employee. The tribunal accepts the evidence from Mr Austin (in the respondent's HR Department) that he did not have access to any contract of employment, merely that the file he was able to access would have the "employee information" details provided to the respondent by the transferee at the time of TUPE transfer; the claimant was also recorded as a "casual worker". Whether or not this was correct, it was plainly the case that the respondent believed the claimant to be a casual worker, and did not consider it necessary to follow all the procedures which might have been followed if the claimant had been recorded as an employee.

    c. For the avoidance of doubt, the tribunal confirms that it accepts Mr Austin's credible and clear evidence that the personnel computer system showed the claimant all to be a casual worker.

    d. The tribunal also accepts, and it was not challenged by the claimant, that the arrangements for casual workers, and which would be incorporated in every written contract which the respondent had with casual workers, included the following. If a casual worker did no work for the respondent for three months, their contract would be treated as being terminated. The reasoning behind that, apart from any general points as to not keeping on their books people who no longer carried out work for them, related to the termination of their clearances and the need to re-start induction, should they be re-engaged at a later stage. Indeed, it was explained by HR to the claimant when he telephoned the HR office on 16 July 2013 that after

three months of an employee not working "*they tend to make people leave us*". This explanation was plainly correct, the claimant did not query that at the time, and he did not challenge the evidence about this which was given at the preliminary hearing.

e. Although the claimant's immediate line manager, Mr Willsher, was not particularly familiar with the contractual provisions, it was clear that he was aware in general terms that somebody in the claimant's position who had not worked any shifts for three months would normally be deemed to be no longer employed. Indeed, this appears to have coloured his interpretation of the claimant's absence, and his discussions with Mr Doyle. Mr Willsher had expected the claimant to make himself available for work after returning from annual leave, but (as explained below) the claimant had not done so.

f. The position by early 2019 was as follows. The claimant had only carried out limited shifts on his zero-hours contract, but did nevertheless work on a regular basis.

g. The last actual shift worked by the claimant was on 1 March 2019. If he did no further shifts in the subsequent three months, the expectation was that his engagement would then be terminated.

h. The claimant explains that he had told Mr Willsher that he needed a period of time away, and it is not in dispute that the claimant had booked paid annual leave for the end of March. As at the end of March 2019, it is therefore common ground that he was still an employee, or alternatively a casual worker.

i. The tribunal was shown an exchange of text/WhatsApp messages from February 2019, which indicated that the claimant would be in Saudi Arabia from 4 March 2019 "*and would be available from 30th March again*"; he indicated a wish to return to work after that, and Mr Willsher texted back to indicate that work would be available. This was acknowledged by the claimant on 6 February 2019. That is how matters were left until leave completed.

j. In the same exchange of texts (page 44 of the bundle) is a follow-up question from Mr Willsher dated Monday 1 April 2019, asking the claimant "*When are you next free to work*?" There was no reply.

k. The tribunal accepts Mr Willsher's credible oral evidence that he had earmarked suitable work for the claimant to do on his return from leave, and wanted to establish when the claimant would be available. The tribunal accepts his evidence, supported by a copy of text messages (see above), that he texted the claimant, using the claimant's usual telephone number, in a way which was a normal means of communicating between them, at the start of the first week after the claimant was due to return from Saudi Arabia. The tribunal accepts Mr Willsher's evidence (not disputed by the claimant) that he

had no reply to his text, and that it was his usual practice to communicate with the claimant by text, or sometimes by email.

l. The claimant had previously indicated that he was available to work shifts in future, but failed to respond when given the chance to work further shifts. As well as not replying to the text message, he did not make contact with Mr Willsher, which one would expect him to have done if he had wished to come back to work after his leave.

m. Mr Willsher assumed that the claimant had decided that he no longer wished to work for the respondent. He did, however, try making contact again, using the same phone number. He messaged the claimant on 29 May 2019 to ask if the claimant would work a shift, and again on 4 June 2019. In each case, there was no reply from the claimant. The claimant had not informed him that he was no longer using that telephone.

n. It is therefore clear that the claimant worked no shifts after 1 March 2019, albeit he had paid leave at the end of March 2019, and that there he did not respond to any attempts by his line manager to contact him after 1 April 2019, and there is no evidence suggesting that he contacted the respondent to request shifts. After the beginning of March 2019, the claimant simply severed contact with the respondent until after he received a P45.

o. The claimant remained on the respondent's books for the time being, and was included in routine emails about pension entitlement.

p. Matters were left there, for more than three months. The tribunal notes that although this is not a matter relevant to the preliminary issue, the claimant's average wage in the 12 weeks up to the middle of July 2019 was plainly zero, which may be relevant to any potential unfair dismissal claim.

q. The situation then arose that Mr Doyle, as Service Delivery Manager, was looking at reviewing the employees and casual workers used by the respondent in the Southampton area. Mr Willsher provided (by email) the names of four employees who were no longer working, and Mr Willsher confirmed three had "resigned". The tribunal considers that it is tolerably clear that what Mr Willsher actually meant, was not that those three employees had told him (orally or in writing) "I wish to resign," but they had not carried out any work for more than three months (and in the claimant's case, not replied to his messages). In the circumstances, the position for all three was that as they had chosen to show no further interest in carrying out any shifts for the respondent, and should be taken as having resigned, and their engagements terminated.

r. In consequence of this exchange, and without asking Mr Willsher for any further clarification, Mr Doyle signed three letters to the three

affected employees, with similar wording for each, confirming the termination of employment on the basis that they no longer wish to work for the company and had resigned. He appears to have misunderstood what Mr Willsher had been trying to tell him, and worded the letter to suggest that the claimant had spoken to Mr Willsher, rather than reflecting the lack of any contact for over three months being treated as resignation. The tribunal accepts that all three letters (including the claimant's) were posted on or immediately after 11 July 2019 to the addresses on record. A copy was plainly placed immediately on file, as HR were able to access it on 15 July 2019. The tribunal accepts, however, that the claimant did not receive it, or at the very least did not read it.

s. The tribunal accepts that the system used when staff leave, expects that any letter confirming termination would be sent by local management, and that HR would centrally generate a P45. Each would be despatched separately. Following the usual protocol, it was noted that the claimant had carried out no paid work (or taken paid annual leave), which would of course be reflected in HR/payroll records, after 31 March 2019.

t. HR generated a P45 dated 12 July 2018. In the "Details of employee leaving work" section, it specified a leaving date of 31 March 2019.

u. It is not in dispute that the claimant received and read the P45 on 15 July 2019.

v. The claimant was upset, and attempted to make contact with the respondent to query the P45. The question of whether he understood that his contract had been terminated will be considered below.

w. It is noteworthy that when the claimant became aware that a letter regarding his termination has been sent to him on 11 July 2019, he did not in fact request a copy. The tribunal considers that the letter of that date in fact contained little or no information which he was not already aware of by close of play on 15 July 2019.

x. The tribunal would observe, again, that much of the claimant's evidence given at the preliminary hearing, and the claimant's closing submissions, were directed not at whether his employment had been terminated, or whether he understood it as such, but to complain about how unfair it was, against a background that he realised on 25 October 2019 that the decision would not be changed. Although the claimant's case is that employment was not terminated until 25 October 2019, his evidence and submissions really relate to alleged failures and an unfair process by the respondent. The tribunal considers that there is an important distinction between denying that employment had terminated at all, and accepting that it had terminated but arguing that it should not have done, or at least should not have done in that way. Much of what the claimant has presented

is focused on the latter point, rather than genuinely supporting the case that he did not understand the receipt of the P45 (and associated conversations) as notification that employment had ended.

y. The tribunal notes that the claimant telephoned the respondent HR office on the afternoon of Friday, 15 July 2019 explaining that he had that day received a P45. The tribunal accepts the transcript of the conversation as accurate, having listed to the recording. The claimant was put through to Mr AN, who dealt very patiently with his query.

z. The claimant explained that he had not applied to leave the job, but (at 2:10) had just received a P45, "*that is for employee who leave the job*". He confirmed that he had not worked since March. He added (at 2:35), "*I know once it's over three months, they tend to make people leave us*". The claimant complained that he received no letter, but gave the explanation (at 2:44) that, "*I had some uh, certain issues at my uh, it's the, of [a] personal nature and… I received nothing like any letter…*".

aa. During the call, Mr AN evidently accessed the HR computer and told the claimant that there was a letter on file saying that he spoke to Lewis a couple of weeks ago (that was clearly the letter of 11 July 2019 signed by Mr Doyle) and had resigned on 31 March. The claimant's response was that he had not spoken to him and had not resigned.

bb. The tribunal would note that although the ET3 initially appeared to assert otherwise, no doubt relying on the wording of Mr Doyle's letter (on record), Mr Willsher in fact made it clear in his sworn evidence that the issue was not that he had spoken to the claimant and the claimant had said he was resigning. Rather, the problem was that the claimant had had no contact with him at all for well over three months and had not replied to his text message asking him when he would be available. Mr Willsher had interpreted that as meaning that the claimant no longer wished to work for the respondent, especially in light of the three months policy (which the claimant was clearly aware of, having acknowledged that when he spoke to HR).

cc. The claimant explained that he no longer had his old telephone, and he gave the new number to AN. AN told him that he would email the claimant's line manager and ask him to call the claimant.

dd. The tribunal considers that there is nothing in that telephone conversation with HR inconsistent with the claimant believing that his contract had been terminated, but rather indicating his dissatisfaction for that, and his clear statement that he had not in fact resigned.

ee. Immediately after this conversation, AN sent an email to Mr Doyle as the manager responsible, and the man who had signed the letter

confirming termination of employment. The email, timed at 1431, explained that the claimant had called to query why he was made a leaver, and that he had said that he had not resigned. Mr Doyle was invited to give the claimant a call on his new mobile phone number.

ff. As indicated above, the tribunal accepts that Mr Doyle did indeed telephone the claimant. The claimant confirmed that he had not in fact spoken to Mr Willsher, that he had had a few months off, and was not currently working for personal reasons. This account is entirely consistent with Mr Doyle's contemporaneous email to HR, which refers to having had this conversation. Mr Doyle asked HR if the claimant could be reinstated (which the tribunal takes as an acceptance that employment had indeed been terminated, but wondering if the claimant could be allowed to be taken on again). As indicated above, the claimant doubted that he had spoken to Mr Doyle, but the tribunal found Mr Doyle's evidence, supported by the email, to be persuasive.

gg. The tribunal also accepted Mr Doyle's oral evidence that he rang the claimant back the same day, and in the conversation confirmed to the claimant that "*we would have to start over as he hadn't worked for us for over three months, and told him what to do, but he never completed the forms*."

hh. The tribunal considers that this second telephone conversation between the claimant and Mr Doyle is of significance. This should have reinforced in the claimant's own mind that the decision stood, but that he could be re-engaged if he wished to. It is a little perplexing that despite complaining about the manner of his dismissal, the claimant did not seize the opportunity to start work again, when it was offered to him. The claimant told the tribunal in oral evidence that he was in fact available to work but was not given any. It is also of note that in his oral evidence Mr Doyle explained to the tribunal that although he had misunderstood what Mr Willsher had told him about claimant resigning, if he had understood that the position was that the claimant had not worked for over three months despite being offered shifts, he would have terminated the claimant anyway (albeit wording the termination letter slightly differently).

ii. On 19 July 2019 the claimant sent an email to HR, received by Mr Ben Austin. He stated that he had received a P45 but that he had not made a request to leave the company. He did not in fact indicate that he considered that he was still employed, but merely wished to correct the suggestion that he had chosen to resign. Mr Austin replied on 24 July to say he would try to sort this out. He then emailed Mr Doyle to confirm that they had the leavers form, and to ask whether the claimant had continued to work for the company since the leave date.

jj. There were various other exchanges between the claimant and the

respondent which did not particularly take matters further, which the tribunal considers are consistent with the claimant understanding that his employment (or at least his contract as a worker) had been terminated but that he wished to challenge this and that he considered he had been unfairly treated.

kk. The claimant described in oral evidence how he had been spending considerable time researching the law, with books from the library, and considering his legal position. Although he had not yet take legal advice about unfair dismissal, that was plainly on his mind.

ll. The tribunal considers that the contents of the claimant's letter of 2 September 2019 are of particular significance. This letter was written at a time when he had not been provided with any further clear information which altered what he already knew to be the case on 15 July 2019.

mm. The claimant's letter appears to indicate, on any reasonable reading of the words he used, that he considered he had been dismissed, that he considered that the dismissal was unfair and in breach of his statutory rights, and that the termination of employment was confirmed by the receipt of the P45 on 15 July 2019. He complained, in the second paragraph, that the correct procedure had not been followed in terminating his employment.

nn. The final paragraph of the letter is of particular significance, and reads as follows:

> *"Now with this development of ending my employment is not only deviation of employment rules and regulations but it's an attempt to deprive an employee to avail his retirement entitlement as my retirement is due within next two years. I am now seeking to plead my case with the employment tribunal soon with dual legal representation. This letter has been sent for your information and record"*

oo. The tribunal notes that the letter does not indicate that the claimant believed that he was still employed, nor does it ask for anything in particular. But it makes it clear that the claimant believes that he had been unlawfully dismissed and would be bringing a claim in the employment tribunal.

pp. The tribunal considers it is clear that at this stage he had researched his rights and considered that he had an arguable case for unfair dismissal arising out of being sent the P45 on 15 July 2019. He plainly had all the information he needed to present a claim in the Employment Tribunal, subject to any further information as to contacting ACAS and presenting a form on-line, information which is very easily available, especially noting that the claimant had already researched the law, and may well have been aware of procedures

already.

qq. A few days later, on 6 September 2019, the claimant confirmed his understanding in a further email to the respondent's HR department.

rr. In the email to HR, the claimant referred to his "unfair dismissal", plainly acknowledging the that he was aware of the fact of his dismissal. He complains that it contravened the law to end his employment in the way that the respondent had done. He confirmed that his job had been ended. He made it clear that he was unhappy that he had not received a satisfactory reply or explanation, and started and ended his email with a clear indication that he was about to commence legal proceedings in the Employment Tribunal for unfair dismissal. The email was acknowledged on 11 September, and the claimant was informed that it had been sent to Mr Doyle to investigate.

ss. The tribunal considers that the email of 6 September 2019 again shows that the claimant believed he had been dismissed, and that he already had the grounds to bring a claim for unfair dismissal. At no point in this email did he suggest that he believed that he had not been dismissed.

tt. The claimant's case at the preliminary hearing was that it this stage he did not believe that he had been dismissed. The tribunal found this explanation to be lacking in credibility.

uu. In early September the claimant had already confirmed to the respondent in writing that he had been dismissed, but that he believed that was unfair and infringed his legal rights and that he would be bring a case of unfair dismissal.

vv. In fact, it was more than six weeks before the claimant progressed his claim.

ww. The claimant explained in his oral evidence that he sought advice from solicitors on his unfair dismissal claim, but had decided not to follow it up because of the cost involved. However, he was aware in general terms of time limits and the method of bringing a claim, including the need to go to ACAS first.

xx. The claimant told the tribunal that he believed his claim was already out of time, when he went to ACAS.

yy. The claimant then went to ACAS to commence early conciliation on 21 October 2019, and explained at the preliminary hearing that this was with a view to bringing an unfair dismissal claim. This is inconsistent with his explanation to the tribunal that he did not think he had been dismissed, and that this was did not know until 25 October 2019, after early conciliation had completed, that he had

been dismissed.

zz. The claimant asked for early conciliation to be terminated quickly on 23 October 2019, and a certificate was issued.

aaa. At this stage, the claimant should have been ready to present his unfair dismissal claim. He did not do so. He did not satisfactorily explain to the tribunal why it was that, although he had all the information he needed, and at the beginning of September had stated that he had been unfairly dismissed and would bring a claim, no such claim was presented at this point.

bbb. The next relevant event was that on 25 October 2019 the claimant again emailed the HR Department, complaining how the matters were handled, again confirming that he had the right to claim unfair dismissal, and requesting that the P45 be withdrawn.

ccc. The HR Department replied to the claimant's email the same day, expressly explaining that his casual workers agreement had been ended and that he had verbally resigned on 31 March 2019 (which was in fact a misunderstanding of the fact the claimant had not worked since that date, had not replied to a message from his line manager, and had been treated in the usual way of the contract being terminated after three months' absence). No further information was provided, save that it was emphasized that the 11 July 2021 letter confirmed the position, and a copy was attached to the email.

ddd. The tribunal notes that although the letter was re-sent, at no stage had the claimant requested to see the letter, even though he had known of its existence and (broadly) its contents, since 15 July 2019, when he rang the company to talk about the P45. The claimant was not possessed of any more material information than he had had on 15 July 2019. Before receipt of the email, the claimant in fact had researched the law, sought legal advice, been to ACAS, and nothing really changed on 25 October 2019.

eee. Later on 25 October 2019, the claimant sent a further email, which asserted that he was an employee, not a casual worker. It disputed the circumstances leading up to the termination of employment. It also explained that the claimant had lost but now found his old phone and had seen text messages from his employer asking him to work shifts. The email ends with the slightly cryptic explanation, "*your today's email will be the beginning of appeal date against which I will call or can be defined as unfair dismissal from employment*."

fff. Despite knowing on 15 July 2019 that the contract had been terminated, and that the respondent was at that stage relying on the contract having ended with effect from 31 March 2019 (some seven months previously), the claimant waited for a further four weeks before presenting his tribunal claim on 22 November 2019.

ggg. The initial explanation for this further delay given by the claimant (in his oral evidence, as there was no explanation at all in his witness statement), is that he needed to "*prepare his case*". He later also suggested that he believed he had an additional month to present his claim, even though it is hard to see how his earlier contact with solicitors before 21 October 2019, and his contact with ACAS on that date, when he believed that he was already out of time, could have led to such a conclusion. The claimant did not say why he believed that the P45 received 15 July 2019, referring to termination of employment on 31 March 2019, still justified an extra month to present his claim after early conciliation.

hhh. The tribunal would observe that the claim form is set out as straightforward narrative of events as the claimant saw them, most of which reflected earlier matters which had been referred to in his correspondence in early September. The brief additional matter, about seeing the 11 July letter for the first time on 25 October, adds very little and is merely a straightforward statement of fact. It is hard to see what further preparation was needed. The claimant confirmed that he was not working at the time, and that before early September he had already done considerable legal research as to his rights.

Conclusions

68. The tribunal approached the case within the scope of section 111 of the Employment Rights Act 1996 and in accordance with the issues which had been identified and agreed at the first preliminary hearing on 7 May 2019 (see paragraph 45 above). The judge explained the legal test to the claimant, and also drew a distinction between the "reasonably practicable" test in unfair dismissal cases, with the "just and equitable" test in discrimination cases.

69. In essence, for the claim potentially to have been presented in time, the claimant had three months from the effective date of termination (taking into account the date of communication of the termination of employment) to commence ACAS early conciliation. The tribunal could not have jurisdiction until the claimant had obtained an ACAS early conciliation certificate. It should be noted that early conciliation for an unfair dismissal claim can be commenced during the notice period, but that is not relevant to any argument put forward by the parties in this case.

70. Ms Young referred the tribunal to quite a lot of case law, and the claimant to rather less, but it is not necessary to rehearse this in these written reasons. Matters largely turn on their facts and upon applying the words of the statute to those facts. The tribunal took account of the case law, and printed off and read the cases referred to in writing, but the principles are fairly well-established. Cases included *Palmer and Saunders v Southend-on-Sea Borough Council* *[1984] IRLR 119,* and *Cosmeceuticals Ltd v Parkin* *(2017) UKEAT/0049/17/BA.* Only brief mention is made of the case

law, below.

71. The first issue is the effective date of termination, or to put it another way, when the clock started ticking for the claimant to present his claim (initially, by obtaining an ACAS early conciliation certificate). It should be noted that once the effective date of termination is established, it is for the claimant to prove on the balance of probabilities that it was not reasonably practicable to presented the claim within the applicable time limits.

72. The relevant date is not the decision to terminate employment, or an earlier date when employment was said to have terminated, but rather the date that this is communicated. It should be noted that if ambiguous words are used in communicating the dismissal or the termination, it is an objective test: the tribunal should (broadly speaking) take into account all the surrounding circumstances and how a reasonable employee would have understood them, in light of those circumstances. In ambiguous correspondence, the interpretation should not be a technical one but should reflect what an ordinary, reasonable employee would understand by the words used. Any letter must be construed in the light of the facts known to the employee at the date he receives the letter (see *Chapman v Letheby and Christopher Ltd* [1981] IRLR 440).

73. In this case the P45 of 12 July 2019 date was received on 15 July 2019, and the tribunal has accepted that a letter sent around the same time was not seen by the claimant.

74. On any analysis, the tribunal considers that as soon as the claimant read the P45, he was aware that the respondent was indicating that his contract (be it as an employee or as a casual worker) was terminated. The claimant had done no paid work after 31 March 2019, and this was indicated as the date of leaving. The claimant was aware that termination would normally follow not working for three months.

75. There is, of course, a dispute as to the claimant's employment status, but agreement that it was a zero hours contract, and the HR system recorded the claimant as being a casual worker. There was plainly no written contract of employment between claimant and respondent – any contract (not shown to the tribunal) would have been between the claimant and his previous employer. It is common ground that when the P45 was issued, the claimant had not worked since 1 April 2019.

76. One can readily understand the respondent's policy that for staff on their books as a casual worker (even if that status might have been incorrect), and in a role where there was an induction process and staff would need to have new induction and new security clearances, that the contract would be ended if they accepted no shifts for a period of three months. Indeed, it is hard to see why, unless a lengthy leave of absence has been agreed or there is a clear reason for absence (such as sick leave), an employer should indefinitely hold open a job for a worker who has accepted no work and not replied to any messages. It is hardly surprising

that the claimant was treated as having effectively "resigned", or to put it another way, had behaved in a way indicating that he no longer intended to be bound by the contract. The claimant had notified his line manager that he would be available for work after 30 March 2019, but in reality severed all contact and neither accepted nor sought work after that date. A reasonable inference to draw would be that the claimant had decided to end the agreement and not to work again for the respondent.

77. Although there is an issue of procedural fairness, there can be no doubt that as at early July 2019 management treated the claimant's contract as having been terminated after more than three months' absence, even if the label "resignation" (perhaps reflecting the wording of the standard casual worker contact, not shown to the tribunal) was not perhaps the most apposite.

78. The tribunal has carefully considered what the claimant understood by receipt of the P45. He plainly knew that P45s were only sent to employees after employment had terminated, and repeatedly said so. It is plain, however, that he objected to being taken off the respondent's books, even if at the time he was not prepared to carry out any work. Clearly the claimant knew that he had done no work in the previous three months. The same would presumably apply to the other two employees who were terminated at the same time.

79. The tribunal considers that it is plain that the claimant, on receipt of the P45, would have assumed that "my employment has ended", but he was not happy with that, and rang HR the same day. The tribunal considers that the most logical explanation for that conversation was that the claimant understood that his employment had ended, but wanted to change that, and believed that it was unfair, and based on a misunderstanding.

80. The tribunal would characterise the telephone conversation, and subsequent interactions, as effectively representing the claimant's understanding to be as follows (1) employment had ended, that (2) management appeared to believe that he had resigned but he did not consider that that was correct, (3) procedures were unfair, (4) he wanted the decision reversed and to be re-instated, and (5) that he might bring claim of unfair dismissal in the Employment Tribunal.

81. That position should have been even clearer in the claimant's mind after speaking to HR and to Mr Doyle on 15 July 2019. The tribunal notes that there was never any promise by the respondent that the termination would be cancelled, there was no request for the claimant to see a copy of the letter which explained why it had been terminated, and the claimant at no stage did he say in terms "I do not believe my employment was ended". It was more "you've treated me wrongly, as I didn't resign, so why did you terminate my employment as if I had?". Although believing himself to be an employee, he did not avail himself of the grievance procedure.

82. The tribunal has some sympathy with the position that the claimant was in. He was trying to get to the bottom of why his employment had been terminated, and was not given much more information, albeit it turned out there was not much more information to give. Essentially, on 15 July 2019 had all the information he needed. When on 25 October he received a copy of the letter which had been sent to him on 11 July 2019, but not seen (albeit he had not requested a copy), it would have held no surprises. The letter's contents, which he had already understood to be on 15 July 2019, covered what he been complaining about all along, and which he had wanted changed. The claimant was not in any stronger position to know where he stood on 25 October 2019 than he had been on 15 July.

83. In considering what had been communicated to the claimant on 15 July, and whether he understood that his employment (or at any rate his contract) had been terminated, it is also relevant to focus on what the claimant did or said. It is notable that the claimant, in his own account, made it clear that he started researching employment law, and considered taking legal advice, plainly on the basis that his dismissal might be unfair. This was reflected in the letter he sent to the respondent on 2 September 2019. It is significant that this letter makes no suggestion that the claimant was unsure as to whether employment had been terminated, or needed more information on that point, and it did not request a copy of the letter of 11 of July 2019 which the claimant had been told about. It made no suggestion that the claimant believed that she was still an employee. Rather, it echoed the comments which the claimant had made in the telephone call to HR on 15 July 2019, that his understanding was that P45s were sent to employees whose contracts had been terminated. The claimant's letter and the email he sent a few days later, refer to the fact that his employment had been terminated, complained about the circumstances of that determination, and made it clear that he was intending to bring a case in the employment tribunal.

84. The tribunal would observe, as an obvious matter of common sense, that it would defy logic for a claimant to refer to the termination of his employment having amounted to unfair dismissal and his intention to present such a claim, unless he accepted that what had been communicated to him on 15 July 2019 amounted to the termination of his contract of employment. The tribunal does not accept the claimant's case that he only believed that he had been dismissed as late as 25 October 2019.

85. Although the claimant has not satisfactorily explained why he waited so long before he went to ACAS, he made it clear to the tribunal that when he contacted ACAS on 21 October 2019, and commenced early conciliation, it was with a view to presenting his claim of unfair dismissal. It would again defy logic for a person who did not believe he had been dismissed to commence early conciliation expressly so as to bring a claim based upon dismissal. Early conciliation completed early and a certificate was issued on 23 October 2019, again before the date the claimant now

submits that the dismissal was communicated to him.

86. It is also noteworthy that what prompted the respondent's final email of 25 October 2019, was in fact the claimant's own email, sent earlier that day. Again, was not expressly suggesting that the claimant believed that his employment was continuing. The email complains about his zero hours contract, and appeared to be arguing that because of the unfairness of the way the respondent had approached his contract, it was improper for him to be dismissed. He requests that his P45 be withdrawn, and that if the respondent still wished to end his employment, "*they can initiate it later in accordance with employment regulations*". The tribunal would interpret this, again, as being premised upon the understanding that employment had indeed ended, but that the claimant believed it should not have done.

87. The respondent's reply of 25 October 2019 did not provide any new information, but confirms that the casual workers agreements had been ended.

88. In fairness to the claimant, his final email of 25 October 2019 left matters slightly equivocal as to his understanding of time limits, by referring to this date as the "*beginning of appeal date against which I will call or can be defined as unfair dismissal from employment*". Whilst, taken in isolation, that might perhaps be interpreted as an understanding that the termination of employment had been communicated to him for the first time that day, the reality is somewhat different. What had gone previously makes it clear that notwithstanding the claimant's objections to the way he had been treated, and not withstanding confusion as to whether employment had ended at the end of March or when termination was communicated to him on 15 July 2019, as at the latter date he understood that the termination of his employment had indeed been communicated to him. He also knew that he could reapply, but would in any event need to go through the induction and security clearance processes. Possible confusion in the claimant's mind as to the status of "appeals", and how the time limits might have operated, does not change this underlying position.

89. Overall, the tribunal considers that the receipt of the P45 on 15 July 2019, in combination with the contents of the telephone call to HR the same day, and then the telephone conversations with Mr Doyle, made it sufficiently clear to the claimant that his employment had been terminated. The claimant's behaviour after that date, including commencing and completing ACAS early conciliation with a view to an unfair dismissal claim, and the content of letters and emails after that date, is consistent with that conclusion. It is inconsistent with the claimant not understanding at the time that he his contract had been terminated.

90. The tribunal also notes that at times the claimant has complained that she never physically received a dismissal letter. The tribunal considers that this is something of a red herring, as the issue is not whether the claimant had or had not received a dismissal letter in the post (and the tribunal has accepted on balance the claimant did not see the termination letter until

later), whether a reasonable employee would understand that what had been communicated to him amounted to the termination of his employment. Although there can be legal consequences for the failure to provide written reasons for dismissal, the law does not require that employment contracts be evidenced in writing, nor that the contract can only be brought to an end by the receipt of a dismissal letter.

91. The analysis above has concluded that, subjectively, the claimant would certainly have known, and believed, on 15 July 2019, that employment had been terminated, even if he was displeased by this and wished to dispute what he had apparently said to his line manager. Applying the objective test, the tribunal is satisfied that an ordinary reasonable employee, with the knowledge which the claimant already had, or had gained, on 15 July 2019, would have understood that he the employer had terminated his employment.

92. It is a feature of this case that there was ambiguity in the surrounding circumstances. There was ambiguity as to whether the claimant was a casual worker or a zero-hours employee. There was ambiguity as to whether the claimant had resigned (it turns out to be clear that he had not resigned, merely stopped working after 1 March 2019). There was ambiguity as to whether employment was terminated for the right reason, and as to whether the right procedures were followed. There was ambiguity over whether the respondent might or might not get the decision reversed, albeit the claimant knew that he would have to re-apply. There was ambiguity over whether employment ended on 15 July 2019, or as long ago as 31 March 2019, when the claimant had least worked (or at least taken annual leave). However, the tribunal considers that this ambiguity does not undermine the clear message from sending the P45, and the conversations the same day, that on 15 July 2019 the claimant knew (as any ordinary reasonable employee would have done) that his employment had been terminated.

93. The tribunal finds that the effective date of termination was 15 July 2019.

94. The claimant should therefore have commenced ACAS early conciliation on or before 14 October 2019. He did not do so until 25 October 2019.

95. The claim is out of time. This also means, although this is a secondary point, that as a matter of law the claimant is unable to rely upon any extension of time as a result of completing early conciliation.

96. The third question is whether the claimant can show that it was not reasonably practicable to have presented the claim in time. This does not mean “reasonable”, which would be too favourable to employees, and does not mean “physically impossible”, which would be to inflate favourable to employers, but means something like “reasonably feasible”. The relevant test is not simply a matter of looking at what was possible, but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.

97. On the evidence before the tribunal, the claimant has not presented an arguable case that he could not have presented the claim in time. Indeed, whatever confusion there may have been in his mind as to his rights, he had conducted research and in a letter and email to the respondent at the beginning of September 2019 had made it clear that he knew he had been dismissed, that he believed the dismissal was unfair, and that he intended to make a claim for unfair this missal in the employment tribunal. Indeed, it is interesting to compare the contents of the claim form to what is reflected in the claimant's correspondence at the beginning of September. Although the claim form makes mention of 25 October 2019, the bulk of it relates to facts that were clear to the claimant, certainly by the beginning of September, and which were largely reflected in what he had written to the respondent at that earlier stage. If the claimant was in a position to draft that correspondence at the beginning of September, during which he referred to legal representatives, and also explained to the tribunal that he approached solicitors, it is difficult to see why he did not go on and do that which he said he would do, namely set the wheels in motion to present the claim. It is a particular weakness in the claimant's case that nothing material changed before he eventually commenced early conciliation on 21 October 2019. There is an absence of any coherent explanation for what changed between the beginning of September and 21 October. It would appear that nothing had changed.

98. Although the tribunal is sympathetic to the idea that the claimant may have hoped that the respondent would find some way to resolve the matter on a mutually agreed basis, he had not received any response to his strongly worded correspondence at the beginning of September which suggested that there was any likelihood of that happening, by this stage. Indeed, by threatening imminent legal action and complaining about his unfair treatment, the claimant was hardly signalling any likelihood of an amicable resolution. He had never presented a formal grievance or sought to appeal in any formal way against the decision to terminate his contract. The claimant had done legal research and can be presumed to have understood in general terms about time limits, or at least knew where to find out that information. In fact, he made it clear to the tribunal that when he went to ACAS he knew that he was already out of time.

99. The tribunal has considered the contents of the factual unfair dismissal claim which the claimant eventually presented on 22 November 2019, and considers it that it is abundantly clear (other than comments on the correspondence of 25 October 2019) that the claimant could have presented a similar claim for unfair dismissal by early September 2019, and certainly by 14 October 2019 (and indeed, had he gone to ACAS by that date he would have had longer to refine whatever he wished to write). There is really no satisfactory explanation as to why the claimant did not progress his claim between the beginning of September and 14 October.

100. There was no formal internal appeal in this case, and even if there had been, pursuing an internal appeal does not mean that an employee is in some way given extra time to present a claim (see _*Palmer v Southend-on-*_

Sea Borough Council). The claimant raised some rather unclear point as to appeals, which the tribunal considers do not change the factual matrix. This was a case where the claimant knew all the facts, was aware of time limits, and if he was seeking to argue that even after he had completed ACAS early conciliation he was hoping that matters might be resolved internally in his favour, the tribunal does not consider that this provides any justification to extend time, especially where (on the facts of this case) the overall circumstances make it clear that it was reasonably practicable to have presented the claim in time.

101. The claimant has not demonstrated that it was not reasonably practicable to present his claim in time, or at least to have commenced ACAS early conciliation by 14 October 2019.

102. In consequence, the tribunal must dismiss the claim for want of jurisdiction.

103. Although that is an end of the matter, the tribunal has nevertheless turned its mind to the question of whether, if it had been minded to conclude that it was not reasonably practicable, the claim was presented within such further time as is reasonable. This would not impose a burden of proof upon the claimant, and is a different test from "reasonably practicable", but is a matter for the tribunal to weigh up. And it should be stressed that although the tribunal has made clear findings above, it was nevertheless sympathetic to the position that the claimant was in.

104. The claimant's case was that he did not know where he stood until 25 October 2019 (even though this was after ACAS early conciliation had already concluded). The tribunal would wholly reject any notion that the effective date of termination was as late as 25 October 2019, but that would not necessarily prevent (had the facts been materially different) the claimant from establishing that the lack of clarity made it not reasonably practicable. If the tribunal had accepted the claimant's case on practicability, it would have done so against the background that the claimant already had clear in his mind the relevant facts, had already research the law, had already approached a solicitors firm (albeit decided not to follow it up) and spoken to ACAS. He had already, the best part of two months earlier, set out in writing his understanding as to why he could bring an unfair dismissal claim. He was plainly not proposing to present a detailed claim setting out a full analysis of the law, but rather set out his account of events and why he thought it was unfair. On his own admission he already believed before he went to ACAS that his claim was out of time and that in fact the respondent was relying on 31 March 2019 rather than the later date of 15 July 2019.

105. The respondent's email of 25 October 2019 had merely confirmed the status quo, and reiterated that there had indeed been a termination. If the claimant had been reasonably waiting for such confirmation, and knowing that he was already on the face of it out of time, he could be expected to present a claim very quickly. The tribunal would, in those circumstances,

conclude that a few days at most would be sufficient for the claimant to fill in the necessary detail in a claim form and dispatch it. Other than choosing his words, there was really further nothing further which he needed to do. Taking an objective view, having regard to the public interest in adhering to time limits and the lack of any valid subjective or objective from the claimant as to the further delay, a reasonable period would not be longer than a few days at most.

106. The tribunal considers that a further reasonable time would not take the claimant beyond the beginning of November 2019. As it is, the claimant waited a further four weeks before presenting his claim. The tribunal would in any event have concluded that the claim was not presented in such further time as is reasonable, and even if it had accepted the "not reasonably practicable" arguments, would nevertheless have concluded that the tribunal had no jurisdiction to hear the claim.

Employment Judge Emerton
Date: 31 March 2021

Reasons sent to the parties: 06 April 2021

FOR THE TRIBUNAL OFFICE

Note - Covid-19 arrangements

The hearing was listed for a preliminary hearing in public to determine this preliminary issue, to be heard by telephone, with the agreement of the parties. This was in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, and it was in accordance with the overriding objective to do so. It was listed to Southampton Employment Tribunal on the published daily cause list, with the opportunity for members of the public to request access to listen to the hearing. The tribunal took account of the contents of an electronic bundle and emailed witness statements, and heard oral evidence from four witnesses and oral submissions from both parties.