# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss E L Ferguson**

**Respondents:** **(1) Nexus Workforce Ltd**
**(2) Clipper Logistics PLC**

# PRELIMINARY HEARING

**Heard at:** Watford Employment Tribunal **On:** 13 May 2021

**Before:** Employment Judge Gordon Walker

**Representation**
Claimant: In person
First Respondent: Ms L Bone, counsel
Second Respondent: Ms T Hand, counsel

# RESERVED JUDGMENT

1. The Claimant's application to amend the claim to bring a claim of race discrimination is refused;

2. The claims that were brought by the Claimant against the First and Second Respondents were:

    a. Unfair dismissal, pursuant to section 94 Employment Rights Act 1996 ("ERA");

    b. Unauthorised deduction from wages, pursuant to section 13 ERA;

    c. Holiday pay accrued but unpaid on termination, pursuant to section 13 ERA and/or regulation 14 Working Time Regulations 1998 ("WTR"); and

d. Breach of contract claim for notice pay, pursuant to Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("1994 Order").

3. The Employment Tribunal does not have jurisdiction to hear these claims because:

   a. The Claimant was neither an employee nor a worker of the Second Respondent, within the meaning of section 230 ERA or regulation 2(1) WTR;

   b. The Claimant presented her claims out of time, contrary to section 111 ERA, section 23(2) ERA, regulation 30 (2) WTR and article 7 1994 Order. It was reasonably practicable for the Claimant to present the complaints within the relevant time limit, and the Claimant did not present her claims within such further period as the Tribunal considers reasonable;

   c. The Claimant was employed by the First Respondent for less than two years ending with the effective date of termination, contrary to the service requirement at section 108 ERA.

4. The Claimant's claims against the First and Second Respondents are therefore dismissed.

# REASONS

## Introduction

1. The First Respondent is an employment business which provides flexible labour to its clients. The Second Respondent is a business which provides storage and transportation of retail goods. The First Respondent provides labour to the Second Respondent.

2. The Claimant was employed by the First Respondent as a flexible employee to provide services to its clients. The Claimant was assigned by the First Respondent to work as a warehouse operative for the Second Respondent. The First Respondent subsequently terminated its contract of employment with the Claimant.

3. The Claimant engaged in ACAS early conciliation with the First and Second Respondents, from 4-7 September 2020 and on 10 September 2020, respectively.

4. On 10 September 2020 the Claimant presented a claim against the First and Second Respondents. On 11 September 2020 the Claimant presented a further claim against the Second Respondent. The two claims were consolidated by the Employment Tribunal on 3 November 2020.

5. The Respondents contested the claims and raised jurisdictional arguments. On 31 March 2021 the Tribunal listed an open preliminary hearing to determine the issues of jurisdiction.

6. The preliminary hearing was heard remotely on 13 May 2021. The parties did not object to the case being heard remotely. The form of remote hearing was video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

## Claims and issues

7. The Claimant drafted her claim forms without professional assistance. The claim forms contained a lengthy background narrative dating back to the 1970s. The Claimant alleged that she founded and/or inherited the First and/or Second Respondent and funded their infrastructure, but they were stolen from her, along with her savings, by individuals who also tried to poison her. I explained to the Claimant that many of the

allegations that she made in her claim forms fell outside of the jurisdiction of the Employment Tribunal, for example those of identity fraud and theft.

8. The claim forms contained the following Employment Tribunal claims:

    a. Unfair dismissal, pursuant to section 94 Employment Rights Act 1996 ("ERA");

    b. Unauthorised deduction from wages, pursuant to section 13 ERA;

    c. A claim for holiday pay accrued but unpaid on termination, pursuant to section 13 ERA and/or regulation 14 Working Time Regulations 1998 ("WTR");

    d. A breach of contract claim for notice pay.

9. The Claimant also ticked the box, in her second claim against the Second Respondent, to state that she was discriminated against on the grounds of race. There was no reference in the narrative section of her claim form to any allegation of discrimination, on grounds of race or at all.

10. At the outset of the preliminary hearing, I asked the Claimant to clarify her claims, which she did as follows:

    a. The claim of unfair dismissal was brought against the First and Second Respondents. The Claimant asserted that the Respondents dismissed her without having the right to do so, because they no longer wanted her to work in the warehouse;

    b. The claim of unauthorised deductions from wages was brought against the First and Second Respondents. It related to the period from 1 December 2018 to 19 April 2020 and comprised unpaid wages and unauthorised deductions for income tax. The Claimant also claimed that the Second Respondent made unauthorised deductions from her wages in the period from 1996-1998;

    c. The claim for holiday pay unpaid on termination was brought against the First and Second Respondents. The Claimant alleged that she was not paid for the 2019 or 2020 holiday year;

    d. The claim for notice pay was brought against the First and Second Respondents. The Claimant alleged that she was not paid any notice pay;

    e. The Claimant intended to bring a claim of race discrimination against the Second Respondent. The Claimant asserted that she was the only British person working for the Second Respondent and that the Second Respondent

otherwise exclusively employed people from Eastern Europe. The Claimant alleged that she had been told by the Second Respondent *"we do not want you"*. She said that this was said by *"many people"* and that this happened *"very often*", the last occasion being 19 April 2020. The Claimant was unable to give more specific particulars of this claim, even when asked to do so.

11. The issues for the preliminary hearing were discussed at the outset of the hearing. The Respondents had drafted a joint list of issues, which was sent to the Claimant and the Employment Tribunal on 19 March 2021. The Respondents' list accurately recorded the relevant issues for the hearing, save that it did not refer to the following matters:

    a. That the Claimant had ticked the box for race discrimination on her second claim against the Second Respondent; and

    b. The WTR claim.

12. The issues for the preliminary hearing are set out below. These were the issues recorded in the Respondents' list of issues, together with some changes, which I have underlined or struck through for ease of reference:

***1. JURISDICTIONAL ISSUES PURSUANT TO THE SECOND RESPONDENT***

*1.1 Was the Claimant an employee of the Second Respondent <u>within the meaning of section 230(1) ERA</u>?*

*1.2 If not, was the Claimant a worker of the Second Respondent <u>within the meaning of section 230(3) ERA and/or Regulation 2(1) WTR</u>?*

*1.3 <u>Has the Claimant presented a claim of race discrimination against the Second Respondent?</u>*

*1.4 <u>Should the Claimant be given permission to amend her claim in the terms set out at paragraph 10(e) of these reasons?</u>*

*1.5 ~~If not,~~ Should the Second Respondent be removed as a party to these proceedings?*

*1.6 Alternatively, should the claims against the Second Respondent be struck out in their entirety?*

***2. JURISDICTIONAL ISSUES PURSUANT TO THE FIRST RESPONDENT***

***Unfair Dismissal - Length of Service***

2.1 *Should the complaint of unfair dismissal against the First Respondent be dismissed because the Claimant is not entitled to bring it if they were employed by the First Respondent for less than 2 years ending with the effective date of termination as required by section 108 Employment Rights Act 1996 (**ERA**)? Does the Tribunal have jurisdiction to hear her claim for unfair dismissal?*

**Unfair dismissal – Out of Time**

2.2 *Whether the Claimant's complaint of unfair dismissal was presented to the Employment Tribunal before the end of the period of three months beginning with the effective date of termination as required by section 111 ERA, taking into account any extension of time as a result of the ACAS conciliation process?*

2.3 *If not, whether the Tribunal is satisfied that it was not reasonably practicable for the Claimant to present the complaint within the relevant time limit?*

2.4 *If so, whether the complaint was presented to the Tribunal within such further period as the Tribunal considers reasonable?*

***Unpaid Wages – Out of time***

2.5 *Whether the Claimant's complaints related to unpaid wages and/or holiday pay unpaid on termination were presented to the Employment Tribunal before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made as required by section 23(2) ERA, taking into account any extension of time as a result of the ACAS conciliation process?*

2.6 *If not, whether the Tribunal is satisfied that it was not reasonably practicable for the Claimant to present the complaint within the relevant time limit?*

2.7 *If so, whether the complaint was presented to the Tribunal within such further period as the Tribunal considers reasonable?*

***Breach of Contract – Out of Time***

2.8 *Whether the Claimant's complaints alleging breaches of contract were*

*presented to the Employment Tribunal before the end of the period of three months beginning with the effective date of the termination of her contract, taking into account any extension of time as a result ofthe ACAS conciliation process?*

*2.9* *If not, whether the Tribunal is satisfied that it was not reasonably practicable for the Claimant to present the complaint within the relevant time limit?*

*2.10* *If so, whether the complaint was presented to the Tribunal within such further period as the Tribunal considers reasonable?*

***Working Time Regulations claims – Out of time***

*2.11* *Whether the Claimant's complaints related to holiday pay unpaid on termination were presented to the Employment Tribunal before the end of the period of three months beginning with the date on which it is alleged that payment should have been made, as required by regulation 30(2) WTR, taking into account any extension of time as a result of the ACAS conciliation process?*

*2.12* *If not, whether the Tribunal is satisfied that it was not reasonably practicable for the Claimant to present the complaint within the relevant time limit?*

*2.13* *If so, whether the complaint was presented to the Tribunal within such further period as the Tribunal considers reasonable?*

***Other Claims***

*2.14* *Does the Claimant raise any other claims which the Tribunal has jurisdiction to determine?*

*2.15* *Should the claims against the First Respondent be struck out in their entirety?*

**Procedure, documents and evidence heard**

13. The First Respondent produced a 153-page electronic bundle of documents. This bundle was agreed with the Second Respondent. The Claimant had been consulted on the contents of the bundle, but she did not agree them. The Claimant sent additional documents to the Tribunal under cover on an email dated 12 May 2021.

14. I heard evidence from the Claimant and two witnesses called by the First Respondent: Mr Brookes, the First Respondent's Account Manager, and Mr Coates, the First Respondent's Payroll Manager. Mr Brookes and Mr Coates produced written witness statements. In the absence of a written witness statement from the Claimant, I treated the claim forms as such.

15. The First Respondent provided written opening submissions. I heard oral submissions from all parties.

**Findings of fact**

16. The First Respondent is an employment business which provides flexible labour to its clients. The Second Respondent is a business which provides storage and transportation of retail goods.

17. The First Respondent provides labour to the Second Respondent pursuant to a framework agreement dated 17 January 2020. I was not provided with a copy of the framework agreement. I accept the Respondents' pleaded case on this issue as this was not challenged by the Claimant. It is common practice to have such an agreement in place in tripartite situations of this kind whereby an employment business supplies workers to an end-user.

18. The Claimant was employed by the First Respondent under a contract of employment signed on 28 November 2018. There was no contract between the Claimant and Second Respondent.

19. The Claimant's employment with the First Respondent commenced on 1 December 2018. I conclude that this was the date of the commencement of employment, because:

    a. Although there initially appeared to be a dispute on this issue, the Claimant stated during the hearing that she commenced employment with the First Respondent on 1 December 2018. The Claimant said this in answer to initial questions from myself, and also under cross examination by the First Respondent;

    b. In section 5 of her first claim form, the Claimant gave 1 December 2018 as the date when her employment started;

    c. The Assignment Sheet at page 112 of the bundle stated that the start date of the Claimant's first assignment for the First Respondent was 1 December 2018.

20. The Claimant was employed by the First Respondent as a flexible (or *"flex"* to use the term given in the contract) employee. She was assigned to work as a warehouse operative for the Second Respondent at the Second Respondent's warehouse in Sandy Way, Northampton.

21. The Claimant had previously worked for the Second Respondent under contract of employment with a different employment business (Encore Personnel Services Ltd ("Encore")) dated 31 May 2017. The Claimant produced emails from Encore dated 6 October 2017 and 3 April 2018. Each email stated that the Claimant had been assigned to work for the Second Respondent for one week. The Claimant also produced payslips which showed that she was paid for 55 hours of work as a general operative during her employment with Encore.

22. The Claimant signed an updated contract of employment with the First Respondent on 13 March 2019.

23. In the period up to 5 April 2020 the Claimant earned £3,502.91 in her employment with the First Respondent. This figure is taken from the Claimant's P60s for the 2019 and 2020 financial years.

24. On 19 April 2020 the Claimant's employment with the First Respondent was terminated. In her first claim form, the Claimant asserted that her employment with the First Respondent terminated on 12 June 2020. I have reached my decision that her employment terminated on 25 April 2020 because:

    a. It is clear from the First Respondent's letter to the Claimant of 19 April 2020 that the Claimant was released from her assignment with the Second Respondent on 19 April 2020, following a conversation earlier that day. This letter informed the Claimant that it may not be possible to provide her with an alternative assignment;

    b. It was not in dispute that Mr Brookes had offered the Claimant an alternative assignment at Monsoon Wellingborough, but the Claimant declined to accept this. The parties disagreed as to the reason why the Claimant rejected the assignment, but that is not material to this issue;

    c. The First Respondent then produced a P45 dated 28 May 2020 with a leaving date of 25 April 2020;

d. The Claimant accepted under cross examination that, after that date, she did not do any work or receive any pay (save for that related to holiday pay on termination) from the First Respondent;

e. On 29 May 2020 the Claimant wrote an email to the First Respondent requesting her holiday pay. The Claimant accepted under cross examination that she made that request as her employment had been terminated. Specifically, the Claimant stated in answer to questions on this issue: *"in case they don't want me to work anymore, it is normal to ask for my holiday pay… if they paid me holiday pay it means they ended my contract"*;

f. The Claimant explained that she believed her employment had been terminated in June 2019 as that was the date recorded in her second P45 issued by the First Respondent. The First Respondent did produce a second P45 dated 18 June 2020, which gave the leaving date as 13 June 2020. I can understand why this was confusing for the Claimant. However, I do not find that the second P45 accurately recorded the Claimant's leaving date because:

    i. I find that the second P45 was produced because the First Respondent made a further payment to the Claimant post termination, for her holiday pay. I accept Mr Coates' evidence on this point, as it was clear, logical, and consistent with the documentary evidence. The documentary evidence shows that the First Respondent made a payment to the Claimant for her holiday pay on 13 June 2020, which is the date erroneously recorded as the leaving date in the second P45;

    ii. The incorrect leaving date was then rectified by the First Respondent by way of a third P45 dated 9 July 2020, which recorded the leaving date as 25 April 2020.

25. On 21 April 2020 Mr Brookes sent an email to all employees enclosing a letter explaining that the Swedish Derogation would be repealed by the First Respondent from 6 April 2020. During the course of cross examination, the Claimant alleged that in her meeting with Mr Brookes on 19 April 2020 she was told that if she did not sign the form regarding the repeal of the Swedish Derogation, she could no longer work for the First Respondent. In answer to my question, Mr Brookes denied that there was any discussion about this issue in the 19 April 2020 meeting. I prefer the evidence of Mr Brookes on this point because his evidence was consistent with the fact that the form referred to by the Claimant was not sent to employees until after the 19 April 2021 meeting.

26. As previously mentioned, the Claimant wrote to the First Respondent by email on 29 May 2020. In her email, the Claimant stated that the First Respondent was her employer, and she made a request for unpaid wages and holiday pay.

27. The Claimant also referred in that email to text messages she had received for recruitment opportunities with the First Respondent. Mr Brookes explained under cross examination that the Claimant would have received generic messages that were sent to all former employees when new work opportunities become available. If the Claimant had passed the necessary recruitment processes in respect of these opportunities, the Claimant and the First Respondent would have entered into a new contract of employment.

28. During the hearing, the Claimant asserted that the First Respondent had promised her further work in July 2020. I do not accept that the First Respondent made any offers or promises of work to the Claimant after her employment was terminated on 25 April 2020. I find that the First Respondent sent the Claimant generic messages regarding potential opportunities for work, but that these were not progressed. I have reached this conclusion because it is consistent with:

    a. The Claimant's email of 29 May 2020 which stated that the Claimant had received text messages *"for recruiting"* but the Claimant had been unable to progress these with the First Respondent;

    b. The evidence of Mr Brookes under cross examination referred to at paragraph 27 above;

    c. The following statements made by the Claimant under cross examination: *"they didn't offer me any more work"*; *"I did not accept [further work] as the work was in the premises of Clipper"* and *"I was threatened in June 2020 and that was why I didn't ask for more work".*

29. As previously stated, on 13 June 2020 the First Respondent made a payment to the Claimant of £328.34 in respect of her holiday pay. A second P45 was therefore produced on 18 June 2020. This erroneously recorded the Claimant's leaving dated as 13 June 2020. This issue was rectified by the production of a third P45 dated 9 July 2020 which correctly recorded the Claimant's leaving date as 25 April 2020.

30. On 29 August 2020 the Claimant sent a further email to the First Respondent requesting unpaid wages and holiday pay.

31. On 4 September 2020 the Claimant commenced ACAS early conciliation with the First Respondent. That process completed on 7 September 2020.

32. On 10 September 2020 the Claimant presented a claim against the First and Second Respondents.

33. The ACAS early conciliation process against the Second Respondent commenced and concluded on 10 September 2020. The Claimant presented her second claim against the Second Respondent the following day, on 11 September 2020.

**Legal principles**

Employment status

34. To bring a claim of unfair dismissal, the Claimant must be an employee within the meaning section 230(1) ERA, which provides as follows:

***ERA section 230 - Employees, workers etc.***

*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

35. To bring a claim for unauthorised deduction from wages, the Claimant must be a worker within the meaning of section 230(3) ERA, which provides as follows:

***ERA section 230 - Employees, workers etc.***

*(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*

*and any reference to a worker's contract shall be construed accordingly.*

36. To bring a claim for holiday pay under the working time regulations, the Claimant must be a worker within the meaning of regulation 2(1) WTR, which has the same meaning as section 230(3) ERA.

37. To bring a claim for breach of contract (for example for notice pay or contractual holiday pay) the Claimant must be also be a worker, as stipulated by the Employment

Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order").

38. In ***James v Greenwich London Borough Council*** [2007] ICR 577, the EAT gave guidance to Employment Tribunals in deciding whether to imply an employment contract between an agency worker and an end-user. The Court of Appeal in ***James v Greenwich London Borough Council*** 2008 [ICR] 545 endorsed the EAT's approach and confirmed that an Employment Tribunal will only be entitled to imply an employment contract between an agency worker and an end-user where it is necessary to do so to give business reality to the situation. It would not be necessary to do so if the agency arrangements were genuine and accurately represented the relationship between the parties.

Time limits

39. In order to comply with the statutory time limits, the Claimant was required to commence the ACAS early conciliation process within three months from when the alleged wrong occurred. If she had done so, the time limit for presenting her claim to the Employment Tribunal would have been extended to allow for the period of ACAS early conciliation and/or to ensure that she had at least a month following the conclusion of ACAS early conciliation in which to present her claim. This is a summary of the statutory position. The specific statutory wording that I have applied is cited below:

***Section 23(2) ERA (for claims of unauthorised deductions from wages)***

*(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, or*

*(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

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

*(a) a series of deductions or payments, or*

*(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*

*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) applies 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.*

*(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*

***Section 111 ERA (for unfair dismissal claims)***

*(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*

*(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) applies for the purposes of subsection (2)(a).*

***Regulation 30(2) WTR (for holiday pay claims)***

*(2) Subject to regulations 30A and 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 …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 … months.*

*(2A) Where the period within which a complaint must be presented in accordance with paragraph (2) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (2).*

***Article 7 1994 Order (for breach of contract claims)***

*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*

*(ba) where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution)Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).*

*(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.*

***Section 123 Equality Act 2010 (for discrimination claims)***

*(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*…*

*(3) For the purposes of this section—*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

***Section 207B ERA Extension of time limits to facilitate conciliation before institution of proceedings***

*(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").*

*(2) In this section—*

*(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

*(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

*(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

*(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

*(5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.*

40. As set out above, the statutory time limits for the unfair dismissal, unauthorised deduction from wages, holiday pay and breach of contract claims can be extended by the Employment Tribunal if it was not reasonably practicable for the Claimant to present her claim within the time limit, and she presented it within a further period that the Employment Tribunal considers reasonable.

41. The onus of proving that presentation in time was not reasonably practicable rests on the Claimant (***Porter v Bandridge Ltd*** [1978] ICR 943). As per the guidance in ***Palmer and anor v Southend-on-Sea Borough Council*** [1984] ICR 372, the meaning of *"reasonably practicable"* lies somewhere between *"reasonable"* and *"physically possible"*, it means something like *"reasonably feasible"*.

Service

42. Section 108(1) ERA requires the Claimant to have at least two years continuous service to bring a complaint of ordinary unfair dismissal.

43. Section 108(3) ERA makes certain exceptions to the two-year service requirement. Dismissals in connection with regulation 5 of the Agency Workers (Amendment)

Regulations 2019, which repealed the Swedish derogation, are not cited within this list. Therefore, the two-year service requirement would still apply in such cases.

Contents of the claim form

44. The question whether a claim form contains a claim must be judged by reference to the whole document: ***Ali v Office of National Statistics*** [2004] EWCA Civ 1363.

45. The Second Respondent referred me to the case of ***Chandhok v Tirkey*** [2015] ICR 527, in which Langstaff P (as he then was) stated:

*16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.*

*17. I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.*

*18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system*

*of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.*

46. In ***Baker v The Commissioner of Police for the Metropolis*** UKEAT/0201/09 the EAT upheld the decision of the Tribunal that a claim form did not contain a claim of disability discrimination, in circumstances where the claimant had ticked the box for disability discrimination, but made no complaint in the narrative section that was obviously related to disability discrimination.

Amendment applications

47. In ***Vaughan v Modality Partnership*** UKEAT/0147/20 the EAT recently gave guidance to Employment Tribunals on the correct approach to adopt when considering an application to amend. The paramount consideration is the balancing of the relative injustice or hardship between the parties of allowing or refusing the amendment. In doing so, the Tribunal should consider the real practical consequences of allowing or refusing the amendment. The factors cited in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836 are not a checklist, but simply a discussion of the kinds of factors that are likely to be relevant when conducting that exercise. So too is the extent to which the new pleading is likely to involve substantially different areas of inquiry from the old.

48. In ***Galilee v Commissioner of Police of the Metropolis*** [2018] ICR 634, the EAT gave guidance to Employment Tribunals on determining out of time applications to amend. Whilst time limits are relevant to the decision making process, it may not always be possible to determine that issue until the evidence is heard. There is no mandatory rule that all out of time issues must be decided before permission to amend can be considered. Where amendments introduce new causes of actions, they will take effect for the purposes of limitation at the time permission is given to amend. In cases involving consideration of whether it would be *"just and equitable"* to grant an extension, ***Edinburgh City Council v Kaur*** [2013] SC 485 should be applied. In some circumstances it may be possible to decide the just and equitable issue, but usually this should be the subject of a final decision reached after hearing the evidence.

Strike out

49. Rule 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("ET Rules") gives the Tribunal the power to a strike out a claim for having no reasonable prospect of success. A claim may not be struck out unless the Claimant has been given a reasonable opportunity to make representations (Rule 37(2) ET Rules).

50. Discrimination claims should not be struck out on grounds of having no reasonable prospects of success, save in the most obvious cases: ***Anyanwu v South Bank Student Union*** [2001] ICR 391; ***Eszias v North Glamorgan NHS Trust*** [2007] ICR 1126; ***Balls v Downham Market High School and College*** [2011] IRLR 217.

51. Tribunals should also be slow to strike out claims brought by litigants in person for having no reasonable prospects of success, particularly where the factual issues are in dispute: ***Mbuisa v Cygnet Healthcare Ltd*** UKEAT/0119/18; ***Cox v Adecco*** UKEAT/0339/19.

52. However, Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is no reasonable prospect of the facts necessary to establish liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion before full evidence has been heard: ***Ashir v British Airways PLC*** [2017] EWCA Civ 1392.

## Conclusions

Claims against the Second Respondent

*Employment status*

53. It is not in dispute that the Claimant was an employee of the First Respondent. The Claimant asserted that she was also an employee of the Second Respondent, because the Second Respondent managed and controlled her work on assignment.

54. There was no express contract of employment between the Claimant and the Second Respondent. I conclude that there are no grounds to imply a contract of employment, because:

    a. The contract was performed in a way that was consistent with the terms of the Claimant's contract of employment with the First Respondent, which stipulated that she was employed as a flexible employee to provide services to the First Respondent's clients at various sites;

    b. The agency arrangements appear to be genuine and to accurately represent the relationship between the parties. There was no evidence to the contrary;

    c. The Claimant had been assigned to the Second Respondent for around sixteen months by First Respondent, and, before that, through Encore. However, the evidence (the P60s and the payslips and emails from Encore) shows that she did not work there consistently or for long periods. In any event, the mere fact

that an agency worker has worked for a particular client for a considerable period does not justify the implication of a contract between the two;

d. Although the Claimant had previously worked at the Second Respondent's site, under a contract of employment with Encore, there was no existing contractual relationship between the Claimant and the Second Respondent at the time that the contract of employment with the First Respondent commenced.

55. I find that there was a classic tripartite relationship between the parties. The Claimant was an employee of the First Respondent. She was neither an employee nor a worker of the Second Respondent within the meaning of section 230 ERA.

*Has the Claimant presented a claim of race discrimination against the Second Respondent?*

56. In her second claim against the Second Respondent, the Claimant ticked the box to allege race discrimination.

57. The only references in her claim form to race or nationality were:

a. *"In 1996 after that deal, I paid £3000 pounds … for the purchasing and disposing of the Company Nexus Workforce Limited in order to be easier for me in that moment to operate an employment agency with British persons as a members of staff";*

b. *"… my name as the account holder was my originate British name Evelyn Isabel Ferguson. From the period of my residing in Bulgaria when I became a double citizenship";*

c. *"I was attacked in the street and my British passport and my identity card were stolen";*

d. *"There in the warehouse were speaking thousands of people many of them illegal immigrants, who even do not speak the English language."*

58. Despite acting as a litigant in person, the Claimant was able to particularise her other claims. The narrative sections of the claim forms start and end with a precise allegation that the Respondents owed the Claimant *"unpaid salaries and other payments"* and *"unpaid wages, salaries, back pay and other payments"*, respectively. This allegation was particularised and quantified. The Claimant also referred to her dismissal within the narrative section.

59. Reading the claim forms as a whole and having regard to the legal authorities on this issue cited above, I find that the Claimant did not present a claim of race discrimination against the Second Respondent.

60. The Claimant did nothing more than tick the box to allege race discrimination. The Claimant made no express or implied allegation of discrimination (on grounds of race, or at all) in the long narrative section accompanying her claim forms. This was notwithstanding that she was able to particularise her other claims. The references that the Claimant made to race or nationality did not contain any express or implied allegation of discrimination. They formed part of the extensive background information contained in the claim form.

*Amendment application*

61. At the outset of the hearing, I asked the Claimant about her potential claim of race discrimination against the Second Respondent. The Claimant stated that she intended to bring a race discrimination claim against the Second Respondent. She stated that she was the only British person working for the Second Respondent and that the Second Respondent otherwise exclusively employed people from Eastern Europe. The Claimant alleged that she had been told by the Second Respondent *"we do not want you"*. She said that this was said by *"many people"* and that this happened *"very often*", the last occasion being 19 April 2020. The Claimant was unable to give more specific particulars of this claim, even when asked to do so.

62. I have treated this statement from the Claimant as an application to amend her claim to bring a claim of race discrimination against the Second Respondent.

63. I asked the Claimant about the prejudice that she would suffer if I refused her amendment application. Her response was as follows: *"I am not focussed on the race discrimination claim, the problem is bigger, it is not only me that has the problem, it is not only me as a British person who has the problem, I am more focussed to receive back my bank accounts".* I take this statement to mean that the Claimant's primary concern was to recover the money that she alleged was due to her from the Respondents. This was the main issue for her, and she did not assert that this issue was related to her race or nationality. The Claimant was not focussed on the race discrimination claim.

64. I asked the Second Respondent about the prejudice that they would suffer if I allowed the amendment application. Ms Hand had not anticipated this issue and did not have clear or complete instructions from the Second Respondent. She submitted that the balance of hardship fell in favour of the Second Respondent, as the Claimant did not

appear to be concerned with pursuing this claim. On the other hand, the Second Respondent would face the prejudice of having to respond to a claim that the Claimant could not even particularise.

65. I have considered the time limits and applied the guidance in ***Galilee***. It is possible for me to determine the limitation issue. The Claimant alleged that the last act of discrimination took place on 19 April 2020. Therefore, even if the Claimant could establish *"conduct extending over a period"* within the meaning of section 123(3)(a) Equality Act 2010 (which she did not expressly assert), this would be treated as done at the end of that period i.e. on 19 April 2020. Accordingly, ACAS early conciliation should have commenced on or before 20 July 2020 and the claim is out of time. The amendment introduces a new cause of action. If permitted, it would take effect for the purposes of limitation at the time permission was given to amend. The claim would therefore be ten months out of time. I have heard some evidence from the Claimant as to her reason for delaying in presenting her claim. Whilst I have not determined the just and equitable point, I consider that the Claimant would have difficulty persuading an Employment Tribunal that it was just and equitable to extend time in circumstances where she had no good reason for the delay, a point which I have addressed below at paragraphs 81-83.

66. I conclude that the balance of prejudice falls in favour of refusing the amendment application, for the reasons set out below.

67. Although the Claimant would otherwise be precluded from bringing her claim of race discrimination, she said that she was not focussed on pursuing this claim. The claim also seems to have low prospects of success, because:

    a. The Claimant was unable to give the essential details of the amened claim, such as the name of the alleged perpetrators;

    b. The amended claim would be ten months out of time and the Claimant is unlikely to be able to persuade an Employment Tribunal that it is just and equitable to extend time.

68. The prejudice to the Second Respondent is more considerable, because:

    a. Given my findings above, if the application were allowed, the Second Respondent would face the prejudice of having to defend this claim in circumstances where all other claims against them had been dismissed;

    b. Absent the basic and essential particulars of the claim, the Second Respondent would have difficulty investigating and defending the claim;

c. The application is in respect of a new cause of action which concerns a completely new factual enquiry;

d. The Claimant's delay in presenting the claim could cause forensic difficulty for the Second Respondent as memories fade over time. Given that the Claimant was unable to name any of the individuals involved in the alleged discrimination, the Second Respondent was unable to give more precise information on the forensic prejudice they would suffer from the delay.

*Removal of the Second Respondent as a party*

69. Given my findings above, the claims against the Second Respondent will be dismissed.

*Strike out application*

70. As the claims against the Second Respondent will be dismissed, it is not strictly necessary to consider the strike out application. However, for completeness, I have considered the Second Respondent's application to the limited extent set out below.

71. I have found that there was no pleaded claim of race discrimination. If I had reached the opposite conclusion, I would have struck out the claim for having no reasonable prospect of success.

72. The Claimant had reasonable opportunity to make representations on the strike out application at the hearing. She was on notice of the strike out application from receipt of the Second Respondent's Grounds of Resistance (paragraph 13) and the Respondents' joint list of issues.

73. I have had regard to the authorities cited, and the cautious approach to be taken to striking out discrimination claims, particularly those brought by litigants in person.

74. Given that the Claimant made no express of implied allegation of discrimination in her claim form, and she was unable to provide the essential particulars of her claim at the preliminary hearing, I am satisfied the Claimant had no reasonable prospect of establishing the facts necessary to establish liability on the race disclination claim.

75. Therefore, if (contrary to my conclusion above) the Claimant had pleaded a race discrimination claim, I would have struck this claim out pursuant to rule 37(1)(a) ET Rules.

76. The other matters contained in the claim form are background information and do not raise claims which the Tribunal has jurisdiction to determine.

Claims against the First Respondent

*Time limits*

77. Having regard to the statutory time limits cited above, the Claimant was required to commence ACAS early conciliation with the First (and Second) Respondent on or before 24 July 2020.

78. For the claims of unfair dismissal, holiday pay on termination and breach of contract, time runs from the effective date of termination, which was 25 April 2020. Although there was no express contractual term for payment of accrued but untaken holiday on termination, the Claimant had the right to such a payment pursuant to regulation 14 WTR, which provides that the payment should have been made on termination.

79. The Claimant contends that the Respondents made a series of deductions, the last of which was in respect of her work on 19 April 2020. The Claimant's payslip in respect of her work of 19 April 2020 was dated 25 April 2020. I find that this was the date of the payment of wages from which the last alleged deduction was made. I noted that the terms of the contract of employment state that the Claimant would be paid weekly in arrears, however in this instance it appears that she was paid a day early.

80. The Claimant commenced ACAS early conciliation against the First Respondent on 4 September 2020, more than four months late. Accordingly, her claims are out of time.

81. I asked the Claimant why she did not present her claims earlier, for example in June or July 2020. I asked her whether there was anything preventing her from putting her claim in earlier. The Claimant's response was that she had been *"occupied by many things"*, she had *"tried to find someone as a witness"* and that she did not want to jeopardise her future employment prospects with the First Respondent, given that she had been promised work in July 2020.

82. I find that the Claimant has failed to discharge her burden of proving that it was not reasonably practicable for her to present her claim in time, because:

    a. The Claimant did not suggest that she was ignorant of her rights or in any way impaired in presenting her claims;

    b. The Claimant's reasons for delay were (1) that she wished to find a witness; and (2) in order not to jeopardise her future employment prospects with the

First Respondent. I find that it was nevertheless reasonably practicable for her to present her claim in time, because:

i. The absence of a witness is not a reasonable barrier to her presenting the claim form, as this does not require witness evidence;

ii. Neither is future employment prospects. Indeed, according to the Claimant's own evidence under cross examination, she did not wish to continue to work for the First Respondent.

c. The Claimant was able to articulate her claims by email to the First Respondent on 29 May 2020. This was before the limitation period had expired. If she had chosen to do so, the Claimant could have used the contents of that email as the basis for drafting her claim form.

83. After expiry of the limitation period, but before commencing ACAS early conciliation, the Claimant wrote an email to the First Respondent on 29 August 2020. The Claimant used the contents of this email as part of her claim form. Part of the six-page narrative to the claim form was written in very similar, if not identical, terms to the Claimant's three-page email of 29 August 2020. Since the Claimant was able to draft the principal parts of her claim form by 29 August 2020, I find that the Claimant could, and should, have presented her claim by this date. I therefore find that even if (contrary to my conclusion above) it was not reasonably practicable for the Claimant to present her claim in time, the complaints were not presented within a further reasonable period either.

*Service*

84. Even on the Claimant's own case, she lacked the requisite two years' service to bring her claim of unfair dismissal against the First Respondent.

85. The Claimant's claim form does not include a claim of automatic unfair dismissal. When the Claimant was asked to clarify her claims at the outset of the hearing, she did not advance any allegations of automatic unfair dismissal. During the hearing and in her correspondence to the Tribunal of 10 March 2021 the Claimant implied that she was dismissed because she had objected to the First Respondent repealing of the Swedish Derogation. I do not find that this was part of the Claimant's claim as presented to the Employment Tribunal as there is no mention of this point within the claim form. In any event, this point would not assist the Claimant as the two-year service requirement would still apply, because this type of claim is not cited in the list of excluded claims at section 108(3) ERA.

*Other claims*

86. The other matters contained in the claim form are background information and do not raise claims which the Tribunal has jurisdiction to determine.

*Strike out application*

87. Given my findings above, the claims against the First Respondent will be dismissed as the Tribunal does not have jurisdiction to hear them. It is therefore not necessary to consider the strike out application, which was merely a repetition of these jurisdictional arguments in any event.

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Employment Judge **Gordon Walker**

Date 24 May 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
14 June 2021
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THY
.....
FOR EMPLOYMENT TRIBUNALS