EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107845/2021

Preliminary Hearing Held via Cloud Video Platform (CVP) on 20 August 2021

Employment Judge Murphy

Mr A Catterson	**Claimant** **In Person**
Search Consultancy Ltd	**Respondent** **Represented by** **Mr P Singh,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not dismissed by the respondent within the meaning of section 95 of the Employment Rights Act 1996 on 31 July 2020 or at all. The claimant's complaint of unfair dismissal is, therefore, dismissed.

REASONS

Issues

1. The claimant has presented a claim for unfair dismissal. He alleges he was dismissed by the respondent on 31 July 2020.

2. The respondent resists the claim on the merits and also on the grounds that (1) the respondent did not dismiss the claimant on 31 July 2020, as alleged, or at all; and (2) in the event that the respondent is found to have dismissed the

claimant on that date, his complaint is in any event time barred in circumstances where it was presented out of time, and it would have been reasonably practicable for the claimant to have presented it in time.

3. The respondent accepts that the claimant had held employee status at all material times.

4. In the circumstances, a preliminary hearing was fixed to determine the issues of whether the respondent dismissed the claimant and, if so, whether the claimant's claim was presented within the time limits prescribed by section 111(2) of the Employment Rights Act 1996 ("ERA"). The hearing took place via cloud video conferencing, there being no objection by either party to this format.

5. The Tribunal heard oral evidence from the claimant only and found him to be a credible witness though his recollection was at times hazy when it came to detail of the chronology. A relatively brief Inventory of Productions was lodged to which a number of additions were made on the morning of the hearing following preliminary discussions regarding the availability of documentary evidence relating to the alleged events of 31 July 2020. It was also identified that the claimant's contract of employment had been only partially produced and the remaining pages of that document were lodged following the adjournment.

6. Before taking evidence from the claimant, the terms of section 111(2) of ERA were read to the parties.

Findings in Fact

Having heard the claimant's evidence, the Tribunal found the following facts to be proved.

7. The claimant was employed by the respondent from 23 April 2018 pursuant to a contract which he signed on 4 March 2018. The claimant did not read the terms and conditions before signing them on 4 March 2018 but read them prior to the commencement of his first assignment which the respondent arranged for the claimant to undertake with its client, the Clydesdale Bank. The 23 April

2018 was the so called 'Effective Date' as defined in the contract (as "the commencement date of the Assignment directly following upon your signature of these Terms and Conditions"). After reading the Terms and Conditions, the claimant raised no query or protest with the respondent regarding any of the terms of the contract.

8. The contract included the following terms:

> 1. JOB TITLE AND DUTIES
>
> …
>
> b) You will be assigned from time to time to carry out work services for Clients in your capacity as a Search Associate.
>
> c) In carrying out any work services, you agree to work under the direction of the Client at whose premises you are Assigned to work, from time to time, and to carry out those duties in a loyal and trustworthy manner.
>
> d) you agree that you might be transferred to a new Assignment at any time without restriction as to location or client, as directed by the Company.
>
> e) You agree that the Company or Client may terminate an Assignment at any time without prior notice or liability to you. Termination of an assignment is not termination of your employment.
>
> …
>
> g) The Company will endeavour to obtain suitable assignments for you to perform the Type of Work and in this capacity, the Company will operate as an Employment Business under and as defined in the Conduct Regulations. You acknowledge that there may be times when no assignments are available.
>
> …
>
> 2. REMUNERATION & PAYMENT

a) Whilst on Assignment you will be entitled to be paid in respect of the hours that you work regardless of whether or not he Company has been paid by the Client.

…

g) Subject to any statutory entitlement under the relevant legislation referred to in clauses 7 and 8 below and any other statutory entitlement, you are not entitled to receive payment from the Company for time not spent on assignment, whether in respect of holidays, illness or absence for any other reason, unless otherwise agreed.

…

3. HOURS OF WORK

a) The Company guarantees to offer you a minimum of 336 hours of work in each successive 12 month period of continuous employment (beginning on the Effective Date), paid at a rate at least equivalent to the National Minimum Wage in force at the time. Your hours of work will vary according to the requirements of the Company and the Client. Accordingly, there will be no standard or normal working hours applicable to these Terms and Conditions. It is a condition of your employment that you work flexibly in accordance with the Client's requirements whilst on Assignment with that Client, though at all times you will remain subject to the overall control of the Company. You acknowledge that there may be periods when a particular Client has no work available for you and your attention is drawn to Clause 2a) above. The Company will wherever possible Assign you to such other work as it has available with any other Client at any location and your attention is drawn to the provisions of Clause 3c) below.

…

c) It is a condition of your employment that you undertake work when required by the Company. If, without good cause, you decline or

> refuse to work on any particular Assignment then the same shall be regarded as gross misconduct entitling the Company to terminate your employment. Declined assignments count towards our offer of guaranteed hours.
>
> …
>
> 5. NOTICE
>
> a) …
>
> b) The Company must give you the following notice periods to terminate your employment:-
>
> …
>
> iii. three weeks' notice if you have been continuously employed for more than two years but less than three years with an additional week's notice for every full year of continuous employment thereafter up to a maximum of 13 weeks' notice for twelve or more years of continuous employment.

9. The claimant worked at the Clydesdale for 36 hours per week on Mondays to Wednesdays between the hours of 7 pm and 7 am. The Claimant continued to work these hours under the assignment until he was placed on furlough on or about 13 April 2020, after Government restrictions were put in place in response to the Covid 19 pandemic.

10. In early May 2020, the respondent asked the claimant to return to work at the Clydesdale on the same assignment but under a different pattern of working hours. He was asked to work 9 am to 5 pm from Monday to Friday. The Claimant declined this request, as he did not consider that the PPI related work which he carried out for the Clydesdale amounted to "essential" work.

11. The respondent repeated its request that the claimant return to work with its client on three or four occasions in May, June and July 2020. The claimant declined the request on each occasion for the same reason until, towards the end of July 2020, he agreed to a return. Throughout the period

from 13 April to 31 July 2020, the Claimant was paid furlough monies by the respondent.

12. During the week commencing 25 July 2020, the claimant told the respondent's Denise McGillivray that he was willing to return to work at the Clydesdale bank. Re-training had been organized by the Clydesdale for the week commencing 3 August 2020 in which it was envisaged the claimant would participate.

13. At 2.01pm on 31 July 2020, the claimant received an email from Ms McGillivray in the following terms:

> Hi Adam,
>
> I would much rather speak to you over the phone but I'm not sure when you will pick up my missed call and I know you have stated in the past you prefer any comms to be via email.
>
> Unfortunately when I went spoke [sic] to the bank about returners for Monday and to update them on your situation, I have been advised that there has been a change in circumstances at the bank and they have decided that anyone that hasn't already returned to work will no longer be required in this assignment.
>
> The reasons for this are that they have now maxed out the office in terms of capacity as people that where [sic] asked to return had confirmed back sooner that they were happy to do so and that they have looked at numbers / capacity in the office again based on confirmed returners and they are not able to bring anyone else back. They have made the decision that they will now be able to meet the deadline that they have based on the numbers that they already have returned to the office.
>
> I'm really keen to speak to you as I don't want to just deliver this via email so please call me.
>
> Kind regards
>
> ..

14. Ms McGillivray's email did not come entirely as a surprise to the claimant because he had been informed by one of his colleagues that he had received a similar email from Ms McGillivray before the claimant did. At some stage the claimant identified that there was a difference between the email he received and that which his colleague received. His colleague's email included an additional paragraph which was not present in the claimant's email. The paragraph read as follows:

> I am so sorry to have to deliver this news to you via email especially. I was not expecting this today as I'm sure you weren't, I will try my best to get you into another assignment as soon as possible.

15. The claimant did not raise the difference between his email and that of his colleague with the respondent on 31 July 2020. He did so subsequently, on or about 31 August 2020, in the context of a grievance hearing.

16. On 31 July 2020, the claimant consulted his trade union, Unite, following receipt of Ms McGillivray's email. After discussing the matter with Unite, he sent the following response at 2.39 pm:

> Hi Denise
>
> Was just in the middle of replying to your other email.
>
> Okay, seems a bit coincidental that the bank have made this decision now, given that the last intake was weeks ago and training was arranged for Monday, however have only now realized they are at full capacity, when in reality there was an entire night shift function to accommodate as well as the day shift function.
>
> At the heart of my reluctance to work was the issue of PPI being classed as essential or non-essential. I asked numerous times for the proof from you or where the bank were getting their 'essential' information from and was not provided with this. In turn, this could have all been avoided. For this reason, I wish to raise a formal grievance and will be taking this further.

Also, my holiday pay from last year and this years accrual will still be owed.

I'm guessing you will be unfamiliar with my work history as it was not you who interviewed me initially, however I previously worked for Investors in People Scotland and coincidentally I worked on the project for Search. I will also be getting in touch with them to inform them of what has been happening.

Adam

17. Ms McGillivray responded by email at 2.58 pm in the following terms:

Hi Adam,

In regards to the information I did explain to you over the phone the reasons that PPI was classed as essential working and what the bank had done to make the office safe for you all to return. I was waiting for a formal email to be sent to me as all my comms has been over the phone with my client. In regards to you returning to work my understanding is the main reason you couldn't return when asked a few weeks ago and last week was due to you not being able to return to your flat and this was the main reason you couldn't return in relation to cost of travel etc which is whey [sic] you asked to take three weeks holiday which couldn't be accommodated although I appreciate there was some questions around essential working and your return.

In regards to raising a grievance, I will ask HR what the process is for this.

I can also look at your holidays you have and have them processed for you.

In regards to your assignment ending I must make it clear that this isn't a decision I have made nor a decision that Search have made I can only act on the communications and requirements of my clients

and they have advised me of their reasons for not being able to accommodate anyone else to return to the office. The decision they have had to make based on people who have already or committed to return or which you were included in, workload, capacity of office to ensure safety measures are able to be carried out and also the fact that PPI workload is reducing. My understanding is this decision was made today.

This is not a decision I would have wanted for anyone as I certainly do not want to see anyone out of work more so now than ever, my aim is always to help people find work and keep them in work as long as possible and I can only apologise that your assignment has come to an end in this way.

No I wasn't aware of that and I appreciate you may want to let them know but this also wouldn't have changed the end decision that had to be made in the current circumstances.

Kind regards

…

18. The claimant responded to this communication via email at 4.43pm in the following terms:

Hi Denise,

Just because the office has been deemed as being 'safe' to work in doesn't make the function essential work. I am amazed you think this is the case.

My flat issue is an issue I am having, which is why I requested the holidays, which you explained I could not take at this time. I only found out I could not take these holidays on Tuesday of this week. Although this is an ongoing issue, the main issue is and has always been the difference between essential and non-essential work. I have asked numerous times where the bank got this information from that PPI is classed as essential and you never provided me

> with this. Again, an office being deemed as 'safe', does not make the work essential. Even on Wednesday, when you emailed me, you stated "I can ask what the reasons are and they where [sic] given although I'm not sure how this would affect you now as you haven't returned during that period which is totally fine and was your decision to make".
>
> Please also forward this email on to HR who are processing the grievance and also make them aware of the email that you sent to me this morning, which was also sent to another person, sharing my email details with them, which should have been for my eyes only, as this is a breach of GDPR guidelines.
>
> Thanks
>
> Adam

19. These were the only communications between the claimant and respondent on 31 July 2020. There were no phone conversations, though Ms McGillivray had tried to call the claimant before sending her email at 2.01pm.

20. The claimant did not, at the material time on 31 July 2020, consider he had been dismissed by the respondent. He developed this perception later, following the passage of many months during which the respondent omitted to contact him to offer him any work.

21. A grievance hearing was arranged for 31 August 2020 by telephone call. The respondent's Sharon Mckechnie conducted the grievance hearing. The hearing was principally concerned with the claimant's concern about PPI being classified as essential work by the respondent's client. It was not suggested during the meeting on 31 August by Ms McKechnie that the claimant had been dismissed. The claimant himself did not inform Ms McKechnie that he considered himself dismissed or ask that she clarify whether he remained employed by the respondent.

22. Ms McKechnie issued a grievance outcome on 7 September 2020 which did not communicate a dismissal to the claimant. The claimant appealed against the grievance outcome by letter dated 7 September 2020. The letter ran to three pages. The claimant raised the omission of the paragraph which appeared in the email received by his colleague on 31st July 2020 from the email he received from Ms McGillivray. This 'missing' paragraph referred to a commitment to try her best to get his colleague into another assignment as soon as possible. The claimant did not, however, assert that the lack of such an express commitment amounted to a dismissal or query his employment status.

23. The claimant received a grievance appeal outcome on or about 23 September 2020 from the respondent's Jillian Fleming. In relation to the missing paragraph, Ms Fleming concluded, following investigations, that it had not "purposefully been removed" from a template but that the emails were tailored in other respects to the individual circumstances of the claimant and his colleague. She did not accept that Ms McGillivray's intention was not to look for alternative assignments for the claimant but apologised if this omission left him feeling that he was being treated differently to his peers. She continued:

> I would like to assure you that you remain on our Associate database and we will continue to look for alternative assignments for you.

24. Ms Fleming ended the same letter with the following sentence:

> Our Office Services Team will continue to seek suitable alternative assignments for you, and will make contact with you as soon as one becomes available.

25. The respondent did not process any P45 in relation to the claimant. It did process a P60 for him for the tax year to 5 April 2021.

26. The respondent's electronic consultancy database, screen shots of which were taken on 3 August 2021, showed that as at that date, the claimant's status was recorded as 'active'.

27. There was a lull in contact between the parties. There was no telephone contact after 31 August 2020.

28. In the meantime, the claimant ceased to pay his subscription to Unite in September 2020. He did not have any discussion with Unite about whether he had been dismissed or about time limits in relation to any possible unfair dismissal claim. There was mention by the claimant of the possibility of bringing a claim for unfair dismissal in his discussions with Unite and Unite told the claimant that would be a decision for him. All communications between the claimant and Unite ceased in September 2020 when he ended his membership.

29. It was not until after the claimant's engagement of Unite had ended that he gave serious consideration to the possibility of bringing a claim for unfair dismissal. At this time, the claimant was aware at some level that there was a time limit for bringing an unfair dismissal claim but he did not know what it was. On 28 September 2020, the claimant initiated and Early Conciliation process with ACAS in respect of his dispute with the respondent.

30. He received an email from his allocated Conciliator on 7 October 2020. It included the following passage:

> **I'll call you to discuss your dispute.**
>
> We're very busy at the moment and it may take longer to call. **But please wait for me to call you.**
>
> …
>
> Before we speak you should read our guide at www.acas.org.uk/early-conciliation
>
> …

31. The claimant waited for the conciliator's call, but no call was forthcoming. Around this time, the claimant consulted the ACAS online guide which included information about time limits, as the conciliator's email instructed. Despite this the claimant continued to labour under a misapprehension as to the time limit rules.

32. An ACAS EC certificate was issued on 28 October 2020. The covering email included the following text:

> The certificate is evidence that you notified Acas before making a tribunal application. Please keep it safe.
>
> **It is your responsibility to ensure that any tribunal claim is submitted on time.**
>
> Acas cannot advise you about when a tribunal claim should be submitted.

33. The claimant did not submit a claim in the months following receipt of his certificate because he believed he required to await a call from the Acas conciliator. He emailed his conciliator on 5 November 2020 to ask when he might expect a response. He made no further enquiries of ACAS thereafter. Nor did he at any time seek advice from any other such source such as the Citizens Advice Bureau in relation to time limits. Nor did he carry out any online research in order to educate himself on the applicable time limits or the impact of any delay in contact from Acas following receipt of the EC certificate. The claimant had access to a device and had a reliable internet connection. He was unemployed between 31 July 2020 and April 2021 though he was actively seeking jobs throughout that period.

34. On 3 February 2021, the claimant received an email from ACAS as follows:

> Hi Adam
>
> I am picking up some of my colleague Matthew's work in his absence and note that you had previously requested an update. We

had contacted the Respondent regarding your potential claim and await their response. We will let you know if we do hear anything back from them.

As you are aware, the Early Concilation deadline passed on 28/10/20 and you were emailed your certificate on that date, which will enable you to make a claim to the Employment Tribunal if you wish.

35. The claimant replied by email on 3 February 2021 in the following terms:

…

Oh I was not aware that was the purpose of the certificate email. I thought it was just part of the process. I didn't realise it was because Search had not replied.

I will go down the tribunal route then.

36. He lodged his ET1 with the Tribunal until 22 February 2021. Between 3 and 22 February 2021, he did not seek to acquaint himself with the position on time limits. He held an assumption that leniency would be given regarding any time limits as a result of the global pandemic, though this was not based on advice from any source. He was also looking for jobs in this period. The claimant did not consider a further nineteen-day delay to be particularly material. He interpreted the words in the email of 3 February 2021 that this "will enable you to make a claim to the Employment Tribunal if you wish" as implying that time limits did not present a problem.

37. The claimant had been advised by the respondent in the grievance appeal process that a different consultant would be assigned to him. However, it was Ms McGillivray who made the next contact with the claimant on behalf of the respondent. She sent a standard 'candidate get in touch' template email to the claimant on 24 March 2021. Although the Tribunal accepted on the balance of probabilities that the email was sent, the Tribunal also accepted the claimant's evidence, on balance, that he did not receive it.

38. He did, however, receive an email from Ms McGillivray's colleague, Richard Brown, on 22 June 2021, enquiring as to the claimant's current working situation. The claimant had secured new employment in April 2021 but did not respond to Mr Brown's enquiry to update him on his situation.

39. The claimant received further emails from the respondent on 23 June, 3 August and 19 August 2021, asking him to get in touch and attempting to set up a Zoom meeting with him. The claimant did not respond to these emails.

Relevant Law

Was there a dismissal?

40. To succeed in a complaint of unfair dismissal, an employee must have been dismissed within the meaning of section 95 of ERA, which provides as follows:

> 95(1) For the purposes of this Part an employee is dismissed if (and subject to subsection (2) only if) –
>
> (a) The contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) He is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
>
> (c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

41. Where the fact of dismissal is disputed, it is for the employee to satisfy the Tribunal on this point, on the balance of probabilities.

42. A dismissal will not be effective until the employee actually knows he is being dismissed (**Gisda Cyf v Barratt** [2010] IRLR 1073*,* SC*).*

43. In **Sandle v Adecco UK Ltd** [2016] IRLR 941, the EAT considered a scenario where Adecco ("the agency") provided temporary agency workers to its clients. The client had concerns over the claimant's performance in that case and ended the assignment. The claimant was supplied by the agency to work as a commercial lawyer. During her notice period with the client, a manager at the agency made an attempt to call the claimant and left a voicemail but made no further attempts to contact her. The assignment ended and neither party made any attempt to get in touch. The agency took no steps to find her new work (apparently assuming this was her wish), and the claimant herself did not contact the agency at all to discuss this. The claimant then brought a claim for unfair dismissal against Adecco UK Ltd. The Employment Tribunal held that the claimant had remained employed, albeit in limbo, at the time she presented her claim. The tribunal agreed with Adecco's submissions that it had done nothing to communicate a dismissal to the claimant and dismissed her claim, holding that she had not discharged the burden of proof which rested with her to show dismissal.

44. The EAT dismissed her appeal. It ruled:

> In our judgment, the ET in the present case was not wrong: dismissal does have to be communicated. Communication might be by conduct and the conduct in question might be capable of being construed as a direct dismissal or as a repudiatory breach, but it has to be something of which the employee was aware.

45. The EAT further observed that the circumstances of Ms Sandle's employment were not irrelevant to the determination the Tribunal had to make. Agency workers may well experience gaps between assignments that will not fir the standard direct employment model; context is everything. The claimant's own response – the failure to treat the agency's conduct as a constructive dismissal – was a relevant consideration in this regard, as was the absence of any finding on the part of the Tribunal to the effect that the Agency itself considered its contract with the claimant had come to an end. She had been unable to

demonstrate she had been dismissed and, on that basis her appeal to the EAT failed.

Time Limit for claiming Unfair Dismissal

46. The law relating to time limits in respect of unfair dismissal is set out in the Employment Rights Act 1996 ("ERA"). Section 111, so far as relevant, provides as follows:

> *(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.*

47. S.207B of ERA provides for an extension to the three-month time limit in certain circumstances. In effect, s.207B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'day A' and 'Day B' as defined in the legislation. This 'stop the clock' provision only has effect if the early conciliation process is commenced before the expiry of the statutory time limit (**Pearce v Bank of America Merrill Lynch** UKEAT/0067/19).

48. Where a claim has been lodged outwith the three-month time limit, the Tribunal must determine whether it was not reasonably practicable for the claimant to present the claim in time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably practicable, then the

Tribunal must determine whether the further period within which the claim was brought was reasonable.

49. In **Lowri Beck Services Ltd v Brophy** 2019 EWCA Civ 2490, the Court of Appeal summarised the approach along the following lines.

1. The test should be given a "liberal interpretation in favour of the employee".

2. The statutory language is not to be taken only as referring to physical impracticability and might be paraphrased as to whether it was "reasonably feasible" for that reason.

3. If an employee misses the time limit because he or she is ignorant about the existence of the time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time. Importantly, in assessing whether ignorance or mistake are reasonable, it is necessary to take into account enquiries which the claimant or their adviser should have made.

4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (**Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53).

5. The test of reasonable practicability is one of fact and not of law (**Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119).

50. With respect to the effect of the retention of a skilled adviser *per* **Dedman**, it was held in **Syed v Ford Motor Co Ltd** [1979] IRLR 35 that trade union officials fell to be categorised as 'skilled advisers', such that their wrong advice was visited on the claimant.

51. With respect to the issue of ignorance of the time limit, in **Wall's Meat Ltd v Khan** [1978] IRLR 499, Brandon LJ held that ignorance or mistake will not be reasonable "if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made." In **Dedman**, Scarman LJ explained that relevant questions for the Tribunal would be:

> *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of his rights, would it be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."*

Submissions

52. Mr Singh gave an oral submission on behalf of the respondent. What follows is a summary, not a verbatim account. On the question of whether the claimant was dismissed, he referred to the terms of the contract. He referred in particular to clause 1e): "Termination of an assignment is not termination of your employment." He argued the respondent had fulfilled its obligation under clause 3a) to offer a guaranteed minimum number of hours, in the 12-month periods commencing 23 April 2018, 23 April 2019 and 23 April 2020. In the 12-month period commencing 23 April 2020, he pointed out the minimum hours had been offered with the Clydesdale Bank between early May and July 2020, though the claimant had declined the offer.

53. The claimant, he submitted, was not told by the respondent that his employment had terminated. On the contrary, he referred to the grievance appeal outcome, which indicated an intention to continue to look for assignments for the claimant. Mr Singh also invited the Tribunal to consider the evidence of the respondent's internal records which showed the claimant had not been issued with a P45 and that the respondent had made attempts to contact the claimant from March 2021. He posited that the claimant's

participation in the respondent's internal grievance procedure did not sit easily with a suggestion that the claimant did not consider himself employed through August and September 2020.

54. On the question of time bar, Mr Singh pointed out that the burden of proving it was not reasonably practicable to present his claim within the normal time limit sits with the claimant. He directed the Tribunal to the dicta of Lord Denning and Scarman LJ in **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53. He referred, particularly, to the dictum of Scarman LJ quoted above at paragraph **[45]**.

55. Mr Singh invited the Tribunal to consider; the claimant's access to sources of information online; the fact the claimant had accessed the Acas guide; and the fact that the email from Acas dated 28 October 2020 made it clear that it was the claimant's responsibility to lodge his claim on time. He cited the **Walls Meat** case, and said that consideration required to be given to the claimant's state of mind at the material time and whether the ignorance or mistaken belief was reasonable. He pointed out that Brandon LJ said it would not be so if it arose from the fault of the claimant in not making such inquiries as he should, in all the circumstances, have made.

56. On the question of whether the claim was brought within such further period as was reasonable (the second limb of the test under section 111(2)(b) of ERA), Mr Singh submitted it was not. He cited **Cullinane v Balfour Beatty Engineering Services** Ltd UKEAT/0537/10 as authority for the proposition that any assessment regarding whether the time taken from the learning of rights to the submission of the claim was reasonable must take into account the primary time limit and the strong public interest in claims being brought promptly. Mr Singh observed that the claimant had indicated his intention to go down the ET route on 3 February 2021 but that a further 19 days elapsed. There was, in his submission, no cogent explanation for this and no reasonable excuse provided. The claim form was relatively brief and could reasonably have been prepared and lodged much sooner.

57. The claimant gave a submission orally on his own behalf. Again, it is not reproduced verbatim, but is summarised. The claimant repeated his denial that he had received any email from the respondent's Denise McGillivray in March 2021. He said that no such email was disclosed by a subject access request he had made. The lack of contact from the respondent did not suggest, in his submission, that he remained employed. He argued that otherwise, he might be employed by the respondent for the rest of his life which, he suggested, did not make sense. He submitted that the respondent had failed to return information he requested about whether his work for the Clydesdale Bank was or was not 'essential' in the context of pandemic restrictions. The first contact he received from the respondent was, he alleged, eleven months after his employment had ended. In response to Mr Singh's point regarding his participation in the grievance process, he argued that an employee can raise a grievance against a company even if he no longer works for them. He pointed out that he should not have been contacted by Ms McGillivray in March or June 2021, given the respondent had indicated he would be allocated an alternative consultant.

58. The claimant said he waited for a call from Acas as the email instructed him to do, and eventually obtained a response from the conciliator's colleague in February '21. He attributed the lengthy period that followed his conciliator's first email to the pandemic and suggested that businesses not responding to people was a widespread phenomenon in that period. He submitted that these were exceptional circumstances which should override any time limit which had expired. He suggested that barriers were being put in place to prevent information being heard. When asked to clarify this remark, the claimant explained that he was referring to the restriction of the issues at the Preliminary Hearing to the preliminary questions of whether there was a dismissal and whether the claim was time barred. This, he noted, was a potential barrier to the hearing of his substantive concerns regarding his treatment in relation to the Clydesdale Bank assignment.

Discussion and Decision

59. It was for the claimant to show that he was dismissed within the meaning of section 95 of ERA. There was no suggestion by the claimant that he had resigned and held himself constructively dismissed nor that his employment had ended by virtue of the expiry of a limited term contract. What required to be proved, therefore, was that the respondent had terminated his contract for the purposes of section 95(1)(a).

60. The claimant maintained that he was dismissed on 31 July 2020. He led no evidence, however, that a dismissal was communicated to him on that date, or at all. His evidence was that he himself did not interpret himself to have been dismissed at the material time on 31st July 2020; he developed this perception later. The claimant latterly inferred he had been dismissed on that date only when many months passed thereafter without contact from the respondent. He did not contact the respondent to seek to clarify his employment status. He did not intimate his resignation from the respondent and assert a constructive dismissal.

61. There may be circumstances in which a dismissal may be inferred from the conduct of the parties. In this case, however, the respondent did not act in a manner that was incompatible with the continuing of the employment relationship. The contract of employment envisaged that there may be periods during when no assignments would be available for the claimant and that he would not be paid during such periods. The respondent had, as at the date of the hearing, complied with its obligation to offer the claimant a minimum number of guaranteed hours annually. It still has time in which to do so for the twelve-month period commencing 23 April 2021.

62. The respondent's internal personnel and tax records were consistent with its position that the claimant remained its employee. The claimant was told expressly in September 2020 that the respondent would continue to seek alternative assignments for him. The contact the respondent made with the claimant in June and August 2021 to discuss his employment situation was

similarly consistent with its position that the employment relationship continued to subsist.

63. The Tribunal had regard to the approach of the EAT in the **Sandle** case outlined above at paragraphs **37-39**. Though there are some factual differences, there is significant similarity. There was no communication of dismissal by the respondent in this case, just as there was none in **Sandle**. As the EAT said,

> dismissal does have to be communicated. Communication might be by conduct and the conduct in question might be capable of being construed as a direct dismissal or as a repudiatory breach, but it has to be something of which the employee was aware.

64. In line with the EAT's approach in **Sandle**, it is relevant for the Tribunal to consider the circumstances of the claimant's employment in determining whether there was a dismissal. As the EAT observed, agency workers may well experience gaps between assignments that will not fit the standard direct employment model. Context is important. The gap following the end of July 2020 coincided with the continuing Covid 19 pandemic and government restrictions. The claimant himself struggled in his efforts to find employment during this period and only secured a new job (not via the respondent) in April 2021. The Tribunal does not find that the gap in assignments or in contact, on the facts of this case, in and of themselves evidence a dismissal, or indeed a fundamental breach of contract. This was an 'agency style' contract of employment where unpaid periods without assignments were expressly envisaged in the Terms and Conditions.

65. The claimant makes no case that he elected to treat the agency's conduct as a constructive dismissal and nor is there any evidence he did so. As in **Sandle**, there is no finding in the present case that the respondent considered its contract with the claimant had come to an end. Having regard to all relevant circumstances, including the absence of any communication of a dismissal by the respondent, the terms of the employment contract, and the facts which have been found in relation to events on and after 31 July 2020, the claimant

has not shown that the respondent terminated his contract of employment on 31 July 2020 or at all.

66. The claimant's complaint of unfair dismissal is, therefore, dismissed, and it is unnecessary for the Tribunal to consider the matter of time bar.

Employment Judge: Lesley Murphy
Date of Judgment: 26 August 2021
Entered in register: 31 August 2021
and copied to parties