THE EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

BETWEEN

Claimant: Mr J Hubbard
Respondents: Mr John Stanley (1)
Farriers Registration Council (2)
National Farriery Training Agency (3)

Heard at: Newcastle Hearing Centre **On:** 15 July 2021

Before: Employment Judge Morris (sitting alone)

Representation:
Claimant: In person then Dr J Hubbard (his mother)
First Respondent: Ms E Warman, solicitor
Second and Third Respondents: Mr D Bayne of counsel

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1) The first respondent was the claimant's only employer and, therefore, the claimant's complaints against the second and third respondents are not well-founded and are dismissed.

2) The claimant shall pay to the second respondent the sum of £330 in respect of the costs it has incurred in connection with these proceedings.

3) The claimant's complaints were not presented to the Employment Tribunal before the end of or within the period of three months as provided for in the statutory provisions set out in paragraph 29 of the Reasons below; and the Tribunal is satisfied that it would have been reasonably practicable for his complaints to have been presented before the end of that period.

4) In the circumstances, the Tribunal does not have jurisdiction to consider the claimant's complaints, which are dismissed.

REASONS

Representation and evidence

1. Although the claimant initially represented himself, supported by his mother, fairly early in his cross examination he asked that his mother should represent him, which was agreed. This arose because Dr Hubbard had interjected comments during the cross examination. When this occurred again (at the point in the hearing to which paragraph 24.5 below relates) I explained that Employment Tribunal proceedings were intended to have some flexibility but that she could not answer the questions asked of the claimant or prompt him in relation to those questions. I explained, however, that she could be the claimant's representative, which would enable her to raise points in re-examination and submissions (explaining what those terms meant) but she must decide what her role was to be. The claimant and Dr Hubbard discussed this issue and agreed that she would become his representative. I explained that I was content for the hearing to proceed on that basis and repeated that Dr Hubbard could not answer questions asked of the claimant, which she said she understood. The first respondent was represented by Ms E Warman, solicitor; the second and third respondents were represented by Mr D Bayne, of counsel.

2. The claimant gave evidence by reference to a written witness statement and a statement of means, both of which he had been ordered to produce at a preliminary hearing held on 21 June 2021 ("the June Hearing"). No evidence was presented on behalf of the respondents who relied, instead, on the submissions made by their respective representatives and (in the case of the first respondent) the cross examination of the claimant.

3. The Tribunal also had before it two bundles of documents that had been produced on behalf of the respondents and by the claimant respectively. The numbers shown in parenthesis below refer to the page numbers or the first page number of a large document in the bundle produced on behalf of the respondents as it was that bundle to which reference was primarily made during the hearing; any references to page numbers in the bundle produced by the claimant are prefixed by "C".

The claimant's complaints

4. The claimant's complaints were as follows:

    4.1 His dismissal by his employer was unfair contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the 1996 Act").

    4.2 He was wrongfully dismissed when his contract of employment was terminated in that his employer had been in breach of that contract in not giving to him the notice of that termination to which he was entitled.

    4.3 Contrary to Regulation 14 of the Working Time Regulations 1998 ("the WTR"), his employer had failed to pay him compensation in lieu of holiday that he had accrued but not taken at the termination of his employment.

The issues

5. This was a public preliminary hearing the issues to be determined at which were set out at paragraph 5 of the Case Management Summary arising from the June Hearing (56). Given, first, my Judgment above that, simply put, the claimant's claims were presented 'out of time' and, secondly, the fact that that Summary is a matter of record, it is not proportionate that I should set out all six of those issues here. Those that are relevant to my Judgment are set out in paragraphs 5.1 and 5.4 of that Summary as set out below. For clarity I record that the claimant originally commenced proceedings against five respondents. At the June Hearing he withdrew his claims against the fifth respondent as it did not exist as an entity. That being so, the paragraphs in the Summary that are set out below refer to four respondents. Thus, the relevant issues to be determined at today's preliminary hearing are as follows (*the emphasis appears in the original Summary*):

    5.1 "Whether the complaints of unfair dismissal, wrongful dismissal (notice pay) and outstanding holiday pay **as against all 4 Respondents** should be dismissed on the ground that

        5.1.1 they were presented after the end of the period of three months beginning with the effective date of termination (or in the case of holiday pay the date payment should be made) and that

        5.1.2 the Tribunal is not satisfied that it was not reasonably practicable for the complaints to presented before the end of that period or, if satisfied, the complaints were nevertheless not presented within such further period as the Tribunal considers reasonable."

    5.4 "Whether the complaints should be struck out **as against the 2nd, 3rd and/or 4th Respondents** on the ground that there is no reasonable prospect of the Claimant establishing that any of those Respondents employ the Claimant under a contract of employment or that he was employed by any of them as a worker under a contract whereby he undertook to perform personally any work for the 2nd, 3rd and/or 4th Respondent;"

6. Once more in the interests of clarity, I record that in correspondence after the June Hearing the claimant withdrew his claims against the fourth respondent also and judgment dismissing those claims was given on 7 July 2021 (66). Hence the three respondents in the proceedings today.

The claims against the second and third respondents

The claims

7. I accepted the submission by Mr Bayne that my decision in respect of the issue referred to at paragraph numbered 5.4 above could result in the second and third respondents ceasing to be parties to these proceedings with consequent saving of time and costs. If that were to be my decision, such savings would result from, first, Mr Bayne being released from the hearing as he represented only those two

respondents and, secondly, time being saved in respect of the hearing dealing with the issue referred to at paragraph numbered 5.1 above. For these reasons I decided that it would accord with the overriding objective contained in rule 2 of the Employment Tribunals Rules of Procedure 2013 ("the Rules") if I were to deal first with that issue at paragraph numbered 5.4. The claimant confirmed that he understood these points and that he was content that the hearing should proceed in this fashion.

8. Having heard submissions from Mr Bayne, which were primarily to direct me to documents that were relevant to this issue, I then adjourned to consider those and other documents, including the claimant's witness statement and statement of means.

9. I noted the following in particular:

   9.1 Although the Apprenticeship Agreement (93) that the claimant had entered into on 16 May 2011 had inserted details of the first respondent in the wrong position (i.e. in the section reserved for details of the third respondent) there was a clear intention that the first respondent would be "The Approved Training Farrier" ("ATF"), and he was defined as being "(ATF/Employer)". This was clear from the fact that the first respondent had written his signature on the last page of the Agreement (104) under the side-heading, "Signed by the ATF".

   9.2 In that same Agreement, the claimant details are given under the heading "The Apprentice" (Employee)".

   9.3 In the Case Management Summary arising from the June Hearing it is recorded that the claimant "described today that he was employed by the First Respondent" albeit in accordance with a tripartite training agreement.

   9.4 It was the first respondent who, on 7 March 2013, had signed the Mutual Termination and Disclaimer Form (111), which terminated the Apprenticeship Agreement.

   9.5 In the claimant's witness statement he had not referred to either the second or third respondent as being his employer. Instead, he expressly referred at paragraph 9 to the third respondent having "managed my formal apprenticeship" and, at paragraph 12 to the second respondent having "directly employed all NFTA staff and made policy decisions".

   9.6 In a letter from the claimant to the FRC dated 26 July 2018 (C20) he stated that an Employment Judge in an earlier case "ruled that my employer was still John Stanley".

   9.7 That same point is made within paragraph 25 of claimant's witness statement where he records that in Employment Tribunal proceedings in 2014 against the institution that had been the fourth respondent in these present proceedings, "John Stanley was a stated to be my employer".

10. On reconvening I informed the claimant that although I was open to persuasion otherwise, my assessment of the documents was that it was the first respondent alone who had been his employer. I explained, further, that in accordance with section 94 of the 1996 Act, Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Extension Order") and rule 30 of the WTR, his complaints of unfair dismissal, wrongful dismissal and failure to pay holiday pay respectively could only be advanced against an employer. On this basis, the Tribunal would not have jurisdiction to hear his complaints against the second and third respondents.

11. Having exchanged glances and nods with Dr Hubbard, the claimant stated that he understood and agreed with my assessment, and that he was content to go forward on this basis.

12. That being so, I gave my judgment that all the claimant's complaints against the second and third respondents were not well-founded and were dismissed.

Costs application

13. At this point, Mr Bayne applied under rule 76 of the Rules that a costs order should be made in favour of his clients. There were two bases for his application: first, that the claimant's claim against them had no reasonable prospect of success; secondly, that he had acted otherwise unreasonably. He explained that following the indication given by the Employment Judge at the June Hearing, his instructing solicitors had written to the claimant an email dated 5 July 2021 indicating that this application would be made. Costs of some £5,000 had been incurred but, having seen the claimant's statement of means, only costs incurred since the June Hearing were pursued on the basis that at least thereafter it was clear to the claimant that his claims against the second and third respondents had no prospect of success and as such, his behaviour had been unreasonable. Mr Bayne explained that his brief fee for today's hearing was £1,000 plus VAT; although he then accepted my point that his clients would be able to recover VAT.

14. In response, the claimant stated that he had not behaved unreasonably in that the second and third respondents had had an involvement in terminating the Apprenticeship Agreement and that he had thought at the time, until now, that they were also his employer. I enquired whether he had maintained that opinion despite what the Employment Judge had said at the June Hearing and he confirmed that he had explaining that they were described as "managing agent" but had more powers.

15. In coming to my decision I reminded myself of the relevant provisions in the Rules, which are as follows:

> **"When a costs order or a preparation time order may or shall be made**
>
> *76(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that —*

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success."

"Ability to pay

84 In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

16. I also reminded myself of the considerations that case law indicates are relevant to the majority of applications for costs, which include the following:

16.1 It is well-established that making an award of costs is the exception rather than the rule: see, for example, Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255 in which the Court of Appeal noted that a tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts.

16.2 It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than one who is professionally represented. In AQ Ltd v Holden [2012] IRLR 648, EAT it was held that a tribunal cannot and should not judge a litigant in person by the standards of a professional representative. That is not to say, however, that litigants in person are immune from such orders but proper allowance must be made for their inexperience, lack of objectivity and limited knowledge of the law and practice.

16.3 The test of "no reasonable prospect of success" sets a high standard: Balls v Downham Market High School and College [2011] IRLR 217.

16.4 A key question is not whether a party thought he or she was in the right but whether he or she had reasonable grounds for doing so: Scott v Inland Revenue Commissioners Development Agency [2004] ICR 1410.

16.5 Costs are compensatory not punitive (Lodwick v Southwark London Borough Council [2004] ICR 884, CA) and, therefore, it is necessary to examine what losses have been caused to the respondents, limiting those losses to costs "reasonably and necessarily incurred": Yerrakalva. In this regard I acknowledge that these respondents reasonably only pursued costs incurred since the June Hearing on the basis that at least thereafter it was clear to the claimant that his claims against them had no prospect of success and as such, his behaviour had been unreasonable.

16.6 Although not a precondition, the giving of a costs warning is a factor and I accept that such a warning was given in this case: Oko-Jaja v London

Borough of Lewisham EAT 417/00 and Vaughan v London Borough of Lewisham [2013] IRLR 713 EAT.

17. After some reflection upon the above principles and the evidence in the case before me, I announced my decision in respect of the costs application. By way of context, I referred to the claimant's witness statement, which I had noted had been well-drafted generally and referred to statutory law and case law relevant to the "effective date of termination" of his employment and the concept of "not reasonably practicable" to an extent far more than would, in my experience, be typical of a litigant in person. In that context, I explained that with reference to the particular findings that I have made above, I struggled to understand the claimant's suggestion that he thought that either of the second or third respondents were his employer. At this, the claimant interjected that although the third respondent had been the managing agent, it could terminate his employment and he thought that only an employer could terminate employment. I continued that I was not persuaded by this and referred to the maxim that 'ignorance of the law is no excuse'. I also had in mind that the Employment Judge at the June Hearing had referred on more than one occasion to the number of "obstacles" that lay in the path of the claimant in pursuing his claim and that he had engaged in "a frank discussion about the impact of these issues on the Claimant's ability to pursue his complaints against any of the Respondents."

18. The word "employer" is defined in section 230(4) of the 1996 Act as follows:

> *""employer", in relation to an employee or a worker, means the person by whom the employer or worker is (or, where the employment has ceased, was) employed".*

That word "employer" is similarly defined in regulation 2 of the WTR while article 3 of the Extension Order, with reference to section 3(2) of the Employment Tribunals Act 1996, refers to a claim for damages for breach of a contract of employment or other contract connected with employment.

19. Having considered the matters set out above in the round, I was satisfied that the claimant or those who were supporting him could and should have identified who was his employer or with whom he had a contract of employment and, further, that neither the second nor the third respondent met those definitions.

20. For the above reasons, I was satisfied, first by reference to rule 76(1)(b) of the Rules that the claimant's claims against the second and third respondents had no reasonable prospect of success and, secondly, by reference to rule 76(1)(a) of the Rules that the claimant had acted unreasonably in either the bringing of the proceedings (or part) against the second and third respondents or the way that the proceedings (or part) against those respondents have been conducted. In accordance with rule 84 of the Rules I therefore considered the claimant's ability to pay in light of the statement of means that he had produced. Having done so, I decided on the above bases that I would award costs against the claimant. I stated, however, that I would need to give the amount of costs some thought

(including, again, in light of the claimant's statement of means) and would announce my decision in that regard at the conclusion of the hearing.

21. When deliberating later in this hearing I reflected on all of the above matters and, again having regard to the claimant's ability to pay in accordance with rule 84 of the Rules, determined that an appropriate award of costs would be £330, which I announced at the conclusion of the hearing.

22. By the time I announced this decision Mr Bayne had, with my agreement, left the hearing and I subsequently realised that he had not clarified in favour of which of his clients the costs order should be made. In those circumstances I caused a letter to be written to the solicitors for the second and third respondents seeking clarity on this point. In a reply by email dated 6 August 2021 it was clarified that "The costs award should be made in favour of the Second Respondent", which is what I have done in the above Judgment.

Consideration and findings of fact in respect of the complaints against the first respondent

23. In light of the above findings and my decision that the claimant's complaints against the second and third respondents are not well-founded, I shall, for ease of understanding, refer below to the first respondent as "the respondent", the second respondent as "the FRC" and the third respondent as "the NFTA".

24. Having taken into consideration all the relevant evidence before me (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law, including that referred to by the representatives, (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

    24.1 In a letter dated 4 March 2013 from the NFTA to the claimant, which was copied to the respondent and others, (106) it is recorded that an Apprenticeship meeting had been held on 1 March 2013, at which a number of action points had been agreed. These included the following: the claimant would speak to the first respondent "about a mutual termination"; the Employment Relations Manager ("ERM") (*I assume of the NFTA*) would then confirm with the respondent and issue the appropriate paperwork; once the claimant was fit (*at this time he was awaiting surgery as a result of an accident and was unfit for work*) he would be sent a list of "part way through ATFs"; once an ATF had been found, the NFTA would discuss with the claimant and his new ATF the way forward for him returning to the programme.

    24.2 In evidence, the claimant said that although he had attended the meeting, a mutual termination was not spoken about, and he was surprised to receive this letter. Despite that evidence of being surprised I note that although his evidence was that he would have discussed the letter with both of his parents, he did nothing to correct any misunderstanding on the

part of the NFTA. The claimant later accepted in evidence, however, that, being present at the meeting "they would have discussed it with me".

24.3 The ERM wrote to the claimant on 5 March 2013 (the day after the meeting) stating, amongst other things, "I understand that you wish to terminate your Apprenticeship with Mr Stanley AWCF on a mutual basis" (108). The claimant's evidence was that he did not wish to terminate his apprenticeship but he did not expressly seek to correct that statement in that letter. What he did say in evidence was that he had returned the Continuance Declaration, which it was stated in the letter he should complete if during the stated 14 day period he decided that he wanted to change his mind about terminating his apprenticeship. A copy of a completed Continuance Declaration is not contained in either of the bundles of documents but I accept that he did return such Declaration in that I note that in the letter from the ERM to the claimant dated 19 April 2013 (113) it is recorded that the claimant "had signed and return the letter of continuation which would be used if you did not want to mutually terminate your apprenticeship with Mr Stanley".

24.4 In that letter of 19 April 2013, the ERM stated that on 12 March 2013 he had forwarded to the claimant a copy of the Mutual Termination Form that had been signed by the respondent but he had not yet received a signed copy of that form from the claimant. Although that letter is ambiguous, I am satisfied that the claimant was asked by the ERM to sign and return the Mutual Termination Form, either in the earlier letter of 12 March (which is referred to in that letter of 19 April) or in that letter of 19 April itself. Indeed, given the paragraph in that letter, "Could I please ask that you sign the enclosed form that Mr Stanley has already signed and return it as soon as possible to enable me to finalise this matter", I am satisfied that the Form was enclosed with that letter notwithstanding that the note under the ERM's signature refers only to, "Enc: Continuance Declaration", and does not refer to the Form as a second enclosure.

24.5 Paragraph 4.3 of the Mutual Termination and Disclaimer Form (111) provides that if either the ATF or the apprentice decides that the Apprenticeship Agreement should continue, "he **must** give written notice" to the NFTA before the expiration of the Suspension Period, which is stated as being "18 March 2013". Paragraph 4.4 of that Form continues that if neither the ATF nor the apprentice give that notice, "the Apprenticeship Agreement shall be deemed to be terminated on the Intended Termination Date, this being 4 March 2013".

24.6 Above the signatures on that Form is entered, in manuscript, the date 7 March 2013. It appears to be signed by the respondent, the claimant and on behalf of the NFTA. The claimant's evidence, however, is that that is not his signature. Ms Warman sought to suggest that the claimant's signature on that Form was very similar to that on his apprenticeship agreement. I accept that there are some similarities but there are also some differences and, not being a graphologist, I do not make any findings in this respect.

24.7 Even leaving that important point to one side the situation is confused by the fact that the first page of that Form (111) is stamped "Received 12 Mar 2013" while the second page of that Form (112) is stamped (apparently with the same stamp) "Received 1 May 2013". Neither of the parties could provide any explanation for this. That is confusing in itself but further confusion arises from the fact that, as mentioned above, it is clear from the ERM's letter of 19 April 2013 (113) that the Continuation Declaration had by then been signed and returned by the claimant, which would thus appear to have been before the signed Form was received on 1 May 2013. The question arises, therefore, which document would take precedence. It might be argued that, having been returned and signed, the Continuation Declaration remains valid for continuing the Apprenticeship Agreement notwithstanding the subsequent return on the signed Form but it is equally arguable that returning the Form on 1 May is indicative of the intention of the claimant and respondent mutually to terminate the apprenticeship notwithstanding the earlier return of the Continuation Declaration.

24.8 On that date of 1 May 2013 the ERM wrote to the respondent enclosing his "copy of the Mutual Termination and Disclaimer Form signed by you and Mr Hubbard confirming the end of the Apprenticeship Agreement between yourselves" (116). There is no evidence that the claimant then took issue with the ERM to the effect that he did not wish his apprenticeship to end.

24.9 Thereafter, the claimant appears to have been in something of an indeterminate state. Facts relevant to this question of whether his employment with the respondent was continuing include the following:

24.9.1 In his claim form, ET1, the claimant stated at question 5.1 that his employment ended on "04/03/2013" (8).

24.9.2 From at least July 2013, the claimant co-operated with the NFTA in seeking to identify a new ATF for him. This is apparent from an email dated 15 July 2013 from the ERM headed "Restarting the Apprenticeship" in which it is noted that the claimant had been sent "a list of ATFs looking to take on apprentices halfway through their apprenticeship", and it is recommended that the claimant should contact one of ten named ATF's referred to "who are desperately looking for a part way through apprentices" (C10). The same is similarly apparent from an entry in the table at paragraph 28 of the claimant's witness statement in which he states, "throughout July 2013 I was in contact with the NFTA about the continuation of my apprenticeship training, including being provided with a list of ATFs seeking 'part way through' apprentices".

24.9.3 One of the names in that list was Mr Paul Smith. In the letter from the claimant to the FRC dated 26 July 2018 referred to above (C20) he states, "Through a list of farriers seeking part-way through apprentices provided by the NFTA I obtained a trial with Paul Smith (August 2013

to mid-February 2014)" but, "Because I did not have a college place I was unable to continue in employment with Paul Smith". In this regard, in the table at paragraph 28 of his witness statement, the claimant refers to an exchange of emails in October 2013 (C11).

24.9.4 The above point is reflected in paragraph 25 of the claimant's witness statement in which he records "Transferred to new Approved Training Farrier, Paul Smith, from 27 August 2013 (validated 18 October) to 19 February 2014." Similarly, within the table at paragraph 28 of his witness statement the claimant states, "following a trial with Paul Smith I was taken on from 14 October".

24.9.5 In the exchange of emails in October 2013 referred to above (C11) the claimant's apprenticeship number is given as 5705. His apprenticeship number in respect of his apprenticeship with the respondent was 5514 (C3). At paragraph 54 of his witness statement the claimant states that he was issued with a different apprenticeship number but, in oral evidence, stated that being given a different number from that which he had had in respect of his apprenticeship with the respondent did not make him think that that apprenticeship had terminated

24.9.6 The claimant confirmed in evidence, however, that an apprentice cannot have two ATF's at the same time. It follows, therefore, that if he was taken on as an apprentice by Mr Smith and given a new apprenticeship number (which is his evidence) his apprenticeship and employment with the respondent must have terminated.

24.9.7 The claimant also confirmed in evidence that he had not received any wage from the respondent since March 2013.

24.9.8 He also confirmed that he had had no contact with the respondent since March 2013.

24.9.9 The Apprenticeship Agreement records, at clause 4b), the period of the apprenticeship as terminating on 31 August 2015 (unless terminated earlier) and the claimant confirmed that it had not been extended.

24.9.10 In a statement produced by an investigator working on behalf of the FRC, which is dated stamped 27 June 2018 (C19), it is recorded that the claimant told him that he was "a registered apprentice as far as I know", that he was "on an apprentice agreement at Northallerton" and his ATF was the respondent. In questioning during this hearing, the claimant's evidence in this regard was unsatisfactory and at times evasive. He confirmed that he had told the investigator that he was a registered apprentice. He then said that in 2018 he was waiting for a new ATF and then that he had gone back as an apprentice with no ATF. He then clarified that one cannot be an apprentice without an ATF. When the inconsistency in his evidence was put to him, he confirmed he had said to the investigator that he was a registered apprentice but as he could not be an apprentice without a trainer he

had thought that he would tell the investigator that the respondent was his ATF.

24.9.11 Also in the investigator's statement it is recorded that the claimant's father told him that the claimant "was apprenticed to John Stanley of Northallerton but that this post had been terminated by mutual consent and that he intended to start an apprenticeship with a Paul Smith ….".

24.9.12 In 2018 a private prosecution was brought against the claimant for carrying out unlawful farriery. In the notes of the judgment dated 12 June 2019 (127), District Judge J Hirst records, "In March 2013 the defendant signed a written agreement ('Mutual Termination & Disclaimer Form') confirming the termination of the apprenticeship."

24.10 Each of the above matters arose before the date of 11 December 2020, which is the date relied upon by the claimant as being the effective date of the termination of his employment. That arose in circumstances of a further charge of unlawful farriery being brought by the RSPCA and the FRC, which was heard in December 2019. The claimant states that at that hearing on 11 December 2020 Judge Barker stated that he had been dismissed around March 2013 in accordance with the Mutual Termination and Disclaimer Form.

24.11 The claimant's claim form, ET1, (5) was presented to the Employment Tribunal on 7 March 2021. Early Conciliation commenced on 16 February 2021 and ended on 17 February 2021. In his witness statement the claimant accepts that was that he "was aware of the three-month time limit from the EDT".

24.12 He maintains, however, that he submitted his claim within that time limit as he submitted it within three months of 11 December 2020 when he says he was told by Judge Barker that he had been dismissed. He also maintains that it was not reasonably practicable to submit a claim before that date as he did not know until then that he had been dismissed by the respondent on 7 March 2013. Furthermore he had been told by the NFTA that he was a continuing apprentice. The reasons that he did not know he had been dismissed by the respondent on 7 March 2013 include cover up and dishonesty, failure to disclose, missing documents, unrealised opportunities to tell him. These all contributed to making it not reasonably practicable for him to lodge his claim before he did and provided obstacles to him knowing he had been dismissed.

24.13 The claimant's explanation for any delay thereafter was that when he was told this on 11 December 2020 it was just before Christmas, it was the middle of a pandemic and he was living some 140 miles from home on a boat without access to the Internet and all the libraries had been shut down.

Submissions

25. After the evidence had been concluded the parties' representatives made submissions, which addressed the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account in coming to my decision.

26. That said, the key points made by Ms Warman on behalf of the respondent included as follows:

    26.1 In his claim form the claimant had said that his employment ended on 4 March 2013, which was the intended date according to the Mutual Termination Form. As such, the claim should have been presented within three months but was actually presented on 7 March 2021, some eight years out of time.

    26.2 The claimant states that it was not reasonably practicable for him to have presented his claim form in time as it was only on 11 December 2020 that Judge Barker made him aware that he was dismissed in March 2013. That cannot be so because the claimant had signed the Termination Form and has not produced a copy of the Continuation Declaration he maintains he signed and returned. The continuation of the employment with the respondent is inconsistent with the claimant requiring a new ATF on 15 July 2013 and starting a new job with a new ATF, Paul Smith, in August 2013 for which he received a new apprenticeship number.

    26.3 The claimant had received no pay from the respondent or had any contact with him since March 2013. If there had been no termination he would be expected to return to work with the respondent. He did not and it can be inferred from that that he knew that his employment had been terminated.

    26.4 In the Employment Tribunal proceedings in 2014 the claimant was told that he was employed by the respondent so he knew that any claim had to be against him.

    26.5 When the claimant was interviewed by the investigator in 2018 the claimant said that he should speak to his parents and when the investigator did so the claimant's father confirmed that his apprenticeship had been terminated by mutual agreement. Thus, it is to be inferred that if the father knew that, the claimant was also aware. Additionally, the claimant had said that he was waiting for a new ATF and therefore he was no longer with the respondent but then changed his answer to say that he could not remember 100% but would have said that the respondent was his ATF. He accepted that he had had no contact with the respondent and could not have two ATFs. As such, as he was training with Mr Smith his employment with the respondent must have ended.

26.6 The apprenticeship agreement was for a fixed term ending on 31 August 2015. There is no evidence of its continuing beyond that date therefore the claimant cannot have been an apprentice 2018.

26.7 In the first of the claimant's prosecutions Judge Hirst said in June 2019 that he had signed the Mutual Termination Form confirming the termination of his apprenticeship with the respondent. It cannot be that the claimant did not know before 11 December 2020 that his apprenticeship had been terminated.

26.8 With reference to the decision in Dedman v British Building and Engineering Appliances Ltd, given the opportunities open to the claimant to understand the facts, it was reasonable for him to bring his claim within three months. If it was not reasonably practicable, the claim was not then brought within a reasonable time. The claimant asserts that having been told by Judge Barker on 11 December 2020 that he had been dismissed, the delay in then presenting his claim was because of Christmas, the pandemic and living 140 miles away. 11 December was, however, two weeks before Christmas, that was not the first time that the claimant was aware that his apprenticeship had been terminated, the pandemic was not declared until 11 March 2021, which was after the claim form was presented and it could have been submitted online even if the claimant had no Internet access as he communicated through his mother's email account.

27. The key points made by Dr Hubbard on behalf of the claimant included as follows:

27.1 The Mutual Termination Form had not been sent to the claimant to sign. Instead, he had signed the continuance declaration.

27.2 There had been two Forms. The first on 7 March 2013 had been signed by the respondent alone; the second date stamped 1 May 2013 had three names. The apprenticeship had not terminated on 4 March but had continued after that date. He had not been told of a termination on 4 March: there had been no meetings and no correspondence.

27.3 The claimant says that it is standard to change to another ATF and that is what happened. He was sent a list of ATFs and he followed the instructions he was given.

27.4 He had not been dismissed on 7 March or at any other time. The first he heard of this was on 11 December 2020 when Judge Barker told him that there was a clear agreement that his apprenticeship came to an end around March 2013. The Form date stamped 1 May was presented as having been signed on 7 March – it was not. By the time it was stamped on 1 May it is suggested that it still terminated the apprenticeship from 4 March.

27.5 By reference to the issue set out at paragraph 5.1.1 of whether the claimant's claims were presented after the end of the period of three months beginning with the effective date of termination, the effective date is not 4 March, 7 March or 1 May 2013 but is 11 December 2020 because case law supports that it is not the date of the letter notifying dismissal but the date on which the letter is read (see Gisda Cyf v Barratt ICR 1475 [2010]; and if told by a third party of dismissal before receipt of the letter, that is the effective date of termination (see Robinson v Fairhill Medical Practice EAT/0313/12. It was accepted that not knowing is no excuse but if facts are not known, there is no way to respond. Case law shows that ignorance of a fact which is crucial to a claim can make it not reasonably practicable to lodge a claim within the time limit: see Cambridge and Peterborough NHS Foundation Trust v Crouchman UKEAT/0108/09. In this case the fact of which the claimant was crucially ignorant was that he had been dismissed.

27.6 The effective date of termination of the claimant's employment is 11 December 2021 when he was told of that by Judge Barker and that despite being a mutual termination, his dismissal could be effected by respondent's signature alone.

27.7 Not only had the claimant not been told that his apprenticeship had ended, he had been actively encouraged to believe something else, which was that he had been told by the NFTA that he was a continuing apprentice.

27.8 In summary, the claim was presented on 7 March 2021 which is within three months of 11 December 2020.

28. At this point Dr Hubbard began to move on to the issue at paragraph 5.1.2 of whether it was not reasonably practicable for the claimant complaints to presented before the end of the three-month period but, in discussion, clarified that she did not seek to pursue any alternative to the effective date of termination of the claimant's employment being on 11 December 2020 when he was informed of that fact by Judge Barker. As such, it was unnecessary for her to address this second issue.

The Law

29. The principal statutory provisions that are pertinent to the issues at this public preliminary hearing (so far as relevant) are as follows:

29.1 Unfair dismissal - Employment Rights Act 1996

"111 Complaints to employment tribunal

(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."

29.2 Notice pay - Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1990

*"**7 Time within which proceedings may be brought***

…. 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) ….
(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.

29.3 Holiday pay - Working Time Regulations 1998

*"**30 Remedies***

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

(a) has refused to permit him to exercise any right he has under—
(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4) or 13(1);
(ii) regulation 24, in so far as it applies where regulation 10(1), 11(1) or (2) or 12(1) is modified or excluded; or
(iii) regulation 25(3) or 27(2); or
(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).

(2) 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 (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on

which it should have been permitted to begin) or, as the case may be, the payment should have been made;
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months."

Application of the facts and the law to determine the issues

30. The above are the salient facts and submissions relevant to and upon which I based my Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

31. In that context, I turn to consider the issues that I have to determine at this public preliminary hearing. For the reasons explained above, and having already dealt with the issue set out at paragraph 5.4 of the Case Management Summary arising from the June Hearing, the only issue that I address below is that set out at paragraph 5.1 of that Summary.

32. An Employment Tribunal has to decide issues on the evidence before it and applying the civil standard of proof of on balance of probabilities. It does so with some humility recognising that its findings of fact might not accord with the actual facts.

33. Although the position is far from clear-cut, on the evidence presented to me at this hearing I find it more likely than not that the claimant signed and returned the Mutual Termination and Disclaimer Form (111). That was received by the NFTA on 1 May 2013 and would effect the termination of the Apprenticeship Agreement, and, therefore, the claimant's employment, on 4 March 2013 in accordance with clause 2.2 of that Form.

34. That said, I am also satisfied that the claimant had signed and returned the Continuance Declaration (113). I accept the point made by Ms Warman that there is no copy of that signed document in either of the bundles of documents but the letter from the ERM dated 19 April 2013 is clear when it states, "You had signed and return the letter of continuation". In accordance with clause 4.3 of the Form, this would have the effect of continuing the Apprenticeship Agreement.

35. The question arises, therefore, which document would take precedence. It might be argued that, having been signed and returned, the Continuation Declaration remains valid for continuing the Apprenticeship Agreement notwithstanding the subsequent return of the signed Form; but it is equally arguable that returning the Form on 1 May is indicative, at that time, of the intention of the claimant and the respondent mutually to terminate the apprenticeship and the employment notwithstanding the earlier return of the Continuation Declaration.

36. Whether or not the Apprenticeship Agreement was terminated by the Mutual Termination and Disclaimer Form or continued in accordance with the Continuance Declaration the facts as to the actual termination or continuation of the apprenticeship between the respondent and the claimant and, therefore, the

employment of the latter by the former are as I have found them to be at paragraph 24.9 above.

37. On the basis of those findings, which it is not necessary to repeat here, I do not consider to be credible the claimant's contentions that his employment with the respondent continued between March 2013 and December 2020.

38. In that regard the claimant's evidence was that apprenticeships can be transferred. Dr Hubbard similarly submitted that it was standard to change to another ATF and that is what happened, and that he had been told by the NFTA that he was a continuing apprentice. That might well be right but if the claimant's apprenticeship was transferred his employer would be the new ATF and, therefore, he would have no claim against the respondent.

39. It is often difficult to identify the effective date of termination of an employment relationship in the absence of an express termination or dismissal by the employer or resignation by the employee in a situation commonly referred to as being constructive dismissal. In Kirklees Metropolitan Council v Radecki [2009] ICR 1244, however, the Court Appeal held that matters such as removing an employee from the payroll was a sufficiently unequivocal statement of the employer's intention to terminate the employment. To that I would add the facts as I have found them to be in this case of not providing any work or training to an apprentice or there being any contact between the employer and the employee in relation to the purported employment relationship.

40. Stepping back and considering all the evidence before me in the round, I am satisfied that the Mutual Termination Form was entered into by the claimant and the respondent which effective a termination of the claimant's apprenticeship in March 2013. This is evidenced by the respondent having stopped paying the claimant, not providing him with any work, not providing him with any training and not having any contact with him whatsoever in relation to the purported continuing employment relationship. Indeed, in his claim form, the claimant gives that date of 4 March 2013 as the date upon which is employment ended.

41. In short, by whichever route one takes to this issue (namely the completion of the Mutual Termination Form or the practicalities of the cessation of any employment relationship between the respondent and the claimant) I am satisfied that effective date of termination of the claimant's employment was 4 March 2013

42. Each of the three statutory provisions set out above require a claimant to present his or her claim to the Employment Tribunal within a period of three months. The language of the provisions is very similar:

    42.1 A complaint of unfair dismissal must be presented before the end of the period of three months beginning with the effective date of termination.

    42.2 A contract claim must be presented within the period of three months beginning with the effective date of termination of the contract giving rise to the claim.

42.3 A ‘standard’ claim for compensation related to entitlement to leave must be presented before the end of the period of three months …. beginning with the date on which it is alleged that the exercise of the right should have been permitted.

43. The above are not only requirements with which a claimant must comply. They go far beyond that to the very jurisdiction of an Employment Tribunal in that, in each case, it is expressly stated that “an employment tribunal shall not entertain” such a complaint unless it is presented as required in those provisions.

44. In each case some flexibility is introduced in that each of the provisions provides, in similar language, that where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented in the required period, it will nevertheless be presented ‘in time’ if it is then resented within such further period as the Tribunal considers reasonable.

45. In this case, however, as recorded above, Dr Hubbard clarified in submissions that she did not seek to pursue any alternative to the effective date of termination of the claimant’s employment as being other than on 11 December 2020 when he was informed of that fact by Judge Barker and that, as such, the claim was presented ‘in time’ when it was presented to the Tribunal on 7 March 2021. That being so, the issue of reasonable practicability does not arise.

46. For completeness, however, is right that I should address this question of “reasonably practicable”, not least because it is referred to in the claimant’s witness statement.

47. I first remind myself that the onus of proving that it was not reasonably practicable to present the claim in time rests on the claimant: Porter v Bandridge [1978] ICR 943. That case also establishes that the correct test is not whether the claimant knew of his rights but whether he ought to have known them. Further, in Wall’s Meat Co Ltd v Khan [1978] IRLR 199 CA it was suggested that this involves a simple question, “Had the man just cause or excuse for not presenting his complaint within the prescribed time?

48. In this regard, in essence, the claimant states that he did not know until 11 December 2020 that he had been dismissed by the respondent on 7 March 2013. I repeat that I do not find the claimant’s evidence in this respect to be credible.

49. The particular issues relied upon by the claimant in this connection all relate to the effective date of termination being 11 December 2020. As recorded above, he said that it was just before Christmas, it was the middle of a pandemic and he was living some 140 miles from home on a boat without access to the Internet and all the libraries had been shut down. The principal point in this respect is that those issues all relate to the period between 11 December 2020 and 7 March 2021 when the claim form was presented and, therefore, are irrelevant if the claimant is correct that his effective date of termination was 11 December 2020 as his claim would have been presented ‘in time’ in any event. They are also largely irrelevant given my finding that the effective date of termination was 4 March 2013 as they relate only to a very short period of three months

commencing on 11 December 2020 and not to the preceding period of almost 8 years after the effective date of termination of 4 March 2013. Indeed, although understandable given the basis of his claim, the claimant gave no evidence whatsoever relating to it not being reasonably practicable for his claim form to have been presented at any time prior to 11 December 2020. Finally, on points of detail in this respect, as Ms Warman submitted the pandemic on which the claimant relies was not declared until 11 March 2020, which is after the presentation of the claimant's claim form. Additionally, the first 'lockdown' was not put into place until 23 March 2020, libraries were not closed until that date and as Dr Hubbard had good Internet access, a simple claim form could have been submitted online by her on behalf of the claimant.

50. For these reasons, and in the context of my fundamental finding that I did not find credible the claimant's evidence that he did not know until 11 December 2020 that he had been dismissed by the respondent in March 2013, he has failed to satisfy me that it was not reasonably practicable for him to present his claim form within three months of the effective date of termination as I have found it to be: i.e. by no later than 3 June 2013.

Conclusion

51. In conclusion, the judgment of the Tribunal is as follows:

    51.1 The first respondent was the claimant's only employer and, therefore, the claimant's complaints against the second and third respondents are not well-founded and are dismissed.

    51.2 The claimant shall pay to the second respondent the sum of £330 in respect of the costs it has incurred in connection with these proceedings.

    51.3 The claimant's complaints were not presented to the Employment Tribunal before the end of or within the period of three months as provided for in the statutory provisions set out in paragraph 29 of the Reasons above; and the Tribunal is satisfied that it would have been reasonably practicable for his complaints to have been presented before the end of that period.

    51.4 In the circumstances, the Tribunal does not have jurisdiction to consider the claimant's complaints, which are dismissed.

Postscript

52. After I had announced my judgment and reasons as set out above, Dr Hubbard sought clarification of the difference between a contract of apprenticeship and a contract of employment. I explained that, at risk of oversimplification, the terms amounted to the same and referred her to sections 230(1) and (2) of the 1996 Act, which respectively provide as follows:

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

"*In this Act "contract of employment" means a contract of service or apprenticeship ….*".

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 August 2021