



EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant
Ms Hussain

And

Respondent
DHU Healthcare CIC

AT A PRELIMINARY HEARING

Held: Nottingham **On:** 18 January 2022

Before: Employment Judge R Clark (Sitting alone)

REPRESENTATION

For the Claimant: Ms Hussain in person

For the Respondent: Mr Cameron, employment consultant

JUDGMENT

1. The claim of unfair dismissal is **struck out** for lack of jurisdiction. It was presented out of time and it has not been shown to have been not reasonably practicable for it to have been presented it in time.
2. The claim of unlawful deductions from wages is **struck out** for lack of jurisdiction. It was presented out of time and it has not been shown to have been not reasonably practicable for it to have been presented it in time.
3. To the extent that the claim of unlawful deductions from wages could also be presented as a claim of breach of contract outstanding on the termination of employment, it is **struck out** for lack of jurisdiction. It was presented out of time and it has not been shown to have been not reasonably practicable for it to have been presented it in time.
4. The claims of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments are **not** struck out. Separate case management orders follow.

REASONS

1. Introduction

1.1 This is a hearing listed principally to determine the date of termination of the claimant's employment with the respondent. Related to that is the question of whether any or all of the claims presented on 9 April 2021 were presented out of time. If they were, I will have to then go on to determine the question whether time should be extended for that part of the claim, according to the applicable tests.

2. The claims before me

2.1 I need to say at the outset that the claim presents a range of allegations which can be conveniently grouped into three categories. The previous applications have been made on the contention that her claim is all about the non-renewal of the claimant's fixed term contract of employment and that, if that is out of time, all claims fall away. Indeed, the case management orders made as a result seemed to accept that. Whilst, in essence, it is correct to say this claim is all about the non-renewal of employment, not all of the issues unfold in the sense that that phrase is technically used. I shared at the outset how my understanding of how the claims, summarised below, did not lead to that simple conclusion. On explaining my understanding, Mr Cameron agreed certain claims were in time.

2.2 The first category is the alleged deduction from wages claim for which time runs from the date of the last alleged deduction. The last pay date that I can see in the claimant's schedule is in September 2020. It was agreed all pay dates were on or around the 23rd of each month. There may be a further deduction in the pay paid on 23 October 2020 although as there was said to be a substantial overpayment, that could prove not to be the case as a fact depending on what claims fell to be determined. For present purposes, however, I consider time limits running from 23 October 2020.

2.3 However, it is also possible for these factual allegations of underpayment to be framed in law as a breach of contract outstanding on the termination of employment under the 1994 extension of jurisdiction order and I consider that as an alternative. Such claims run from the effective date of termination ("EDT").

2.4 The second category of claim is the unfair dismissal claim. It is trite that time runs from the EDT. This has been the key question for which this hearing has been listed.

2.5 The final category is the disability discrimination claims. These were unparticularised at the time EJ Heap set down today's hearing although they were part of Ms Hussain's allegations in her ET1. Judge Heap ordered further particulars to be provided. Those further particulars were provided and clearly allege discriminatory acts or omissions at four key points

of the chronology. They are the non-renewal of the original fixed term contract itself, the failure to appoint the claimant to the permanent post as part of the internal recruitment process, the failure to appoint her to it as part of the external recruitment process and, finally, the failure to appoint her to an alternative post of clinical adviser, which she says was a post to which she had previously been offered employment around two and a half years earlier at the same time as when she had been appointed to the pilot IUC pharmacists post. In each case she alleges that the decision was direct discrimination because of her conceded disability of dyslexia, discrimination arising from disability due to the respondent's reasoning said to be for things arising from her dyslexia, and failures to make reasonable adjustments concerning the interview and selection process timing and questioning arrangements.

2.6 The significance of this third category of claims is that, whilst it clearly is part of the same factual chronology as contains the end of the claimant's fixed term contract employment, the claims stand independently of the previous employment ending. Even if I rule that the claim of unfair dismissal cannot proceed, the jurisdiction for these claims of discrimination stands on its own, under either sections 108 or 39(1) of the Equality Act 2010.

2.7 The dates of the four acts or omissions she relies on are respectively said to be: -

- a) The date when the fixed term contract ended. Ms Hussain says 31 December 2020. The respondent says 5 October 2020.
- b) The date she learned she had been unsuccessful in the internal recruitment. It is common ground she was verbally informed on 22 December 2020 and confirmed in writing on 4 January 2021 but there remains some dispute as to when the interview took place and when decision was actually made.
- c) The date she learned she had been unsuccessful in the external recruitment for the same post. This also seems to be agreed to be 19 January 2021.
- d) The date she learned she had been unsuccessful in the alternative post of Clinical Adviser. The claimant says this was in February 2021.

2.8 It is abundantly clear that most of these dates appear in time. There may still be a time limit issue for some, but it can be seen that it is not the case in which resolving the time limit for the claims relating to the expiry of the fixed term contract is itself determinative of the claim as a whole.

3. Summary of the case before me

3.1 The claimant was appointed to a post of Integrated Urgent Care Pharmacist (IUC Pharmacist). This was a two-year duration fixed term contract for 15 hours per week during which she would study for and obtain relevant qualifications. There were about 8 or 10 such appointments made to what was known as the IUC "pilot scheme". They all started broadly at

the same time but each had their own individual two year-long fixed term contract with individual start and expiry dates. The respondent also employed permanent pharmacists. The claimant mainly worked weekends. She worked one 7.5 hour shift and was allocated another 7.5 hour shift for when she had to attend university for the studies. She performed occasional additional hours from month to month which were paid as overtime.

3.2 The claimant's training and qualification was disrupted due to covid and extensions granted to the her as it was to others. Other factors led the respondent to review the pilot. There is a dispute as to the outcome of that review. It is common ground the present fixed term contracts would cease at some point. The claimant says all IUC pilot pharmacists were reassured that they would become permanent pharmacists. The respondent says the review meant there were fewer permanent posts available than fixed term pharmacists employed such that not all would be successful.

3.3 There is no dispute that the claimant's fixed term contract ended, only when it ended. There is no dispute that on two occasions the respondent declined to recruit the claimant to the permanent post and, similarly, to an alternative post. The curious aspect of this case is explaining the unusual events that occurred in respect of the initial expiry date of the fixed term contract. Did it continue or not and, if it did, for how long? The facts around this issue are unusual and at the time, each party has conducted itself and represented its position to the other in a way which has fertilised this basis of this dispute before me today.

4. Evidence

4.1 I have heard from Ms Hussain and, for the respondent, from Ms Gerrard the head of HR. Both were questioned on a written statement adopted on affirmation. I was referred to a small bundle.

5. The facts

5.1 I start with the basic chronology which engages the time limit question. The claimant engaged in ACAS early conciliation between the dates of 16 February 2021 and 11 March 2021. The ET1 was presented on 9 April 2021, slightly within the month extension of day B. Against those dates, one can calculate that the earliest date in time for any matter contained in that claim form is 17 November 2020. Any allegation occurring before that date is out of time and requires an extension.

5.2 For the first 22 months or so of the parties' relationship, the events are not controversial. On 17 August 2018 Ms Hussain was offered the post on the IUC pharmacist on the pilot scheme. At the same time, she was also successful in an application for the post of Clinical Adviser but she chose the Pharmacist role. The significance of the alternative post is that she says this is the same post she was then found to be unsuitable for in February 2021.

5.3 I have seen a written statement of particulars in respect of the appointment. The key information being: -

- a) a start date of 6 October 2018,
- b) that the contract type was “temporary”
- c) at clause 3, under the heading “duration of contract” the statement that the employment was temporary and expected to continue until 5th October 2020.
- d) Under the heading “hours” that claimant was part time working only 15 hours per week.

5.4 On the limited evidence I have of timesheets, I accept the claimant’s evidence that she worked the bulk of her rota hours at weekends alongside her study commitments.

5.5 I should add that there is a suggestion in the claimant’s evidence that for a few weeks prior to the official start of this contract, she was working in such a way as to have commenced her continuous service. If that is correct that would extend her period of continuous service beyond the two years. However, I decline to reach a finding on that. It is unnecessary for my purposes and in any event the written contract duration itself would give the claimant the necessary 2 years’ qualifying service to present a claim of ordinary unfair dismissal.

5.6 The pilot scheme also resulted in an opportunity to obtain a qualification. It seems Ms Hussain, and some others, had had to defer tests or gain extensions at university for some of the assessments due to the disruption to arrangements for assessment as a result of covid. It meant the claimant would not achieve the final qualification in the expected two years.

5.7 I then must jump ahead almost two years to the end of the contract term. The manner in which the respondent provided their services for which the claimant’s employment formed part, was subject to a review. I have not seen the report arising from that review. Ms Gerrard describes how the respondent decided that it had insufficient need for all the pilot pharmacy staff and hours and all those pilot pharmacists on temporary contracts were asked to apply for the redesigned roles available if they were interested in them. I have some concern about this contention as there was, at the same time a pay dispute with another group of permanently employed pharmacists which seems to have created a demand for some additional work, in the short term at least. Perhaps the best analysis is that this dispute did not alter the long-term plans, but created a short term need to cover the work.

5.8 For the claimant’s part, she gives evidence that she was told by her manager Mr Graham, in response to the review, that the pilot scheme had been successful and there was in fact a shortage of hours for pharmacy staff in the new structure.

5.9 Reconciling these apparently opposed positions seems possible on the basis that there is likely to have been some knowledge in the management that not all of the 8 – 10 temporary pharmacists employed on the pilot would apply for permanent roles, as in fact turned out to be

the case. As a result, it may not be wrong to say both that there would be a reduction in the number of posts but also to make statements reassuring the staff of sufficient available posts. Whatever was actually said to her and her colleagues is not before me but I accept her evidence that she was reassured that there would be a process for the pilot pharmacists to become permanent. However, I also find that it was made clear to the staff concerned that there was a change in the formality of that process to what they might have expected. I find there had, in the past, been a practice and expectation that staff on temporary contracts would simply be moved to new contracts. From now on, they had to apply for the defined vacancy and satisfy a selection process.

5.10 The respondent was not particularly well organised in arranging this process in a timely manner, at least in respect of all of the temporary pharmacists. The announcements of what was going to happen, both during informal discussions and in formal correspondence, all happened in September 2020. I find although the exact dates varied slightly, the expiry of all the fixed term contracts was destined to happen too soon for any sort of internal selection process to be concluded. The claimant's contract would expire on 5 October 2020. I find during September, the claimant and her colleagues were informed by their manager, Dan Graham, about the new pharmacist structure and roles that would be advertised in the near future.

5.11 I find the claimant and her colleagues were told that the employer realised the timescale was too short and the relevant staff were told their current contracts would be extended 31 October 2020 to allow the selection process to conclude. I find at least 2 of the temporary pharmacists chose not to apply and found employment with a different employer at the end of their contracts. Neither party could tell me the exact number of temporary pharmacists in post but a consensus arose between the parties that it was somewhere in the region of 8-10, meaning 6-8 were left to apply for the permanent posts. Of the remaining temporary pharmacists, I find they would all in due course apply for a permanent post.

5.12 I pause there to introduce an important aspect of this case. Pharmacists are at risk of clinical negligence claims. Prescribing and dispensing in the NHS 111 setting in which this employer operates is particularly risky. The pharmacists benefitted from an indemnity under their contracts of employment. There was, however, a concern amongst the temporary pharmacists that if they continued to work beyond the end of the written contract of employment, they would not be covered by the employer's indemnity. Most, if not all, shared this concern. For her part, in an email dated 11th of September 2020, Ms Hussain asked the explicit questions: -

what date does my contract end?

If our contract has ended and we are still on the rota to work where do we stand from the point of view of indemnity cover ?

with regards to the new rotas will they be as sent earlier or some other arrangement ?

will the terms and conditions of pay be the same or will they be amended ?

5.13 In an email reply of the same date the head of NHS 111 HR, Michelle Gerrard replied saying: -

Your contract expires on 5th October. The permanent roles will be advertised and notified to you including pay rates.

Even if a contract expires, if the employee continues to work it is considered to be an extension of their contract, so indemnity is not affected.

As soon as we have more information, we will be in touch again.

5.14 On 14 September the claimant asked for a copy of her contract which was provided the following day. It is common ground this confirms the end of the original fixed term as being 5 October 2020 as had been stated.

5.15 As far as I can see, the verbal offer to extend the fixed term contract had been made, the concerns the claimant (and others) had about indemnity appeared to have been answered in writing confirming the indemnity would continue if the employment relationship continued beyond the expiry date.

5.16 I find the claimant was not content with this reply. Whilst she undoubtedly wanted to continue working, she wanted the offer of the extension to be put in writing. If it was not, she was not prepared to work after 5 October. Despite Ms Gerrard's written assurance, she felt she remained exposed to a potential risk.

5.17 Details of the advert and job description were emailed to the individuals affected, including the claimant on 25 September 2020 and gave a closing date of 7 October. The claimant was invited to apply and did so.

5.18 For its part, by the end of September 2020 the respondent's position can be summarised as this: -

- a) It had given notice to the staff of the selection process.
- b) It had recognised that the fixed term contracts would expire before that could conclude and had verbally offered extensions to 31 October 2020.
- c) It had answered in writing the concern that the indemnity would continue.
- d) It anticipated that not only would all of the remaining temporary pharmacists apply for the posts but that they would all accept the temporary extension of their fixed term contract to 31 October 2020. To that end, it had prepared the staffing rota for October on the basis that the previous workforce would be available for work.
- e) It set about emailing the staff individually to confirm the extension to 31 October 2020.

5.19 I have seen contemporary internal emails of 2/10/2020 about staffing needs generally and the pilot pharmacists such as Ms Hussain specifically. It is an internal email within HR

and was not shared with Ms Hussain at the time but its content is consistent with what the respondent had said verbally. Part of it states: -

“the below pharmacists temp contracts have been extended with the advert going out for the hours available” –

5.20 It then lists the relevant staff members and clearly included the claimant. For whatever reason the claimant was not sent an email confirming the extension to 31 October. I cannot say whether she was the only person missed off. I cannot say that this was anything more than one of a number of manifestations of delay on the respondent’s part in the execution of this change.

5.21 Conversely, however, I cannot see that the claimant chased the employer for written confirmation of the extension to her contract beyond the earlier exchange on 11 September 2020. I find at no time did she either express her acceptance of the verbal offer of the extension subject to it being put in writing, nor did she expressly reject it. As of 5 October 2020, the claimant’s position was silent and to be judged by the parties’ surrounding actions. I find the employer expected that the claimant would accept the offer of the extension. I also find had she simply turned up for work according to the rota it would have accepted that performance as acceptance of the offer. I find that against her silence, the existing contract would have expired on 5 October but because the employer believed that she would accept and might do by performance - and because she would not be rostered to work until the weekend of 10 or 11 October anyway - the respondent remained ignorant of her true position for a few days after the apparent expiry date.

5.22 On 5 October itself, the claimant submitted her application for the permanent pharmacist role.

5.23 I find on Thursday 8 October 2020, Ms Hussain and Mr Graham had a telephone discussion about her continued working. She says during that she maintained her previous and ongoing objection to working without written confirmation of the contract based on the indemnity concerns. I have no reason to doubt that she did express that as an obstacle to her continuing to work and I have not heard from Mr Graham to say anything to the contrary and I can see he does appear to have referred to this concern in a general sense at various times in contemporary documentation. However, in responding to the claimant’s concerns, I cannot conceive he would have said anything different to that which Ms Gerrard had confirmed in writing the previous month. I do find it of concern that immediately after the phone call Ms Hussain went to the trouble of drafting an email to Mr Graham to, as she put it, “clarify further what we discussed on the phone”. That email says nothing about the indemnity. Instead, it sets out a range of other reasons why she will not be working her rota. She said: -

Just to clarify what we discussed on the phone earlier today.

My contract as a trainee IUC pharmacist ended on the 5th October.

There has been an offer to extend the contract from HR to the end of the month, however at this present moment in time I am unable to commit to the 15 hours that were on the original contract, for various reasons. Also, there is a possibility that I am unable to work this coming Saturday.

For that reason, I would like to reduce these down to 7.5 hours.

I know this is a busy time so I will try and help out on some days by picking up additional shifts, if I am able to manage that.

5.24 The reference to being unable to work this coming Saturday was because the claimant's mother was unwell and she was required to visit her. Whatever the contractual state of affairs, it is likely that she would not have been able to work that weekend in any event. I have considered this email very carefully and, having done so, I cannot construe it in any way other than a rejection of what the claimant herself recognised as an "offer" by HR to extend the contract to the end of the month on its existing terms and a counter offer to continue working for the respondent on new terms. Whether there were other changes in the offer or not (there is some hint that rates of pay may have been subject to change at some point) Ms Hussain was counter offering to work to a contract of half her working hours, namely 7.5 hours per week.

5.25 Nothing happened further. As each subsequent weekend passed and the claimant did not turn up for any of her shifts, Mr Graham became concerned that this was unauthorised absence as he continued to labour under the belief that everyone had taken up the extension as offered. He chased her. She told him she had not received any written communication in relation to her contract. He then sought advice from Ms Gerrard. On 23 October, she advised him that she had sent the information on the advert and new rates of pay to the claimant but she didn't extend her contract. She went on to say in respect of the apparent failure to attend work: -

"if she has attended for some shifts but not others you can still speak to her about this. If she's attended none, then we would consider that her contract has ended"

5.26 Mr Graham replied he was not aware she had not been extended and would update the rota.

5.27 On 26 October Ms Gerrard sought an update from Mr Graham stating asking if she had turned up for any shifts as she was one that Ms Gerrard believed had applied for the permanent role. On 26 October, Mr Graham replied stating his understanding which was that the claimant had applied but" -

she had effectively refused to work from 5th of October onwards as she stated she had not received any notification about her contract having been extended and she also believed she would not have any indemnity. ...

5.28 On 27 October, Miss Gerald wrote again to Mr Graham and various other HR colleagues who were asked to check the claimant's application status. She also set out how she had previously answered the question on the contract extension and confirmed that indemnity continued to run if people continue to attend after a temporary contract expired and in doing so would have accepted the terms of conditions. She said she would confirm to the

claimant in writing that her contract has now ended. She set out various instructions to those recipients of the email including: -

Laura can you draft a letter please

Dan [Mr Graham] can you prepare the leaver documentation and pick up the DNA's but agree this has been a bit messy

5.29 In other respects, she also referred to the possibility of splitting contracts into 7.5 hours which suited some of the pharmacists and, it seems, was something that might therefore have been possible for the claimant had there been greater engagement by both parties in the contractual discussions prior to the expiry of her fixed term contract.

5.30 I find every other pharmacist on the pilot IUC scheme did continue to work through October (whether they received written confirm of the offer of extension or not). I find all but those that had left for new employment had applied by the deadline of 7 October 2020 and the selection process was taking place. I have no explanation as to why it took as long as it did to conclude the recruitment but as the end of October approached, it was not concluded.

5.31 It is curious, but not inconsistent either way, that the claimant's "internal" application therefore continued to be processed as it did after she was deemed to have left. Ms Gerrard explained that as she had applied whilst still an employee, she was considered eligible. She was invited to interview during November 2020. There is a dispute as to whether it took place on 16 or 26 November.

5.32 Before then, however, those whose fixed term contracts were extended to 31 October again had to raise concerns about what would happen if the matter was not resolved by then. Mr Graham again sought advice from HR. On 29 October 2020, someone in HR sent an internal email, again, not seen by the claimant at the time proposing that the pharmacists who had applied for the permanent posts be sent an email confirming a further extension to 30 November, again to allow the process to conclude. I am satisfied that the author of that email was unaware of the developments taking place to unpick what had and had not happened with the claimant's offer. It is common ground between the parties that the claimant did not receive an email confirming any contract extension and unlike the situation a month earlier, there had not been any verbal offer put to her. She knows of this correspondence only because of obtaining it subsequently in these proceedings or her DSAR request.

5.33 On 23 October the claimant was paid. That appears to have been payment for the full month. There are issues with that payment and whether it contains the previous month's overtime or not that do not need me to reach findings on for today's purpose. All I need to record is that, although at first the fact of any payment at all appeared to be an error, there was, of course, a period of employment and working over the first days of October and as such this was a proper pay date even if the contract had ended on 5 October.

5.34 On 16 or 26 November, the Claimant was interviewed with Dan Graham and Jenny Doxey. She heard nothing about the result through the rest of November.

5.35 As for the other applicants, I find they were all appointed and commenced their permanent posts by 1 January 2021. The claimant believes they all started on 1 January but I am conscious not to go beyond the findings I need to make. All I need to find is that everyone else was successful and that, out of the same necessity as applied at the end of October, if they did not start their permanent employment on 1 November 2020, I find their fixed term contracts were extended once again into December. There is nothing to suggest there was any internal communications to the effect that the claimant's employment be extended.

5.36 The date of 23 November 2020 was the November pay date for the respondent's employees. There was no pay paid and no payslip issued to the claimant. The same occurred on 23 December 2020. Part of the reason for that is, of course, the initial state of affairs at the beginning of October and that the claimant's non-attendance had now reached a relatively settled position. Instructions had been issued by Ms Gerrard for the claimant to be told and leaver forms processed. Unfortunately, in a further episode of delay, those instructions would not be actioned for some time yet. On or around 16 December 2020, Mr Graham processed the leaver form. I have not seen it but the contents appear to have conveyed the fact that the claimant elected not to continue working as when the leaver correspondence was eventually sent to her much later on 21 January 2021, it referred to a resignation. I return to that as it arises in the chronology. For present purposes, at this stage in the chronology the claimant was in the dark about her application and, taking her position at the highest for the moment, she was continuing to withhold her labour until she received any written communication that her contract had been extended.

5.37 On 22 December, Ms Hussain chased the outcome of her interview. She was able to speak with Mr Graham and was told she had been unsuccessful. If she otherwise believed her employment was continuing pending that appointment, she now knew her employment was or would soon end. She asked for feedback. On 4 January 2021 she received it in an email. She sought, and received, further details of her feedback on 6 January 2021.

5.38 Pausing there in the chronology, I have not been given a clear picture of the numbers the respondent needed to recruit in this appointment process and it may be that there was some fluctuation in the business need over time. However, I can conclude that not only was every other applicant in the pilot scheme successful, but at the time the respondent declined to appoint the claimant to one of the permanent posts, it still had a need for at least one other pharmacist. I can be confident there was still at least one vacancy as the post was then advertised again externally after the claimant was rejected. The claimant applied again with a closing date of 18 January 2021. The day after the closing date, the claimant received an email to say her application was unsuccessful.

5.39 On 19 January 2021 the claimant raised a formal grievance concerning the failure to renew her employment on a permanent basis.

5.40 Shortly afterwards, on 21 January 2021 I find the formal leaver process as had been directed by Ms Gerrard back in October was eventually completed and sent. An HR officer wrote to the claimant saying "further to your leaver form received on 16th December 2020

whereby you gave your resignation. As detailed in your leaver form, you indicated that your last shift was 5th October 2020". The claimant sought clarification as she did not regard herself to have resigned. I am satisfied both the leaver form and this correspondence that flowed from it has sought to fit the events into what is essentially a standard form.

5.41 By letter dated 1 February 2021, the grievance was dismissed by Dr Bhatti.

5.42 The claimant then applied for a further external vacancy of Clinical Adviser. The significance of this post is that it was essentially the same role that she had also been successful in applying for when she first applied to the respondent a little over two years earlier. At the time, she had been offered both and elected the pharmacist role. On 2 February 21 she was shortlisted and went through the selection process once again. On 2 March 2021 she learned she had been unsuccessful. She then went through a further process of seeking full feedback for not being selected. This rejection is itself said to be an act of both less favourable and unfavourable treatment.

6. DISCUSSION

Wages

6.1 I start with the claims of unlawful deduction from wages. Claims brought under section 23 of the Employment Rights Act 1996 as unlawful deductions from wages must be presented within 3 months of the deduction. Where, as arguably is the case here, there is a series of deductions, that time runs from the last of them. In this case, the last deduction appears to be on the pay date of 23 September 2020 but I have already explained why it is appropriate to consider the time to run from 23 October 2020 on the basis of how the claimant puts her claim.

6.2 That date falls outside the earliest date in time. In other words, the claimant would have had to commence early conciliation or present a claim based on an exemption, no later than 22 January 2021. That did not happen.

6.3 By Section 23(4), a tribunal may extend time for the presentation of a complaint where it was not reasonably practicable to present it within the 3 month time limit and the time within which it was presented was itself reasonable.

6.4 I am not satisfied the claimant has shown it was not reasonably practicable to present this claim in time. It stands completely independent of the status of her continuing employment. If, for the purpose of this claim, I accept that she thought her employment was continuing, any dispute or confusion about that state of affairs has absolutely no effect on her ability to challenge the wages she received in October, September or in any of the months of the preceding two years that she says there was an underpayment. Nothing is put before me and I am satisfied she either knew or ought reasonably have known of her rights in respect of

her pay and how to enforce it before the tribunal. I am bound to conclude that it was reasonably practicable for such a claim to be presented and for that reason, the tribunal does not have jurisdiction to determine the claim of unlawful deduction from wages presented on 9 April 2021.

6.5 I have already referred to the possibility that the facts underlying a claim of unlawful deduction from wages might also be framed as a claim of breach of contract. Where the employment relationship has ended, the time for bringing such a claim runs from the effective date of termination. That means it depends on the exact same date of termination as does the claim of unfair dismissal to which I turn now.

Unfair dismissal

6.6 To claim unfair dismissal under section 111 of the Employment Rights Act 1996, the claim must be presented within 3 months of the effective date of termination. If not, the claimant must show that it was not reasonably practicable to present the claim within that time, and that the period within which it was presented was itself a further reasonable period of time.

6.7 The starting point is the contract of employment. It was a fixed term contract. I considered whether the phrase “expected to” continue until 5th October 2020 removes the necessary certainty required for a fixed term contract and have concluded it does not. The parties understood it as such and neither raises this point. In any event, the phrase “expected to” does not more than allow the possibility that it could be determined sooner by notice from either party. Therefore, I am satisfied that if the matter were to end there, this claim would not arise as there clearly was an expectation on both sides that the employment would cease on 5 October 2020.

6.8 However, I am also satisfied that the verbal representations by Mr Graham and, no doubt, other representations at the time by the respondent generally including HR made in advance of that date, was that there was an offer for the existing fixed term contract to be extended to 31 October. The claimant herself records that offer.

6.9 In advance of the expiry, the claimant made clear she had a concern about accepting the verbal offer out of fear that the indemnity might not apply after the end of the current contract term. I have found that the respondent stated in writing that the indemnity would continue if she worked after the end of the original contract date. Despite confirmation that the indemnity would still apply, the claimant neither expressly accepted, nor expressly rejected, the offer of the extension. Even then, faced with no express response to the offer, the respondent worked on the basis that it assumed everyone would accept, and was prepared to regard performance as acceptance of the offer of extension. However, the claimant did not work and at no time after 5 October 2020 can it be said she performed any terms of her contract of employment so as to be taken to have accepted the offer of an extension to 31 October 2020. That is a conclusion I come to on the facts of her subsequent non-attendance.

6.10 However, it is not necessary to rely only on the absence of an acceptance of the offer of an extension to the contract as, on 8 October 2020, the claimant expressly rejected it and in the process of doing so made her own counteroffer to continue working but on different terms, in respect of hours. The fact that the respondent did not appear to have ever addressed the counteroffer is nothing to the point. Similarly, the fact that the counteroffer was in terms that it might will have been prepared to consider and may even have done so in other cases, does not have any contractual force in this case.

6.11 It is highly significant in this case that the respondent was prepared to treat performance as acceptance. Had the claimant turned up for work, it would have been bound by its conduct and representations to have treated that as her accepting the extension to her previous fixed term contract so that her employment would then have terminated on 31 October 2020. The fact is the claimant never worked again after the expiry of the fixed term contract. Against the clear rejection of the offer and counteroffer, I am unable construe any other actions of the claimant as performance under any extended contract.

6.12 I agree entirely that she was entitled to be concerned about the indemnity and may well have had reasons for wanting a different contractual relationship with the respondent. None of that means there was any automatic continuation of the contract after its expiry. The fact she was not satisfied with the oral offer of an extension was something she was entitled not to accept. But not accepting it meant the employment ended on 5 October. She was entitled to counter offer a different package of terms, but the respondent's silence on that meant no new contract was formed and the existing contract expired on 5 October 2020. There was slippage in the chronology because the claimant was not rostered until the weekend of 10/11 October 2020 and had she attended work I am satisfied the respondent would have regarded her as accepting the extension to 31 October. She did not attend work. I have considered whether her expressing to Mr Graham that she also might not be able to work that weekend amounts to some form of performance of her contract (in the form of absence notification) but have rejected that as it comes within the same communication rejecting the offer of continuing the 15 hours per week contract in favour of her counter offer of a 7.5 hour per week contract.

6.13 It follows that I am not satisfied there was any contractual relationship continuing beyond 5 October 2020 and that the original fixed term contract expired on that date. That is the effective date of termination.

6.14 If I am wrong about that conclusion, and something in her actions on or around 8 October amounted to an acceptance of the verbal offer to extend the contract to 31 October 2020, then she is still out of time.

6.15 I do not regard the fact that she was still apparently considered for what had been an internal advert for the permanent post to give any force to the continuation of a contract.

6.16 Similarly, the internal correspondence that the claimant has obtained as a result of a DSAR does not assist to create a contractual relationship beyond 5 October. It clearly shows that through October, some individuals in the respondent organisation assumed she would

have accepted, albeit she had not. Some treated her as continuing on the payroll because until the matter was clarified, she did. It is also clear that she did not feature in those internal arrangements beyond November 2020. All of that is clearly the mistake of individuals on one side of the bargain. None of that goes to establish a consensus between the claimant and the respondent on the continuation of the employment relationship.

6.17 It follows that I am satisfied that the effective date of termination was the expiry of the fixed term contract on 5 October 2020. The claim is therefore out of time unless the claimant shows that it was not reasonably practicable to present a claim within time. I am not satisfied on these facts that the claimant's own positive actions in rejecting the verbal offer unless it was put in writing or rejecting the terms of the offer as she did on 8 October entitle her to say it was reasonable to assume her employment continued thereafter. There may well be deficiencies on the respondent's part as to how it has handled this matter and if the claimant was a passive passenger to those deficiencies and delays, I might have been able to come to a different conclusion but I have to say the claimant was active in rejecting the offers of extension at the outset and nothing that happened thereafter means it was not reasonably practicable for her to present a claim sooner and in time. As I have already concluded, this is an intelligent claimant with ability to research her rights. She either knew of them and how to enforce them or reasonably ought to.

6.18 For completeness, that conclusion applies equally to the alternative wages claim if it were brought as a claim of breach of contract outstanding on the termination of employment.

The discrimination claims

6.19 I have already indicated that there are a number of claims of discrimination that are in time. The allegations that potentially crystallise at a time which is out of time and which require further consideration are the allegations of non-renewal of the expiry original fixed term contract on its expiry and the decision not to appoint the claimant to the permanent pharmacist role. All other allegations of discrimination appear to me to be in time.

6.20 I start with the non-renewal of the fixed term contract expiring on 5 October 2020 and whether time should be extended. In this respect, I am no longer considering whether it was not reasonably practicable to present the claim in time but whether it is just and equitable to extend time.

6.21 That test admits a far broader assessment of the surrounding facts. It is usually a means by which the out of time claimant can argue for an extension of time. In this case there is much to be said of why it would be just and equitable to deny the claimant the ability to prosecute her claim that the discriminatory non-renewal of a contract expiring on 5 October should be permitted to be brought in a claim presented on 9 April 2021. In this case, however, I do not reach that conclusion. Even considering the totality of the case, the fact remains on both parties' contentions that the employer did intend to renew the contract on its expiry, or at

least, and despite any criticism of the formality with which it executed its intention, it was prepared to be contractually bound to any employee that turned up for work or otherwise adopted the contract after its expiry. I do not, therefore, regard it as just and equitable to extend time where the claim cannot possibly be established as, if the claimant had turned up for work, the respondent's previous representations would have meant there was an extension, initially to 31 October 2020. Had the claimant accepted that first extension, I have no doubt she would have been within the scope of the subsequent extension offered to the end of November and any subsequent extension through to the start of the permanent contract. Had she not been successful in securing a permanent contract, the later effective date of termination would in any event have been clear and any event occurring after 17 November 2020 would have been in time in any event.

6.22 For those reasons it seems to me it is not just and equitable to extend time to permit the claimant to advance a claim that the non-renewal of her fixed term contract of employment expiring on 5 October 2020 was discriminatory when both cases point to an offer of renewal.

6.23 I then turn to the next in time event. That is the decision not to appoint the claimant to the permanent position of IUC pharmacist following her application and interview to the post.

6.24 I start my analysis with the dates on which she learned of that decision. She was told in a telephone conversation of the outcome on 22 December 2020 and this was confirmed in writing on 4 January 2021. Either date means this claim is in time. Of course, the date it was communicated is not necessarily the same date that the alleged discriminatory decision was made. There is a difference between the parties in the evidence of the interview date. Of course the decision itself may be made at a date after the interview and before it is communicated but, assuming the claimant's application was rejected on the day of the interview itself, the claimant recalls it as being on 16 November, which would be one day out of time. The respondent's evidence is that the interview was on 26 November 2020 which is in time. Looking at the evidence in the round the claim is either in time or, even if the claimant's recollection of the interview date is correct, it is without doubt just and equitable to extend time to permit that claim to proceed.

6.25 I would add to that analysis an alternative position that the remaining allegations of discrimination occur in January and February which are patently in time. The January decision, if not also the February one, appear to have sufficient to engage the prospect of being linked to the earlier recruitment decision by reference to the systems and personnel. I do not decide that point, but reach a conclusion that it would potentially be a sufficiently live issue to leave it open to a final hearing. However, that will only be necessary if for whatever reason my conclusion that the first decision was in time is found to be wrong.

6.26 As a result, despite the fact that the claim of unfair dismissal and deductions from wages are no longer before the tribunal, the circumstances of what is effectively the non-renewal of the previous contract are albeit they only proceed in the form of claims of disability discrimination.

Case number: 2600650/2021

EMPLOYMENT JUDGE R Clark

DATE 21 January 2022