EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Krasniqi	**v**	Mitie Limited (formerly Interserve FM Limited)

Heard at: Central London Employment Tribunal On: 27 April 2022

Before: Employment Judge Norris, sitting alone (via CVP)

Representation:
Claimant – In Person
Respondent – Ms Q Amir, Solicitor

RESERVED JUDGMENT WITH REASONS – PRELIMINARY HEARING

Background to the Preliminary Hearing (PH)

1. The Claimant worked for the Respondent as a security officer. His place of work was the National Cyber Security Centre in Victoria St, London. The dates of his employment are in dispute. The Claimant says that he started work on 1 December 2016 and that his employment is continuing, while the Respondent says he started on 31 October 2016 and was dismissed on 11 August 2017. I return to the question of the Claimant's dates of employment, which is critical to the preliminary issues before me, below.

2. On 15 September 2021, the Claimant lodged a claim in which he had ticked that he was bringing complaints of unfair dismissal, race and sex discrimination and unlawful deductions from wages. The Respondent resisted the claim by way of form ET3 submitted on 10 February 2022. Among other points, the Respondent asserted that the tribunal had no jurisdiction to hear the claim because it was presented out of time, or alternatively because the complaints within it stand no reasonable prospect of success, or because the manner in which the Claimant was conducting proceedings was unreasonable or vexatious.

3. A Preliminary Hearing (Case Management) (PHCM) took place before Employment Judge Goodman on 23 March 2022. She confirmed with the Claimant that he had ticked the sex discrimination box in error and was not pursuing a complaint under that head. She also established the following:

a. On 20 June 2017, the Claimant was involved in an incident on site relating to his security clearance. He left the site and was suspended. He lodged a grievance which was not upheld;

b. On 24 July 2017 he attended an investigation meeting and was put on the redeployment register. It is the Respondent's case that the Claimant was told he would be dismissed after two weeks if no vacancy had been found for him at another site;

c. On 11 August 2017, a further meeting took place which the Claimant did not attend and he was dismissed by letter of 15 August 2017 with four weeks' notice;

d. The Claimant denies having received the dismissal letter and says that the last communication he had from the Respondent was on 24 July 2017 when he was told he was being put on the redeployment list;

e. Notwithstanding the above, the Respondent continued to pay the Claimant until 22 December 2017. It says that this was an error and accordingly brought County Court proceedings to recover the overpayment. (I note from the Claimant's bundle that he entered an Acknowledgement of Service in which he indicated that the claim was disputed but did not enter a defence). Judgment in default was entered against the Claimant (in the sum of £10,699.73 plus costs), which the Claimant has not met so that the amount outstanding is now around £12,000.

f. The Claimant last worked for another employer in 2019 or so and has been caring for his young daughter since then. He receives Universal Credit.

4. The basis for the claim is unclear. The "background and details" in the box at section 8.2 of the ET1 form simply says:

> "Suspened on basic wages.
> Discrimination by adam lambeth
> Promised by mike fanton redeployment also proof of letter sent to hr.
> Unfair dismissal".

The Claimant told Employment Judge Goodman that he believes he was removed from site because of race, specifically that he is originally from Kosovo although he is British and he believes that those born in Britain were preferred.

5. Employment Judge Goodman explained to the Claimant that in order to claim unfair dismissal, an employee must have had two years' continuous service. Clearly, regardless of his correct start date in 2016, if it is correct that he was dismissed on or before 31 October 2018 at the latest, he did not have sufficient service. The Claimant asserts however that he was never dismissed and remains employed by the Respondent, albeit on the redeployment register.

6. Employment Judge Goodman could not deal with the Respondent's application to strike out the claims at the hearing before her because it had been listed only for a PHCM. Although she could have heard submissions about the making of the deposit order, it was decided that a public preliminary hearing would take place at which the tribunal's jurisdiction to hear the complaints would be determined first, and then if there were any claims that were permitted to proceed, the tribunal would go on to consider whether to make an order under rule 39 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) that the Claimant is to pay a deposit (or more than one) as a condition of proceeding with any complaints that have little reasonable prospect of success.

7. She made Orders accordingly, including for the mutual exchange of documents relating to the points to be considered at the preliminary hearing. The Respondent was ordered to prepare an indexed and paginated bundle and the Claimant to prepare a written witness statement dealing with matters relevant to the preliminary issues, which EJ Goodman set out in the Summary, and including a statement of truth. This was to be sent to the Respondent's solicitor no later than Wednesday, 20 April 2022. All these documents were then to be forwarded to the tribunal no later than Friday 22 April.

8. Unfortunately, although it appears the parties had made some effort to comply with the orders, there remained considerable confusion at the start of the Preliminary Hearing. The Claimant had produced something called a "witness statement", which in fact was a bundle of documents comprising 1085 pages, many of which were marked up or annotated to some degree, while the Respondent had produced a separate bundle comprising 377 pages but of which the majority were duplicates of each other. Some emails in the Respondent's bundle were copied multiple times and the bundle itself was extremely poorly indexed and in no discernible order. Ms Amir offered to send me a later version of the bundle produced by her colleague, but since the Claimant had not had this in advance, I declined. Neither party had prepared anything in writing for the PH.

9. As I indicate below, there may be documentation in the bundle, which I did not come across and which is helpful to one side or the other, but neither the Claimant nor Ms Amir took me to these documents. The PH had been listed for just three hours and I had another hearing later that day. I had read some of the documents beforehand but it was difficult to discern a proper chronology.

10. It was agreed that the Respondent's title should appear as above.

11. The Claimant gave evidence on oath and answered a number of questions from me in which I sought to clarify the contents of his bundle to the extent that I have been able to read it in advance. Ms Amir then cross-examined him very briefly by asking him to confirm that he relied on its contents, which he did. As the Claimant was fasting, we then took a break for 10 minutes before I asked the Claimant to make any submissions he wished, to which the Respondent then replied and finally the Claimant concluded the hearing with brief further argument. I reserved my judgment.

Findings of fact

I make the following brief findings of fact based on the evidence given before me, both written and oral, so far as is necessary to determine the preliminary points.

12. The Claimant started work for the Respondent on 31 October 2016, according to the statement of main terms and conditions of employment in his bundle. He was issued with a statement two weeks later. I do not need to consider its terms in great detail, but I note that it includes the right for the Respondent to move its employee to another location, either on a temporary or permanent basis, by giving them reasonable notice of any such change; and to suspend them from duty "in order to protect the legitimate business and commercial interests" of the Respondent or of its customers, suppliers and other external partners. During that period of suspension, the Respondent is required to continue to pay its employee their basic rate of pay and to provide all benefits to which they are contractually entitled. The employee agrees to remain available to attend meetings as required or to provide information to facilitate a handover of their duties. The relevant clause expressly states that during such period the employee remains an employee of the Respondent and is "prohibited from any other paid working with or for any other person, organisation and company in any capacity" without the Respondent's prior approval.

13. I find that there was an incident on the evening of 19 June 2017 involving the Claimant and his line manager Mr Lambert. The Claimant was at his workplace on the reception desk and Mr Lambert spoke to him by telephone. As a result of that discussion, which became heated, the Claimant left the site.

14. The Claimant was suspended from work the following day. It is the Respondent's case that this was as a result of a client request to remove him from site after he had been unable to obtain the necessary security clearance for that particular building. However it is fair to say that the initial letter confirming his suspension, dated 20 June 2017, confirms that he has been suspended due to the alleged conduct of a failure to fulfil his contracted hours. The letter sets out certain requirements during the period of the Claimant's suspension and in particular, so far as is relevant to the PH before me, that he:

    - must not attend company premises or make contact with customers or colleagues or business associates;
    - must not perform work for any other employer or undertake self-employment during his normal working hours;
    - was required to notify the company if he fell ill or was incapacitated and to comply with the sickness absence reporting provisions in his contract;
    - was require to apply for annual leave in accordance with the normal holiday procedure.

15. A subsequent letter, dated 27 June 2017, inviting the Claimant to an investigation, adds that there has been a failure to pass the required security clearance. This letter indicates that once the investigation has been concluded, the Respondent would, if it wished to instigate disciplinary proceedings, invite the Claimant to attend a formal disciplinary meeting at a later date. Additionally, it observes that as he has been removed from site due to a formal request from the client, he should be aware that an outcome of the process may be that his

employment is terminated, continuing that that will depend on the outcome of the disciplinary process. It adds that if the allegations are not proven the Respondent would attempt to find the Claimant an alternative role and reverse the decision of the client before making the decision to dismiss. However, the investigation relates to alleged gross misconduct and a request from the client, and accordingly the Claimant is to remain suspended while the investigation process is ongoing.

16. There was a further letter dated 13 July 2017 in which it is stated that the letter of 17 (sic) June is superseded and that the investigation has been reduced to the client removal due to the failure to pass required security clearance.

17. It is clear therefore that at the outset there was some confusion about the reason why the Claimant was suspended but I am satisfied – indeed he does not dispute - that he knew he was. It is fair to say that there appears also to have been further confusion in July 2017 about the Claimant's status, because he emailed the Respondent's HR operations team complaining that he had been "given an unfair dismissal" and was very upset about this. A senior HR assistant responded within the hour to say that they had been unable to locate any letter regarding dismissal, and the email of 11 July confirmed that the Claimant was on unpaid suspension but that during that period he was required to adhere to the terms of that suspension in accordance with the letter of 20th June.

18. The Claimant was invited to an investigatory meeting on 24 July 2017 to discuss his failure to meet the security clearance requirements. It appears that that meeting was postponed until 11 August 2017. The Claimant did not attend, and the meeting accordingly took place in his absence. The outcome was that the Respondent reached the decision to terminate the Claimant's employment with notice. He was not required to work that notice period of four weeks and was to be paid in lieu. In addition he would receive payment for his accrued but untaken annual leave entitlement up to that date. He was given the right of appeal.

19. A letter was prepared, dated 15 August 2017, explaining the outcome. The letter purported to terminate the Claimant's employment retrospectively to the date of the meeting on 11 August 2017.

20. It is the Claimant's case that he did not receive this letter and that accordingly he has remained on suspension ever since, while the Respondent seeks to redeploy him elsewhere in its organisation.

21. However, for a number of reasons, I do not accept the Claimant's argument that his suspension has continued ever since:

    a. As I have noted above, the Respondent continued to pay the Claimant for several months – until 22 December 2017 - after it had taken the decision in August 2017 to terminate his employment. On 5 February 2018, the Respondent wrote to the Claimant by letter headed "Overpayment of Net Wages" seeking the repayment of just over £12,500 gross. When he did not make that repayment, the Respondent filed County Court proceedings to which the Claimant did not submit a defence. Judgment was entered in the

Respondent's favour in default. Although the Claimant did not defend those proceedings and therefore it is incorrect to assert, as Ms Amir did, that a Judge has reached their conclusions based on any evidence on this point, I consider that I am nonetheless bound by the findings of the County Court on 16 April 2019 that the Respondent was entitled to that repayment and hence that the Claimant was not entitled to receive any wages after August 2017. The inference I draw from this must be that the County Court has found the Claimant was not employed by the Respondent after that date.

b. Secondly, the Claimant's own bundle contains numerous examples of the Claimant himself asserting that he has been dismissed (unfairly) by the Respondent, including in the claim before me, including but not necessarily limited to the examples set out below:

    i. On February 18, 2018, the Claimant was told by the Respondent's resourcing team that he had been unsuccessful for a position as a Security Officer and he responded, "May I know the reason why you will not be taking my application forward as I need to report it to job centre plus. When I **previously** worked the same site same position for the ncsc gchq [sic]" (emphasis added).

    ii. On 20 June 2018, the Claimant emailed the Respondent's then representative Ms Harding indicating that he was in the process of drafting his defence to the County Court proceedings and requesting a number of documents. The email concludes: "I am taking this matter to the lawyers Employment Tribunal" [sic].

    iii. On 27 July 2018, the Claimant emailed a number of addressees including the Respondent's HR Operations inbox "To Whom it May Concern" saying that he was bringing a lawsuit for (among other grounds) "discrimination, race including colour, nationality, ethnic or national origin, victimisation, bullying, causing a lot of stress, unfair dismissal…". I consider it unlikely to be mere coincidence that the words used precisely match the definition of race at section 9 Equality Act 2010 (EqA). It is more likely on balance of probabilities that the Claimant had, as he had indicated the month before, formed the intention to lodge an Employment Tribunal claim, including for race discrimination.

    iv. On 18 January 2019, the Claimant emailed representatives of the Respondent and its HR operations team stating that he was "filing up for early conciliation" with complaints of "unfair dismissal, discrimination, victimised, threatening and bully behaviour and false allegations" [sic].

    v. As part of the County Court proceedings, on 9 April 2019, Ms Harding lodged a witness statement in which she set out the dates of the Claimant's employment as 31 October 2016 to 11 August 2017. She appended the Claimant's terms and

conditions of employment to which I have referred above. She referred at paragraph 24 of her statement to the Claimant's assertion that he had been told another position would be found for him and that he understood he was still on unpaid leave. She appended the exchange of emails both from July 2017 and January 2019. The Claimant received that statement; he has included it in his bundle before me.

vi. From an unknown date in or around late 2018, the Claimant was being assisted by Mr Peter Mike, to whom he referred before me as his McKenzie friend. I understand that sadly Mr Mike has since passed away but at the time, it is clear that he was very active on behalf of the Claimant. On 23 April 2019, Mr Mike emailed a number of people asserting that an employer cannot claim termination of employment without a P45. Clearly this is a mistaken assertion, but equally clearly, the Claimant and Mr Mike knew that it was the Respondent's position that the Claimant's employment had termined.

vii. Although undated, there is a Respondent's Notice from the Wandsworth County Court (the Claimant in this case was the defendant or Respondent in the County Court proceedings). At part C of that document, the Claimant has asserted that he wishes to rely on the following evidence in support of his application: "Unfair dismissal and breaches under HRA".

viii. On 11 October 2019, Mr Mike emailed the County Court and copied in the Respondent among other addressees, confirming that he had submitted a tribunal application on behalf of the Claimant and referring to the letter that the Payroll Liaison Manager had sent to the Claimant in January 2018 with the date given of 11 August 2017 as the termination of his employment. Mr Mike stated, "Had I seen 5 January 2018 letter then I would have taken this step I took now to ask the Employment Tribunal to accept out of time appeal from this letter due to him being taken advantage off [sic] by his ex-employer, its legal team and CCMCCH [a debt collection agency], local court and CLCC". The email concludes, "Please show this to the presiding judge to please adjourn the matter for the Employment Tribunal to deal with as there is a case of deliberate dismissal because [the Claimant] and his line manager were not getting on well and the company chose to part company with new officer rather than the old employee of the firm".

ix. On the same date, Mr Mike forwarded documents to the Claimant, instructing him to print the email and the attachments and advising him to hand them to the judge at the court and to tell them that he had made an application to the Employment Tribunal and that the hearing was to be adjourned for its decision. Mr Mike said, "If some barrister they called pro bono approached and they said they can get the

adjournment then let them, otherwise hand these to the judge and the papers of yesterday and say nothing further unless the judge want to strike out the judgment against you and wish know about **the dispute that caused the dismissal**." (Emphasis added).

x. The Claimant included that first claim form in his bundle for the PH before me. The claim was marked as received by the London South Employment Tribunal on 11 October 2019. The Claimant (or Mr Mike on his behalf) had ticked that he did not have an Early Conciliation certificate number and in answer to the question why he did not have one, he had ticked the box that says: "My claim consists only of a complaint of unfair dismissal which contains an application for interim relief". In answer to the question of when his employment started, he had indicated it was 31 October 2016 and in answer to the question, "Is your employment continuing?", he had ticked no and he had given as the end date 11 August 2017. He confirmed that he had worked or been paid in lieu of notice.

xi. Notwithstanding what had been said about the Early Conciliation certificate, the Claimant was not seeking interim relief and his claim was not limited to, though it did include, a complaint of unfair dismissal. In addition the Claimant had, as he has in his later claim that is the subject of this decision, ticked race discrimination and "other payments".

xii. In the narrative at box 8.2 of the first claim, where the Claimant was invited to set out the background details, it was confirmed that Mr Mike had filled in the box on his behalf and was assisting the Claimant who, he said, had been treated "unfairly by his **former** employer" (emphasis added). Mr Mike asserted that in a letter dated 5 February 2018, the Payroll Liaison Manager Mrs Duffy had found a letter dated 15 August 2017 on file saying that the Claimant was dismissed with immediate effect on 11 August 2017 for "failure to attend disciplinary meeting" [sic].

xiii. Mr Mike continued that the Claimant was waiting on an application he had made to his employer and when his January payment was not made, he claimed Jobseekers' Allowance. When the letter explaining why he had not been paid came on 5 February 2018, the Claimant started looking for work elsewhere. He had an interview the following month and was in different employment between 16 April 2018 and January 2019.

xiv. Further down the first claim form, it is indicated that the Claimant was later trained by another company to be their control room supervisor and that he had been offered the job on 2 August 2019. However on finding that the Claimant had

a County Court judgment against him, that new employer withdrew the job offer on 28 August 2019.

xv. At box 9.2 of the first claim form, where the Claimant was invited to set out the remedy that he was seeking, the following text has been entered "Prefer to wait until I hear from tribunal if it can allow my claim as exceptional circumstances due to the excessive delay in bringing it".

xvi. In an email dated 15 October 2019 to the Solicitors' Disciplinary Tribunal Enquiries Department, the Claimant states that the Respondent's solicitors used false statements to secure the County Court judgment, based on incorrect information they had received from Mrs Duffy at the Respondent's West Bromwich office. He said "Their conviction rests on me not attending any of the three disciplinary meetings at Waterloo office, 20 June to 11 August 2017 and at third meeting my employment was terminated. I then became aware from Mrs Duffy's letter six months after." Hence it is the Claimant's case, based on this correspondence, that he knew in February 2018 he had been dismissed.

xvii. Although not all are dated, there are documents in the Claimant's bundle in connection with the employment he entered after leaving the Respondent. There is a letter dated 30 September 2019 from a director of Commonside Community Development Trust indicating that she met the Claimant in November 2018 when he was working as a security guard at the library next door to her workplace. There is an undated letter of reference from a Mr Tucker, who describes himself as the Contracts Manager of Sight & Sound Security and says that the Claimant had worked for him for the past eight months. This reference is reinforced by the Winter 2018 newsletter of Sight & Sound Security in which it is reported that the Claimant was awarded third prize for that quarter for greatly improving the security environment on site at one of the libraries in the London Borough of Merton.

xviii. On 29 October 2019, the Employment Tribunal at London South wrote to the Claimant rejecting his claim on the basis that no Early Conciliation certificate number had been provided even though the claim required one. The letter, which is a template, concludes by noting that explanatory notes are included called "Claim rejection – Early Conciliation: your questions answered".

xix. Mr Mike continued to be active at that time on behalf of the Claimant. Also on 29 October 2019, it appears he emailed ACAS about the Claimant's situation, because there is a response dated 31 October 2019 referring to that message. I

reproduce much of that email here because it is relevant to the issues before me:

"Having read the judgment you copied to us it would appear that [the Claimant] did not contact ACAS before he made his Employment Tribunal claim. It is a legal requirement that anyone making a claim to the Employment Tribunal must notify ACAS first. ACAS will then offer early conciliation to the individual and the employer to see if they can help resolve the dispute. Conciliation is voluntary so if it is refused or the one month timescale for early conciliation passes without the dispute being resolved, ACAS issue a certificate. This certificate contains a number that must be included on the Employment Tribunal ET one claim form. Reading the judgment, this number was missing from the tribunal claim form completed by [the Claimant] and so the judge rejected his claim. The tribunal office have included some information to help you if you want the judge to reconsider the judgment and as part of that reconsideration [the Claimant] will need to supply an early conciliation certificate number. To obtain an early conciliation certificate either [the Claimant], or you on his behalf, will have to formally notify ACAS of his dispute. This can be done via our website by following this link https://ec.acas.org.uk/. This will take you to further information about early conciliation and then the notification form. Alternatively a notification can be taken over the telephone by calling 0300 123 1122. There is a time limit asking for a reconsideration of the judgment and so [the Claimant] might want to consider the option of taking the certificate as soon as possible".

xx. On 6 November 2019, an email from the complaints department at ACAS was sent to Mr Mike which read as follows:

"The further information you have provided in your email of 31 October would appear to mainly relate to [the Claimant's] disciplinary experience. ACAS have produced a code of practice regarding disciplinary processes but we do not monitor how it is applied, that is for the Employment Tribunal. As I explained in my last email, anyone wanting to make a claim to an Employment Tribunal must notify ACAS first. No permission is required to do this and making the notification within the correct time period is the responsibility of the individual. Unless or until [the Claimant] makes an early conciliation notification as outlined in my previous email ACAS are unable to become involved in this dispute."

xxi. A subsequent email to Mr Mike from the complaints department of ACAS reads as follows:

"I understand that [the Claimant] has issues over the ending of his employment and this is something that can be looked at by the Employment Tribunal as part of the claim. The Claimant cannot make a claim to the Employment Tribunal without them first completing an early conciliation notification within the timescales laid down by law and I refer you back to my two previous emails where this is explained in more detail. ACAS offers an independent an [sic] impartial conciliation service for those involved in Employment Tribunal claims. But without a live early conciliation notification or Employment Tribunal claim ACAS are unable to become involved. [The Claimant] will need to decide what he wants to do next, either ask for the tribunal judge to reconsider their decision not to allow the claim to progress or accept that the matter is now closed."

This was in response to an email of 6 November 2019 from Mr Mike in which he asserted that the Claimant "was not made aware of his employer decision of 11 August 2017 terminating his employment with immediate effect until 5 February 2018".

xxii. Although Mr Mike then appears to have corresponded further with the London South Employment Tribunal, neither he nor the Claimant entered ACAS early conciliation and nor did they seek to resubmit the original claim for reconsideration. Instead Mr Mike emailed the Employment Appeal Tribunal alleging maladministration. On 9 January 2020, the EAT emailed Mr Mike saying "is it your intention to appeal the decision of the Employment Tribunal? If so please see attached EA T appeal form for you to complete and return together with the ET1 claim, the ET3 response form the ET decision you are appealing. Time to appeal any decision of the Employment Tribunal is 42 days from when the decision was entered in the Regsister [sic] and sent to the parties."

xxiii. It is apparent from the Claimant's bundle that he raised an issue with his Member of Parliament because there is a response to him dated 2 August 2021 in which a Caseworker on her behalf confirms that she will raise a Parliamentary question concerning the issue of very tight legal deadlines for discrimination claims and the pressure this puts litigants in person under.

xxiv. Finally, of relevance that I have observed in the Claimant's bundle is an email dated 4 August 2021 from Ms Kenworthy of the Equality and Employment Law Centre in Liverpool. She observes that it is already been explained to him that if he did not bring a claim at the time, he is out of time to bring it now because more than three months less one day has passed since he was dismissed or left the Respondent. She notes that the Claimant appears to have concerns that the Respondent is somehow interfering with applications he is making for jobs. This included an application that he had apparently made to

join the security team at the Department of Work and Pensions in September 2020. Another issue relates to an application made by the Claimant for a security position at the House of Commons in or around 22nd of April (presumably 2021 also). Ms Kenworthy concludes that she is unable to assist him at this time.

22. On oath, the Claimant told me that it is his position he still works for the Respondent. He said that he has not received the letter that he was promised with the redeployment that he should have had. In the circumstances, he said he believes he remains suspended on his basic wage. He acknowledges that he has worked since August 2017 with at least one other company, but he pointed out that it is not impossible to have two jobs.

23. The Claimant said that once the Respondent stopped paying him in December 2017, he needed to support himself and his family, so he took another job but still considered himself to be working for the Respondent. I asked how this fitted with the fact that he had taken full-time employment between 2018 and 2019 with someone else. He said that if things had continued, he would have made an arrangement with the Respondent pursuant to a zero-hours contract.

24. I also asked about the documentation in his bundle that suggested the Claimant was aware from October 2019 onwards that he needed an Early Conciliation certificate. He told me that he had had a lack of knowledge. He said that if Ms Amir or I required him to do a job as a Security Officer, he would be more than happy to take care of us and ensure that we were safe, but when it came to the law and how the system worked, he could proceed only on the basis of common sense. The Claimant said he believed during the period when Mr Mike was assisting him as his McKenzie friend and from what he'd been told by ACAS that he was exempt from the requirement for an Early Conciliation certificate because he was working at the National Cyber Security Centre and that is part of GCHQ.

25. He said that he needed to check again if he was mistaken about the exemption but that he had realised these were the hurdles to jump. I noted that he had ticked in his first claim however that he was applying for interim relief and that the tribunal had been very clear that he was not exempt under this head. I asked why he had not then gone to get an Early Conciliation number in October 2019, when he had been told it was required.

26. The Claimant said this was a period of time when he had just become a father and he found it very challenging in itself just to look after the baby, let alone dealing with issues such as bullying and harassment. He was concerned for his life and his daughter's life, and what was going through his head at the time was that people have threatened him that he had committed treason on duty and if somebody said that you had committed treason, there was a fear for his life thinking that his head would be cut off or that he would be taken and beheaded. He says he tried to contact ACAS and Citizens Advice to ask them what to do but they told him they had a conflict of interests. He said that he had approached many organisations but they always had issues and he was prevented from going ahead with the claim. He was very stressed and confused and he is not educated but he had made his best efforts and tried to

contact the organisations giving legal advice though he had not been successful to this day and the pandemic had restricted his access to those sources.

27. I explained to the parties that I was going to use the link that the Claimant had been given in the email from ACAS in October 2019, and indeed that took me to the ACAS website and explained the process for submitting a claim. I asked the Claimant about this and why he had not followed that link himself at any stage between October 2019 and October 2021. The Claimant said that something must have restricted him or happened to him that he could not recall. He said that Mr Mike was assisting him with the situation and that he was sure Mr Mike's health was deteriorating at the time and ultimately sadly he was deceased and that should be taken into consideration because it was a hard time for him and enhanced his levels of stress, because the person who was helping him and passed away.

Submissions and the Law

28. The Claimant addressed the tribunal in an impassioned oral submission, saying that he simply wants to go back to work and did not want that to be taken away from him. He said that the Respondent went behind his back in securing the County Court judgment and that he has been fighting since 2017 to the best of his knowledge and in the best way that he can. He says that he has applied for jobs but cannot secure them because of the County Court judgment and he does not know what he is supposed to do.

29. At the hearing before me, Ms Amir did not raise an argument regarding estoppel nor did she suggest as such that the 2021 claim was an abuse of process in light of the earlier claim which had been brought on the same grounds. She relied instead on the authorities relating to the time point (noting that there are different legal tests which the tribunal is required to consider whether or not the claim has been presented out of time and, if it has, whether time should be extended) and also on the fact that so far as the unfair dismissal claim is concerned, the Claimant did not have the requisite service to pursue the claim in the first place.

30. In the circumstances, I do not consider it appropriate or necessary for the tribunal of its own motion to consider the authorities in relation to estoppel and/or abuse of process (including *Henderson v Henderson*[1]*, Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd*[2]*, Securum Finance Limited v Ashton (No 1)*[3] and *C (A Child) v CPS Fuels Limited)*[4]*,* though I observe that in light of the previous refusal by London South tribunal to accept the claim in the absence of an Early Conciliation certificate number, the Claimant may have been in difficulty under either or both of these heads.

31. Section 123 Equality Act 2010 (EqA) requires that any complaint of discrimination under the Act must be brought within three months starting with the date of the act to which the complaint relates, or such other period as the tribunal considers just and equitable.

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[1] [1843-1860] All ER Rep 378
[2] [1998] 1 WLR 1426
[3] [2001] Ch 291
[4] [2001] EWCA Civ 1597

32. The tribunal's discretion to extend time is a wide one although time limits are to be observed strictly in Employment Tribunals and there is no presumption that time will be extended unless it cannot be justified; quite the reverse.

33. Section 111 Employment Rights Act 1996 (ERA) requires that a complaint of unfair dismissal must be brought within three months of the date of dismissal, unless it was not reasonably practicable to do so, in which case it must be brought within a reasonable time thereafter.

34. Since 6 May 2014, anyone wishing to present a claim to the tribunal must first contact ACAS so that attempts may be made to settle the potential claim (section 18A Employment Tribunals Act 1996). On a prospective claimant doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued from, and including, the date the matter is referred to ACAS to, and including, the date a certificate issued by ACAS to the effect that settlement was not possible was received (or was deemed to be received) by the prospective claimant. Further (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the prospective claimant receives or is deemed to receive the certificate. This applies in both types of complaint, whether under ERA or EqA.

35. There are exemptions to the requirement to have the Early Conciliation certificate:

    - where a claimant wishes to bring proceedings on the same claim form as another person who has complied with the Early Conciliation requirements;
    - where proceedings are not "relevant proceedings";
    - where the Respondent has contacted ACAS first in relation to a dispute;
    - where the claim is one for unfair dismissal only and the application to institute proceedings is accompanied by an application for interim relief;
    - where the proceedings are brought against any of the Security Service, the Secret Intelligence Service or Government Communications Headquarters (GCHQ).

36. It is mandatory according to Rule 12(2) of the Employment Tribunal Rules for a claim to be rejected by an Employment Judge if it is one which institutes relevant proceedings and is made on a claim form that either does not contain an Early Conciliation certificate number or confirmation that an Early Conciliation exemption applies, or contains confirmation that an Early Conciliation exemption applies when it does not.

37. Where a claim is rejected under rule 12(2), it is to be returned to the potential claimant with a notice of rejection explaining why it has been rejected and how to apply for a reconsideration. If the claimant is still in time to correct the defect and re-present their claim within the original time limit, it is open to them to do so. If they are by now out of time, having initially presented their claim on or near to the deadline, their only option will be to apply for a reconsideration.

38. I was not addressed on the authorities relating to the effective date of termination (EDT) in cases where there has been termination without notice,

but I have reminded myself of the following: *Brown v Southall v Knight*[5]*, McMaster v Manchester Airport PLC*[6] and *Gisda Cyf v Barratt*[7]. These cases are authority for the proposition that in the absence of evidence that an employee has deliberately failed to open the letter that summarily terminates their employment, the EDT is the date on which they learn of their dismissal or have a reasonable opportunity of doing so.

39. According to section 108 ERA, the right not to be unfairly dismissed does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the EDT.

Conclusions

40. I reach the following conclusions on the issues that were set out in Employment Judge Goodman's case management summary of 23 March 2022 (underlined below):

    Whether the Claimant is still employed by the Respondent, and if not, what was the effective date of termination?

41. The Claimant is not still employed by the Respondent.

42. I accept his unchallenged evidence that he did not receive the letter that purports to dismiss him, dated 15 August 2017, in the ordinary course of post or by email. That letter itself refers to a decision taken on 11 August 2017 at a disciplinary hearing which the Claimant did not attend. Accordingly, I find that he was not aware on 11 August 2017 that the decision had been taken to dismiss him, and I heard no evidence from the Respondent as to when the letter signed by HR Operations on behalf of Mr Fenton was posted, or indeed if it was.

43. It is clear from other correspondence between the parties that they frequently communicated by email but there is no confirmation that this letter was sent by such means and nor is there any record of posting. Nobody attended the PH on behalf of the Respondent to give evidence as to when or by what means the dismissal letter was delivered.

44. I am also satisfied that in the immediate period after that hearing in August 2017, given that the Claimant continued to receive his salary, which the Respondent acknowledges he had been entitled to receive while he was on paid suspension, it was not unreasonable for him to take the view that he was still employed.

45. Nonetheless, the fact is that there must have come a time when the Claimant knew or ought reasonably to have known that he was not employed by the Respondent. There were numerous occasions when it was or must have been obvious to the Claimant that his employment had ceased and it was not reasonable for him to continue to take the stance that he remained on paid suspension.

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[5] [1980] IRLR 130
[6] UKEAT/49/97
[7] [2010] URLR 1073

46. While, because of the way in which the bundles have been prepared, the precise chronology is slightly unclear, a key indicator that the Claimant was no longer employed would have been the fact that the Respondent ceased to pay him in January 2018 and shortly after that, wrote to him to say that he had been paid in error and was now required to repay the salary received since his dismissal. At that point, in February 2018, it appears to be common ground that a further copy of the August 2017 letter was sent to the Claimant and therefore he says this was the first chance that he had to read it. At any rate, it was at this point onwards that he knew, without a doubt, that the Respondent's position was that he had been dismissed.

47. I have set out above all the occasions on which the Claimant has declared that he was unfairly dismissed, the corollary of which must therefore be that he believed his employment to have been ended by the Respondent. Very clearly, this will include the fact that he submitted a claim of unfair dismissal in October 2019. Had he not believed himself to be dismissed at all, it beggars belief that he would have sought to bring such a complaint.

48. Further, the County Court judge's decision, by which, as I have said, I consider myself bound, found in terms that the Claimant had been dismissed and hence had not been entitled to the money paid to him after that occurred. It may be that the County Court judge had before him documentation which is not before me at all, or at least not in an easily searchable form, so that he was able to take the view that the Claimant had been dismissed in August 2017.

49. Additionally, and on the evidence before me, the Claimant was actively seeking other work from February 2018 at the latest (since he was reporting to Job Centre Plus according to the email regarding his failure to secure a Security Officer job), and he subsequently secured such new work, on a full-time basis. If he genuinely believed that he was still employed by the Respondent but on paid suspension, he would have been acting completely contrary to the express requirements in the letter of 20 June 2017 in which he was told that he had to make himself available to the Respondent throughout normal working hours and was not permitted to take any other work or self-employment while he remained on suspension. I do not accept that it would have been open to the Claimant to have two jobs, although I do accept that there is no general principle forbidding it. While there is no criticism intended of the Claimant, his conduct in seeking and taking other employment was wholly inconsistent with his position that he was and/or is still employed by the Respondent.

50. Further, although the Claimant told the Respondent on 10 August 2017 that he was sick and unable to attend any meetings, it does not appear that he thereafter sought to comply with the sickness reporting procedures as required by his contract of employment (and as underlined by the terms of the suspension letter), nor to seek to take any holiday between that date and the end of the year or thereafter. Despite on his own case being on paid suspension and awaiting notification of his redeployment to another site, the Claimant appears to have made no attempts whatsoever to contact the employer to rearrange the disciplinary hearing nor to chase up his

redeployment. Had he done so, he would have been notified that the decision had been made to terminate his employment.

51. One inference from the Claimant's failure to make any contact with his employer between August 2017 and January 2018 might be that he had in fact received the dismissal letter and knew that he was no longer employed, but for the reasons I have set out above, and not least because that evidence on oath was not challenged, I have discounted that. Nonetheless in the circumstances, and for these purposes only, I find that at the latest the EDT was the date on which he would reasonably have been able to learn of his dismissal and I find that that was one week later, after the disciplinary hearing took place which he did not attend, i.e. 18 August 2017. It would have been reasonable for him from that date onwards to be in regular contact with the Respondent to ascertain what the next steps were, to keep his managers updated as to his sickness absence and to attend – once he was well enough – the hearing that he must have believed had been postponed pending his recovery.

    <u>At the date of termination, had the Claimant been employed for more than two years?</u>

52. Even if I am wrong on that, it is acknowledged by the Claimant that he did as a matter of fact know he had been dismissed by the beginning of February 2018, and since his employment did not commence until the end of October 2016, on any analysis, he did not complete two years' service and accordingly does not have the right to bring a claim of unfair dismissal under section 108 ERA.

    <u>If the claim was presented more than three months from the EDT, was it not reasonably practicable to present it in time? If yes, was the claim presented within a reasonable time thereafter?</u>

53. Although in the circumstances I do not need to consider the time point in relation to the unfair dismissal claim, I do so because a similar analysis will apply to the time point in relation to the unauthorised deductions from wages.

54. I have determined that the Claimant was not entitled to receive wages after his EDT of 18 August 2017 and that that is the date on which time began to run for submission of his claim. The Claimant had until 17 November 2017 to enter Early Conciliation. He did not do so until 13 October 2021, after he had in fact submitted his second claim on 15 September 2021.

55. Consequently, he cannot take advantage of the extension of time afforded to those who engage in early conciliation. His claim was presented just under 46 months out of time.

56. I consider that it was reasonably practicable, in the sense of being reasonably feasible, for the Claimant to have presented it in time. I do not accept that he was incapable of doing so, whether by reason of ignorance, physical incapacity or otherwise. He was engaging in litigation (in the County Court), seeking and obtaining and fulfilling other employment obligations elsewhere, and, crucially, he brought a claim in October 2019 on the same grounds.

57. That claim was already very considerably out of time as was recognised on the face of it. It was rejected because the Claimant had not complied with the ACAS Early Conciliation requirement, though not for the reason that he gave me (that he was employed by part of GCHQ). It had to be rejected because he had said that he was making a claim only for unfair dismissal and was seeking interim relief, when this was not accurate.

58. The Claimant was given ample opportunity on numerous occasions through assistance from both ACAS and the Employment Tribunal to put right the defect by securing an Early Conciliation certificate and resubmitting the claim with an application for reconsideration of the rejection, but he failed to do so. Had he done so, he could have made an application for time to be extended. He has given me no satisfactory explanation for that failure. Even in October 2019 he would have had to show it was not reasonably practicable to present the claim in time and that he had presented the claim within a reasonable time thereafter. He did not do so then, and he has not done so now.

    Having regard to the EDT, when was the last deduction from wages properly payable? If the claim was presented more than three months from the EDT, was it not reasonably practicable to present it in time? If yes, was the claim presented within a reasonable time thereafter?

59. The same issues arise in connection with the claim for wages. Given that I have found that the EDT was 18 August 2017, the Claimant was not entitled to receive any wages thereafter and he had likewise until 17 October 2017 to enter Early Conciliation. Again it was reasonably practicable for him to submit the claim in time and in any event, it was not presented within a reasonable period after October 2019 when he was on notice that he required an EC certificate.

    In respect of any claim for wages paid in 2017, and included in the County Court judgment for recovery of overpayment, is the Claimant barred from raising this claim in further litigation, because it has already been decided by a judge (res judicata)?

60. For this complaint, there is the further difficulty that the County Court judgment has already been determined in favour of the Respondent so that the Claimant was not entitled to those wages that he was paid between August 2017 and January 2018. The Claimant did not, on the papers before me, appeal that decision and so I conclude that this claim has already been determined and cannot be re-determined by me.

    Equality Act claims – what is the date of the act or acts complained of? If more than three months before the claim was presented, is it just and equitable to allow the Claimant to proceed out of time? The tribunal will consider the reasons for any delay and weigh up the prejudice caused to the Respondent by any delay and prejudice to the Claimant if not being allowed to proceed, and whether it is possible to have a fair hearing.

61. As regards the claims under the EqA, it is extremely difficult to work out what the date of the act or acts complained of might be. As the Claimant did not comply with EJ Goodman's Order to produce a witness statement explaining

the events on which his claim is based, I have referred back to the claim form which is extremely brief as set out above.

62. The only reference to discrimination is an allegation against Mr Lambeth, but so far as I am aware he took no action in relation to the Claimant after the incident on 19 June 2017. It was not he, for example, who dealt with the Claimant in his redeployment efforts nor was it he who dismissed the Claimant. Accordingly, the Claimant had until 18 September 2017 to enter Early Conciliation in this regard, rendering the claim that he submitted on 15 September 2021 four years almost to the day out of time.

63. I note in passing that even in the second claim form, the Claimant has not complied with the requirement to have an Early Conciliation number prior to lodging the claim. On this occasion, he has ticked that ACAS does not have the power to conciliate on some or all of his claim, which is still incorrect, although as I have noted he has then gone on to obtain an Early Conciliation certificate subsequently. Although he said at the hearing before me that because he worked for the National Cyber Security Centre and that is part of GCHQ he did not require an Early Conciliation number, that is also incorrect. That was **where** he worked, but the NCSC was not his employer. The Respondent is a private company and ACAS does have the power to conciliate on some or all of this claim, as was made clear to the Claimant in the 2019 letters from the Employment Tribunal at London South and in the correspondence from ACAS.

64. I have then gone on to consider whether to exercise the tribunal's just and equitable discretion in relation to the discrimination complaints. The delay is extremely substantial. No, or no adequate, reasons have been given for this delay. It is still unclear what the grounds of complaint in relation to the discrimination are, but there is no doubt that a delay of this length will have had a very significant effect on the Respondent's ability to defend the claim.

65. So far as I can see from what has been placed before me, no specific complaint of race discrimination was raised by the Claimant in his original grievance in June 2017. The Claimant appears to have said in his grievance hearing on 13 July 2017 that Mr Lambert was abusing his power and trying to aggravate the Claimant, causing him to become emotional. He complained that Mr Lambert had not allowed him to take his annual leave and said that he wanted peace. He used the phrase that he was "being discriminated against" on two occasions but not in the context of it being motivated by race.

66. The Respondent itself is not to blame for the delay in any way. Because the Claimant did not approach ACAS in 2019, the Respondent would not have been put on notice at that stage that a claim was being contemplated. By contrast, the Claimant has not acted promptly or reasonably in bringing the discrimination claim even though he knew of his right to do so. On the contrary, I find his failure to secure an Early Conciliation number following the rejection of his October 2019 complaint was wholly unreasonable. Had he done so, this would have given him the opportunity to apply for reconsideration and to have asked for the discrimination claim to be accepted out of time at that stage. It was not reasonable for him to have delayed by a further two years and then to lodge a fresh claim though on the same grounds.

67. I accept the Claimant's submission that he is not an expert in employment law and I further accept that the arrival of a first child is something which is both time-consuming and distracting notwithstanding the pleasure it also brings. However those considerations do not provide an adequate explanation in this instance. Even after the arrival of his daughter, he maintained extremely significant levels of correspondence as I have set out above.

68. The Claimant is clearly an intelligent man who has access to the Internet and other resources which would have pointed him in the right direction. At no stage has he suggested he did not realise there was a time limit that had to be observed. He was advised at various times by Mr Mike and by others, including ACAS themselves, what he had to do. ACAS also reminded him in October 2019 about the applicability of time limits. Although he was told that one lawyer whom he had seen in relation to his claim had a conflict of interest, he was also told that this did not apply to others at the same law centre; nonetheless, he does not appear to have returned to speak to anybody else.

69. In all the circumstances I do not exercise my just and equitable discretion. The tribunal accordingly does not have jurisdiction to hear the discrimination complaints, as they were presented out of time and time is not extended.

    In the alternative, the Respondent asserts that the claims are vexatious, the Claimant having presented a claim in October 2019 which was rejected by the Employment Tribunal. In addition, the Respondent asserts that the Claimant's conduct of the claim has been scandalous or vexatious by sending emails to their employees and chairman, with threats of suicide.

70. Since I have found that the tribunal does not have jurisdiction to hear the complaints, or any of them, I do not go on to consider in detail the Respondent's alternative position(s) that the claim is vexatious and/or scandalous. I will however say that both these positions appear to have considerable merit based on the material in the bundles before me.

71. The Claimant clearly feels very strongly about the matters which he discussed at the hearing before me, and in particular the fact that a County Court judgment has been entered against him; that has clearly distressed and preoccupied him for a number of years. Perhaps because of that judgment, he has struggled to obtain employment elsewhere in the security industry. However, this is not the forum in which to deal with that judgment; and so for all the reasons I have set out above, the Claimant's Employment Tribunal claim cannot proceed and is struck out.

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Employment Judge Norris
Date: 9 May 2022
JUDGMENT SENT TO THE PARTIES ON

09/05/2022.

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FOR THE TRIBUNAL OFFICE