EMPLOYMENT TRIBUNALS

Claimant: Mr Gary Crickmay

Respondent: Bayleaf Janitorial Supplies Limited

Heard at: London South Employment Tribunal (by Video/CVP)

On: 19 and 20 July 2022

Before: Employment Judge Chapman QC (sitting alone)

Representation
Claimant: Mr Tom Street, Solicitor (by video/CVP)
Respondent: Mr Salah Jezia, Director of the Respondent (by CVP).

RESERVED JUDGMENT

1. It is the judgment of the Tribunal that it does not have jurisdiction to consider the Claimant's claims of unfair dismissal, wrongful dismissal and unauthorised deduction from wages and holiday pay having regard to the applicable statutory time limits.

REASONS

Issues

2. At the commencement of this Hearing on 19 July 2022, I had the benefit of discussing with the parties a list of issues which was helpfully produced in the Summary section of a Case Management Order that was made by Employment

Judge Robinson on 20 April 2022. Both parties had seen the List of Issues in good time prior to the start of this Hearing and it was clear to me that the written evidence produced on both sides was helpfully focussed on the preliminary matters that are described below (while also dealing with other matters in issue). While these preliminary issues are often the subject of determination at a separate hearing which precedes the substantive (liability and/or remedies) hearing, in this case they have been case managed to be dealt with by evidence and submissions immediately prior to the substantive hearing and as part of the same (two day) listing. It will be clear from the discussion below that, in this case, there is factual evidence and there have been submissions as to law which relate to issues such as the effective date of termination of the Claimant's relationship with the Respondent company (and the circumstances surrounding the same) which might have relevance both to the preliminary issues and to the substantive issues. In the circumstances, it made sense to list all matters to be heard together. However, I have asked the parties to focus their submissions on the matters set out below in order to make the best use of time. In the event, the preliminary and, as to unfair dismissal, liability issues have occupied a full day of Tribunal time in evidence and most of one further day in submissions and in the provision of this judgment and reasons.

3. The issues with which this judgment deals were identified by Employment Judge Robinson as follows (and as agreed by both parties):

    1. Time limits

    (1) Given the date the Claim Form was presented and the dates of early conciliation, any complaint about something that happened before 12 July 2020 may not have been brought in time.

    (2) Were the unfair dismissal, wrongful dismissal and unauthorised deductions from wages claims made within the 3 month time limits? The Tribunal will decide: (a) what was the effective date of termination? (b) were the claims made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination/the date of deduction from wages? (c)if not, was it reasonably practicable for the claim to be made to the Tribunal

within the time limit? (d) if it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Employment status

Was the Claimant an employee/worker of the Respondent within the meaning of section 230 of the Employment Rights Act 1996?

(If issues 1 and 2 are determined by the Tribunal in the Claimant's favour):

3. Unfair dismissal

- What was the reason (or principal reason) why the Claimant was dismissed?

- Was it a potentially fair reason?

- Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

4. I have heard evidence and submissions from the parties which deals with these issues. I have not heard evidence or submissions with respect to remedy. I am most grateful to the parties and their representatives for the care and focus that they have brought to the issues before me.

Documents and witness evidence for this Hearing

5. A Bundle of documents was produced by the parties in advance of the Hearing. This was indexed and paginated and ran to 101 pages. It contained, among other things (and in this order): the ET1 Claim Form and a Schedule of Loss; the ET3 Response Form; the documents on which the Claimant relied; the documents on which the Respondent relied; the ACAS Early conciliation certificate (also available to me on the Tribunal's hard copy file); and, two short witness statements provided on behalf of the Respondent (from Ms Benevides Cox and from Ms Enriques).
6. At the start of this Hearing on 19 July 2022, I was provided with the following additional materials. First, as to witness statements: (a) a written witness statement from the Claimant, Mr Gary Crickmay, which, in the copy provided to me, was

unsigned and undated, although the Claimant has confirmed the content of the same; (b) written witness statements on behalf of the Respondent from (in the order in which they gave evidence), (i) Mr Salah Jezia, Director of the Respondent (who also appeared at this Hearing to represent the Respondent company), signed and dated 1 July 2022; (ii) Ms Liseth Benavides Cox, Office Manager at the Respondent company, signed and dated 18 July 2022; (iii) Ms Virginia Ferreira, Financial Officer at the Respondent company, signed and dated 18 July 2022. I point out that the more recent witness statement from Ms Benavides supplements the brief witness statement from her which was already in the Hearing Bundle. Second, I was provided yesterday with some additional documents which have been added (in sequential order) at the end of the Bundle. The Claimant additionally relies on: an exchange of text messages with Balvinder Kaur, dated 21 July 2020 (new page 102 in the Bundle); a text message from Ms Benavides dated 23 July 2020 (new page 103 in the Bundle); a delivery note for the delivery of products to Ekia Nordic Kitchen, dated 30 July 2020 (new page 104 in the Bundle). The Respondent has supplied the following additional documents for the Bundle: certain emails on various dates between 11 August 2020 and 1 September 2020 (which are placed in the Bundle with numbering from page 105 to page 109); and, an itemised mobile telephone bill for a telephone which I am told belongs to Mr Jezia and which is dated 15 August 2020 (covering the charges for calls made between 22 July and 1 August 2020 inclusive). Both parties today exchanged these additional documents and time was provided for the parties to read the same and, where relevant, to take instructions so that questions could be asked about them.

7. Before the evidence commenced, Mr Jezia raised a concern that the Claimant had been late in serving his witness statement so that it did not comply with the Case Management Order made by Employment Judge Robinson and, in effect, amounted to a response to the Respondent's witness evidence, rather than an independent account of relevant matters. Mr Jezia told me that his witness statement had been sent to the Claimant on 1 July 2022, whereas the Claimant's statement did not reach Mr Jezia until 14 July 2022. While Case Management

Orders are made to be observed by the parties so that there is fairness on both sides, Mr Jezia made it clear that he wished the Hearing to proceed as scheduled (without a postponement), he had clearly had time to read and digest the Claimant's witness statement and, in the event, he was able to ask questions arising out of the Claimant's written witness statement in a clear and coherent manner. In the circumstances, and in the exercise of my discretion pursuant to rule 2 of the Employment Tribunals Rules of Procedure (the overriding objective) and rules 5 and 29 – 30 thereof, it seemed to me appropriate to proceed and to admit in evidence the witness statement to which I have referred.

8. As to oral evidence at the Hearing, during the course of the first day (19 July 2022), I heard from the Claimant, Mr Crickmay, and from Mr Jezia, Ms Benavides and Ms Ferreira for the Respondent. These witnesses were cross-examined by Mr Jezia, on behalf of the Respondent, and Mr Street, solicitor for the Claimant, respectively. Ms Enriques, whose short witness statement appears in the Bundle, was unavailable to give oral evidence at the Hearing, but I have admitted her statement in writing and have given it such weight as appears to me appropriate in the light of the obvious limitation that the Claimant has not been able to ask her questions about its contents.

Findings of fact

9. The Respondent is a limited company registered in England which supplies janitorial services and products to customers in the catering, restaurant and hospitality industries. Mr Jezia, Director, appeared on behalf of the Respondent company at this Hearing.
10. The Claimant provided services to the Respondent company between 1 May 2015 and July 2020. He liaised with clients and assisted in the procurement of orders. I have also heard evidence that, from time to time, he might have provided health and safety training to clients, although the frequency/regularity of this role is unclear. The basis on which the Claimant's services were initially engaged and the nature of his relationship with the Respondent are in issue.
11. As to the chronology, the following facts and matters are common ground/have not been disputed:

a. As I have indicated, the Claimant's relationship with the Respondent company commenced on 1 May 2015. At page 14 of the Bundle there is an email from Mr Jezia to the Claimant which is dated 1 May 2015 and which reads as follows, "*I would like to welcome you to the Bayleaf Janitorial Supplies Limited team and to confirm the terms of your employment. As agreed, you will be contracted as a self-employed services provider starting from 1 May 2015 and your salary will be as follows:*" There then followed a recital of certain terms as to payments in that, for the first three months, the Claimant was to receive £1,500 per month and 30% of gross profit on the sales that he generated; and, after 3 months, the Claimant was to receive £1,000 per month and 30% of gross profit on the sales that he generated. There was then an adjustment to the payments as between new and existing customers from 1 May 2016 onwards. The Respondent was also to be responsible for the Claimant's monthly travelcard. The email signed off, "*I hope that this is the start of a successful partnership.*"
b. The Claimant was provided by the Respondent with a mobile telephone (although he tells me that, depending on the quality of signal/network connection, he also made use of his personal mobile phone for work purposes from time to time). The Claimant was also provided by the Respondent with a business card on which he was described as a "*sales director*" (see, Bundle p. 78), an email address which appears on the business card and with certain charts and materials for the performance of his services. The Claimant did not wear a uniform, did not drive a company car (although there was some evidence that this might have been discussed as a possible aim) and also told me that he sometimes made use of his own tools and equipment (for installation purposes) when seeing clients (because these tools worked better);
c. The Claimant commenced work with and for the Respondent in 2015. His payment terms were later adjusted so that the initially agreed 30% commission was to be significantly adjusted downwards to 11% for a period of three years to be followed by a further downwards adjustment to 2%. This adjustment appears to have followed the expression of concern by Mr Jezia/the Respondent about the volume of sales generated by the Claimant and, in

particular, about his ability to retain clients. The adjustment to commission appears to have followed a unilateral decision by Mr Jezia for the Respondent, although the Claimant did not ultimately challenge this and continued to provide services on the new terms. The Claimant was unable to recall the exact date on which this adjustment took place, but there has been some suggestion that it was in 2018 (nothing turns on the precise date). The Claimant's factual evidence is that, as he put it, he was "*sacked*" by Mr Jezia and then re-engaged on the adjusted terms as to commission that I have described. Mr Jezia contests this and denies that he dismissed the Claimant. However, given that the Claimant continued to work for the Respondent for a considerable period after these events, it does not seem to me that anything turns on this and I have not been addressed on this factual issue in closing;

d. The Claimant's work for the Respondent appears to have been organised so that he worked principally with clients that he had sourced and with whom he had relationships. He appears to have spent some time (perhaps more limited) with existing clients of the Respondent, although the nature and extent of this role is not clear to me. As I have indicated, from time to time, the Claimant performed health and safety training for clients, but the frequency of this is not clear from the evidence and it has not been suggested to me that this was one of the Claimant's principal roles;
e. The Claimant submitted invoices to the Respondent with respect to the payments he was due. This was done by his attending the office to speak to the office manager, Ms Benavides. There are examples of the invoices submitted by the Claimant in the Bundle (for example, at page 21). The invoices set out what are described as wages, travel expenses and commission at the prescribed percentage rates. I have heard evidence from both parties that the Claimant required assistance from the Respondent's office staff in identifying the sales on which commission was due (so that the commission figure could then be claimed on the invoice);
f. The Claimant filed his own income tax and national insurance returns to HMRC. This appears to have been done by him on a conventional annual basis (see,

the return for year 2019/20 which is in the Bundle at page 1). These returns were filed by him on a self-assessment/self-employed basis. I have been told by both parties that the Claimant usually asked the Respondent's staff to provide him with two invoices: the first with expenses and the second with expenses removed. Mr Jezia has commented on this in his witness statement at paragraph 14, but I make no specific findings in this regard;

g. On 23 March 2020 the Respondent company closed as a result of the pandemic. On 2 April 2020, the Claimant raised a concern by text message to Mr Jezia about the payment of his commission (Bundle, pages 34 – 35). There does not appear to have been a response to this and the Respondent's office was closed during this first period of pandemic lockdown;

h. On 18 June 2020 an email was sent by David Osborn the accounts and office manager of HW Catering (a client of the Respondent company) complaining about an email (which I have not seen) from the Respondent relating to the supply of some dispensers. The email was sent by Mr Osborn to the Claimant and to Mr Jezia (as well as to Mr Hassan, the Managing Director of HW) and can be found at pages 3 and 4 in the Bundle. On 6 July 2020 a further email of complaint (and chasing a response from the Respondent) was sent to the Claimant and Mr Jezia, together with Mr Hassan, by Mr Osborn and this can be found at page 3 in the Bundle. At 1241 pm on 7 July 2020 Mr Hassan sent an email to the Claimant and Mr Jezia which escalated matters by referring to Mr Osborn's earlier complaints about the dispensers and which also raised a number of specific concerns about overcharging by the Respondent;

i. It is common ground that, in July 2020, on a specific date that is important and is heavily contested, a short telephone conversation took place between the Claimant and Mr Jezia of the Respondent. It is common ground that Mr Jezia called the Claimant. It is also common ground that, in the course, of this conversation, Mr Jezia said to the Claimant, "*You created a monster, don't come back, you no longer work for Bayleaf.*" I will refer to this as "*the dismissal telephone conversation*";

j. It is common ground that, after July 2020, the Claimant received no further payments from the Respondent company. While the Claimant appears to have liaised with clients and, even, to have sent text messages to the office staff at the Respondent in July, August and September 2020, both parties accept that the association between the Claimant and the Respondent came to an abrupt conclusion as a result of the July 2020 telephone conversation and I have been asked by both parties to treat this as the date of dismissal/effective date of termination. I will do so. The issue between the parties is one of fact and concerns the date on which this telephone conversation took place;

k. On 11 October 2020 ACAS received notification as to the early conciliation process. On 11 November 2020, by email, ACAS issued the early conciliation certificate. On 4 December 2020 the Claimant commenced these proceedings;

l. At the conclusion of his evidence the Claimant was asked by me about his situation and life circumstances in the period between July 2020 and early December 2020 when the ET1 was submitted. His reply was that he was sitting at home and waiting for life to return to normal after lockdown ("*like everybody else*"). He was losing his home (for reasons that were not described in any detail) and "*other things were happening*" and he wanted an answer from Mr Jezia as to the reasons for the abrupt end to their relationship.

12. Turning to the contested matters, I emphasise in this judgment that I have concluded that both parties have given candid and honest evidence to this Tribunal in which they have done their best – within the limitations of recollection of events that took place 2 years ago – to provide accurate answers to the questions that they have been asked. However, it is for me to resolve the factual issues between them and my findings of fact are as follows:

a. The first and, perhaps, most important contested issue concerns the date on which the Claimant's relationship with the Respondent came to an end. Given that it is common ground that the dismissal telephone conversation was in July 2020, the issue of fact is whether this was on 7 July 2020 as the Respondent contends or 31 July 2020 as the Claimant contends. The date and fact of dismissal (on 31 July 2020) is disputed and the Claimant bears a burden of

proof in this regard, although both parties have advanced a positive case as to the date of dismissal and, insofar as they have both sought to discharge an evidential burden in this regard, this case does not seem to me to turn on the formal or legal burden of proof. On the balance of probabilities, and on the basis of the evidence that I have heard and read from both parties, I have concluded that the dismissal telephone conversation was on 7 July 2020 and not on 31 July 2020. While the Claimant's evidence is that he does not know why he was dismissed, there is a clear and obvious coincidence in time between the emailed complaints from HW Catering in late June and early July 2020 to which I have referred and Mr Jezia's evidence that he called the Claimant on 7 July 2020. I find that the dismissal telephone conversation was prompted by the complaints made in emphatic and escalating terms by HW Catering. While the Claimant informed me that he and his wife (who did not give evidence in these proceedings) had a clear recollection that the dismissal telephone conversation was on 31 July 2020, he had no diary or other documentary record that this was the date. Moreover, and insofar as it is necessary to base my conclusion on the parties' oral evidence, Mr Jezia struck me as the more accurate historian in the detail of the evidence that he gave on this topic and, having seen both parties and heard them cross-examined, I prefer his factual evidence. Further support for 7 July 2020 as the key date can be found in the emails from Ms Ferreira of the Respondent to Cortel (the telephone provider) seeking a stop of the Claimant's mobile telephone on the ground that he had "*left the company*". The email from Ms Ferreira to Cortel was in the late afternoon (after Mr Jezia tells me that he spoke to the Claimant in order to dismiss him): see, page 47 of the Bundle. Ms Ferreira and Ms Benavides both inform me that the dismissal telephone conversation was on 7 July 2020, although they were not themselves party to it. These matters taken together are sufficient to support the finding of fact that I have made as to the date. I have also been provided (at page 51 of the Bundle and in unpaginated form) with itemised mobile telephone bills from Mr Jezia's only mobile telephone which, he tells me, detail a call from him to the Claimant on 7 July (in the afternoon), and, equally, no call from him to the

Claimant on 31 July 2020. The Claimant used two mobile telephone numbers for work and also had a home landline. He could not now recall the mobile telephone numbers and could not recall whether Mr Jezia had called him – for the purposes of the dismissal telephone call – on his landline or mobile and, if the mobile, on which number. In the circumstances, I am unable to reach a firm conclusion as to the evidential value to be placed on the itemised bills. However, for the reasons that I have given, I have concluded that the dismissal telephone conversation was on 7 July 2020;

b. As to the potential employment status of the Claimant, there is much common ground as I have already indicated. Insofar as it is necessary for me to reach findings of fact in this regard, I find that the Claimant did not work set hours each week, his hours of work were not monitored by the Respondent's staff, he was not line managed on any or any regular or formal basis (although he had occasional meetings with Mr Jezia on neutral ground, by which I mean in cafeterias and restaurants, at which work and non-work matters were discussed). While I accept that the Claimant felt that he was constrained to work exclusively for the Respondent (and I have seen no evidence that he did not do so), I also accept the evidence from Mr Jezia that he did not stipulate this as a requirement. The email of 1 May 2015, however terse and, as a record of contract, inadequate, seems to me the most reliable documentary source for the mutual obligations of the Claimant and the Respondent such as they were and as they were understood by both parties and this document is wholly silent as to hours of work each week, exclusivity and as to rights to delegate or the obligation not to delegate work as the case may be. There was no contractual entitlement to sick leave or holiday pay and, as to the holiday taken by the Claimant, he appears to have informed the Respondent's office staff that he was taking 3 or 4 days off as he wished; there was no mutuality of obligation as far as I can tell in this regard, save that the Claimant informed the Respondent's staff in advance as a courtesy;

c. With respect to the manner in which the dismissal took place and insofar as this remains relevant, I find that this was in the course of a short telephone

conversation. While it is common ground that this was a summary dismissal, it was clearly unaccompanied by any process in the form of any investigation, any consultation or any formal disciplinary procedures. No one has suggested that any formal or other procedures were followed with respect to the dismissal telephone conversation.

Legal framework as necessary to the preliminary issues for determination

(1) Time limits

13. In most cases, Employment Tribunal proceedings must be started within the time limits that are set out in the statutory provisions conferring the right to bring the proceedings. Time limits are relevant to the question whether the Employment Tribunal has jurisdiction to entertain the claim at all.

14. The time limits (for the presentation of a claim) that are of relevance to the present case (and the claims set out in the ET1 and listed in the Case Summary attached to Employment Judge Robinson's Case Management Order) are as follows:

    a. Unfair dismissal under section 98 of the Employment Rights Act 1996 ("*the ERA 1996*"): 3 months starting with the effective date of termination, subject to the extensions of time relating to early conciliation pursuant to section 111(2)(a) of the ERA 1996 which is (by section 111(2A)) subject to section 207B of the ERA 1996 which is of relevance to this case and which provision is described and set out below;

    b. Breach of contract: 3 months from the effective date of termination pursuant to Article 7 of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994;

    c. Unlawful deduction from wages: 3 months from the date of the last deduction pursuant to section 23(2) - (3) of the ERA 1996 which, again, is (by section 23(3A)), subject to section 207B of the ERA 1996;

    d. Holiday pay on termination of employment: 3 months from the date when the payment should have been made pursuant to regulation 30(2) of the Working Time Regulations 1998.

15. These three month time limits are, in common, subject (where they have not been met) to a provision that the relevant claim may be presented "*within such further*

period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period" of three months. The burden as to reasonable practicability in this regard falls on the Claimant. I bear in mind that the statutory provision as to extension on reasonable practicability grounds is to be given a liberal interpretation in favour of the Claimant (see, ***Dedman v British Buildings*** [1974] ICR 53 (CA)) and that reasonable practicability involves practical considerations of fact to be considered by the Tribunal.

16. It is common ground in this case (and has been confirmed with the Claimant's solicitor at this Hearing) that, in the event that the relevant three month time limit has not been met, there are no remaining claims over which the Tribunal will have jurisdiction.

17. As to section 207B this relevantly provides that where, as here, the early conciliation rules apply and the Claimant has complied with the requirement to notify ACAS of his intention to bring claim before an Employment Tribunal, the usual time limit is suspended during the conciliation period (that is, from the date on which ACAS receives the Claimant's notification until the day that the Claimant receives or is deemed to receive the early conciliation certificate. If the time limit for the claim is scheduled to expire in the period between ACAS receiving the notification and one calendar month after the end of the conciliation period then the time limit will instead expire at the end of that period.

18. The ET1 Claim Form in the present case was, as I have indicated, presented on 4 December 2020. The relevance of section 207B of the ERA 1996 in the present case is that if the effective date of termination was 7 July 2020, then the 3 month time limit would be 6 October 2020 (ie. 3 months less one day). ACAS early conciliation, commencing 11 October 2020, was *outside* the 3 month time-limit and, because a later ACAS conciliation process does not have the effect of extending a time limit which has already expired, this claim would then be time barred and the Tribunal would have no jurisdiction. Conversely, if the effective date of termination was 31 July 2020, then the 3 month time limit would be 30 October 2020 (ie. 3 months less one day). The early conciliation process would extend the

time limit by the period of 32 days prior to the ACAS certificate. Given the conclusion of ACAS early conciliation within this extended time limit, there would then be an extension of at least one calendar month from the end of the conciliation period pursuant to section 207B(4) of the ERA 1996: that is, an extension of time to 11 December 2020 (in which case an ET1 presented on 4 December 2020 would be just within time).

19. In the circumstances, and for this reason, the identification of the effective date of termination and whether it was on 7 or 31 July 2020 is, as I have indicated, of critical relevance to the Tribunal's jurisdiction.

20. As to the effective date of termination, I have indicated that it is common ground that this can only have been on the date of summary dismissal in the dismissal telephone conversation whenever this took place.

(2) Employee or self-employed

21. There are a number of statutory definitions for the terms "*employee*" and "*contract of employment*". For present purposes, section 230(1) - (2) defines "*employee*" and "*contract of employment*" (respectively) as follows: "'*employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*"; and, "'*contract of employment' means a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing*."

22. Case law has provided further definitional content to these terms. While, at times, the case law has focussed on a worker's control and supervision (including subjection to any disciplinary procedures) by those for whom he or she works, the extent of organisational integration into the alleged employer's business and the mutuality of obligations between the parties to the putative employment contract, the present position may be summarised as follows. There is a certain irreducible minimum of the factors which must be present in order for there to be a contract of service/employment and these factors can be grouped under three broad headings: (i) control (incorporating the old control test found in the case law); (ii) personal performance (that the enployee must agree to have provided his or her own work or skill in exchange for a wage or other remuneration); (iii) mutuality of

obligation (see, the formulation in the well-known case of ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions*** [1968] 1 All ER 433 (QB) and the more recent Supreme Court authority in ***Autoclenz Ltd v Belcher*** [2011] ICR 1157 (SC)).

23. Among other relevant factors that may need to be considered are: any written contract between the parties (although the terms in which the same describes their relationship is not determinative); the provision of uniform, equipment and the like; the manner in which the payment for services provided is organised and remunerated; the subjection of the worker to the disciplinary processes of the potential employer; the obligation of the potential employer to offer work and any corresponding obligation of the potential employee to perform such work for reward; the extent to which the potential employee is integrated into the business of the potential employer; and, the tax and national insurance status of the potential employee (although, again, I direct myself that this is not a determinative consideration and is one factor among others that needs to form part of a balanced and overall consideration of the relevant or potentially relevant factors). In the same way that the manner in which work and potential employment relationships are (almost) limitless in the present day, the potentially relevant factors are many and any perusal of the case law will highlight the fact-sensitive nature of the decisions which Courts and Tribunals have reached over time. That said, I do bear in mind the irreducible minimum requirements for a contract of service/employment by reference to the broad parameters that I have described.

24. By contrast to the definition of an employee, a "*worker*" within the meaning of section 230(3) of the ERA 1996 is a person working under a contract of employment or a person who works "*under … any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the* [worker] *… undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the* [worker] … ."

Conclusions

25. For the reasons set out above, I have concluded that the dismissal telephone conversation took place on 7 July 2020. It follows that I conclude that these claims were presented out of time.
26. As to reasonable practicability, the Claimant bears the burden with respect to this issue. I have heard no evidence from him that that there were any particular life circumstances, save for a general reference to the surrounding circumstances of the pandemic, that might have meant that it was not reasonably practicable for him to commence proceedings within time. In fairness to the Claimant, he did not make any specific suggestion to me in evidence that the pandemic was the reason for his failure to ensure that the ET1 was presented in time. In his clear and helpful closing submissions, Mr Street suggested that the Claimant might – in the absence of formality and a written letter from the Respondent confirming dismissal – have been confused about the extent of his legal rights and the time limit for the presentation of the claim. However, this submission is at odds with the Claimant's factual evidence: he knew that he had been dismissed in the dismissal telephone conversation. While, regrettably, this conversation was not accompanied by any process or formality at all there was no doubt in either party's mind about its result or outcome and I have already found that this conversation was on 7 July 2020. What is missing in this case as relevant to the extension of time now sought is any reason or explanation for the Claimant's failure to present a claim within the time limits, allowing for the extension of time that is available as a result of the ACAS early conciliation procedure. It has not been suggested to me that the Claimant was ignorant of the rights on which he has sought to rely in bringing these proceedings. Accordingly, I am unable to find that it was not reasonably practicable for the Claimant to present his claims within the time limits and it is unnecessary for me also to consider whether, if so, the claims were presented within a reasonable further period of time. Accordingly, the Tribunal lacks jurisdiction and these claims must be dismissed.
27. In the circumstances, it is unnecessary for me to deal with the parties' submissions on the additional preliminary issue relating to the employment or other status of

the Claimant. However, in deference to the parties' evidence and submissions on the point, if it were necessary for me to do so I would have concluded that the Claimant was not an "*employee*" within the meaning of section 230 of the ERA 1996, but did meet the wider definition of "*worker*". As to employment status, the email of 1 May 2015 describes the Claimant as having both terms of employment and as being self-employed. It does not particularly assist in obtaining a clear understanding of the reality of the parties' relationship, save – negatively, and as I have indicated – in its identification of what is missing from the Claimant's contractual obligations. What is of more assistance in this regard is the factual evidence and the following facts and matters seem to me to militate in favour of a conclusion that the Claimant, while a "*worker*", was not also an "*employee*": he did not work from an office or any set premises (while most of his work was concentrated in London, there was no geographical restriction on the places where he worked); the Claimant was, I find, able to set his own hours without time-sheets or any monitoring or control of his hours; the Claimant was able to take holiday without pay whenever he wished to and had no obligations in this regard, save the courtesy of informing the Respondent's staff (which he did as a matter of practice); the Claimant was under no express or implied contractual obligation to devote the entirety of working life to the Respondent's business; the Claimant was subject to minimal and lightest touch supervision or direction (and then on an irregular and informal basis); the Claimant was supplied with some materials by the Respondent (but also made use of his own tools and, indeed, his own emails and mobile telephone); while the Claimant had a regular retainer payment, the Claimant invoiced the Respondent for the sums that he was owed and accounted to HMRC on a self-employed, self-assessment basis; the Respondent clearly had employees working for it, but the Claimant and, perhaps others (who organised their affairs on a limited company basis) were not employees. Taking all of these matters together, it seems to me that the description which most accurately describes the Claimant's employment status is that he was a self-employed worker under contract, rather than an employee.

28. This concludes the judgment of the Tribunal.

_____
Employment Judge Chapman QC
Date: 20 July 2022

Sent to the parties on
Date: 4 August 2022

_____
Michael Chandler
For the Tribunal Office

Note
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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