EMPLOYMENT TRIBUNALS

Claimant: Mr Habila Tikon

1st Respondent: The Commissioner for Her Majesty's Revenue and Customs

2nd Respondent: Mitie Limited

Heard at: London Central by CVP on 16 December 2022

Reserved decision 29 December 2022

Before: Employment Judge Hindmarch

Appearances
For the claimant: Mr Sykes – Consultant Lawyer
For the 1st respondent: Mr Kirk – Counsel
For the 2nd respondent: Mr MacMillan – Counsel

RESERVED JUDGMENT

1. The Claimant's claims against the First Respondent are struck out as having no reasonable prospects of success.

2. The claims of unfair dismissal and for detriment under s47(B) Employment Rights Act 1996 are out of time and are struck out.

3. The remaining claims of unlawful deduction from wages and/or breach of contract will proceed against the Second Respondent only.

REASONS

1. This case came before me for an Open Preliminary Hearing on 22 December 2022 by Cloud Video Platform. After hearing submissions from all parties there was insufficient time to deliberate, and I therefore reserved my decision to 29 December 2022.

2. By an ET1 filed on 24 October 2021, following a period of ACAS Early Conciliation from 22 October 2021 to 22 October 2021 (as against the First

Respondent) and 23 October 2021 to 25 October 2021 (as against the Second Respondent), the Claimant brought complaints as follows-

a. Against both Respondents
    i. Detriment under s47B (1) Employment Rights Act 1996 (ERA)
    ii. Unlawful deduction from wages under s13 (1) ERA and breach of contract as regards termination payment

b. Against the Second Respondent only –
    i. Unfair dismissal under s103A ERA
    ii. Unfair dismissal by s95 (1) (a) and s98 (1) (4) ERA

3. The Final Hearing was originally listed in the summer of 2022 however the hearing time (then 3 days) was felt to be insufficient, and the hearing was postponed and relisted for a 6-day Final Hearing to commence on 23 January 2023. Employment Judge Glennie made an order to this effect on 11 May 2022.

4. In advance of the postponed Final Hearing, the parties had agreed a list of issues, prepared a trial bundle running to about 900 pages and exchanged witness statements. I had sight of these documents at the hearing before me.

5. On 27 May 2022 the Respondents made a joint application in writing for an Open Preliminary Hearing to consider striking out the claim, or, in the alternative, the making of a deposit order.

6. On 30 September 2022, Employment Judge Glennie decided that an Open Preliminary Hearing to consider the application was appropriate. Employment Judge Glennie ordered that 'if the Claimant wishes to give any evidence about his ability to pay a deposit order, he should send to the Tribunal and the Respondents no less than 7 days before the Preliminary Hearing a witness statement, with any supporting documents, dealing with this.'

7. The Claimant did not provide a witness statement or any documentation dealing with means in advance of the hearing before me. When the Claimant filed his claim he had representatives on record. By the time of the May 2022 hearing, he was a litigant in person. I was told by Mr Sykes, who represented the Claimant before me, that the Claimant had only 're-instructed' his firm a few days before the Open Preliminary Hearing such that the witness statement and documents evidencing means had not been prepared. During the course of the hearing, Mr Sykes did send some of the Claimant's bank statements to the Tribunal. I was however unable to hear evidence from the Claimant as to means as he experienced difficulties with his microphone. Given the other time constraints, I ordered the Claimant to file a witness

statement and any other documents going to his means by close of business on 20 December 2022, and the Respondent's to file any comments in response by close of business on 22 December 2022. These documents were forwarded to me by the Tribunal before I reached my Reserved Decision on 29 December 2022.

8. The Respondents had prepared a bundle for the Open Preliminary Hearing running to some 343 pages. Both Mr Kirk for the First Respondent and Mr MacMillan for the Second Respondent had prepared Skeleton Arguments which referred to the page numbers in that bundle. Mr Sykes had also prepared a Skeleton Argument; however, in this he had referenced page numbers from the Final Hearing bundle. He said he had not seen the Preliminary Hearing bundle and contended the Tribunal would be best assisted by using the Final Hearing bundle. As I had both bundles I was able to find the documents that the parties wished to draw my attention to.

9. Mr Sykes' Skeleton Argument was accompanied by caselaw – Adams v GKN Sankey Ltd (1980) IRLR 416. During the course of the hearing, Mr Kirk sent in further caselaw – Duniec v Travis Perkins Trading Company Limited UKEAT/0482/13, and Chapman v Letheby & Christopher Ltd (1981) IRLR 440.

10. At the outset of the hearing there was a discussion about whether it was appropriate to hold an Open Preliminary Hearing on the issues in question. Mr Sykes for the Claimant explained he had resisted the Respondents applications previously. The Respondents took the view there were matters that could quite rightly be determined at an Open Preliminary Hearing (issues as to whether there had been a TUPE transfer of the Claimant's employment from the First Respondent to the Second Respondent and time limit issues). Employment Judge Glennie had already decided these matters should be determined at an Open Preliminary Hearing and I saw no reason to interfere with that.

11. Mr Sykes was concerned that the hearing would involve making factual findings which should be aired at a Final Hearing. I indicated I would not need to hear witness evidence and that I could consider the large volume of documents before me and I would take the Claimants case at its highest. I agreed I was not to conduct a mini trial of the facts but that I could take uncontentious facts from the documentary chronology.

12. The following facts were not in dispute and were discernible from the documents: -
    a. The Claimant commenced employment with the First Respondent on 8 March 2004. The job offer letter confirming this start date was at pages 99-101 of the Preliminary Hearing bundle.

b. The agreed List of Issues reveals the Claimants assertion that he made the first protected disclosure in late 2019 and the second protected disclosure by way of a grievance in August 2020.
c. The List of Issues refers at paragraphs 18 to 16 to detriments occuring from April 2020 and the last one said to be 'following dismissal, the Claimant not being offered the right of appeal'.
d. There is only one allegation in the List of Issues that concerns the First Respondent after the [disputed] TUPE transfer and that is on 23 March 2021. I return to the issue of the TUPE transfer below. All other detriment allegations after that date are made against the Second Respondent only.
e. The Claimant's final payslip with the First Respondent was at age 315 of the Preliminary Hearing Bundle and referred to a payment date of 31 March 2021.
f. On 17 April 2021, the Second Respondent wrote to the Claimant placing his position at risk of redundancy, pages 231-232 of the Preliminary Hearing Bundle.
g. On 23 April 2021, the Second Respondent wrote to the Claimant inviting him to a consultation meeting, page 245 of the Preliminary Hearing Bundle.
h. On 15 May 2021, the Second Respondent invited the Claimant to a second consultation meeting, page 269 of the Preliminary Hearing Bundle.
i. On 16 May 2021, the Second Respondent emailed the Claimant with details of his 'voluntary redundancy exit quotation', page 270 of the Preliminary Hearing Bundle.
j. On 18 May 2021, the Second Respondent emailed the Claimant 'I acknowledge your preference to take voluntary redundancy. I therefore write now to confirm that your employment with (the Second Respondent) is to terminate on the grounds of redundancy, effective 30 June 2021… You are required to work your notice period up until 30 June 2021. Your notice period is 13 weeks in recognition of your continuity of service. Therefore, your notice will commence on 31 May 2021, and you will be entitled to 9 weeks PILON. Your final payment, including any outstanding holidays will be paid to you on 27 July 2021', page 272 of the Preliminary Hearing Bundle.
k. On 22 May 2021, the Claimant replied: - 'As you may already know. I have accepted the redundancy.' A copy of the email is at page 271 of the Preliminary Hearing Bundle.
l. On 12 June 2021, the Claimant emailed the Second Respondent stating, 'as you well know, I have accepted to take the redundancy payment' and the Second Respondent wrote to the Claimant 'your contract of employment will end on 30 June 2021, where you are also eligible for 8 weeks' notice PILON.' A copy of this email exchange is at page 282-283 of the Preliminary Hearing Bundle.

m. On 25 June 2021, the Second Respondent wrote to the Claimant 'your last date of employment will be 30 June 2021', page 288 of the Preliminary Hearing Bundle.
n. The P45 bore the Second Respondents details as employer and a 'leaving date' of 30 June 2021, page 324 of the Preliminary Hearing Bundle.

13. I heard submissions from the Respondents first.

14. Mr Kirk set out the First Respondent's position namely that there were 2 matters of law on which his client argued the claim should be struck out as against the First Respondent; firstly that the Claimant's employment had transferred from that of the First Respondent to the Second Respondent under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) on 11 January 2021, such that the Second Respondent assumed any liabilities concerning the Claimant, and secondly that the claims against the First Respondent were all out of time and the Claimant was not able to show that it was not reasonably practicable to present in time or that it would be reasonable for time to be extended.

15. The First Respondent's position was that the Claimant's employment transferred from it to the Second Respondent on 11 January 2021. This is agreed by the Second Respondent. The Claimant argued there was no transfer at that time or, in the alternative if there was a transfer it occurred on a different date. The Claimant accepted his wages were paid by the Second Respondent from 11 January 2021 but said the Second Respondent acted inconsistently with the operation of TUPE by not acting in accordance with the Claimant's terms and conditions.

16. There were documents in the Preliminary Hearing Bundle referring to the TUPE exercise. The First Respondent had decided (for business and operational reasons) to have its security services outsourced to the Second Respondent, a third-party provider. The documents show the employees affected were 'all HMRC security guards' and this included the Claimant's role. The date of transfer for the Claimants work location was said to be 11 January 2021 in a number of consultation papers. On 6 January 2021, the First Respondent emailed the Claimant stating "I understand that you have not engaged either with (the Second Respondent) or with (the First Respondent's) security managers…about your transfer to (the Second Respondent). I therefore wanted to make sure you have the correct information that you need to make a decision about what to do next. TUPE transfer is a legal process. If you are still in your current job on Monday, you will transfer to (the Second Respondent). Not engaging will not stop that process… I also understand you do not have SIA licence: This means that you won't be able to undertake a security guard role (within the Second Respondent) until you have this licence, because it is a legal requirement of

all guards in the private sector." A copy of this email was at page 568 of the Final Hearing Bundle. On 8 January 2021, the Second Respondent wrote to the Claimant 'We are delighted to have been awarded the security contract for (the First Respondent) and equally delighted to be welcoming you to (the Second Respondent)." The letter referred to the application of TUPE. A copy of the letter was at pages 166-171 of the Preliminary Hearing Bundle.

17. The Second Respondent wrote again to the Claimant on 13 January 2021. It set out its understanding that the Claimant had not engaged with the TUPE consultation exercise "you refused to even take our TUPE consultation pack and demonstrated no interest to transfer", page 172 of the Preliminary Hearing Bundle.

18. The Claimant responded the following day, 14 January 2021, by email to the Second Respondent "I would like to firstly apologise if it was taken that I wasn't interested in engaging with HR. I will like to humbly request the opportunity to transfer to (the Second Respondent)", page 174 of the Preliminary Hearing Bundle.

19. On 21 September 2021, solicitors for the Claimant wrote to the First Respondent stating, 'January 2021 following the Transfer of Undertaking Protection of Employee (sic) to Mitie', pages 300-302 of the Preliminary Hearing Bundle. In the ET1 the Claimant referred to 'On 11 January 2021 (being) purportedly transferred to (the Second Respondent) under duress.'

20. In the First Respondent's submission the factual matrix evidenced by the documents and the undisputed conduct of the policies pointed to a TUPE transfer of the Claimant's employment from the First to the Second Respondent. There was a service provision charge involving an organised grouping of employees (including the Claimant) and, under Regulation 4(2), the duties and liabilities of the First Respondent transferred to the Second Respondent.

21. If the Claimant was arguing that he objected to the transfer, the First Respondent accepted that the Claimant appeared initially not to engage in the consultation exercise but that his correspondence referred to at paragraph 18 above could only be read as consistent with a transfer.

22. If the Claimant was arguing in the alternative that he was unfairly dismissed as of the date of transfer, the First Respondent's position was that this was an entirely new point (having not been pleaded), and the only unfair dismissal allegation in the ET1 and/or List of Issues was against the Second Respondent and made the Claimant's position in relation to time limits more difficult as the ET1 was not presented until October 2021, many months after January 2021.

23. On the time point issue, the First Respondent contended the claims it was facing must be out of time. There was no complaint of unfair dismissal against it and the protected disclosure detriment claim referred to a 'one-off' incident which occurred on 23 March 2021. The incident is pleaded in the List of Issues as being "In or about late March 2021 Mr Coughlin advised (the Claimant) his appeal was no longer going forward". In the First Respondents submission informing an employee that their grievance is not upheld is a one-off matter that ends the process. The Claimant was not employed by the First Respondent as at 23 March 2021. Even if the Claimant was right and the detriment was a continuing act, it ended when the Claimant's employment came to an end on 30 June 2021.

24. The First Respondent contended that the Claimants employment (it said, with the Second Respondent) ended on 30 June 2021 and that it was wrong in law for the Claimant to argue the effective date of termination did not occur until later.

25. I then heard submissions for the Second Respondent, from Mr MacMillan. Mr MacMillan referred me to the significant savings to the public purse if I were to strike out matters on the basis the claim was out of time.

26. The Second Respondent accepted that the Claimants employment transferred to it under TUPE in January 2021. I was referred to the fact that the Claimant emailed the Second Respondent asking to transfer on 14 January 2021, that the Second Respondent paid the Claimant, trained him, assigned him to duties and handled the later redundancy exercise.

27. On the time point, the Second Respondent understood the Claimant to be contending that his employment did not end on 30 June 2021, but instead ended on a later date when he received his final pay. The Second Respondent said this position was wrong in law.

28. Both Respondents referred me to the fact that if they were correct and the claims were out of time, the Claimant had not adduced any evidence as to why it was not reasonably practicable to present in time and/or as to why time should be extended.

29. I next heard submissions from Mr Sykes on behalf of the Claimant. He dealt with the time point firstly. He referred me to Adams v GKN Sankey and said where notice is given, the effective date of termination is when the notice expires. He referred me to s97 (1)(a) ERA. He argued that the Second Respondent's email to the Claimant of 18 May 2021, referenced at paragraph 12j above, referred to a notice period of 13 weeks, and so the notice period ended 31 August 2021, which was the effective date of termination, and all claims were in time.

30. On the issue of the 23 March 2021 detriment, the Claimant argued this was a continuing act. The Claimants grievance/concerns involved his pay and his grade. The pay and grade were not revised in his favour so the detriment continued.

31. On the unlawful deduction from wages/breach of contract claim, the Claimant stated the last payments he received were on 27 August 2021 so these claims were in time.

32. Turning to the issue as to whether there was a TUPE transfer, the Claimant argued that because after he accepted the transfer on 14 January 2021, he was suspended by the Second Respondent until he acquired an SIA licence, that the Second Respondent refused to transfer him on his existing terms and condition and refused to apply Regulation 4(1). The Claimant contended that the First Respondent's email to him of 6 January 2021, particularly regarding the need to acquire an SIA licence, showed the Respondents acting contrary to Regulation 4(1) and obstructing its coming into effect. That was the Claimant's primary submission. In the alternative, the Claimant contended he had been dismissed.

33. The Claimant also suggested that by the Second Respondent's use of the First Respondents enhanced voluntary redundancy scheme, the First Respondent was 'controlling' the redundancy exercise with the Second Respondent simply 'fronting' this.

34. I heard from Counsel for the Respondents in reply. Mr Kirk for the First Respondent agreed that s97 (1)(a) ERA was in play but argued that this was a dismissal with notice, where the notice given was less than the full contractual notice and the correct interpretation was that the effective date of termination was 30 June 2021. He referred me to the Chapman and Dunies case. The Second Respondent set out clearly in the email of 18 May 2021, that notice would commence on 30 May 2021, and end on 30 June 2021 with the balance of notice pay being made by way of PILON.

35. On the TUPE issue, Mr Kirk made the point that TUPE occurs by operation of law and the Claimants submission that the Respondents somehow thwarted the operation of Regulation 4(1) was not a good one. The redundancy scheme implemented was one that had transferred.

36. Before hearing from Mr MacMillan in reply, I enquired of him whether, if the Second Respondent had made a final payment of wages to the Claimant on 27 August 2021 (pay slip at page 323 of the Preliminary Hearing Bundle), any unlawful deduction from wages/breach of contract claim was in time. Mr MacMillan agreed but only as against the Second Respondent.

The Law

37. Rule 37 of the Employment Tribunal Rules 2013 provides:(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds— (a) that it is scandalous or vexatious or has no reasonable prospect of success;

38. The EAT has held that the striking out process requires a two-stage test in HM Prison Service v. Dolby [2003] IRLR 694 EAT. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. In Hassan v. Tesco Stores UKEAT/0098/19/BA the EAT observed: "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules was interpreted as requiring a two stage approach."

39. In Mechkarov v. Citibank N A UKEAT/0041/16, the EAT set out the approach to be followed including:- (i) Ordinarily, the claimant's case should be taken at its highest. (ii) Strike out is available in the clearest cases – where it is plain and obvious. (iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

40. Regulation 3(b) of TUPE states that the Regulations apply to "a service provision charge, that is a situation in which – (a) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor")."

41. Regulation 4 provides

"(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer…but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) … on the completion of a relevant transfer –

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(7) paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee."

42. s97 ERA 1996 provides

"(1)…in this Part "the effective date of termination"-

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires."

43. s111 ERA provides

"(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(2) Subject to the following provisions of this section an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

44. s111 applies to 'ordinary' unfair dismissal claims and those brought under s103A ERA.

45. s48(3) ERA provides that protected disclosure detriment claims must be presented 'before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a serious of similar acts or failures, the last of them.

46. s23(2) ERA provides that claims for unlawful deductions from wages should be presented within "three months beginning with (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or (b) in the case of a complaint

relating to a payment received by the employer, the date when the payment was received." If there are a series of deductions (as alleged by the Claimant in this case) the references in s23(2) to the deduction is the "last deduction… in the series."

47. The breach of contract claim is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Article 7 provides the claim must be brought "within the period of three months beginning with the effective date of termination of the contract", and an extension of time may be granted "where the Tribunal is satisfied that it was not reasonably practicable" to present in time provided presentation is "within such further period as the Tribunal considers reasonable."

48. For all the claims in this case, the Claimant was required to engage in ACAS early conciliation (s18 Employment Tribunals Act 1996), within the original (3 month) time limit. The Claimant failed to engage with ACAS within that time limit he does not benefit from any extension of time allowed for early conciliation.

49. If the claims are out of time it is for the Claimant to show why it was not reasonably practicable to present his claim in time – Palmer and Saunders v Southend-on-Sea Borough Council (1984) ILR 372.

50. I have earlier in this Judgment referred to case law I was taken to by the parties during the hearing on the issue of the effective date of termination. The Claimant contended that Adams v GKN Sankey Ltd was authority for his argument that the 13 week notice period ended on 30 August 2021 – that notice was given, but that the Claimant was not required to work it, however, employment ended at the end of the notice period. In Adams the EAT held "There is a distinction between a case where an employee is dismissed with notice but is given a payment in lieu of working out that notice, and a case where no notice of dismissal is given but a payment is made in lieu of notice. Where notice of termination is given, as the Court of Appeal made plain in Brindley v HW Smith (Cabinets) Ltd, the effective date of termination is the date when notice expires and the fact that a person is not required to work during the period of notice does not mean that the employment terminated earlier than the date specified. However, if the date of termination of employment is immediate but salaries or monies are paid in respect of a subsequent period, according to Lord Denning's Judgment in the Court of Appeal in Dedman v British Building and Engineering Appliances Ltd, they are to be taken as compensation for immediate dismissal and not by way of continuation of the employment."

51. Mr MacMillan referred me to paragraph 4 of the Adams Judgment in which the EAT refers to the case of Dixon v Stenor Ltd (1993) IRLR 28 and the Judgment given by Sir John Donaldson "If a man is dismissed without notice

with money in lieu, what he receives is as a matter of law damages for breach of contract. During the period to which the money in lieu relates he is not employed by his employer."

52. Mr Kirk referred me to the headnote of the Chapman case which states "whether in a particular case a dismissal letter evinces an intention to the part of the employers to terminate the contract at once, wages being paid in lieu of proper notice, or an intention only to terminate the contract at a future date, depends upon the construction of the letter itself. The construction… should not be a technical one but should reflect what an ordinary, reasonable employee would understand by the words used."

Conclusions

53. Turning firstly to the issue as to whether the First Respondent should be released from these proceedings on account of the Claimant's employment being the subject of a TUPE transfer to the Second Respondent, I agree with the Respondents position. The documentation which I have referred to makes it clear there was a planned TUPE transfer of security guards (including the Claimant) from the First Respondent to the Second Respondent on 11 January 2021.

54. I accept that it appears the Claimant did not initially engage in the consultation exercise however there is no evidence that he objected to the transfer. Indeed, to the contrary, when chased by the Respondents regarding his position, on 14 January 2021 the Claimant informed the Second Respondent that he wished to transfer and therefore was treated as an employee of the Second Respondent who paid him, assisted him in gaining his SIA licence, and whom eventually engaged with him in relation to the redundancy exercise and confirmed his redundancy and notice entitlements.

55. I remind myself I have to take the Claimant's case at its highest when deciding whether to strike out a claim as against a party. The claims against the First Respondent are detriment under s47(B) ERA, unlawful deduction from wages and breach of contract 'as regards termination payment.' Under TUPE liability for these claims would pass to a transferor, in this case the Second Respondent who accepts that is the position. The Claimant's 'primary case' as described by Mr Sylees, and thus his case at its highest, is that because after he agreed to transfer on 14 January 2021, the Second Respondent then required him to obtain an SIA licence, TUPE cannot have applied as the Second Respondent did not transfer him on his existing terms and conditions. With respect, that cannot be correct. The Respondents are correct that TUPE operates by operation of law. The Claimant did not object to the transfer, in fact he positively agreed to it. If he was then unhappy about his terms there were options open to him but he continued to take payment from, and work for, the Second Respondent through to the date of termination several months later. The Claimant's case at its highest has no

reasonable prospect of success. His employment clearly transferred to the Second Respondent on 11 January 2021 and the First Respondent has no liability to the Claimant.

56. Having found that grounds for strike out under Rule 37(1)(a) arise here, I must then consider my discretion as to whether in fact to strike out. For the reasons given it is clear from the undisputed and contemporaneous documents, that the Claimant agreed to transfer and did so. He has a remedy against the Second Respondent who accepts it assumes any liabilities regarding him. It will save time and expense and be in accordance with the overriding objective to release the First Respondent as a party and I exercise my discretion to do so.

57. I note the List of Issues contains one 'post-transfer' detriment allegation against the First Respondent dated 23 March 2021. Even if the First Respondent remains liable for that it says it is out of time. The Claimant says it is a continuing detriment to termination.

58. This leads me to the issue of the effective date of termination. Any 'continuing detriment' must have ended then. In my Judgment the email sent by the Second Respondent in the Claimant, recited at paragraph 12j above, is clear and unambiguous. The Second Respondent is giving the Claimant notice of termination 'effective 30 June 2021', part of the notice period he is required to work and part of which will be met by a payment in lieu of notice. This is repeated several times in the later correspondence and reflected in the P45. Any objective construction of the Second Respondent's correspondence makes it clear the contract is to be terminated on 30 June 2021 and not at any future date. Using the Chapman wording this construction reflects what 'an ordinary, reasonable employee would understand by the words used.' The effective date of termination was 30 June 2021 and all relevant 3 month time limits begin to run from that date. The time limit expired on 29 September 2021 and was not extended by any period of ACAS early conciliation as the Claimant did not engage with the early conciliation process during this period (he did not go to ACAS until late October 2021).

59. Thus the claims with regard to s47(B) detriment and unfair dismissal were presented out of time, by over 3 weeks. This is despite the Claimant having instructed solicitors within the primary 3-month period. The Claimant led no evidence whatsoever as to why it may have not been practicable for him to present in time nor as to why time might be extended. I am therefore unable to find other than the claims of detriment and unfair dismissal are out of time.

60. Turning to the claims of unlawful deduction from wages and breach of contract as regards the Second Respondent only (given my finding that there was a TUPE transfer), the Second Respondent accepts the final payments it

made to the Claimant were on 27 August 2021 and therefore that these claims only were presented in time. I therefore allow these claims to proceed.

61. Given my decision as set out above, I did not need to consider the Claimants means and I do not make any deposit order.

Employment Judge Hindmarch
6 January 2023

Sent to the parties on:
10 January 2023