Case No: 2303665/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr N Obonyo

Respondent: Communication Workers Union

Heard at: **Croydon (via CVP)** **On:** **13 November 2024**

Before: **Employment Judge Leith**

Representation
Claimant: In person
Respondent: Mr Kennedy (Counsel)

JUDGMENT

1. The complaints of unfair dismissal, breach of contract, unauthorised deduction from wages and failure to pay accrued but untaken annual leave were brought outside the relevant time limits. They are dismissed on the basis that the Tribunal does not have the jurisdiction to consider them.
2. The claim for a statutory redundancy payment is struck out because it has no reasonable prospect of success.

REASONS

Claims and issues

1. The Claimant makes the following claims:
    1.1. Unfair dismissal;
    1.2. Breach of contract (in respect of notice pay);
    1.3. Unauthorised deduction from wages (in respect of salary from 28 February 2023 until termination of employment);
    1.4. Pay in lieu of untaken holiday entitlement under the Working Time Regulations 1998; and
    1.5. Entitlement to a statutory redundancy payment,

2. The issues for this hearing were identified by EJ Othen at the preliminary hearing on 29 May 2024, as follows:

"7.1 Unfair dismissal & wrongful dismissal (failure to pay notice pay):

7.1.1 Was the unfair and/or wrongful dismissal complaint presented outside the time limits in (as applicable) sections 111(2)(a) & (b) of the Employment Rights Act 1996 and article 7 of The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and if so should it/they be dismissed on the basis that the Tribunal has no jurisdiction to hear it/them?
7.1.2 Should either or both complaints be struck out under rule 37 on the basis that they have no reasonable prospects of success?
7.1.3 Should one or more deposit orders be made regarding those claims under rule 39 on the basis of little reasonable prospects of success?

Dealing with these issues may involve consideration of subsidiary issues including: what the effective date of termination was and whether it was "not reasonably practicable" for a complaint to be presented by the claimant within the primary time limit.

7.2 Arrears of pay and holiday pay:
7.2.1 Was any complaint presented outside the time limits in sections 23(2) of the Employment Rights Act 1996 and/or Regulation 30(2) Working time Regulations 1998, and if so should it/they be dismissed on the basis that the Tribunal has no jurisdiction to hear it/them?.
7.2.2 Should any complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success?
7.2.3 Should one or more deposit orders be made relating to those claims under rule 39 on the basis of little reasonable prospects of success?

Dealing with these issues may involve consideration of subsidiary issues, including: whether there was a relevant "series" of deductions; whether it was "not reasonably practicable" for a complaint to be presented by the claimant within the primary time limit.

7.3 Claim for a statutory redundancy payment:
7.3.1 Should the complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success?
7.3.2 Should a deposit order be made relating to this claim under rule 39 on the basis of little reasonable prospects of success?"

Procedure, documents and evidence heard

3. I heard evidence from the Claimant, who gave his evidence by way of a pre-prepared witness statement on which he was cross-examined. I had before me a bundle of 134 pages.

4. After the conclusion of the evidence, I heard submissions from the Claimant and from Mr Kennedy (which in Mr Kennedy's case were supported by a skeleton argument.

5. I delivered my judgment with reasons orally to the parties during the hearing. Mr Obonyo requested written reasons for the judgment, which I provide in this document.

Law

6. Rule 37 of the Employment Tribunal Rules of Procedure 2013 deals with the Tribunal's power to strike out claims. It provides as follows:

> 37.—(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;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

7. Strike out is a draconian step that should be taken only in exceptional cases.

8. In considering whether a claim has no reasonable prospect of success, the Tribunal must consider whether there is a "more than fanciful" prospect of the claim succeeding (*A v B and another* [2011] ICR D9).

9. The Claimant's case must be taken at its highest. The tribunal must be particularly careful not simply to ask a litigant in person to explain their case while under the stresses of a hearing, but must take reasonable care to read the pleadings and any other key documents (*Cox v Adecco and ors* [2021] ICR 1307).

10. In the context of an unfair dismissal claim, guidance was given by the Court of Session in the case of *Tayside Public Transport Co Ltd v Reilly* [2012] IRLR 755. Almost all unfair dismissal claims are fact-sensitive. Where the central facts are in dispute, the claim should be struck out in only the most exceptional circumstances. Where there is a serious dispute between the parties, it is not for the Tribunal to conduct an impromptu trial of the facts. That said, the Court of Session recognised that there may be cases where it is instantly demonstrable that the central facts in the claim are untrue, such as where they are conclusively disproved by disclosed documentation.

11. The EAT held, in *HM Prison Service v. Dolby* [2003] IRLR 694 EAT that the striking out process requires a two-stage test. 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. *Dolby* was decided under a previous version of the Employment Tribunal Rules, but the important part of the wording of the relevant rule was the same as in the present version.

12. The Tribunal's power to make a deposit order is set out in Rule 39, which provides as follows:

> 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
>
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
>
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

13. The purpose of a deposit order is to weed out claims which are unlikely to succeed but do not meet the strike out criteria, and to give a clear warning that costs may be payable if a claim succeeds (*Hemdan v Ishmail and anor* 2017 ICR 486). The Tribunal retains a discretion even where the test in rule 39 is met.

14. In considering whether to strike out or make order a deposit, the Tribunal must bear in mind the overriding objective, in rule 2 of the Rules:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues;

and

(e) saving expense."

<u>Jurisdiction – unfair dismissal</u>

15. Section 95(1) of the Employment Rights Act 1996 Act provides as follows:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) , only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

16. The time limit for bringing such claims is set out in section.111(2):

> "(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.
> (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)."

17. Section 207B deals with Early Conciliation – insofar as relevant it provides as follows:

> "(2) In this section—
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
> (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
> (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
> (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section."

18. The effective date of termination ("EDT") is defined in section 97 of the Act

> "(1) Subject to the following provisions of this section, 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,
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) *"the material date"* means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer."

19. Section 86 provides as follows:

"86.— Rights of employer and employee to minimum notice.

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

(4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and, accordingly, subsections (1) and (2) apply to the contract.

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

20. The Claimant referred me to the case of *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22*,* which deals with the effect of notice on the EDT.

21. In the case of *Lowri Beck Services Ltd v Patrick Brophy* [2019] EWCA Civ 2490, Underhill LJ summarised the case law on the meaning of "reasonably practicable" as follows:

> "(1) The test should be given "a liberal interpretation in favour of the employee (*Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] ICR 1293 , which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53).
> (2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119 . (I am bound to say that the reference to "feasibility" does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)
> (3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.
> (4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (*Dedman*). I make that point not because there is any suggestion in this case that the Claimant's brother was a skilled adviser but, again, because the point is referred to by the Employment Judge.
> (5) The test of reasonable practicability is one of fact and not of law (*Palmer*)."

<u>Jurisdiction – breach of contract</u>

22. Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 gives the Tribunal jurisdiction to consider claims for breach of contract in certain circumstances. Article 7 provides as follows

> "Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-
>
> (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated,

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

23. Article 8B deals with extension for early conciliation. It is in substantially the same terms as s.207B of the 1996 Act.

Jurisdiction – unauthorised deduction from wages

24. A claim about an unauthorised deduction from wages must be presented to an employment tribunal within three months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that (section 23 of the 1996 Act).

Jurisdiction – annual leave

25. Regulation 30 of the Working Time Regulations 1998 deals with the Tribunals' jurisdiction to hear complaints about breaches of the Regulations. Regulation 30(2) provides as follows:

> "(2) [Subject to regulation 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented–
>
> (a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

26. Regulation 30B deals with the extension of time for early conciliation. Once again, it is in substantially the same terms as s.207B of the 1996 Act.

Qualifying service – unfair dismissal

27. Section 108 deals with the qualifying period of service to bring a claim of unfair dismissal. Subsection 1 says this:

> "Section 94 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 effective date of termination."

The subsequent provisions are not relevant in this case.

Qualifying service – redundancy payments

28. Part XI of the 1996 Act deals with the right to a redundancy payment. Section 155 provides that an employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date.

29. In a case where the employee has been dismissed, the relevant date is defined in section 145 of the Act. Subsection (2) provides as follows:

> "(2) Subject to the following provisions of this section, *"the relevant date" —*
>
> (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,
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
>
> (c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect."

The subsequent provisions are not relevant in this case.

Factual findings

30. Because this hearing was listed to determine the question of jurisdiction in respect of the complaints of unfair dismissal and breach of contract, I must make a factual finding regarding the Claimant's effective date of termination. I must also make factual findings relevant to the question of reasonable practicability.

31. The Claimant was employed by the Respondent from 1 March 2021. His offer of employment letter was dated 2 March 2021. It started by saying this:

> "Following recent conversations, I am writing to offer you the position of Cleaner with the Union on a 6 month fixed term contract from 1st March to 27th August 2021."

32. The Claimant was also issued with a document entitled "Statement of Particular Terms of Employment. That document provided that the Claimant would be paid by monthly instalments. It said this regarding notice periods:

> "The notice to be given by the employer to terminate the contract of employment of an employee who has been continuously employed for 4 weeks or more is as follows:
>
> • 4 weeks but less than 2 years service - 1 week

• 2 years but less than 3 years service - 2 weeks

One week for each additional completed year of continuous employment, to a maximum of twelve weeks.

The notice to be given by an employee who has been continuously employed for four weeks or more to terminate his/her contract of employment is as follows:

• Not less than 1 week.

The periods set out above do not prevent the employer or employee waiving the right to notice or from accepting a payment in lieu of notice."

33. The Claimant's fixed term contract was then extended on various occasions:
    33.1. On 5 August 2021 (around 3 weeks prior to expiry), the Respondent wrote to the Claimant to offer an extension of his contract to 26 February 2022.
    33.2. On 20 January 2022 (just over a month prior to expiry), the Respondent wrote to the Claimant to offer an extension to 26 August 2022.
    33.3. On 3 August 2022 (around 3 weeks prior to expiry), the Respondent wrote to the Claimant to offer an extension to 25 February 2023.

34. The Claimant was on annual leave, from which he was due to return to work on 8 February 2023. On 7 February 2023 he emailed the Respondent indicating that he would not be returning to work the following day due to a motorbike accident.

35. Nicola Murphy of the Respondent emailed the Claimant on 10 February 2023 asking him to contact his Cleaning Supervisor on a daily basis to notify them of absence, unless he had been signed off by his GP for a specific period of time. She attached a copy of the Respondent's sickness absence procedure. The Claimant did not respond to that email.

36. On 12 February 2023, the Claimant flew from London to Nairobi, and on 13 February 2023 he flew on from Nairobi to Entebbe. There were flight booking confirmations of those flights in evidence before me, and the Claimant accepted in cross-examination that those were the flights he took.

37. On 14 February 2023, Ms Murphy emailed the Claimant again. She asked him to make contact with her directly, as his supervisor was on annual leave.

38. On 16 February 2023, Sue Dale, the Respondent's Deputy Head of Human Resources, emailed the Claimant explaining that the Respondent was concerned about the lack of contact from the Claimant. She reminded the Claimant about the need to keep in touch during his absence. She explained that the email had also been sent to the Claimant by post. The Claimant did not respond to that email.

39. On 20 February 2023, Alice Butler, the Respondent's Head of HR and Facilities, wrote to the Claimant. She explained that as he had not been in contact, his pay would be stopped with effect from the end of February (as his absence was unauthorised). She also said this:

> "A decision on your current fixed term contract is due to be taken shortly (this comes to an end on 25th February 2023) and in light of the current position, I will be writing to confirm the CWU decision".

40. The letter of 20 February 2023 was hand-delivered to the Claimant's address.

41. On 22 February 2023, Ms Butler wrote to the Claimant again. She set out the chronology of the Respondent's attempts to make contact with him. She then explained that the Respondent would not be extending his fixed term contract, which was due to expire on 25 February 2023, and that his employment would therefore end on 26 February 2023. She noted that there was no annual leave owed to the Claimant upon termination.

42. The Respondent once again attempted to hand-deliver the letter of 22 February 2023 to the Claimant's address. It was also emailed to the Claimant's personal email address.

43. On 25 February 2023 the Claimant emailed Ms Murphy from his personal email address replying to her email of 14 February 2023. That was the first contact the Claimant had made since his email of 7 February 2022. He indicated that he was "abroad and still improving". He attached some medical records from Kitgum General Hospital.

44. The Claimant's evidence was that he had not seen the Respondent's email of 22 February 2023. His evidence was he had lost his mobile phone in the accident in which he was injured, and that in order to send the email of 25 February 2023 he had had to borrow a device from a Doctor at the hospital where he was being treated.

45. Ms Butler replied to that email on 2 March 2023. She explained that the Claimant's email had not been seen until Wednesday 29 February 2023 as Ms Murphy had been on annual leave (this should presumably have said 1 March, as 2023 was not a leap year and the first of March was a Wednesday). She acknowledged receipt of the medical records, and recapped the previous correspondence send to Claimant. She confirmed that the Claimant's fixed term contract had not been renewed.

46. The Claimant's last payslip was dated 24 February 2023, and contained his pay for the whole of the month of February 2023. He was not paid by the Respondent after that date.

47. The Claimant's evidence was that in the period after his motorbike accident, he was being treated for severe chest swelling and pain, body bruises, and soft tissue injury. His evidence was that he was formally discharged from

medical care in respect of the injuries he had suffered on 19 May 2023. His evidence was that he then suffered an oedema, which left him unable to walk for a period of 3 weeks from late May 2023, and further delayed his return to the United Kingdom.

48. There was no medical evidence regarding the oedema in the bundle before me. In submissions, the Claimant suggested for the first time that he had emailed evidence of the Oedema to the Respondent's solicitors and that they had not included it in the bundle. I gave him some time to find and forward the email in question. After some time, he accepted that he had not, in fact, emailed any medical evidence regarding his oedema to the Respondent's solicitors. The only medical evidence before the Tribunal was the documents the Claimant had sent to the Respondent on 25 February 2023. Those documents described him as an outpatient at Kitgum General Hospital. They were handwritten and somewhat difficult to read.

49. The Claimant's evidence is that he returned to the UK on 28 June 2023, and saw the Respondent's letter of 20 and 22 February on that day. His evidence was that that was the first time he became aware of the termination of his employment. He emailed the Respondent on 10 July 2023 asking to appeal his dismissal.

50. The claimant notified ACAS under the early conciliation process of a potential claim on 10 July 2023 and the ACAS Early Conciliation Certificate was issued on 11 July 2023. The claim was presented on 14 July 2023.

Conclusions

Effective Date of Termination

51. I start by considering the Effective Date of Termination. The Claimant was employed on a Fixed Term Contract ("FTC"). The FTC was due to expire on 25 February 2023.

52. The Claimant's submission was that as his FTC had been extended on a number of occasions, the Respondent had established a custom and practice of extending his FTC.

53. With respect, I am not persuaded by that submission. The FTC had been extended on three occasions. It could not be said that Claimant's FTC being extended was a custom that was reasonable, notorious and certain. If the intention of the parties had been for the Claimant to be employed on a permanent contract, I consider that the Claimant would have been issued with a permanent contract; either when his previous FTC was due to expire in August 2022, or prior to the expiry of his final FTC on 25 February 2023. He was not.

54. I have carefully considered the notice provisions in the statement of terms provided to the Claimant. Read in context, I do not consider that they run contrary to the fixed term nature of the contract, or that they required that that notice be given before expiry of the fixed term. That would be

inconsistent with the very clear fixed term nature of the contract. Rather, I consider that those provisions would have taken effect had either party sought to terminate the FTC before its expiry.

55. I therefore conclude that the Claimant was employed on an FTC which expired on 25 February 2023. That is the effective date of his termination. The case law on notice to which the Claimant referred in his submissions does not apply. The Claimant was not being dismissed on notice. He was, in a sense, on notice of his date of dismissal from the point in August 2022 when his contract was extended for the final time.

Unfair dismissal and breach of contract

56. It is convenient to deal with the complaints of unfair dismissal and breach of contract together. Having found that the Claimant's effective date of termination was 25 February 2023, it follows that the primary time limit for the purposes of those complaints expired on 24 May 2023. The Claimant does not have the benefit of any ACAS Early Conciliation extension, because he did not contact ACAS until 11 July 2023 – over a month and a half after the primary time limit had expired. Therefore those complaints were brought outside the primary time limit

57. I must therefore consider whether it was reasonably practicable for the Claimant to have brought those complaints in time. The Claimant's case is that he was out of the country, and did not receive notice that his employment was terminating until he returned home on 28 June 2023. His case is that he acted reasonably promptly thereafter.

58. The Claimant's evidence was that he did not receive the Respondent's email of 22 February 2023, which referred to the end of his fixed term contract. The Claimant emailed the Respondent both earlier that month and three days later, from the same email address. His evidence was, of course, that he had lost his phone in the accident which caused his injuries, and that a doctor in the hospital in Uganda lent him a device from which he sent that email on 25 February 2023. But that does not answer the question of why he would not have seen the email of 22 February 2023. He was clearly able to see his inbox when he sent the email of 25 February 2023, since he replied to one of the Respondent's earlier emails.

59. There is a significant inconsistency at the heart of the Claimant's evidence regarding the chronology, in that:

    59.1. The Claimant emailed the Respondent on 7 February 2023 to say that he would not be able to return to work as planned on 8 February 2023 because he had been in a motorbike accident.

    59.2. In his witness statement, he said that he was involved in an accident on 4 February 2023, and was consequently unable to travel back to the UK as planned (impliedly, therefore, his evidence was that the accident took place outside the United Kingdom).

59.3. The Claimant did not leave the United Kingdom until 12 February, and did not arrive in Uganda until 13 February 2023. So on his own evidence, he was not in Uganda on the date on which he said that the accident occurred. He was not in Uganda on 7 February 2023, when he emailed the Respondent about the accident. And he had not even left the United Kingdom by 8 February 2023, the date on which he was due to return to work after his period of annual leave.

60. Given the significant inconsistency in the Claimant's evidence, and his inability to explain why he would not have seen the email of 22 February 2023 when he accessed his emails on 25 February 2023, I find on balance that the Claimant did receive that email. I find that he would have seen it, at the latest, on 25 February 2023. So from that date, I find that he was aware that his fixed term contract would not be renewed.

61. Even if I had found that the Claimant had not seen the email of 22 February 2023, I would still have found that it was reasonably practicable for him to have been aware that his employment had terminated on 25 February 2023. He was employed on a fixed-term contract. That is the date on which the contract was due to expire. Absent correspondence from the Respondent extending the contract, that is when he would reasonably have understood it would end. Furthermore, he was not paid by the Respondent after February 2023, and the Respondent went from making regular attempts to contact him to no longer doing so (after Ms Butler's final email of 2 March). Both of those things would also have underlined the fact that his employment was no longer continuing.

62. The medical evidence regarding the impact of the Claimant's injuries was somewhat sparse. None of it post-dated 25 February 2023. The evidence described the Claimant as an outpatient. The Claimant's own evidence described physical injuries; but they must necessarily have been injuries that were not so significant as to require him to be hospitalised. He was, of course, able to email the Respondent about his condition on 25 February 2023, and attach files to that email. On the evidence before me, I am not persuaded that the Claimant's health prevented him from being able to research the process of bringing an Employment Tribunal claim, nor from contacting ACAS or filling in and submitting an ET1 form.

63. Even if I had found that the Claimant was incapacitated in February 2023, I would have found that he must have recovered his ability to carry out tasks such as online research well before his formal discharge on 19 May 2023. There was simply no medical evidence before me in respect of the period after 25 February 2023. And even on his own evidence, the date on which he was formally discharged was before the primary limitation date of 24 May 2023.

64. Even on the Claimant's evidence there was nothing to suggest that the oedema would have interfered with his ability to research the process of bringing an Employment Tribunal claim, nor to contact ACAS or fill in and

submit the ET1 form. His evidence was merely that it prevented him from travelling.

65. I bear in mind also that the Claimant's own email signature at the relevant times indicated that he has, among many other qualifications, a Masters degree in Law, and a Postgraduate Diploma in Legal Studies. He is clearly an intelligent man, who would have been well able to research how to bring a claim and the time limits for doing so; as many self-representing litigants do successfully every day. The fact he was physically outside the jurisdiction would not have prevented him from doing so.

66. It follows that I conclude that :

    66.1. The claims of unfair dismissal and breach of contract were brought outside the relevant time limit;
    66.2. it was reasonably practicable for the Claimant to have brought those claims in time – neither his claimed lack of knowledge regarding his dismissal, nor his ill health (and the fact he was in Uganda) rendered it not reasonably practicable.
    66.3. Consequently, the Tribunal does not have jurisdiction to consider those complaints. They are dismissed.

67. Even if I had concluded that the Tribunal did have jurisdiction to consider the unfair dismissal complaint, I would have struck it out on the basis that, in light of my finding regarding the Effective Date of Termination, it has no reasonable prospect of success. The deemed extension provision in section 97 of the Employment Rights Act 1996 does not apply to the expiry of a fixed term contract. They only apply where a contract is being terminated by an employer without notice. That was not the situation here. The Claimant's employment lasted from 1 March 2021 to 25 February 2023. As at the effective date of termination, he had not completed the necessary two year qualifying period of employment. There is no reasonable prospect of the Tribunal concluding that the Claimant had the necessary qualifying service to claim unfair dismissal.

<u>Holiday pay and arrears of pay</u>

68. Once again, it is convenient to consider these claims together. The Claimant was paid monthly in arrears. He was paid until 28 February 2023 (so he in fact he was paid for 3 days after his employment had terminated).

69. The claims for holiday pay and arrears of pay were predicated on the Claimant assertion that his employment had continued beyond 25 February 2023. I do not understand his claim to be that there is any other reason why he was entitled to be paid wages beyond 25 February 2023, nor to have accrued paid holiday thereafter. Any such claim must therefore have crystallized no later than 25 February 2023, his final date of service. He had already been paid for February 2023 on 24 February 2023. Any payment for accrued holiday pay would have been due on his final day of service.

70. It follows that the primary limitation period for those claims expired on 24 May 2023. Once again, they were brought outside the primary time limit. For the same reasons as I have outlined above, I conclude that it was reasonably practicable for the Claiamnt to have brought those claims in time. It follows therefore that the claims were brought outside the time limit and the Tribunal does not have the jurisdiction to consider them.

71. In light of my finding regarding the Effective Date of Termination, I would in any event have struck them out on the basis that they have no reasonable prospect of success. They were predicated on the Claimant's employment having continued beyond 25 February 2023. I have found that it did not. Therefore the claims have no reasonable prospect of succeeding.

Redundancy payment

72. In light of my finding regarding the Effective Date of Termination, it follows that there is no reasonable prospect of the Tribunal concluding that the Claimant had the necessary two years service to qualify for a redundancy payment. I therefore conclude that the redundancy payment claim has no reasonable prospect of success.

73. The qualifying period of service is, essentially, jurisdictional. Where an employee does not have the requisite qualifying service, the claim cannot succeed. It would not be in the interests of justice to allow a claim which cannot succeed to progress to a final hearing. To do so would be a waste of time and resources for the parties and the Tribunal. It would fly in the face of the overriding objective. I therefore exercise my discretion to strike out the redundancy payment claim.

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Employment Judge Leith

Dated: 6 December 2024