EMPLOYMENT TRIBUNALS

Claimant:	Mr J Kidane Zegay
Respondent:	Mr B Boylan (1) Freedom Sportsline Ltd (2)
Heard at:	London Central
On:	14 January 2020
Before:	Employment Judge Quill

Representation

Claimant:	In Person
Respondent:	In Person (1) B Boylan, director (2)

RESERVED JUDGMENT

1. All claims and complaints against the First Respondent, Mr B Boylan, are withdrawn by the Claimant and are dismissed upon withdrawal.

2. The correct identity of the Second Respondent is Freedom Sportsline Ltd.

3. The Claimant's claim of unfair dismissal contrary to Section 94 of the Employment Rights Act 1996 was not presented within the time limit stipulated by Section 111 of the Employment Rights Act 1996 as it was reasonably practicable for him to have presented the claim within the time limit imposed by subsection 111(2)(a) and – furthermore and in any event - he also did not present his claim within a reasonable time thereafter for the purposes of subsection 111(2)(b).

4. The Claimant's claim for breach of contract (whether for holiday pay or notice pay or otherwise), as permitted by Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 was not presented within the time limit stipulated by Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 as it was reasonably practicable for him to have presented the claim within the time limit imposed by Article 7(a) and – furthermore and in any event - he also did not present his claim within a reasonable time thereafter for the purposes of Article 7(b).

5. The Claimant's claim for breach of the Working Time Regulations 1998 (failure to pay appropriate amounts for holiday pay) contrary to Regulations 14 and/or 16 was not presented within the time limit stipulated by Regulation 30 of the Working Time Regulations 1998 as it was reasonably practicable for him to have presented the claim within the time limit imposed by Regulation 30(2)(a) and – furthermore and in any event - he also did not present his claim within a reasonable time thereafter for the purposes of Regulation 30(2)(b).

6. The Tribunal has no jurisdiction to hear the complaints of
    a. unfair dismissal
    b. breach of contract
    c. breach of the Working Time Regulations

   and the proceedings in relation to those complaints are dismissed.

7. The complaint of unauthorised deduction from wages (alleged shortfall in payments made for holiday actually taken) is out of time, and the tribunal has no jurisdiction to hear it. That part of that complaint is dismissed.

8. The time limit issue in relation to the Claimant's claim of unauthorised deduction from wages (payment in lieu of unused holiday) contrary to Section 13 of the Employment Rights Act 1996 is to be determined at the full merits hearing.

9. The referral of the question of the Claimant's entitlement to a redundancy payment from the Second Respondent (in accordance with Section 163 of the Employment Rights Act 1996) is not out of time.

10. The hearing due to take place on **19 and 20 March 2020** remains listed and will consider the unauthorised deduction from wages (payment in lieu of holiday pay) and the redundancy payment reference only.

REASONS

Introduction

1. A preliminary hearing was ordered in order to consider:

   1.1. Whether the claims against the First Respondent should be dismissed (if he was not the Claimant's employer);
   1.2. Whether all of the claims should be dismissed due to being presented out of time.

Hearing

2. From the parties, on the day of the hearing, I received a witness statement, with exhibits, from the Claimant and a paginated bundle of documents prepared by the Respondent. I also received written submissions from the Respondent.

3. I noted that the Claimant had also posted his statement and exhibits to the tribunal (received 24 December 2019) and that there were some differences between the copies of the exhibits received by post in comparison to those brought to the hearing today. I therefore arranged for copies of the exhibits which were different to be provided to the parties during the hearing.

4. The Claimant gave evidence and was cross-examined and answered questions from me. I permitted the Claimant to access his email account via his phone during his evidence to aid his memory (in relation to documents that were not included with the hard copies mentioned above). He showed me and the Respondent's representative two such items, as discussed below.

Claims

5. The Claimant had ticked 5 boxes on his claim form, namely:

   5.1. Unfair Dismissal
   5.2. Redundancy Payment
   5.3. Notice Pay
   5.4. Holiday Pay
   5.5. Other Payments

6. The Claimant confirmed that his reference to "other payments" was a reference to compensation if his unfair dismissal claim was successful and was not intended to signify any separate claim.

7. The circumstances in which a person might be entitled to a redundancy payment were explained to the Claimant. He confirmed that he did not wish to withdraw the claim.

8. The Claimant was not sure whether or not the Respondent had made a payment in lieu of notice, or of the amount of notice to which he was contractually entitled. He said that the Respondent's argument that he was entitled to 4 weeks, and that he had been paid 4 weeks' pay in lieu of notice might be correct but confirmed that he wished to continue with the claim as he was not sure about either of these propositions.

9. The holiday pay claim relates to the argument that the Claimant's holiday pay was calculated based on 8 hours per week (which were his minimum contractual hours, according to the Claimant) and not on a higher rate of pay (reflecting the fact that the Claimant alleges that he often worked in excess of 8 hours per week). The Claimant last took holiday a long time before the termination of employment. He did not know if the Respondent made a payment to him in lieu of holiday pay following the end of his employment.

10. The Claimant confirmed that the above-mentioned claims were the only ones that he was seeking to bring. He also confirmed that he was intending to bring them against his employer only, and that he acknowledged that Mr Boylan was not his employer. He wished to withdraw the claims against Mr Boylan, but not against his employer. He agreed that the claims against Mr Boylan would be dismissed.

11. The Claimant accepted that the correct identity of his employer was Freedom Sportsline Ltd (hereafter "the Respondent"). Both parties agreed that an amendment should be made to the claim to reflect the Respondent's correct name.

Issues for the preliminary hearing

12. What was the effective date of termination?

13. On which date did the time limit to submit the various claims expire?

14. If the time limit for any claim expired before 9 August 2019 (the date on which the tribunal received the claim form) then why was the claim presented late, and would it have been reasonably practicable for the Claimant to have submitted the claim within the time limit?

15. If it would not have been reasonably practicable for the Claimant to have presented the claim within the time limit, then was it presented within a reasonable further period.

Findings of Fact

16. The Claimant has a BA in Business Studies. He has not previously been involved in employment tribunal (or other) litigation. However, he was aware from his education and his general life experience that there are time limits for commencing litigation, including bringing claims in an employment tribunal.

17. The Claimant has good comprehension skills, and the ability to access and understand information found on the internet and elsewhere.

18. He started work with the Respondent as a sales assistant and had at least two years' continuous service as of the date of his dismissal. It is not necessary for me to make findings about his contract of employment in relation to contractual hours, holiday entitlement, overtime pay or exact start date.

19. The claim form submitted to the employment tribunal contained an email contact address for the Claimant. That is the Claimant's correct email address. This is the email address that was used by the Respondent when communicating with the Claimant by email (though the respondent also used other methods of communication).

20. The Claimant had some sickness absence from the Respondent. The exact amount of that absence (and whether it was continuous or intermittent) is in dispute and it is not necessary for me to make detailed findings for present purposes. It suffices to say that:
    20.1. On the Respondent's case, the absence had been continuous and had lasted around 18 months prior to the decision to dismiss.
    20.2. On the Claimant's case, he had been suffering from severe back pain which made it difficult to work, and (at least some of the time) he refrained from work on doctor's advice, and he had previously been dismissed (and later reinstated) by the Respondent for reasons connected with sickness absence.
    20.3. The Claimant received Statements of Fitness for Work, signed by his GP, which stated that he was not fit for work. These typically were issued for periods of between one month and three months at a time and, cumulatively, covered most of the period from late 2017 to mid-2019.
    20.4. It was not suggested by the Claimant that there was any medical reason which had prevented him submitting his employment tribunal claim sooner.

20.5. The Claimant had not taken any annual leave since before October 2017.

21. The Claimant attended a hearing with his employer on 13 March 2019. The Claimant was aware that an outcome of the hearing might be that he would be dismissed. He was aware that, according to the Respondent, the dismissal (if any) would be for reasons connected with his sickness absence. No decision was announced on 13 March 2019 and the Claimant was informed that he would be notified of the outcome shortly.

22. On 14 March 2019, the Respondent sent a letter to the Claimant by email. The correct email address was used. The email was sent at approximately 8.13pm. The Claimant does not recall when he opened the email and read it (and, in fact, does not specifically recall receiving the email at all). The Claimant typically opens emails perhaps within an hour or two, and usually no later than a day, after receipt. Based on these facts, I am satisfied, on the balance of probabilities, that the Claimant did receive the email and that he read the email by no later than Friday 15 March 2019. The Claimant was aware that he was due to receive an important communication from his employer, and I think it likely that he would have noticed the email (and opened it and read the attachment) fairly promptly. It is not possible for me to be sufficiently satisfied that he would have had the opportunity to read it in less than 4 hours from the time it was sent (and therefore on 14 March 2019 itself) but I am satisfied that there was nothing which would have prevented him reading this particular email by (at the latest) Friday 15 March 2019, and the Claimant did not suggest that there was any such impediment (albeit he does not specifically admit receiving the email).

23. The same letter, dated 14 March 2019, was also posted to the Claimant. My inference from the fact that the email was sent at 8.13pm is that the letter was not posted until the following day, Friday 15 March 2019. The Claimant accepts that he received the letter by post, but he does not know the date that he received it. The claimant typically opens his post promptly on receipt, and he did not think that he would have failed to open and read this particular letter promptly after the date of receipt. My inference from these facts is that, on the balance of probabilities, the latest date that the Claimant read the posted copy of the letter was Monday 18 March 2019. In other words, while it is possible that the letter arrived one day after posting (so on Saturday 16 March 2019), it is not possible for me to be sufficiently satisfied that that is the case. However, I am satisfied that the hard copy of the letter arrived (and was read) by no later than the Monday.

24. The letter stated that the Claimant had been absent from work since 8 October 2017 due to back pain.

24.1. It stated that the Claimant had not provided an expected return to work date. It said that the Respondent had "made the decision to terminate your employment … on grounds of capability".

24.2. The letter did not expressly state the date from which the Respondent was purporting to terminate the contract of employment.

24.3. However, it did say, "*As your employment has been terminated by the Company you will be paid 4 weeks' pay in lieu of notice. Any monies outstanding including any outstanding holiday pay and your P45 will be forwarded to your home address*."

24.4. When he read the letter, the Claimant understood the letter to mean that his employment had been terminated with immediate effect.

25. The Respondent received an appeal against the dismissal by email dated 22 March 2019. The appeal letter bore the date 21 March 2019. It asserted that the appeal was in response to a letter from the Respondent "dated 19 March 2019 confirming my dismissal from employment". The appeal did not dispute that the Claimant had been absent since October 2017, but rather alleged that the Claimant should be given a further opportunity to provide evidence as to when he might be fit to return to work, and should be offered a phased return.

26. The Respondent replied to acknowledge receipt of the appeal by email dated 27 March 2019. (This latter communication being one of the two items from his phone which the Claimant showed to me and the Respondent's representative during the hearing.)

27. The appeal hearing took place in April and the Claimant was informed around 18 April 2019 that appeal was unsuccessful.

28. The Respondent alleges that it made a payment to the Claimant on or around 26 April 2019 in relation to sums due to him, though no evidence was provided and the Claimant made no admissions.

29. The Claimant contacted ACAS to commence early conciliation on 7 May 2019. He did so by using the on-line method. He supplied his correct email address to ACAS as part of that process. ACAS contacted the Respondent. Subsequently, the parties had some communications with and via ACAS which are covered by without prejudice privilege. There were communications between the Claimant and ACAS during this period, in which he sent emails to, and in which he received emails from, ACAS using the same correct email address which he supplied to ACAS, and which was used by the employer, and was included on the claim form.

30. The 28 day initial period for early conciliation was due to expire on 6 June 2019. The parties and the ACAS officer agreed to extend the period by 14 days; that is, by the maximum period permitted. The last day of the early conciliation period was therefore due to be 20 June 2019.

31. By email received approximately 3.29pm, the Respondent received a copy of the Early Conciliation Certificate on 20 June 2019 from ACAS. The certificate asserts on its face that it was issued to the Claimant by email on 20 June 2019. The Claimant believes that he did not receive a copy via email, or at all, on 20 June 2019. He believes that the certificate ought to have been posted to him, rather than emailed.

32. In broad terms, the Claimant's position is that the first time that he received the ACAS certificate was on 5 August 2019 when – he says – ACAS forwarded to him a copy of an email purportedly sent to him on 20 June 2019, attaching the certificate. It is necessary for me to comment on the Claimant's evidence and the documents in some further detail in order to analyse his assertion.

    32.1. The Claimant relies on an email which was sent to him on 16 July 2019 by the ACAS officer which reads: "*Thank you for this mail. I have not heard further from the Employer's side. You have the option of making a claim to the Employment Tribunal if you wish to do so. You have up to one calendar month from the date on the early conciliation certificate to make a claim if you wish to do so. You may wish to take advice from the Citizens Advice Bureau also.*"

    32.2. This was a reply to an email of the Claimant's sent on the same day (16 July 2019) which formed part of the without prejudice communications and which I have not seen.

    32.3. On Tuesday 30 July 2019, at 6.28pm, the Claimant replied stating "*I still don't have the early conciliation certificate for my case?*"

    32.4. On 5 August 2019, at around 9.33am, the Claimant forwarded a copy of his 30 July 2019 email to ACAS.

    32.5. On 6 August 2019, the Claimant emailed ACAS stating: "*Are you tell me that Im late for the have up to one calendar month from the issue date on the early conciliation certificate*" (sic).

    32.6. On 6 August 2019, at 3.43pm, the ACAS officer replied to say that she could not provide advice on time limits other than to say that the general guide was that there would be up to one calendar month from the date of the certificate. Amongst other things, the reply said, "*You were sent the early conciliation certificate on 20 June 2019 and I have informed you previously of the above*". It repeated that the Claimant could take advice from a Citizens Advice Bureau or elsewhere.

    32.7. On 7 August, at 11:12am, the Claimant emailed ACAS to deny having received the certificate previously. At 1.35pm, the ACAS officer replied to state that she had informed the Claimant by email on 20 June 2019

that early conciliation was concluded and that she would arrange for the certificate to be sent to the Claimant. She also stated that ACAS's records showed that the certificate had indeed been issued by email to the Claimant on 20 June 2019.

33. Included in the documents sent by post to the tribunal, and received on 23 December 2019, Exhibit JKZ5 is a copy of an email sent from ACAS to the Claimant's correct email address, bearing the date 20 June 2019 and the time 3.28pm. The wording of the email is identical to that of the email sent to the Respondent at approximately the same time. It states that the early conciliation certificate is attached, and mentions that it is the Claimant's responsibility to ascertain the time limit for any tribunal claim.

34. In terms of the documents brought to the tribunal today by the Claimant, Exhibit JKZ5 was a different document. It was a copy of the Claimant's email to ACAS at 9.33am on 5 August 2019.

35. The Claimant's position is that he received the 20 June email (and its attachment, being the early conciliation certificate) for the first and only time on 5 August. He had not brought a hard copy of any email to him from ACAS dated 5 August. He showed me (and the Respondent) on his phone an email trail which he said supported his position that ACAS had forwarded the 20 June email to him on 5 August 2019 (and also his position that 5 August was the first time that he had seen that email or its attachment).

36. I did not find that looking at the Claimant's phone was of assistance to me, because the way in which emails were stored in the app did not make clear to me that (as claimed by the Claimant) the 20 June email had been forwarded on 5 August as opposed to having simply been received by the Claimant on 20 June. I also found it surprising that the Claimant had not printed off the 5 August email which (according to him) was the first notification that he had had that the certificate was already issued. However, on balance, I am satisfied that on 5 August 2019, ACAS did send an email to the Claimant which forwarded a copy of the 20 June email and its attachment (the certificate).

37. However, I am fully satisfied that ACAS did transmit the email on 20 June 2019 to the correct email address for the Claimant. No evidence has been presented to me to suggest that there was any defect in the ACAS systems such that it might appear (according to the system) that the email had been correctly sent but that, in fact, it had not been sent. Furthermore, to the extent that the Claimant suggested that it was possible that ACAS might have altered its own records in order to deliberately create a false impression, I reject that argument because it is inherently implausible and the Claimant has no evidence to support it.

38. On the balance of probabilities, I am satisfied that the Claimant did receive the email, with the certificate, to his email account on 20 June 2019. On its face, the email was correctly addressed, and no evidence has been presented to me about any technical defect that would have prevented receipt of the email by the Claimant. It was not suggested to me by the Claimant that the email was actually received but went into some "spam" or "junk" folder and no evidence was presented to me from which I might infer that that is what happened. On the contrary, the evidence was that the Claimant did actually receive other emails from ACAS and they did not go into a "spam" or "junk" folder. On the balance of probabilities, I am satisfied that the email actually arrived in his inbox on 20 June 2019.

39. Furthermore, and in any event, I am satisfied that the claimant knew, or ought to have known, that the ACAS certificate was due to be issued on or around 20 June 2019.
    39.1. Firstly, he knew or ought to have known this because he knew that early conciliation started on 7 May, had lasted for one month, and had been extended by two weeks. Around 6 June 2019, he knew – and/or had the ability to calculate - that 20 June 2019 was the latest that the early conciliation period could end.
    39.2. Secondly, he knew because the ACAS officer specifically notified him that the period was ending on 20 June 2019.

40. The Claimant sought the help of an advice centre to submit his claim. He could not attend on 5 August because it was not open that day. He attended the following day, 6 August. He completed the form and posted it the following day, 7 August, and it was received by the tribunal on 9 August 2019.

The law

Unfair dismissal and breach of contract

41. Section 111(2) of the Employment Rights Act 1996 deals with the time limit for unfair dismissal claims.

> (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.

42. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 uses similar wording – also referring to the effective date of termination - in relation to breach of contract claims.

Working Time Regulations

43. Regulation 14 deals with a worker's entitlement to receive payment, on termination of employment, relating to leave which had accrued – but had not been used – during the period from the start of the final (partial) leave year until the date of termination of employment. By Regulation 14(2):

> Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

44. Regulation 30(2) of the Working Time Regulations 1998 states (insofar as it is relevant)

> (2) Subject to regulations 30A and 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 … 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 … months

Unauthorised deduction from wages

45. The time limits for an unauthorised deduction claim is dealt with in Section 23 of Employment Rights Act 1996), which states, insofar as it is relevant:

> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of 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 …
>
> (3) Where a complaint is brought under this section in respect of—
> (a) a series of deductions or payments, …
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
> …
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
>
> (4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

46. As confirmed in Revenue and Customs Comrs v Stringer [2009] I.C.R. 985, a claim for a payment to which a claimant is entitled by virtue of Regulation 14(2) or Regulation 16 of the Working Time Regulations 1998 can instead/alternatively be brought under Part II of the Employment Rights Act 1996. Furthermore, for such a claim, any time limit issues fall to be decided by analysis of section 23 of the Employment Rights Act 1996.

47. As confirmed by the EAT in Arora v Rockwell Automation Ltd [2006] 4 WLUK 397, where a payment is made, following termination of employment, and where the employee alleges that the payment represents a shortfall in comparison to what he was actually owed, then the time limit for an unauthorised deduction from wages claim, in accordance with Section 23 of the Employment Rights Act 1996 runs from the date on which the payment was made, and not from the (earlier) effective date of termination.

Effective Date of Termination

48. Where an employer terminates employment without giving notice, the effective date of termination is the date on which the termination takes effect. If the communication of the decision to dismiss is not immediate (such as in a face to face meeting, or by a telephone conversation) but is done via (for example) an email or a posted letter, then the effective date of termination is the date on which the employee actually reads the letter or email.

Reasonably practicable

49. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving it was not is on the claimant. When doing so, the phrase "not reasonably practicable" should be given a liberal interpretation in favour of the Claimant.

50. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable in the circumstances. This does not necessarily mean that the Claimant has to act as fast as would be reasonably practicable.

Early Conciliation Provisions

51. Where a potential claimant contacts ACAS to begin early conciliation before the expiry of a particular time limit, then the time limit is affected. Day A is defined as the date on which early conciliation begins, and Day B as the date on which it ends.

52. The new time limit will expire on whichever is the later of the following:
    52.1. The date which is obtained if all of the days from the day after Day A until Day B (inclusive) were ignored when calculating the expiry of the time limit;
    52.2. One month after Day B.

Conclusions and Analysis

The effective date of termination

53. Although no actual termination date was specifically mentioned in the letter dated 14 March 2019, I am satisfied that the actual meaning of the letter was that the Claimant's employment was treated as terminated with immediate effect. The letter uses the past tense when stating that the Claimant's employment has been terminated, and also refers to a payment in lieu of notice. The effective date of termination was therefore the date on which the Claimant read the Respondent's letter dated 14 March 2019. I have concluded that the Claimant read the letter on 15 March 2019 at the latest. Therefore, my decision is that the effective date of termination was 15 March 2019.

Calculation of Time Limit for unfair dismissal and breach of contract

54. Day A was 7 May 2019 and Day B was 20 June 2019. Therefore, the period not to be counted is 8 May to 20 June 2019. This is 44 days. The Claimant did not present his claim within one month of Day B.

55. The time limit (but for the early conciliation provisions) would have expired on 14 June 2019. Ignoring 44 days when performing the calculation, the time limit (as affected by the early conciliation provisions) expired on 28 July 2019.

56. For completeness, I would add that the Claimant drafted his appeal submission on 21 March 2019, meaning that it is beyond any doubt whatsoever that the Claimant had read the dismissal letter by 21 March 2019. If – contrary to my findings of fact – the effective date of termination had been 21 March 2019, then the time limit would have expired on 3 August 2019.

57. Thus, the claim was presented after the expiry of the time limit for unfair dismissal and breach of contract, and it is necessary for me to consider whether it would have been reasonably practicable for the claim to have been presented on or before 28 July 2019.

Reasonable practicability for unfair dismissal and breach of contract claims

58. I am satisfied that it would have been reasonably practicable for the Claimant to be aware that the time limit for these claims expired by (no later than) 28 July 2019. The Claimant knew that there were time limits associated with tribunal claims. He had the means to access (and to understand) information that would have enabled him to ascertain the limitation date. At the very least, the Claimant knew (or had the ability to find out) two relevant pieces of information: (a) that the time limit might expire as early as one month from the end of the early conciliation period and (b) that early conciliation can last for a maximum of one month plus 14 days.

59. I am satisfied that it would have been reasonably practicable for the Claimant to present his claim by no later than 28 July 2019. In reaching this conclusion, I have taken account of the fact that if the Claimant was unaware of the early conciliation number (for example, if he had accidentally deleted the ACAS email attaching the certificate and forgotten that he had received it), then he could not submit a valid claim form. A claim form without the early conciliation number would have been rejected.

60. However, if, for whatever reason, the Claimant had not noticed (or had forgotten about) the email/certificate providing the early conciliation number, it was reasonably practicable for him to have chased this much sooner. He first chased it after 6pm on Tuesday 30 July and, having had no response, chased again on Monday 5 August. He received the copy certificate later the same day. In other words, he received it within 6 calendar days (and on the fourth working day) from when he started to chase.

61. My finding of fact was that the Claimant did know directly from the ACAS officer that the certificate was due to be issued on 20 June and, furthermore, that he knew (or ought to have known) that an early conciliation period which commenced 7 May 2019 could finish no later than 20 June.

62. On his own account, he contacted ACAS on 16 July, which prompted the ACAS email of the same date. That email referred to "*the issue date on the early conciliation certificate*". Although the Claimant says that he did not take that to be a reference to a certificate which had already been issued, the onus was on him to make clear and specific enquiries. It was reasonably practicable for the Claimant to have replied immediately to ACAS on 16 or 17 July, and to ask about the whereabouts of the certificate (if he had not noticed it in his inbox, or had forgotten about it). Had the Claimant done so, then even if ACAS had taken 6 calendar days or 4 working days to reply, then he would have received the early conciliation number several days before the 28 July

deadline, which would have meant that it was reasonably practicable to present the claim (using the on-line facilities if necessary) within the time limit.

63. More straightforwardly, it would have been reasonably practicable for the Claimant to pay close attention to his email inbox and to notice, and remember, the incoming email from ACAS at around 3.28pm on 20 June 2019, which attached the certificate. Had the Claimant done this, then he would have had more than a month in which to present the claim.

64. For the avoidance of doubt, I do not find that the fact that the Claimant wished to have advice from an advice centre meant that it was not reasonably practicable for him to present the claim in time. His appeal against dismissal was rejected in April, and thus the Claimant had ample opportunity in April, May, June and July to seek advice - if needed – on completing the form.

65. Even if, contrary to my findings, it had not been reasonably practicable for the Claimant to present his claim before 5 August 2019 (which is the date on which he admits receipt of the certificate), the Claimant took an unreasonable period of time to present the claim thereafter. In all the circumstances, it would not have been reasonable for him to present the claim any later than 6 August 2019. Box 8.2 of the form ET1 contains just 13 lines of text (alleging the dismissal was unfair) and Box 15 contains just 2 lines of authored text, and then 5 lines copied and pasted from an ACAS letter. Thus, if the Claimant became aware, on 5 August 2019, that the time limit had expired, there is no reasonable explanation for why he could not have submitted a claim form as brief as the one which he did submit immediately.

<u>Calculation of Time Limit for the Working Time Regulations claims</u>

66. In relation to each period of leave that was taken during his employment, the Claimant was entitled by virtue of regulation 16 of the Working Time Regulations 1998 to receive a payment. The payments should have been made to him by the same date on which he was contractually entitled to be paid any salary which would have been earned during the period in which the leave was taken. By virtue of Regulation 30(2) of the Working Time Regulations 1998, the time limit began to run, in relation to each period of leave, from the date on which the payment for that period was due.

67. Neither Claimant nor Respondent provided evidence as to the most recent period of annual leave which the Claimant had taken. However, I was satisfied that the most recent period was before October 2017. Thus, the time limit for the Claimant to bring any claim in relation to Regulation 16 expired long before the Claimant contacted ACAS to commence early conciliation. Thus, the early

conciliation provisions do not extend the time limit. Similarly, the Claimant's assertion that he did not receive his early conciliation number until 5 August 2019 is irrelevant when considering reasonable practicability.

68. The time limit for the Claimant to bring any claim alleging a breach of Regulation 16 of the Working Time Regulations 1998 expired no later than January 2018. The Claimant provided no evidence that it would not have been reasonably practicable for him to present his claim within that time limit. He would, of course, have had to contact ACAS first in order to obtain an early conciliation certificate, but he provided no evidence that it would not have been reasonably practicable for him to do so in or before January 2018.

69. In relation to leave that was NOT taken during his employment, the Claimant was entitled by virtue of regulation 14 of the Working Time Regulations 1998 to receive a payment in lieu of that leave on termination. By virtue of Regulation 30(2) of the Working Time Regulations 1998, the time limit began to run from the date of termination. The early conciliation provisions apply to extend the time limit. The extended time limit expires on the same date as for unfair dismissal and for breach of contract. For the reasons discussed above, the revised time limit therefore expired on 28 July 2019.

70. I therefore have to consider if it was reasonably practicable for the Claimant to submit his Working Time Regulations complaint by 28 July 2019. My conclusion is that it was reasonably practicable for the Claimant to do so, and my reasoning is the same as set out above in relation to the unfair dismissal and breach of contract claims.

71. Even if, contrary to my findings, it had not been reasonably practicable for the Claimant to present his claim before 5 August 2019 (which is the date on which he admits receipt of the certificate), the Claimant took an unreasonable period of time to present the claim thereafter. My reasons for this conclusion are the same as set out above in relation to the unfair dismissal and breach of contract claims.

<u>Unauthorised deduction from wages</u>

72. In relation to each period of leave that was taken during his employment, the Claimant was to receive a payment. This payment would be one which fell within the meaning of "wages" as per Section 27 the Employment Rights Act 1996. If the Claimant was allegedly paid nothing at all in relation to leave actually taken, or else if he was allegedly paid a sum which was less than his actual entitlement, then the Claimant could bring an unauthorised deduction

from wages claim: that is a claim brought under section 23 of the Employment Rights Act 1996 alleging a breach of section 13 of the same act.

73. Where there is a series of deductions (non-payments and/or shortfalls), then the time limit does not seek to run until the last deduction in the series. However, as explained by the Employment Appeal Tribunal in Bear Scotland v Fulton [2015] IRLR 15, [2015] ICR 221, a gap of more than 3 months between deductions breaks the series.

74. In this case, the last period of leave actually taken by the Claimant was before October 2017. Thus, there was a period from (at least) October 2017 until the termination of employment, during which no leave was taken, and therefore no payments for leave actually taken were made, and – therefore – during which there were no deductions (non-payments and/or shortfalls).

75. Thus, the Claimant is out of time in order to bring any complaint (framed as an unauthorised deduction from wages complaint) in relation to payments for leave actually taken. As mentioned above, in relation to the Working Time Regulations 1998 claim, the time limit would have expired no later than January 2018. It would have been reasonably practicable for the Claimant to present a claim (having first contacted ACAS to commence early conciliation) within that time limit.

76. There is, however, the separate point about payment in lieu of leave entitlement that had not been taken. The Claimant was entitled by virtue of regulation 14 of the Working Time Regulations 1998 to receive a payment in lieu of that leave on termination. This payment would be one which fell within the meaning of "wages" as per Section 27 the Employment Rights Act 1996.

77. If there was a complete non-payment in relation to such entitlement (if any), then the time limit might begin to run from the termination date (or, conceivably, any later date specified in the contract of employment as the date on which a payment in lieu of unused leave was to be made). However, if there was not a complete non-payment, but there was in fact a payment which purported to be in lieu of holiday entitlement (but allegedly a shortfall in comparison to his actual entitlement), then time begins to run from the date of that payment.

78. No evidence was presented to me at the preliminary hearing about what payments were made to the Claimant after the termination of his employment, or as to how the payments were calculated. The Claimant made no admissions as to receiving any payments at all, although he did state that it was possible that payments had been made. However, the dismissal letter stated that payments for any accrued holiday would be made, and the ET3

response form stated that the payment in lieu of notice was made on 26 April 2019. The ET3 is silent as to whether any amount was paid in lieu of holiday pay on 26 April 2019 (or at all).

79. Therefore, I decline to make a finding of fact as to whether there was a complete non-payment in relation to alleged entitlement to payment in lieu of holiday pay, or whether something was paid. I therefore do not dismiss, at this preliminary hearing stage, the claim that the Claimant had a right to a payment in lieu of holiday pay which (as a result of Sections 13, 23 and 27 of the Employment Rights Act 1996) can be pursued as an unauthorised deduction from wages claim. I do not make a ruling that this claim is either in time or out of time, and both parties are free to argue that point at the Full Merits Hearing.

Redundancy Pay

80. Based on my findings of fact, and the analysis above, the relevant date in this case is 15 March 2019, being the date when the Claimant's dismissal without notice took effect. By virtue of section 164(1) of the Employment Rights Act 1996, a Claimant is only deprived of the right to a redundancy payment if he fails to take any of the steps listed therein within 6 months of the relevant date. In this instance, the Claimant has referred the matter to an employment tribunal (and also brought a claim for unfair dismissal) within 6 months of the relevant date. The tribunal therefore has jurisdiction to determine whether or not the Claimant is entitled to a redundancy payment.

Conclusion

81. The claims which continue to a full hearing are:
    81.1. Unauthorised deduction from wages in relation to payment in lieu of holiday entitlement on termination of employment.
    81.2. Redundancy payment.
82. All other complaints are dismissed.

Employment Judge **Quill**

28 Jan 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

29/1/2020

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FOR EMPLOYMENT TRIBUNALS