EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Disney**

Respondent: **Personal Security Service Limited**
T/a Personal Security Service Secure Transport

Heard at: **East London Hearing Centre**

On: **31 July 2020**

Before: **Employment Judge Jones**

Representation

Claimant: In person

Respondent: Ms J Wyper (RBS Mentor Services) with Mr Bansal, Ms Reynolds and Mr Booysen in attendance

JUDGMENT ON OPEN PRELIMINARY HEARING

The judgment of the Tribunal is that: -

1) **The Respondent's application to strike the claim out under Rule 37(1)(b) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is refused.**

2) **The Tribunal has no jurisdiction to hear the Claimant's complaint of unfair dismissal as the Claimant had not been employed for a period of not less than two years ending with the effective date of termination; as required by section 108 of the Employment Rights Act 1996.**

3) **The Tribunal has no jurisdiction to hear the Claimant's complaint of breach of the Regulation 30 of the Working Time Regulations 1998 and breach of section 23 of the Employment Rights Act 1996 because the complaints of failure to pay holiday pay, pension pay and unlawful deduction of wages were all brought outside of the statutory time limits.**

4) **The Claimant's claims are dismissed.**

REASONS

1. The Claimant issued her ET1 claim on 14 February 2020. Her complaints were of unfair dismissal, unlawful deduction of wages and failure to pay holiday pay.

2. The Claimant worked for the Respondent as a business support manager. It is agreed that she started working for the Respondent on 18 July 2016. She resigned on 11 July 2017 with her last working day being 4 August. There was a dispute between the parties on the date that she resumed employment with the Respondent and the date it ended.

3. During this hearing the Tribunal heard from live evidence from the Claimant and from Mr Frederik Booysen, one of the Respondent's Directors. Due to the current social distancing rules implemented by central government as a response to the current Covid-19 pandemic, this hearing was conducted by CVP (Cloud Video Platform), which both parties agreed to.

The Respondent's application for strike out

4. The first part of the Respondent's application was that the claim should be struck out because it considered that the manner in which the proceedings have been conducted by the Claimant had been scandalous, unreasonable and vexatious.

5. The application was based on the Respondent's belief of following:

   a. that the Claimant has repeatedly made false allegations regarding the conduct of the Respondent's representative;

   b. that she had displayed obtrusive and dishonest behaviour and told a blatant lie;

   c. that she had submitted an altered ET1 Statement of Claim;

   d. that the Claimant and her adviser, Mr M Adamson deliberately lied in correspondence to the Tribunal and the Respondent's representatives. In an email to the Claimant attaching a draft document he had referred to having been "economical with the truth" in the draft document; and

   e. that Claimant has altered evidence to her advantage and to mislead the Tribunal and the Respondent's representative.

6. The Respondent also submitted that the Claimant had failed to comply with Case Management Orders for disclosure and failed to co-operate in assisting the Tribunal to deal with the case in accordance with the overriding objective, which had impacted upon the preparation of the case.

7. Prior to the hearing, the Tribunal had agreed with the Respondent that this application would be considered at the outset of today's hearing.

8. The Claimant resisted the application.

9. The Tribunal heard submissions from both parties on the application.

Law

10. Rule 37 of the Employment Tribunals Rules of Procedure 2013 states that at any stage of the proceedings, either or its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the ground that it is scandalous, vexatious or has no reasonable prospect of success or that the manner in which the proceedings have been conducted by or on the claimant's behalf (or the respondent) has been scandalous, unreasonable or vexatious; or for non-compliance with any of the tribunal rules.

11. In the case of *Blockbuster Entertainment Ltd v James* 2006 IRLR 630 the Court of Appeal held that the power of an employment tribunal under what was then rule 18(7) to strike out a claim on the grounds that an applicant has conducted his side of the proceedings unreasonably, is a draconic power not to be too readily exercised. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. Even if these two conditions are fulfilled, it is necessary for the tribunal to consider whether striking out is a proportionate response. This requires a structured examination of the particular facts of the case. The question for the tribunal is whether there is a less drastic means to the end for which the strike-out power exists. The answer must take account of the fact, if it is a fact, that the tribunal is ready to try the claims, or that there is still time in which orderly preparation can be made.

Findings

12. The Claimant had some assistance with drafting her claim from a trade union advisor, Mike Adamson. Although, the Claimant has represented herself in these proceedings, Mr Adamson assisted her by drafting a document in which he suggested a form of words as responses to questions that Ms Wyper asked the Claimant on the Respondent's behalf. At the bottom of the page, in comments to the Claimant he told her that what he had drafted was '*suggested wording'* and that she should not hesitate to make changes/amendments as she needed to. He then referred to having been '*economical with some truths'* in the suggested answers *'to give us a little bit of additional time in regards to documentary evidence etc. I have kept the response very simple and in as few words possible'.*

13. The Claimant used the suggested answers and sent them to Ms Wyper. She changed one sentence which needed to be changed as it was grammatically incorrect. Mr Adamson's draft stated *"..and it did detail anywhere within the content of the said email did it detail lieu of notice".* She changed that statement to a more coherent one.

14. Mr Adamson's comment about being *'economical with the truth'* was accidentally revealed to the Respondent on a later occasion. The Claimant explained that in the original email advice from Mr Adamson, he had referred to her having technical difficulties/issues with her laptop and that was the bit that was untrue but she removed it before sending it to the Respondent. In another email to the Tribunal she stated that Mr Adamson had created the draft answers by cutting and pasting a document created for another client/union member and the statement was not a reference to anything in her email being untrue/economical with the truth.

15. It was not clear to the Tribunal what, in the contents of the email was an untruth or in which part of the email the Claimant had been '*economical with the truth'*. The Respondent objected to Mr Adamson's comment but did not identify whether there were in fact untruths in the email which attempted to mislead the Respondent and/or the Tribunal.

16. I find it likely that there has been some alteration of the Claimant's documents. It is unlikely that these were deliberate alterations to mislead the Respondent and the Tribunal and more likely that different versions of the documents were submitted or disclosed at different times and the Claimant, as a lay person had not appreciated the implications of doing so. The Grounds of Complaint on the Tribunal file is different to the version in the Claimant's bundle for today. The Respondent has highlighted those alterations in its application. The Claimant stated that in her haste to prepare for today's hearing she sent out the original draft rather than the version which was submitted to the Tribunal with the ET1 form. This Tribunal agrees that there are different versions of the document. It is unlikely and I had no evidence that the alterations were done to gain the Claimant an advantage in these proceedings. Looking at the alterations, it is evident that they do not advance the Claimant's case any further than the other version of the document. They are likely to have been alterations made between her and Mr Adamson at various stages of drafting the document before they arrived at a version that they were both happy with.

17. Different allegations are made against the Claimant in relation to the draft contract given to her by the Respondent for consideration, while she was still employed. The Claimant wrote on her copy of the contract but it is unlikely that she did so with intent to deceive as she wrote in her handwriting on the document rather than make any attempt to surreptitiously alter dates or clauses. She did not try to conceal her written comments. They were not comments that she tried to incorporate into the document. Instead, I find that they were queries and/or criticisms of the document. The Claimant's evidence today was that she made those annotations on or around 14 September because she was preparing for a discussing with Ms Reynolds about the contract.

18. The Respondent disputed that all those handwritten comments were made in September 2018. It submitted that the comments about continuous employment were made later and with the intention of assisting the Claimant's case. The Claimant sent an email to Ms Reynolds on 12 March 2019 in which she raised a number of issues that she had with the contract. The issue of continuous employment was not referred to in the email but it is clear that the Claimant was in dialogue with the Respondent over the clauses of this contract. The handwritten comment the Claimant made near to the continuous employment clause was not an attempt to alter it or to mislead the Tribunal. Instead the Claimant wrote *"queried as no break in service + employer the same"* in handwriting over the top of the clause. The clause is a typed part of the original document and stated: *"No previous employment counts towards you period of continuous employment with the Company".* The handwritten comment would not have any effect on the interpretation of the contract because it is clearly not part of the contract. One can see that it is obviously the Claimant's comment on the contract and there was no attempt to conceal it or pretend that it was anything other than that.

19. Those were the Respondent's main points supporting their application that the Claimant had been dishonest, lied to advance her case and had conducted this litigation in a vexatious and unreasonable manner.

20. In terms of the second of the Respondent's applications, the Tribunal finds that the Claimant prepared a list of documents as she had been ordered to and sent it to the Respondent on 6 April, in accordance with the case management orders. She sent her

remedy statement to the Respondent on 22 March and a copy to its representative at a later date. She was late with the disclosure of her documents but she wrote to the Respondent and copied the Tribunal on 16 April to notify the Respondent that she had a serious health scare which required surgery, which had delayed her. She prepared a bundle of documents for the hearing and both that and the Respondent's bundle was used today at this hearing. in its application to strike out the claim the Respondent has only referred to the Claimant's failure to comply with the case management orders for disclosure as grounds for strike out.

Decision on the Respondent's application

21. Taking into account all the above, it is this Tribunal's judgment that the Claimant's conduct of the case to date has not been dishonest, vexatious or unreasonable and not to the extent that it would make it impossible to conduct a fair hearing. The parties were able to prepare for today's hearing and there was no late disclosure that prejudiced or could have prejudiced either party.

22. It is my judgment that the Claimant has not shown deliberate and persistent disregard of required procedural steps or for Tribunal orders. Also, it is this Tribunal's judgment that there has not been scandalous, unreasonable or vexatious conduct here. The Claimant is a litigant in person who has had some sporadic union assistance with her case. She has done her best to answer the questions posed to her while putting her case forward.

23. In this Tribunal's judgment there are no grounds for taking the drastic and draconian step of striking out the claim. It is this Tribunal's judgment that it is still possible to conduct a fair hearing in this matter. The Respondent's application to strike out on the above bases was refused.

24. The Tribunal then proceeded to hear the Respondent's substantive application. in dealing with that application, the Tribunal applied the following law.

Law

Effective Date of Termination

25. Section 97(b) Employment Rights Act 1996 states that the effective date of termination in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect.

26. The situation is clear when an employer sends an employee away. That would be the date of termination. What happens when the employer writes to the employee? Is the date of termination the date the letter is sent, received or actually read? in the case of *Brown v Southall & Knight* [1980] IRLR 130 the EAT stated "It seems to us that it is not enough to establish that the employer has decided to dismiss a man or, indeed, has posted a letter saying so. That does not itself, in our view, terminate the contract. Nor, in our view, is it right, in looking at the matters as the tribunal did in considering the reasonable steps taken by the employer, to look solely at what the employer does and to ask whether that constitutes the taking of reasonable steps. In our judgment, the employer who sends a letter terminating a man's employment summarily must show that the employee has actually read the letter or, at any rate, had a reasonable opportunity of

reading it. If the addressee of the letter, the employee, deliberately does not open it or goes away to avoid reading it he might well be debarred from saying that notice of his dismissal had not been given to him'.'

27. This approach was confirmed in the case of *Gisda CYF v Barratt* [2010] IRLR 1073 *SC,* the court held that the effective date of termination is when the claimant actually received and read the letter, or at least had a reasonable opportunity of doing so. Moreover, in relation to this rider ('or had reasonable opportunity') they further held that it is to be construed subjectively to the individual claimant in his or her personal circumstances.

28. *Harvey* states that 'In the most recent case on this issue, *Newcastle-upon-Tyne Hospitals NHS Foundation Trust v Haywood* [2018] UKSC 22, the Supreme Court adopted the same answer to that in *Gysda CYF*, namely that the relevant date is when the employee reads the letter, or at least had a reasonable opportunity to read it.'

The Law on Time limits in relation to each aspect of the Claimant's case:

Unfair Dismissal

29. Section 108 of the Employment Rights Act 1996 states that an employee does not have the right to complain of unfair dismissal unless he has been continuously employed for a period of not less than 2 years ending with the effective date of termination. Section 155 of the same Act states that an employee does not have any rights to a redundancy payment unless he has been continuously employed for a period of not less than 2 years ending with the relevant date.

30. Sections 210 – 213 of the Employment Rights Act 1996 (ERA) address the issue of continuous employment. Section 212 states that any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment. Any weeks when the employee was incapable of work due to sickness, injury, or was absent due to some arrangement with the employer – counts in computing the employee's period of employment.

31. *Harvey* confirms that contractual provisions can confer continuity not given by the statutory scheme but statutory rights (such as the right not to be unfairly dismissed), depend on statutory continuity alone. Continuity of employment is a statutory concept. You either have it by reference to the provisions of the Employment Rights Act 1996 (ERA), or not. The parties cannot agree or act to give or take it away.

Unpaid wages

32. Section 23 of the ERA gives the claimant the right to complain that the respondent has failed to pay her wages properly or at all under section 13 of the same Act. Section 23 states that the Tribunal shall not consider such a complaint unless it is brought to the Tribunal before the end of three months after the date by which the payment of wages should have been made or when the deduction was made.

Holiday pay

33. Regulation 13 of the Working Time Regulations 1998 states that a worker is entitled to 4 weeks annual leave in each leave year. Regulation 16(1) refers to a worker's right to be paid in respect of any period of annual leave to which he is entitled, at the rate of a week's pay in respect of each week of leave.

34. Regulation 30 states that a worker may present a complaint to an employment tribunal that his employer has refused to permit him to take leave or has refused to pay him the whole or any part of any amount due to him under Regulation 16(1) but that the tribunal would not consider a complaint under this regulation unless it was presented to the tribunal before the end of the period of three months beginning with the date on which it is alleged that the payment should have been made or the leave should have begun. If it was not brought within that time period, the tribunal will be able to consider the complaint if it was presented within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Findings of Fact on the substantive issue of the Tribunal's jurisdiction to hear the Claimant's complaints

35. The Tribunal had sworn evidence from Mr Booysen and from the Claimant. The Tribunal also had bundles of documents from both parties. The Tribunal has only made findings of fact here as it needs to in order to decide on the issue of whether it has jurisdiction to hear the Claimant's complaints.

36. The Claimant was employed by the Respondent from 18 July 2016 to 4 August 2017. She submitted her resignation on 11 July 2017. In her letter of resignation, she stated that she was leaving because of a military move and that her last day of employment would be 4 August. The Claimant confirmed that she received a letter confirming receipt of the resignation from Jolene Roberts but she did not agree that it came from the correct person as it was not from her manager, Nicola Brown. The Claimant had sent her resignation letter to Ms Brown but had forwarded copies to Ms Roberts and Mr Booysen. I find that the Respondent acknowledged her resignation on 11 July and her last day of work was 4 August 2017.

37. The Claimant's case was that Mr Booysen approached her on her last day of work and discussed with her the possibility of her continuing to work for the Respondent. I find it unlikely that this happened but that even if there was a discussion, nothing was agreed and no arrangements were made for her to be re-employed by the Respondent. There were two farewell parties organised for the Claimant. She was moving home and as far as the Respondent was concerned, she was going to pursue a beauty course. She confirmed in the hearing that she had enrolled on a beauty course in Hampshire. There were Facebook posts in which she confirmed the end of her employment.

38. There was a party at a restaurant in Chelmsford with her colleagues from the Home and there were photos on her Facebook page recording that event and another farewell party for her on 4 August from which she also posted photos on her Facebook page. In the hearing the Claimant's case was that in the Facebook posts she was only saying goodbye to the Children's Home but intended to continue working at Head Office; I

did not accept that evidence as the posts and photos record two separate farewells. There were no comments on Facebook by the Claimant or her friends that the Tribunal was shown that could be said to confirm an intention/arrangement for her to continue to work for the Respondent at head office or anywhere else. I find it likely that everyone considered that that was the end of her employment and association with the Respondent. The Claimant's live evidence was that when she left in August 2017, she did not imagine being able to continue with the company as her home, being either in Aldershot or Hampshire would have made it too far for her to travel to work.

39. There was no record of any conversation that occurred in or around August in which the Respondent offered the Claimant the opportunity to continue to work for it in any capacity. As the Respondent had accepted her letter of resignation, it is highly likely that it would have put any new arrangement with her in writing but the Tribunal was not shown anything.

40. The Claimant had some emails in her possession regarding renewal of the Respondent's TV licence which were sent to her in October 2017. It is likely that she registered the Respondent's TV licence using her personal email address and that is why the renewal notification was sent to that email address on 17 October 2017. This on its own it does not prove the start of or continuation of an employment relationship. When she received the email from the TV Licensing, she forwarded it to Mr Booysen on 20 October 2017, with the comment that it was due for renewal. She forwarded it from her personal email address.

41. It is likely that about two months after the Claimant left the Respondent, a position as Administrator in Human Resources became available at Head Office and Mr Booysen contacted her to see if she would be interested. Towards the end of October 2017, the Respondent offered the Claimant the job of administrator. The arrangement was that she would work from home. I find it likely that the parties made an agreement that the Claimant would start work on 1 November 2017. She would work 30 hours per week from home. The arrangement was that she would work 1 day a week at the office in North London in every 2-week period.

42. I find it highly unlikely that there was any discussion between the Claimant and the Respondent about continuous employment before she accepted their offer of the new contract. There was no evidence of it. Sometime after she started in November 2017, she was given a new contract to consider. There is no evidence that the Respondent ever agreed to continuous employment. It was one of the matters she wrote on the draft contract but it is likely that this was done around or after termination as the copy she sent to Mrs Roberts did not have that handwritten note on it.

43. There are copy emails from the Claimant dated 11 May 2018 to payroll querying the issue of continuous employment, which she copied to Ms Roberts. In a reply email, Nicola Sorrell of Payroll confirmed that the Claimant's start date with the Respondent was actually 16 November 2017.

44. The email dated 12 March 2019, which the Claimant sent to Ms Roberts about the draft contract covered a lot of points but did not refer to continuous employment. Mr Booysen's evidence was that he had no recollection of a discussion on that issue with the Claimant.

45. On 7 October 2019, Mr Booysen wrote to the Claimant at her work email to inform her that the Respondent considered that it would be more beneficial for the business for the role of HR Administrator to be carried out from the office rather than remotely. The Respondent was not happy with the way in which the reporting lines had been working or the quality of the work that had so far been done. They offered her an opportunity to discuss relocating to the office, 5 days a week. There were two positions on offer. They were either a full-time or part-time position, both based at Head Office. They were willing to discuss these options with the Claimant either in the office, on the phone or by email as was convenient to her.

46. The Claimant replied on 8 October. She made it clear that she was not happy about the Respondent's proposals and did not view them positively. She asked whether there would be an enhanced salary package for more hours. That email exchange took place between the Claimant and Mr Booysen though her work email address of emma@psssecuretransport.co.uk.

47. On 18 October, Ms Roberts wrote to Brett, who is likely to be the Respondent's IT person, to tell him to cancel the Claimant's access to the Respondent's SharePoint immediately. All her emails were to be redirected to Ms Roberts.

48. On 20 October, Mr Booysen replied to the Claimant and informed her that the Respondent had made a decision based on what it believed was in its best interests. He stated that the Respondent considered that it was best for the business to have an HR department in the main office and that the 'home based' position had not been suitable for the business and had not worked for it. The Respondent informed the Claimant that it had decided to close the 'home-based' position, thereby terminating her employment with immediate effect. Mr Booysen told her that she had one week's notice but that she would not have to work that notice as it would be paid in lieu. She was also informed that a letter would be sent to her on the same day, to confirm the dismissal. A similarly worded email was sent to the Claimant again on 21 October to both her personal and work email addresses. The Respondent produced a 'screen grab' at the Hearing which showed that the 20 October email reached her personal account. The Claimant denied ever receiving it. She confirmed that she did receive the email dated 21 October.

49. Copies of text messages exchanged between the Claimant and Brett on 21 October were in her bundle of documents. The Claimant informed him that she could not access her emails and inbox. Her password would not work and she asked for assistance in accessing the Respondent's system. The Tribunal was not shown a full copy of his response. It is unlikely that she was able to get back into that account as her email to Mr Booysen on 23 October was sent from her personal email account.

50. The Respondent wrote to the Claimant by post on 21 October. The letter was headed 'Termination of Employment'. It confirmed that the Claimant's employment had been terminated on 21 October 2019. The Claimant was told that she would be paid a week's pay in lieu of notice and that any other outstanding payments due to her would be paid following her last day of employment. The Respondent had proof of posting to this letter to the 2 Olive Grove, Colchester, CO2 9NF. Although the Claimant stated in the hearing that it was an incorrect address/postcode, the Tribunal is aware that this is the same address that the Claimant entered in her ET1. In the hearing, the Claimant denied receiving this letter.

51. The Claimant responded to Mr Booysen by email on 23 October. It is clear from the contents of that email that she had received the email of 21 October. She expressed shock and upset at being dismissed. She queried whether she had been given the correct notice and whether she had been properly consulted about the proposed changes.

52. The Claimant wrote to the Respondent on 26 November 2019 to raise a grievance. She wrote a further email on 6 December 2019 to chase up her grievance. There are copy letters in the bundle on various dates in November and December where the Claimant queried her pay, denied that she had been dismissed on 21 October and raised queries on the Respondent's actions.

53. It is the Claimant's case that the first letter she received informing her that her employment contract had been terminated was on 7 January 2020.

54. The Claimant entered into conciliation through ACAS on 16 December 2019. The date of issue of the ACAS Certificate was 16 January 2020. The Claimant issued her ET1 on 15 February 2020.

55. In her claim form the Claimant states that she is claiming for redundancy pay, consultation and annual leave, in line with her contract. She did not set out how many days she alleged that she had accrued as annual leave that she had not been paid. Following receipt of her claim the Respondent wrote to the Claimant to get more details from how about her claims for holiday pay, redundancy pay and arrears of pay. In her remedy statement she claims 10.2 days annual leave outstanding. In her email dated 15 May to Ms Wyper, she confirmed that she had taken annual leave and that she had been paid for it. She also contended, in relation to the holiday year in 2019, that she did not take annual leave on the 10 days between 7-14 April 2019 as although they were booked, Mr Booysen did not allow her to take them. It was her case that she should be paid for those days. It is likely that those were the same 10 days referred to in her remedy statement.

56. The Claimant's claim for outstanding holiday pay assumed that she was still employed to 29 November 2019. She confirmed in her email of 15 May 2020 that she had taken 14 days to the 2 September 2019. It is unlikely that there is any annual leave outstanding.

57. It is also her case that she was underpaid for leave taken in 2019 as she alleged that the Respondent did not factor in her overtime in the calculation of the holiday pay. The Claimant claims a total of £174.00 as the shortfall owed to her as a result of this.

58. The arrears of pay claim related to an alleged deduction in November 2017 and alleged deductions in January, April, May, June, July, August, November and December 2018 and July 2019. The Claimant alleged that these are errors in wages logged with HMRC. Lastly, in the email dated 15 May 2020, she alleged that the Respondent failed to pay her pension contribution for the period between November 2017 and April 2018.

59. In her claim she referred to a payment for a 30-day consultation period for her claim that she should have been paid a redundancy payment.

Decision

60. The Claimant has two periods of employment with the Respondent. she was employed from 18 July 2016 to 4 August 2017. There was a clear end to her employment on 4 August. There was no evidence of any continuation of her contract beyond that date.

61. The Claimant's second period of employment with the Respondent began on 1 November 2017. It is likely that she actually started work on 16 November. However, the Respondent treated her start date at 1 November and the Tribunal confirms that this was the start date of her second period of employment.

62. There was no agreement for continuous employment between the two periods. The Claimant did not work for the Respondent between 4 August and 1 November. The correspondence about the TV licence does not show that she was working for the Respondent and it is not evidence of the existence of a continuing employment relationship.

63. The Respondent wrote to the Claimant on 20 October to terminate her contract of employment. The Claimant was also unable to access her work emails and her work account. She did not have access to the Respondent's database. That would have indicated to her that there was an issue with her employment. It is also highly likely, given that it was sent to her work and home email address, that she received the email dated 20 October which indicated that her employment contract was terminated.

64. The Claimant confirmed in the hearing that she received the email dated 21 October. She read and understood that email. She knew that the Respondent had terminated her contract. She was unhappy about that and entered into correspondence with the Respondent about what was the correct period of notice that she believed that she was entitled to and the manner in which her contract was terminated. This shows that as of the 21 October at the latest, the Claimant understood that the Respondent had terminated her contract and that she had been dismissed.

65. In addition, the Respondent wrote to the Claimant on 21 October informing her that her contract had been terminated. Although the Claimant denies receiving that letter, it is evident that it was sent by recorded delivery to the same address, 2 Olive Grove, Colchester, CO2 9NF as the Claimant has put as her home address on her ET1 claim form.

66. It is this Tribunal's judgment that the Claimant received and had a reasonable opportunity to read the email sent to her personal email account on 21 October terminating her contract of employment on that day. She understood that this was an email terminating her contract of employment.

67. It is also this Tribunal's judgment that the Claimant received and had a reasonable opportunity to read the letter sent to her in the post on 21 October terminating her contract of employment on that day. On balance, it is this Tribunal's judgment that she had understood that it was terminating her employment.

68. The Claimant's second period of employment with the Respondent ended on 21 October 2019.

69. The Claimant did not have two years continuous service with the Respondent. The two periods of employment are not joined together. Her most recent employment with the Respondent was from 1 November 2017 – 21 October 2019.

Judgment

Unfair Dismissal:

70. The Claimant had not been continuously employed for a period of not less than 2 years ending with the effective date of termination. The Tribunal does not have jurisdiction to hear her complaint of unfair dismissal. The complaint is dismissed.

71. The Claimant does not have a right to a redundancy payment because she was not continuously employed for a period of not less than two years at the date of the termination of her employment. The claim for a redundancy payment is dismissed.

Arrears of pay and holiday pay claims

72. The Claimant complains of a shortfall in her pay in November 2017 and errors in her wages in 2018 and July 2019 which resulted in a shortfall. Similarly, the claim for outstanding holiday pay related to a period in April 2019 which the Claimant alleged had been booked as leave but she had not been allowed to take it. She alleges that there were incorrect calculations in her leave pay in 2019 and that the Respondent did not properly calculate her pension contributions in November 2017 and April 2018.

73. These claims were all brought on 15 February 2020, after ACAS conciliation between 16 December 2019 and 16 January 2020.

74. All of these claims should have been brought well before December 2019. The claim relating to pay in November 2017 and April 2018 were well out of time at the beginning of 2019. It is not clear how the Claimant arrived at the conclusion that she was underpaid as claimed. However, before the Tribunal can consider these complaints, it has to determine whether they were brought in time. if they are not brought in time then the Tribunal does not have jurisdiction to consider them.

75. The Tribunal referred to the law set out above which shows that complaints of a shortfall in pay or a failure to pay holiday accurately must be brought to the Tribunal within 3 months less one day of the date on which the money should have been paid. The ACAS conciliation process can result in an extension of the time within which the claims should be brought. That would only happen in the following particular circumstance.

76. Section 207B Employment Rights Act 1996 stipulates that Day A is the day on which the claimant contacts ACAS to start the conciliation process and Day B is the day on which the certificate is issued. In calculating 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. In effect, when counting the 3-month time limit set by the legislation during which complaints of a failure to pay holiday pay or an unlawful deduction of wages must be brought, the conciliation period is not counted. However, if the 3-month period expired before the conciliation period began then the claimant does not get the benefit of an extension as there is no provision for that.

77. It is therefore this Tribunal's judgment that the claims for outstanding holiday pay and for a shortfall in the payment of wages and pension payments, were all brought in February 2020 which is more than 3 months after April 2019 (in respect of the holiday that was booked but she was not allowed to take), more than 3 months after November 2017 and April 2018 (alleged miscalculations in pay) or various dates between January to December 2018 and July 2019, which is when she also claims that there were shortfall in her pay and pension.

78. There was no reason given to the Tribunal as to why these claims were not brought to the employment tribunal in the period since that date. The Tribunal's judgment is that it was reasonably practicable for the Claimant to have issued those claims in time. As the Claimant failed to do so, the Tribunal has no jurisdiction to consider her complaints of unlawful deduction of wages and a failure to pay holiday pay. Those claims are dismissed.

Employment Judge Jones
Date: 19 October 2020