Appeal No. UKEAT/0029/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 9 June 2014
Judgment handed down on 24 September 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR K RABESS APPELLANT

LONDON FIRE AND EMERGENCY PLANNING AUTHORITY RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EDMUND WILLIAMS (of Counsel) Instructed by: Anthony Gold Solicitors The Counting House 53 Tooley Street London SE1 2QN
For the Respondent	MISS NATASHA JOFFE (of Counsel) Instructed by: London Fire & Emergency Planning Authority Legal Services 169 Union Street London SE1 0LL

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

The Claimant was summarily dismissed for gross misconduct. His last day of service was 24 August. His internal appeal was heard on 9 January. The internal appeal reduced the finding from gross misconduct to misconduct. Since the Claimant was already subject to a final written warning he was still dismissed but he was told that he would receive – and did receive – pay in lieu of notice. It was argued that the decision on the internal appeal changed the effective date of termination for the purposes of calculating the time limit applicable to a claim of unfair dismissal. The Employment Judge found that it did not.

Held: appeal dismissed. The decision on internal appeal did nothing to alter the effective date of termination. **Gisda Cyf v Barratt** [2010] ICR 1475, **Robert Cort and Son Ltd v Charman** [1981] ICR 816 and **Fitzgerald v University of Kent at Canterbury** [2004] ICR 737 considered and applied. **Hawes & Curtis Ltd v Arfan** [2012] ICR 1244 distinguished: in that case the decision on appeal expressly altered the date at which dismissal took effect.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mr Kirk Rabess ("the Claimant") against a Judgment of Employment Judge Pearl sitting alone in the London (Central) Employment Tribunal dated 29 May 2013. The Claimant had presented a claim of unfair dismissal against the London Fire and Emergency Planning Authority ("the Respondent"). By his Judgment the Employment Judge held that the claim of unfair dismissal had been presented out of time so that there was no jurisdiction to hear it.

2. The key question relates to the effective date of termination of the Claimant's employment. If it is reasonably practicable to do so a claim of unfair dismissal must be presented "before the end of the period of three months beginning with the effective date of termination": section 111(2) of the **Employment Rights Act 1996**.

3. The concept of effective date of termination derives from section 97(1) of the **Employment Rights Act 1996**. Section 97(1) provides as follows:

> **"Effective date of termination**
>
> **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 contract for a fixed term which expires without being renewed under the same contract, means the date on which the term expires."**

The Background Facts

4. The Claimant was employed by the Respondent as a firefighter with effect from 24 January 2006. His contract of employment set out his notice entitlement. By 2012 he was

entitled to one week's notice for each year of continuous employment. No provision was made for payment in lieu of notice ("PILON").

5. In July and August 2012 the Claimant was subject to disciplinary proceedings. On 24 August 2012 he was summarily dismissed. By letter dated 28 August 2012 the Respondent expressly confirmed that his last day of service was 24 August 2012. That was in fact the last day he worked. By a further letter dated 5 September 2012 the Respondent set out the reason for the Claimant's dismissal and again confirmed that he was summarily dismissed, his last day of service being 24 August 2012.

6. The letter dated 5 September informed the Claimant that he had a right of appeal against the decision. This right of appeal was conferred by the Claimant's disciplinary procedure contained in a document entitled "Disciplinary procedure and guidance". The detailed guidance included the following paragraphs:

> **"62. The outcome of the appeal will be either:**
>
> **The case against the employee is upheld (in whole or in part); the sanction will then be the same or a lesser penalty.**
>
> **The case against the employee is not upheld.**
>
> **...**
>
> **64. In cases of gross misconduct dismissal will be summary following the hearing. If the employee is reinstated on appeal, pay will be reinstated and backdated.**
>
> **65. In other cases of dismissal, employees shall be given contractual notice of dismissal following the hearing. Every effort will be made to conclude any appeal process within the notice period. Where it has not been possible to conclude the appeal process within the notice period, notice may be extended for a reasonable period with a view to concluding the appeal process within the notice period. If the dismissal is not upheld on appeal, the employee will be reinstated."**

7. The Claimant exercised his right of appeal. At first, the appeal was scheduled for 23 November. The Claimant was unable to make this date. On 5 December the hearing was rescheduled to take place on 9 January 2013. Assistant Commissioner Knighton was the

decision maker. At the conclusion of the hearing he told the Claimant the outcome. He was satisfied that the charges were proved, but regarded them as misconduct rather than gross misconduct. The Claimant, however, was already on a final written warning. The penalty remained dismissal.

8. The minutes of the hearing contain the following passage:

> **"As you were already on a Final Written Warning, this does not alter the fact that the penalty is dismissal, and therefore I do not uphold your appeal. However it does mean that you will be entitled to notice pay, and arrangements will be made for this to be paid to you.**
>
> **I will confirm my decision in writing, and aim to do this within seven days. This decision is final, there are no further internal avenues for appeal."**

9. Assistant Commissioner Knighton wrote to the Claimant on 18 January 2013 confirming the result. He said:

> **"I upheld the decision of DAC Orbell to find the charges proven, however my finding is that the charges amounted to 'Misconduct' and not 'Gross Misconduct'. Nevertheless, as you had a live Final Written Warning on your file at the time of the original hearing, in finding the charges proven as 'Misconduct', I confirmed the decision of dismissal.**
>
> **Whilst your last day of service remains as 24 August 2012, you are now entitled to six weeks pay in lieu of notice. Payroll have advised that the gross payment amounts to £3,871.02."**

10. Although the Claimant's last day of service was 24 August, he did not commence proceedings against the Respondent until 3 January 2013. His evidence was that his union twice told him he could not start proceedings until the appeal was dealt with; and that as soon as he was told to bring his claim straightaway he did so. The Employment Judge found that it would have been practicable for him to have commenced proceedings within three months of 24 August 2012. This conclusion, which was to my mind plainly correct, is not challenged on appeal. The key question therefore is: was the effective date of termination 24 August, or did it change as a result of the appeal?

The Employment Judge's Reasons

11. The issue of time limits came on for hearing before the Employment Judge on 22 May 2013. He heard submissions from Mr Tibber, a solicitor, for the Claimant and Mr Hill, Counsel, for the Respondent.

12. Mr Tibber submitted that the Claimant was entitled to rely on the appeal decision, which replaced the dismissal for gross misconduct with a dismissal on notice. Particular reliance was placed by Mr Tibber on **Roberts v West Coast Trains** [2004] IRLR 788. This was not a case about the effective date of termination of employment; it was a case concerning the effect of allowing an internal appeal and reinstating an employee.

13. The Employment Judge distinguished **Roberts** and continued as follows:

> **"The ancillary point I take from *Roberts* comes from the citation of the 1996 House of Lords decision in *West Midlands Co-operative Society Ltd v Tipton*. Mummery LJ cites Lord Bridge: 'If the appeal is not successful and it is decided that the original decision of instant dismissal was right and is affirmed, then the dismissal takes effect on the original date.' As I have set out above, the employer deciding the appeal determined that the decision of dismissal was 'confirmed'; and the last day of service was explicitly reconfirmed as 24 August. It seems to me to be clear beyond and real doubt that the outcome of the appeal can have no effect upon the effective date of termination. In accordance with section 97(1)(b) the date in relation to this employee, whose contract of employment had been terminated without notice, is the date on which the termination takes effect. All that the employer was doing in this case was to recognise that at common law the Claimant had not repudiated his contract. It follows that he was entitled to pay in lieu of notice, being the liquidated damages to compensate for the employer's breach."**

14. The Employment Judge was not referred to a recent decision of the Employment Appeal Tribunal in **Hawes & Curtis Ltd v Arfan** [2012] ICR 1244. This dealt specifically with the possibility that an altered decision on appeal might change the effective date of termination; and it decided that if an appeal expressly varied the date on which termination took effect it would alter the effective date of termination.

Submissions

15. In their excellent submissions to me both Mr Edmund Williams, on behalf of the Claimant, and Miss Natasha Joffe, on behalf of the Respondent, took as their starting point the decision of the Supreme Court in **Gisda Cyf v Barratt** [2010] ICR 1475, which is the leading modern authority on the concept of the effective date of termination in the **Employment Rights Act 1996**. Both also sought to rely on **Hawes & Curtis** in support of their submissions. They accepted that the outcome of an internal appeal could alter the effective date of termination. The question was whether the outcome of the appeal did so in this case.

16. Mr Edmund Williams emphasised the general approach to effective date of dismissal laid down in **Gisda Cyf**. The effective date of termination is a statutory construct which should be interpreted in its setting as part of a charter protecting employees' rights. An interpretation that promotes those rights, as opposed to one consonant with traditional contract law, was to be preferred. It was only fair that the decision to treat the Claimant as guilty of misconduct, and entitled to a period of notice, should be reflected in a different effective date of termination. He submitted that what occurred at the appeal hearing was ambiguous and any ambiguity should be resolved in favour of the Claimant employee.

17. Further, Mr Williams placed reliance on the absence of any PILON provision in the Claimant's contract of employment. Once granted that the Claimant was not guilty of gross misconduct, it would be a breach of contract for the Respondent to dismiss the Claimant without notice.

18. Moreover Mr Williams relied on **Roberts v West Coast Trains** by analogy. In both cases there was a disciplinary procedure which allowed for a substituted sanction. Just as the

contract revived for all purposes in **Roberts**, so it revived for the purpose of giving notice in this case.

19. Miss Joffe on behalf of the Respondent, while accepting in principle that an internal appeal could alter an effective date of termination, submitted that whether it did so in a particular case was a question of fact. Here the Employment Judge held that the decision of dismissal was "confirmed" and the last day of service was explicitly reconfirmed as 24 August. Not only was this finding open to the Employment Judge, it was fully supported by the evidence.

20. Miss Joffe pointed out that it had long been established that even where a dismissal is in breach of contract the effective date of termination for the purposes of section 111 is the date notified by the employer: **Robert Cort and Son Ltd v Charman** [1981] ICR 816, approved by the Court of Appeal in **Radecki v Kirklees MBC** [2009] ICR 1244. Indeed the **Employment Rights Act 1996** itself provided for the effective date of termination to be extended by the statutory period of notice for certain purposes only, not including the time limit in section 111.

21. Miss Joffe submitted that there was no true parallel with **Roberts v West Coast Trains**. In that case dismissal had been revoked, and the contract revived. In this case dismissal had been confirmed and a payment made in lieu of notice.

Discussion and Conclusions

22. Section 97 distinguishes between contracts which are terminated by notice, and those which are terminated without notice. In the case of a dismissal with notice, the search is for the

date when the notice expired. In the case of a dismissal without notice, the search is for "the date on which the termination took effect".

23. It is now well established that the effective date of termination is not to be ascertained by starting from an analysis on conventional contractual principles. Lord Kerr of Tonaghmore in **Gisda Cyf** said the following:

> **"37 We do not consider, therefore, that what has been described as the 'general law of contract' should provide a preliminary guide to the proper interpretation of section 97 of the 1996 Act, much less that it should be determinative of that issue. With the proposition that one should be aware of what conventional contractual principles would dictate we have no quarrel but we tend to doubt that the 'contractual analysis' should be regarded as a starting point in the debate, certainly if by that it is meant that this analysis should hold sway unless displaced by other factors. Section 97 should be interpreted in its setting. It is part of a charter protecting employees' rights. An interpretation that promotes those rights, as opposed to one which is consonant with traditional contract law principles, is to be preferred.**
>
> **...**
>
> **41 The essential underpinning of the appellant's case, that conventional principles of contract law should come into play in the interpretation of section 97, must therefore be rejected. The construction and application of that provision must be guided principally by the underlying purpose of the statute *viz* the protection of the employee's rights. Viewed through that particular prism, it is not difficult to conclude that the well established rule that an employee is entitled either to be informed or at least to have the reasonable chance of finding out that he has been dismissed before time begins to run against him is firmly anchored to the overall objective of the legislation."**

24. In **Gisda Cyf** Lord Kerr adopted a description of section 97 as a "statutory construct": see paragraph 35. This expression is also found in **Fitzgerald v University of Kent at Canterbury** [2004] ICR 737. In that case the parties agreed that a contract of employment should be treated as terminated with effect from a date two days earlier than their agreement. It was held that the effective date of termination was not the date they agreed, but the date when they made the agreement – since, until they made the agreement, the contract of employment remained live.

25. Sedley LJ said:

> **"7. The concept of the effective date of termination 'EDT' is a statutory one. It has been present in the employment legislation since its origin in 1971. Its purpose is to give a fixed point of time by which to calculate such things as eligibility for protection against unfair**

dismissal, continuity of employment, loss of rights on reaching retiring age, the amount of the basic award and (as in this case) the time for lodging an originating application.

20 ….. the effective date of termination is a statutory construct which depends on what has happened to the parties over time and not on what they may agree to treat as having happened."

26. In **Robert Cort and Son v Charman** the employee was summarily dismissed in breach of contract. It was argued that, since he did not accept the breach of contract, the contract remained in being and the effective date of termination was not the date of summary dismissal. This submission was rejected. Browne-Wilkinson J said:

"We will assume, without deciding, that the acceptance view is correct and that, where an employer dismisses an employee without giving the length of notice required by the contract, the contract itself is not thereby determined but will only be determined when the employee accepts the repudiation. Even on that assumption, we think that the effective date of termination for the purposes of section 55 (4) is the date of the dismissal and not a later date. We reach this conclusion for the following reasons:

(1) The decision of the Court of Appeal in the *Dedman* **case is the only decision concerned directly with section 55 (4) of the Act. In the other decisions, section 55 (4) is not, so far as we can see, referred to.**

(2) The Act seems to have been drafted on the footing that the unilateral view is correct, i.e. a dismissal even without the contractually required notice terminates the contract. Thus, in section 55 (4) (a) (dealing with the case of termination by notice) it is the date of the expiry of the notice served which is the effective date of termination: nothing in the subsection suggests that this is so only where the length of notice served complies with the contractual obligation. Again, section 49 of the Act lays down certain minimum periods of notice which have to be given. Section 55 (5) provides that where either no notice or notice shorter than that required by section 49 is given, the effective date of termination is the date on which the notice required by section 49 would have expired. Such provision would have been unnecessary if the draftsman had considered that the contract, would not otherwise have been terminated by an unlawful notice.

(3) Section 55 (4) (b) defines the effective date of termination as being the date on which "the termination takes effect." The word "termination" plainly refers back to the termination of the contract. But the draftsman of the section does not refer simply to the date of the termination of the contract, but to the date on which the termination "takes effect." As we have pointed out, even on the acceptance view the status of employer and employee comes to an end at the moment of dismissal, even if the contract may for some purposes thereafter continue. When dismissed without the appropriate contractual notice, the employee cannot insist on being further employed: as from the moment of dismissal, his sole right is a right to damages and he is bound to mitigate his damages by looking for other employment. We therefore consider it to be a legitimate use of words to say, in the context of section 55, that the termination of the contract of employment "takes effect" at the date of dismissal, since on that date the employee's rights under the contract are transformed from the right to be employed into a right to damages. This view receives support from the remarks of Winn L.J. in *Marriott v. Oxford and District Co-operative Society Ltd. (No. 2)* **[1970] 1 Q.B. 186, 193. After pointing out that the statutory definition of "the relevant date" for redundancy payment purposes (now section 90 (1) (a) and (b) of the Act) is the date of the expiry of the notice or (if there is no notice) the date on which the termination takes effect, Winn L.J. said:**

> **"That is consistent with the whole concept that a contract of employment for the purposes of this statute is brought to an end, i.e., it is terminated, when it is so broken that no further *full* performance of its terms will occur." (our emphasis)**

> **This indicates that the date of the final termination of the contract is not necessarily "the effective date of termination" or "the relevant date": if, as in the case of repudiation, further *full* performance becomes impossible, that will be the relevant date.**
>
> **(4) We consider it a matter of the greatest importance that there should be no doubt or uncertainty as to the date which is the "effective date of termination." An employee's rights either to complain of unfair dismissal or to claim redundancy are dependent upon his taking proceedings within three months of the effective date of termination (or in the case of redundancy payments "the relevant date"). These time limits are rigorously enforced. If the identification of the effective date of termination depends upon the subtle legalities of the law of repudiation and acceptance of repudiation, the ordinary employee will be unable to understand the position. The *Dedman* rule fixed the effective date of termination at what most employees would understand to be the date of termination, i.e. the date on which he ceases to attend his place of employment."**

27. This important decision has stood for many years and was approved by the Court of Appeal in **Radecki v Kirklees MBC**: see paragraphs 36, 38 and 48.

28. These cases reinforce what Sedley LJ said in **Fitzgerald**. For the purposes of the effective date of termination it is what actually happens which is important, not what ought to have happened.

29. **Hawes & Curtis** was a case where something did happen to the date of dismissal as a result of an internal appeal. The employer expressly changed the date of dismissal to 4 November; kept the contracts of the employees open until that date and paid them amounts which were neither notice pay nor ex gratia, using the PAYE system. After reviewing the authorities the Employment Appeal Tribunal, of which I was a member, said:

> **"...in our judgment the decision reached at an internal appeal is part of what happened between the parties for the purposes of establishing the [effective date of termination]; and in the (no doubt rare) case where the decision at an internal appeal results in a change of the date on which the employment is terminated, that decision is to be taken into account in determining the [effective date of termination]."**

30. In my judgment, however, this case is different. Nothing happened to change the date of dismissal. The Employment Judge's finding to this effect in paragraph 7 of his Reasons was, in my view, plainly correct. The internal appeal was not allowed. The dismissal was expressly confirmed. The decision on appeal did nothing to alter the date of dismissal: Assistant

Commissioner Knighton said only that there would be an entitlement to notice pay. Contrary to Mr Williams' submission I would regard this as plain from the minutes of the appeal hearing themselves. In any event, the Claimant was told to expect a letter by way of confirmation and the letter is explicit. The last day of service was to remain at 24 August. The date of dismissal remained the same.

31. The fact that a payment was made in lieu of notice does not change the effective date of termination. The date remained the same, just as it did in **Robert Cort**. It is no more appropriate to find the effective date of termination by adding a notional notice period in this case than it was in **Robert Cort.**

32. In summary, therefore, in this case the dismissal was without notice. The decision on appeal to recognise that the Claimant would have been entitled to notice and to make a payment in lieu of notice was not sufficient to change what actually happened. The effective date of termination remained the same. The Employment Judge was correct. It follows that the appeal must be dismissed.