Case Number: 1600661/2016; 1600734/2016; 1600735/2016

EMPLOYMENT TRIBUNALS

Claimants: **Miss B Thomas (1)**
Mrs K Warder (2)
Mrs D Stanley (3)

Respondent: **Cyngor Sir Penfro**

Heard at **Haverfordwest** **On: 14 & 15 March 2017**

Before: **Employment Judge R McDonald**

Appearances

For the Claimants: Mr O James, Counsel (1) Mr O Lewis, Counsel (2)(3)
For the Respondent: Mr C Howells

JUDGMENT

The Judgment of the tribunal is as follows:

1. The First Claimant's claim of wrongful dismissal succeeds.

2. The Second Claimant's claim of wrongful dismissal succeeds.

3. The Third Claimant's claim of wrongful dismissal fails.

4. The Respondent shall pay each of the First and Second Claimant net pay from 1 May 2016 to 31 August 2016.

REASONS

1. The claimants claim wrongful dismissal. All three were Behavioural Support Teachers ("BSTs"). As such they were subject to the Conditions of Service for Schoolteachers in England and Wales ("the Burgundy Book") which is a collective agreement between local authorities and trade unions. Under the Burgundy Book the BSTs were entitled to at least two months' notice (at least three months' notice in Summer term) ending on the last day of a school term. The Burgundy Book specifies that Spring term ends on 30 April 2016 and Summer term on 31 August.

2. It was agreed that all three claimants were originally given written notice that their employment would end on 31 December 2015 ("the Original Notices"). However, it is also agreed that the claimants' employment in fact continued until the end of the Spring term and that letters confirming that end date were not sent out until March 2016 ("the March Letters"). This was less than two months before the 30 April 2016 termination date set out in those letters. The dispute is whether this means that the Respondent was in breach of the notice requirements in each claimant's contract of employment.

3. It was agreed that if I found the Respondent to be in breach of contract, the next date when it could have lawfully terminated the claimants' employment was 31 August 2016

4. The First Claimant was represented by Mr James of Counsel and the Second and Third Claimants by Mr Lewis of counsel. Mr Howells of counsel represented the Respondent.

5. At the hearing I heard evidence from the First Claimant and from the Second Claimant. For the Respondent I heard evidence from Mrs Cara Huggins, who was the claimants' line manager when they were dismissed, and from Ms Cathryn Davies, HR Safeguarding and Education Services Manager.

6. The First Claimant gave her evidence in Welsh. Mr Howells' cross examination questions were simultaneously translated from English into Welsh. Mr James's question in Chief and Re-examination, my questions and those of Mr Lewis were simultaneously translated from Welsh into English as were the First Claimant's responses. I record my gratitude to the interpreter in this case. Mr James confirmed that the First Claimant did not require my judgment to be provided in Welsh as well as English.

7. I did not hear evidence from the Third Claimant. Mr Lewis, representing her and the Second Claimant, explained that she had been working in Lesotho for some weeks and would not be attending the hearing. That obviously meant that Mr Howells would have no opportunity to cross examine her. More seriously, she had not signed a copy of her written statement. At the preliminary hearing on 12 December 2016 Employment Judge Lloyd ordered that witness statements be exchanged by the 10 February 2017. That should have given enough time for arrangements to be made for the statement to be signed by the Third Claimant, even allowing for the fact that she is apparently working in an isolated area with limited communications. It was clearly the responsibility of the Third Claimant and her representatives to ensure that there was a signed statement from her before the tribunal. Although Mr Lewis offered to telephone her in Lesotho so she could confirm that the contents of the statement were true it seemed to me that was not appropriate. Aside from the disruption to the hearing, I could have no way of ascertaining the identity of the person I would be speaking to. I therefore ruled that her statement should not be admitted as her evidence. I accepted it as a draft document but could give its contents very little weight.

8. The parties had prepared a joint bundle. References to page numbers in this judgment are to pages in that bundle.

9. The parties had not prepared draft skeleton arguments nor a concise agreed reading list as required by paragraphs 5.1 and 5.2 of Employment Judge Lloyd's case management order of 12 December 2016. Compliance would have assisted me in understanding some of the more complex submissions made by counsel and ignoring tribunal orders in this way is not acceptable.

10. I heard oral submissions on the afternoon of 14 March. On the morning of the second day of the hearing I asked for further oral submissions on specific issues. I've set the questions I asked in the "Issues" section. Also on the morning of second day the Respondent provided a full copy of the current version of the Burgundy Book. After the hearing I notified the parties that I intended to refer to ***Societe Generale, London Branch v Geys [2012] UKSC 63*** in my judgment. Since it had not been referred to at the hearing I gave them an opportunity to make submissions relating to it. As is usual practice I have considered all the parties' submissions but do not set them out in full in this judgment.

11. With the parties' agreement I reserved my decision.

Issues

12. There was no agreed list of issues and, as I have mentioned, the parties had failed to prepare skeleton arguments. Having heard oral submissions and through discussions with the parties' representatives the issues to be decided were:
    a. What did the each claimant's contract require in terms of notice?
        i. Expressly as a result of the Burgundy Book
        ii. By way of express supplementary terms in their individual conditions of service
        iii. By way of any terms to be implied, e.g. due to custom and practice
    b. In relation to each claimant, did the Respondent comply with the relevant contractual notice requirement?
    c. In deciding (b) does the evidence show that the Original Notices were varied by extending the end date of the claimants' contracts until the end of the Spring term or were the Original Notices "nullified" or withdrawn and replaced by the March Letters?
    d. As a sub-issue to (b) relating to the First Claimant only, did her March Letter terminating her employment dated 3 March 2016 change the basis of her dismissal so requiring fresh notice to be given.

13. To assist in determining those main issues I asked for further oral submission on the second morning on the following subsidiary issues:
    e. Whether the Burgundy Book provides a complete set of contractual terms and (a) if it does what it says about notice requirements or (b) if it does not what the parties' submit the claimants contract says about notice including any submissions about terms arising from custom and practice
    f. In light of the authorities, what the parties submit is required by way of agreement to vary the Original Notices given in writing.
    g. The legal position if there is no agreement, i.e. if the claimant genuinely thought the Original Notices had been nullified while the Respondent genuinely thought those notice had simply been extended.
    h. Any further submissions relating to the email at p.98 of the hearing bundle which Mrs Huggins claimed she had sent to the Second and Third Claimants on the 1 December 2015.

The Law

14. A wrongful dismissal claim is a claim that a dismissal by an employer has breached the employee's contract of employment. In this case, the claim is that the Respondent failed to give each claimant the notice required by their contract to terminate their employment.

15. At the start of the hearing Mr Lewis handed up a copy of the Employment Appeal Tribunal ("EAT") judgment in ***Mowlem Northern Ltd v Watson [1990] IRLR 500***. He also provided an extract from Harvey's Industrial Relations and Employment Law [Issue 220 paras [264]-[287]] relating to "Termination: supervening agreements or counter notice".

16. In ***Mowlem*** the EAT held that there is nothing in law to preclude a mutual agreement between an employer and an employee to postpone the date of expiry of a notice of dismissal for redundancy until the happening of particular event.

17. On the morning of the second day of the hearing I drew the parties' representatives' attention to and provided copies of the case of ***S Jones Industrial Holdings v Jarvis [1994] UKEAT 641/93***. In that case the employee had been given notice due to redundancy but then continued working for the employer. The employer argued that there had been mutual agreement to vary the date at which the notice took effect. The employees argued that their dismissals took effect when the original notice expired.

18. In upholding the finding in favour of the employees the EAT said that "Ordinary contractual principles must apply in a case such as this but in our judgment it is important that employers who have issued a redundancy notice giving date of termination and who later wish to extend the contract…should make it plain to the employees what is proposed."

19. Mr Howells for the Respondent submitted that the EAT in that case was particularly concerned that accepting the employer's argument would mean that the employees would lose their entitlement to a redundancy payment. There is no suggestion that that could happen in this case. I accept that. However, I do not accept that that undermines the relevance of the general principles stated in ***Jarvis***.

20. Baroness Hale summarised those principles when it comes to notice at para 57 of the judgment in ***Societe Generale, London Branch v Geys [2012] UKSC 63*:**

"it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and

employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee."

21. At para 60 of the judgment Baroness Hale goes on to say At para 60 in Geys, Baroness Hale states "Given that such a notice is a necessary incident of the relationship, a wise employer would take care to give it in writing. But if the contract does not require writing, it would be possible for an employer to hand over the correct money and clearly state at the same time that this brings the employment to an immediate end."

22. I was not directed to any specific authorities relating to the incorporation of terms through custom and practice but the principles don't seem to me to be contentious. The custom in question must be reasonable, notorious and certain (see e.g. ***Hagar v Ridehalgh and Son Ltd [1931] 1 Ch 310, Court of Appeal***). Almost by definition, a single incident will not be enough to establish an implied term on the basis of custom and practice.

Findings of Fact

23. The background to this case is a redundancy process involving the reduction in the BSTs employed by the Respondent from 6 to 3. By Autumn 2015 the First Claimant had decided to take voluntary redundancy and the Second and Third Claimants were selected for redundancy.

24. Dealing first with the terms of the claimants' contract of employment. As previously mentioned, the BSTs were subject to the Burgundy Book terms. It sets out minimum notice requirements but does not specify that notice must be in writing.

25. Paragraph 1.6 of the Burgundy Book says that it "is not an exhaustive list of provisions and it should read in conjunction with an authority's own conditions". It was agreed that each of the claimant's written conditions of employment with the Respondent incorporated the Burgundy Book notice requirements but were also silent as to whether notice had to be in writing.

26. Cathryn Davies, HR Safeguarding & Educations Services Manager, gave evidence that she had worked for the Respondent since 1989. She said the Respondent did not have a policy requiring written notice to terminate employment. However, in cross examination by Mr Lewis she confirmed that she was not aware of any one during her time with the Respondent being given oral notice to terminate their employment. She said, however, that her remit extended to 2000 or so of the Respondent 6000 or so staff and so she could only directly comment on practice in relation to a third or so of the workforce.

27. Turning to the narrative of events. It's not disputed that on the 24 September 2015 the Second and Third Claimants were each given notice by a letter from Cathryn Davies that their employment would end on 31 December 2015. It's also not disputed that that notice complied with the requirements of the Burgundy Book, being more than two months' notice ending at the date specified in the Burgundy Book as the end of a school term.

28. It's not disputed that the Second and Third Claimants appealed unsuccessfully against the decision to select them for redundancy. The appeal outcome letters were sent on 4 November 2015. The hearing bundle only included the letter sent to the Second Claimant but I was told that the one sent to the Third Claimant was identical in all relevant parts. After confirming the appeal is dismissed the letter states that "Consequently the details of your redundancy as set out in our letter of 24 September 2015 remain unchanged".

29. On 9 November 2015 Glinys Meredydd, the Second and Third Claimants' NASUWT rep, emailed Cathryn Davies saying that she assumed that the redundancy would not come into effect until the end of the Spring term. The reason for that was that the 4 November 2015 was less than two months from the end of the Autumn term. In other words, notice given on 4 November to terminate employment on 31 December did not comply with the Burgundy Book requirements.

30. Ms Davies took legal advice and on 30 November 2015 confirmed in an email to Mrs Huggins and Nichola Jones, Head of Inclusion, that "both [i.e. the Second and Third Claimants] will be with you until Easter. If you can confirm you agree, I will notify the union – if you can inform the teachers."

31. Nichola Jones replied by email to Cathryn Davies on 1 December 2015 saying "yes, we need to abide by the rules…Can you confirm the date of termination and can letters go out to that effect". Mrs Huggins was copied in to that email.

32. For whatever reason, no such letters were sent to any of the claimants until the March Letters. Mrs Huggins's evidence was that she expected her HR colleagues to send out the letters.

33. Mrs Huggins's unchallenged evidence was that since the Second and Third Claimants' employment was going to continue into the Spring term it

was decided that it was appropriate for the First Claimant's employment to also continue.

34. Mrs Huggins did give evidence about how she says she communicated the change of circumstances to each of the claimants. I have dealt with the evidence about this in relation to each claimant separately below.

35. On 3 March 2016 the March Letters were sent out. They said that each claimant's employment would end at the end of the Spring Term (30 April 2016). It was common ground that in practice that school term finished on the 23 March 2016.

36. The NASUWT contacted the Respondent by email on 11 March 2016 on behalf of the Second and Third Respondent to raise the point that the March Letters did not comply with Burgundy Book requirements. Notice should have been given by the 29 February 2016, i.e. at least 2 months before the 30 April 2016. The Respondent's stance was that claimants were well aware that their employment was coming to an end. The Respondent's view was that therefore no "further or fresh statutory notice" was required (Cathryn Davies's email to Geraint Davies of the NASUWT of 15 March 2016 (p.107)).

37. All three claimants returned to work on the first day after the Easter break but were then told by the Respondent that they should not have done so since they were no longer employed an no longer insured to be on school premises.

38. Turning now to the evidence about how Mrs Huggins says she communicated the change of circumstances to each of the claimants.

The First Claimant

39. In her statement, Mrs Huggins says [para 13] that she verbally agreed with the First Claimant on 1 December 2015 that the First Claimant would continue in employment until 30 April 2016 at which time her request for voluntary redundancy would take effect. The statement does not say whether that "verbal agreement" was reached by phone or at a face to face meeting. Paragraph 6 of the Defence (p.68) says that Ms Huggins "met" with the First Claimant on 1 December 2015. In answer to Mr James's cross examination question, however, Mrs Huggins said her recollection was that it was a phonecall rather than a meeting.

40. The First Claimant agrees that she and Mrs Huggins discussed her employment continuing into Spring Term on the phone in December

2015. Her evidence was that this was during the last week of term, i.e. 2-3 weeks later than suggested by Mrs Huggins, but nothing seems to me to turn on the date of the call. What matters is what was said during it.

41. The First Claimant's evidence was that she was told that she was "to remain in post and stay on in the New Year until further notice" [para 7 of her statement]. Under cross examination she said that she could not recall a specific employment termination date being discussed.

42. As to that, Mrs Huggins said in cross examination by Mr James that she couldn't remember every conversation or meeting with the First Claimant. When it came to what was said during the conversation in December 2015 she would have to rely on her handwritten note (p.97). She accepted that note was not a verbatim note of the conversation. That is a significant understatement. The note is one entry on what I understand to be a page from Mrs Huggins's work notebook. The page is undated. The parties helpfully produced an agreed transcript of the note because the photocopy in the bundle was not entirely clear.

43. The entry relating to the conversation with the First Claimant reads:

"Bethan [i.e. the First Claimant] concerns re terms of voluntary redundancy
Can stay till Easter Start Sep
*Personnel re; redundancy payment"

According to Mrs Huggins's evidence the reference to "Start Sep" was to the First Claimant being due to start a Criminology degree in September 2016. Mr Howells submitted that this supported the Respondent's case that the Claimant was well aware that her employment would terminate at the end of Easter 2016. The First Claimant's evidence was that she had not enrolled on any such course. She accepted in evidence that she had told Mrs Huggins that she would love to do such a degree but said that her financial situation meant she could not do so. I accept her evidence on that point. I also accept it was only natural for her to have considered what options were open to her on leaving the Respondent's employment given that, until being told otherwise in December 2015, she was expecting that employment to come to an end at the end of the Christmas term in line with the Original Notices.

44. The p.97 note does not specifically refer to the 30 April 2016 or any other end date of employment. Instead it simply records the First Claimant's availability and willingness to carry on working until Easter. On the balance of probability I find that the note supports the Claimant's version of that December conversation. However, I think it unlikely that Mrs Huggins would have said that employment would continue "until further

notice" as the First Claimant claims. That would be inconsistent with Mrs Huggins understanding, which was that the employment was only being continued until the end of the Easter Term. I find that during that conversation the Claimant was asked to work the Easter Term but that Mrs Huggins did not in terms explicitly state the date when her employment would end.

45. Mrs Huggins did not suggest that she had written to the First Claimant by email or by letter to confirm when her employment would end. She did suggest that the matter was discussed at supervision meetings and at BST team meetings. However, she only referred in detail to one particular supervision meeting with the First Claimant.

46. Mrs Huggins said this meeting took place on 1 February 2016 and referred to her handwritten notes of it at p.100 of the bundle. The notes are undated and are primarily about the First Claimant's cases as a BST. However, there are two references which the Respondent says are relevant. The first is a line which reads "HR redundancy April – 3 BST". Mrs Huggins's evidence was that this referred to her confirming to the First Claimant that the Respondent still intended to proceed with the proposed redundancy of the 3 BSTs (i.e. the three claimants) in April.

47. The First Claimant said she did not remember a discussion of dates at the supervision meeting. She did not deny that dates might have been discussed, just that she could not remember that being the case. On balance, I find that at that supervision meeting on 1 February 2016 Mrs Huggins did confirm that the Respondent was intending to proceed with making the 3 claimant BSTs redundant in April.

48. The second relevant reference in the p.100 note is "Uni/Crime". Mrs Huggins's evidence is that this referred again to the First Claimant's intention to begin a criminology degree course in September. I've already recorded my findings on this issue above at para 43 of this judgment.

49. The Respondent referred to one further document as supporting its submission that the First Claimant did know that her employment would come to an end on 30 April 2016. At p.99 of the bundle was an email exchange between Ms Davies and Mrs Huggins and another HR colleague, Helen Robinson, on 21 and 22 January 2016. This came about because the First Claimant had phoned the Respondent's payroll function about her redundancy payment.

50. The First Claimant explained in unchallenged evidence that she had contacted them in January because she had received her redundancy payment rather than her salary despite continuing to be employed by the Respondent. The email from Ms Davies to Mrs Huggins says that "[the

First Claimant] telephoned payroll to say that her redundancy has been deferred to Easter…". The Respondent submits that the reference to deferring redundancy is evidence that the First Claimant knew her employment was due to come to an end in April. The First Claimant said she could not remember saying that her redundancy had been "deferred" – she was just ringing up to ensure that her salary rather than redundancy pay was being paid. On balance I think it unlikely that the First Claimant would have used terminology such as "deferred" which Ms Davies uses in her email to Mrs Huggins. That email is reporting a conversation between two third parties and I do not attach the significance to it suggested by the Respondent.

51. Mr Howells for the Respondent suggested that the Claimants were fixed with knowledge of the 30 April 2016 termination date because their union reps were well aware that their employment would end on that date. I accept Mr James's submission for the First Claimant that even if that were correct for the Second and Third Claimants that would not apply to her. She was a member of a different union to the other claimants (UCAC rather than NASUWT). There was no evidence of email or other communications between UCAC and the Respondent about the date the First Claimant's employment would end.

52. The First Claimant in her evidence acknowledged that before they had received the March Letters she and the other claimants had discussed their situation and thought it likely that their employment would come to an end in April. She also acknowledged that she had been told verbally that the employment would be coming to an end due to redundancy. She accepted in cross examination that the only reason she had not been made redundant in December was because of the delay in sending out the appeal outcome letters to the Second and Third Claimants. Her position was that she had never been given notice in that she had not been specifically told that the employment was coming to an end on a particular date. She said that the redundancy process had been ongoing since 2012 and that while she accepted that the employment was likely to come to an end at the end of the Easter Term, she did not take that seriously in the absence of a specific notice of termination.

53. In summary, then, my findings of fact in relation to the giving of "notice" to the First Claimant are:
    a. her expectation from December 2015 was that her employment was likely to come to an end at the end of the Easter term
    b. at the supervision meeting on 1 February 2016 Mrs Huggins confirmed that the Respondent was proposing to make the 3 BSTs redundant in April
    c. prior to the March Letters the First Claimant was not given written notice that her employment would end on 30 April 2016

d. neither was she specifically told verbally in terms that her employment would end on 30 April 2016

54. There is one further issue relating to the First Claimant on which I must make a finding of fact. Mr James suggested that there was a significant difference between the wording of the Original Notices and the March Letters when it came to the First Claimant. Mr James argued that this difference reflected a change in the basis on which the First Claimant was being made redundant. The Original Notice confirmed the Respondent's agreement to terminate her employment "provided that there is still a need to reduce the staffing complement [at 31 December 2015]."

55. The March Notice confirms that "the Head of Inclusion has resolved that there remains a continuous need to reduce the staffing complement of [BSTs]...thus the decision to accept your request to take voluntary redundancy remains". In the subsequent paragraph it goes on to say that "in the event of there not being any alternative employment available for you before that date, your contract will terminate on this date".

56. Ms Davies evidence was that the inclusion of the "alternative employment" wording in the March notice was an oversight on her part. It should not have been included in the letter to the First Claimant given that she was taking voluntary redundancy. I accept that evidence. The issue of "alternative employment" is clearly not relevant when someone is taking voluntary redundancy rather than being made compulsorily redundant. I accept that wording was included in error in the First Claimant's case, the most likely explanation being that it had been copied over from the letters to the other claimants who were being made compulsorily redundant.

The Second Claimant

57. Mrs Huggins statement says that she "relayed the decision [that employment would continue until 30 April 2016] verbally to both the [Second and Third Claimants] by phone" [para 12 of her statement]. She stated that this was in early December 2015. She accepted in her statement and under cross examination that the line to the Second Claimant was very unclear. The entry relating to the conversation in the p.97 note says "bad reception – text to discuss". Under cross-examination by Mr Lewis, Mrs Huggins accepted that she could not say that she had been able to communicate the 30 April end date during that conversation. She also confirmed that there was no record that she subsequently spoke to the Second Claimant to confirm that end date.

58. The Second Claimant confirmed that she received a call from Mrs Huggins where she could not hear what she was saying because of the poor reception where the Second Claimant lived. She says she did not

receive any text message (and none was produced by the Respondent). Her unchallenged evidence is that she received a phone call from the Third Claimant the evening of that failed call from Mrs Huggins to say they would be in work after Xmas. Her evidence was that there was no mention of an end date during that conversation.

59. Mrs Huggins claimed that after calling them, she sent an email to the Second and Third Claimants to confirm the position. That email was at p.98 of the bundle. It is worth describing in detail because Mr Lewis for the Second and Third Claimants submitted that it was never sent.

60. The email is headed "Appeal Process". In the "To" line it has "Kath Warder; Stanley, Denise". The unchallenged evidence from Mrs Huggins was that this means it was addressed to the Second Claimant's home email address. Had it been to her work email address, her surname would have appeared first, i.e. it would have read "Warder, Kath". There is no "From" line nor is there "Sent" line giving the date and time of sending.

61. The text of the email reads "Hi both, I have tried to phone you all – apologies to Kathryn as the line was so crackly. Due to the appeals process taking longer than envisaged, your contract is now until the end of the Spring Term 2016. Please contact myself or Cathryn Davies with any queries. Cara"

62. The Second Claimant's evidence is that she never received this email. She says she has checked her personal inbox and cannot find it. Mr Lewis submits that, whenever it was drafted, the email was never sent. He points to the absence of a sent time and date on the email as evidence that that is the case.

63. Mrs Huggins's evidence is that the absence of a "From" and "Sent" line is a function of the way the email was printed out. She explains that in order to print out an email showing the full details the email has first to be "Forwarded" for printing. If that is not done then it comes out in the format of the email at p.98. In this case (unlike with all the other emails in the bundle) the email was not forwarded before printing. I gave the Respondent the opportunity to return on the second day of the hearing with a screenshot or other evidence to show that the email had indeed been sent. Mr Howells explained on the second morning that it had not been possible to do so because all emails are automatically deleted after 30 days and the Third Claimant's entire inbox had been deleted since she was no longer an employee of the Respodnet's.

64. The Second Claimant's evidence that she had not received the email was convincing. In contrast, I did not find Mrs Huggins's explanation for the absence of a "Sent" line credible. In my experience the format of the email at p.98, lacking both a "From" and "Sent" line is consistent with the format of a draft unsent email. Also, given the importance of the email, had Mrs Huggins's explanation been correct I would have expected her to have re-printed the email at the time to ensure there was a record of the date and time it was sent. Since the Respondent is seeking to rely on that email the onus was on them to show it had been sent. On balance, I find they have failed to do so and find that the email was not sent.

65. Mr Howells submitted that even if not told directly that their employment would end on 30 April 2016, the claimants were fixed with that knowledge because their union reps were aware that that was the case. However, there is no evidence about what the relevant union reps knew or what they told the claimants. In the case of the Second and Third Claimants the relevant union was the NASUWT. At p.95 of the bundle there was the email dated 9 November 2015 from Glynis Meredydd, NASUWT referred to at para 29 of this judgment. It sought confirmation that the redundancies would not take effect until the end of the Spring Term. However, there is no email in response and no evidence given about what the union was told. The Second Claimant's evidence was that she spoke to Ms Meredydd at some point in January to ask what the position would be if they were not given notice by the end of February and was told that in that case the employment would not be terminated. There was no evidence that the NASUWT passed on specific confirmation of an end date. In the absence of any such evidence I do not find that the Second and Third Claimants were somehow fixed with knowledge of their termination date via the NASUWT.

66. As I have noted above, the First Claimant's evidence was that all three claimants did discuss between themselves when their employment might end and that it was likely to be at the end of Easter. The Second Claimant also acknowledged under cross examination that she understood that the only reason her employment continued beyond December was the delay in sending out the appeal outcome letters to her and the Third Claimant. She agreed that logically in that situation the employer would terminate employment at the next available point, i.e. the end of next term.

67. In summary, then, my findings of fact in relation to the giving of "notice" to the Second Claimant are:
    a. her expectation from December 2015 was that her employment was likely to come to an end at the end of the Easter term
    b. her understanding from the NASUWT in January 2016 was that formal notice had not been given

c. prior to the March Letters the Second Claimant was not given written notice that her employment would end on 30 April 2016
d. neither was she specifically told verbally in terms that her employment would end on 30 April 2016

The Third Claimant

68. As with the Second Claimant, Mrs Huggins's evidence was that she phoned the Third Claimant to confirm her employment would be maintained until 30 April 2016 and then followed up with an email [para 12 of her statement].

69. Mrs Huggins evidence is that the Third Claimant's response was "OK". The entry relating to that conversation on the p.97 note reads "[Third Claimant] –OK". It gives no indication of what the Third Claimant was saying "ok" to. The Third Claimant's unsigned witness statement says that she did receive a call from Mrs Huggins to confirm that they would continue to be employed but that "there was no mention of dates at all". However, since that witness statement is unsigned and the Third Claimant and did not appear at the hearing I can give that very little weight. I therefore accept Mrs Huggins evidence about what she said during that conversation and that she did tell the Third Claimant that her employment would be maintained until the 30 April 2016.

70. In relation to the email, I have already found that that the email at p.98 was not sent to either the Second or Third Claimant.

71. In summary, then, my findings of fact in relation to the giving of "notice" to the Third Claimant are:
    a. her expectation from December 2015 was that her employment was likely to come to an end at the end of the Easter term
    b. prior to the March Letters the Third Claimant was not given written notice that her employment would end on 30 April 2016
    c. the Third Claimant was told in a phone conversation by Mrs Huggins in December 2015 that her employment was being extended until 30 April 2016
    d. Other than that conversation the Third Claimant was not specifically told in terms that her employment would end on 30 April 2016

Discussion and conclusions

72. It's convenient to deal first with issue (d). Mr James submitted that the difference in wording between the Original Notice and the March Letter sent to the First Claimant meant that the ultimate decision to dismiss was on a different basis to the decision to dismiss in December. I have found as a fact that the difference in wording was an error and did not reflect a change in circumstance. I reject Mr James's submission on this point.

73. Turning to issue (a), which is what notice was required in this case. I find that neither the Burgundy Book nor the local supplementary terms expressly required notice to be given in writing.

74. For the claimants it was argued that custom and practice meant that written notice was required. I do not accept Mr Howells' submission that custom and practice applies to benefits under contracts and is not appropriate to deal with procedural matters such as the giving of notice. I do accept that the majority of cases relate to benefits, such as bonuses. However, I can't see that there is any objection in principle to a procedural term such as the form in which notice should be given being incorporated by custom and practice.

75. In this case it is certainly true that the evidence from Ms Davies showed that in every case she was aware of, the Respondent gave written notice to terminate employment. The email from Nichola Jones to Cathryn Davies on 1 December 2015 (p.96) clearly envisaged that letters would be sent out setting out the new termination date. As Baroness Hale said in ***Geys***, that is what a wise employer would have done.

76. However, for a term to be incorporated by custom and practice it must be "reasonable, notorious and certain". The central point in this case is uncertainty as to what should happen where written notice was given but the date of termination of employment then needs to be postponed. For the claimants it was submitted that the Respondent had in some way "withdrawn" the notice of dismissal. I find that the reality was that the notice still stood-the fact that the employer intended to dismiss and reason for dismissal still stood. The missing piece of information was the exact date it would now take effect.

77. The question therefore is not whether custom and practice required written notice should be given to terminate employment, but whether custom and practice required a further written notice when a previous written notice had been given and the basis for that notice had not changed. There was no evidence of a similar situation having arisen before and therefore no basis for a "reasonable, notorious and certain" custom and practice. I reject the submission that custom and practice required a further written notice to be served in this case.

78. If no written notice was required, what did the Respondent need to do to terminate the claimants' employment on 30 April 2016? ***Geys*** makes it clear that the other party must be notified in "clear and unambiguous terms that the right to bring the contract to an end is being exercised, and

how and when it is intended to operate". Specifically, "they both need to know the exact date upon which the employee ceases to be an employee".

79. It seems to me that the requirement of clarity as to the exact date of termination must apply as much if not more to a situation where a notice has been given but its implementation postponed as it does when giving notice in the ordinary way.

80. I accept the submission made by Mr Lewis that in assessing whether "clear and unambiguous" notice was given, the context and history of the matter have to be taken into account. This was a case where the redundancy process had been going on since 2012. It was also a case where a particular onus of clarity lay on the employer given that the claimants had already been given notice once only to then be told that their employment would continue. I accept that the reason for that delay was known to the parties but that did not reduce the uncertainty caused for the claimants nor reduce in their minds the possibility of another contingency arising which might further delay the end of their employment.

81. In those circumstances it seems to me that what was required of the Respondent was a clear verbal or written statement expressly stating the exact date when their employment would end, i.e. 30 April 2016. That was particularly important given the previous events and given the difference between the actual end of Spring term date (23 March 2016) and the date on which the Spring term was deemed to end under the Burgundy Book terms (30 April 2016).

82. Applying that to each claimant in turn.

83. I found that the First Claimant was not told in terms that her employment would end on 30 April 2016. The closest Mrs Huggins came to doing so was confirming at the 1 February supervision that the Respondent was still intending to make 3 BSTs redundant in April. I find that was not sufficient to provide the "clear and unambiguous" notice with the "exact date" required by ***Geys***. To my mind it was confirmation of the sentence but not of the date of execution. The First Claimant's claim of wrongful dismissal succeeds.

84. I found that the Second Claimant was not told in terms that her employment would end on 30 April 2016. The Second Claimant's claim of wrongful dismissal succeeds.

85. I found that the Third Claimant was told in a phone conversation by Mrs Huggins in December 2015 that her employment was being extended until 30 April 2016. She was told an exact date and therefore her claim of wrongful dismissal fails.

86. I appreciate that the Third Claimant may find the difference in outcome between her claim and that of the other claimants unfair. However, the difference arises from my findings of fact which were inevitably significantly affected by her decision not to attend the hearing to give evidence.

87. In terms of remedy, the parties agreed at the hearing that if I found for any of the claimants, the remedy I should order each was net pay from 30 April to 31 August 2016. However, I note that the March Letters confirm that each claimant was to be paid "up to and including" the 30 April 2016. It seems to me that to avoid double payment for the 30 April 2016 the remedy I should order is that the First and Second Claimant should be paid their net pay from 1 May 2016 to 31 August 2016 inclusive. The parties did not have the figures for net pay available to enable me to calculate the actual amount payable to each of the successful claimants but agreed that they would be able to resolve the calculation between them after judgment was given.

88. Rule 75(1)(b) of the ET Rules gives the Tribunal power to make a costs order in relation to any tribunal fees paid by a successful claimant. At the hearing there was no application for a costs order nor information as to whether each claimant paid such a fee. I remind the parties' representatives that rule 77 allows a party to make an application for costs up to 28 days after the judgment is sent to the parties.

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Employment Judge McDonald
Dated: 12 April 2017

JUDGMENT SENT TO THE PARTIES ON

18 April 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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