Appeal No. UKEAT/0482/13/DA

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 March 2014

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**(SITTING ALONE)**

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MR M DUNIEC — APPELLANT

TRAVIS PERKINS TRADING COMPANY LTD — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | No appearance or representation by or on behalf of the Appellant |
| For the Respondent | Written Submissions |

**SUMMARY**

**JURISDICTIONAL POINTS – Claim in time and effective date of termination**

EDT. Whether s.86 ERA notice entitlement is to be added to date of summary dismissal under s.97(2). Answer: No. **Robert Cort v Charman** applied. C's appeal dismissed.

**HIS HONOUR JUDGE PETER CLARK**

1. This case has been proceeding in the Ashford Employment Tribunal. The parties are Mr Duniec, Claimant, and Travis Perkins Trading Company Ltd, Respondent.

2. The Claimant, who is of Polish origin, was employed by the Respondent as a driver from 1 October 2007 until his summary dismissal without notice or payment in lieu of notice at a disciplinary hearing held on 15 May 2012. He presented a form ET1 to the Employment Tribunal on 16 August 2012 complaining of unfair dismissal and race discrimination/harassment. The claims were resisted by the Respondent, which took a limitation point in its Grounds for Resistance. At a case management discussion held by Employment Judge Vowles on 15 October 2012 that Judge directed that there be a Pre-Hearing Review held on 13 November 2013 at which an interpreter should be present to assist the Claimant, then represented by Mr Klarecki.

3. On 13 November a Pre-Hearing Review took place before Employment Judge Kurrein. By a Judgment with written Reasons dated 28 November that Employment Judge reached the following conclusions:

(1) The effective date of termination was 15 May 2012.

(2) That accordingly all claims were made outside the primary limitation period.

(3) That the Claimant had not shown that it was not reasonably practicable to present his complaint of unfair dismissal in time. Accordingly that claim fell to be struck out.

(4) Further and in the alternative the unfair dismissal claim had no reasonable prospect of success on its merits and would be struck out on that ground.

(5) All claims of discrimination up to 1 May 2012 were out of time and it was not just and equitable to extend time.

(6) Insofar as the race discrimination claim from 1 May 2012 was in time a deposit of £250 was ordered as a condition for pursuing that claim.

4. Against both the strike-out order and deposit order the Claimant appealed. Both appeals were initially rejected on the paper sift by HHJ Shanks for reasons given in the EAT letters dated 8 March 2013.

5. Dissatisfied with that opinion the Claimant exercised his right to an oral hearing under rule 3(10). That Appellant only hearing took place before Mitting J on 3 October 2013. That Judge dismissed the appeal on the deposit order but permitted the strike-out appeal to proceed to this full hearing. I have had the advantage of reading a transcript of the Judgment delivered by Mitting J on that day, explaining his reasoning. The principal question for me is whether EJ Kurrein took a wrong approach in law in striking out the unfair dismissal claim.

**Effective date of termination**

6. The first question is whether the EJ was wrong to hold that the effective date of termination for the purposes of s. 97 **ERA 1996** was 15 May 2012.

7. At paragraph 4 of his rule 3(10) Judgment Mitting J appears to have accepted the proposition advanced by Mr Klarecki in his grounds of appeal that the form ET1 was out of time if, but only if, the employers were entitled summarily to dismiss the Claimant; if not, then by virtue of s. 97(2) the effective date of termination would have been extended by five weeks, his statutory notice entitlement, and the claim is in time. The Employment Judge made no finding on the question of whether the Respondent was entitled to summarily dismiss the Claimant, in this case for misuse of his staff discount card.

8. Although the Respondent does not appear today, preferring to rely upon a written skeleton which does not address the proper construction of s.97 ERA, I felt unable to accept the proposition advanced on behalf of the Claimant, since it contradicts my understanding of the position, certainly since the Judgment of Browne-Wilkinson P in **Robert Cort v Charman** [1981] ICR 816. That understanding is as follows.

9. S.86 ERA is headed "Rights of employer and employee to minimum notice". By subsection (1) an employee is entitled to one week's notice for each year of continuous service up to a maximum of 12 weeks. In this case, the Claimant was entitled to five weeks' statutory notice under subsection (1) subject to subsection (6), which provides:

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

10. Hence, the common law defence of repudiatory breach by the employee remains open to the employer in a claim for pay in lieu of notice by way of a breach of contract claim justiciable in the ET under the **Extension of Jurisdiction Order 1994**, subject to the maximum award of £30,000.

11. S. 97 is headed "Effective date of termination". By s.97(1)(a), where the contract is terminated by the employer on notice, the effective date of termination is the day on which the notice expires. Under section 97(1)(b):

> **"...in relation to an employee whose contract of employment is terminated without notice...[the EDT] means the date on which the termination takes effect": i.e summary dismissal**

12. S. 97(2) extends the EDT as calculated under subsection (1) by adding the period of statutory notice under s. 86(1) (subject to s.86(6)) to which the employee is entitled but for the

purposes only of s. 108(1) (qualifying period of continuous employment), s.119 (calculation of basic award) and s.227(3) (calculation of a maximum week's pay).

13. S. 111, which deals with time limits, is not included in that list. Thus, when calculating the three-month primary time limit under s.111, s.97(2) does not allow for the addition of statutory notice entitlement under section 86. It follows that the question under s.86(6), to which Mitting J referred, is immaterial to the application of s.111.

14. That was the effect of the ruling in **Charman**, which has not since been questioned. I leave aside the separate suggestion in **Charman** that in a wrongful dismissal action damages might include the loss of the right to claim unfair dismissal as a result of the summary dismissal: see **Harper v Virgin Net Ltd** [2004] IRLR 390 (CA). I have, of course, considered the recent Supreme Court Judgment in **Société Générale v Geys** [2013] ICR 117, a common law claim. However, I agree with the learned editors of *Harvey on Industrial Relations and Employment Law* v.1/D1 727/729 that that ruling does not affect the construction of s.97, which makes clear, see particularly s.97(1)(b) and (3)(b), that summary termination by the employer does not require acceptance by the employee before the contract is terminated for the purposes of s.111. It follows, in my judgment, that the Judge was not required to consider the s.86(6) exercise: the statutory notice period under s.86 is not material to calculating the primary limitation period under s.111.

15. The Appellant has taken a separate point, relying on the Supreme Court Judgment in **Gisda Cyf v Barratt** [2010] ICR 1475, that because the Claimant's wife did not open the letter of dismissal handed to the Claimant at the disciplinary hearing on 15 May until 19 May, at which point shortly thereafter Mr Klarecki became involved, time runs from that date. For the avoidance of doubt, since the point is not addressed in Mitting J's rule 3(10) Judgment, I reject

that submission on the facts found (see Reasons, paragraphs 10, 11). Having heard the evidence, including that of the Respondent's witnesses present at that meeting, the Judge accepted (a) that the Claimant was told that he was summarily dismissed at the meeting and so understood and (b) was given a letter of dismissal at the meeting, dated 15 May, which said, I note:

> **"I (Mr Britain, Branch Manager) therefore confirm you have been summarily dismissed with effect from 15 May..."**

16. Even if, which the Judge did not accept as a matter of fact, the Claimant was disadvantaged by his lack of English in understanding that he had been summarily dismissed on that day, it must have been pellucidly clear to both the Claimant's wife, who does speak English, and to Mr Klarecki when they read the letter, that time ran from 15 May when the Claimant was summarily dismissed. Hence the heading to the appeal letter of 20 May, referred to at paragraph 9.17 of the Reasons.

17. As to the Judge's finding that the Claimant had not established the reasonable practicability escape clause under s.111(2)(b), I can see no error of law in the Judge's approach (see paragraphs 15-19), having correctly directed himself as to the law (paragraphs 12-14).

18. It therefore follows, in my judgment, that the unfair dismissal claim was properly struck out on the limitation ground. In these circumstances, it is not strictly necessary to consider the alternative ground for strike-out on the merits. Were it necessary to do so I should have upheld that finding also. The claim is hopeless. The Respondent made clear the limited circumstances in which the Claimant could use his privileged discount card and he accepted, at the investigation stage, that he was aware of those limitations. He abused that privilege extensively

by lending his card to a friend. Dismissal for that reason, in all the circumstances, was plainly fair.

19. Yesterday, Monday 10 March 2014, Mr Klarecki e-mailed the EAT at 2.48pm, enclosing a skeleton argument and stating that he could not attend this hearing due to ill-health. This morning the case was called on and nobody appeared. I put it back until 10.45. As indicated earlier, the Respondent does not appear but relies on written submissions. In these circumstances, I shall decide this appeal on the papers.

20. For completeness I turn to the skeleton argument submitted by Mr Klarecki on behalf of the Appellant in which the following points are raised:

(1) That the Claimant did not receive a fair trial at the PHR contrary to Article 6 of the European Convention. The point seems to be that the Claimant, as a result of the strike-out order, was deprived of the opportunity to question witnesses, give evidence and call witnesses and make submissions. That seems to be entirely inconsistent with what appears on the face of the Judge's Reasons, which is that he heard evidence from the Claimant, some of which he did not accept (see paragraphs 9.9, 9.13 and 9.15) and evidence from Messrs Britain and Meakin, which he did accept (see paragraph 10).

(2) Mr Klarecki challenges Judge Kurrein's observation at paragraph 4 of his Reasons that the claim of breach of contract had been withdrawn. That is plain from paragraph 4 of the case management order of Employment Judge Vowles. No separate breach of contract claim other than unpaid wages and unpaid holiday pay is indicated. But in any event, having taken the view that the effective date of termination was properly determined as 15 May 2012, it follows that any breach of contract claim that survived would have been dismissed by reason of the time bar. The same rules apply to a claim

of breach of contract under the 1994 order as under the ERA for a claim for unfair dismissal.

(3) Mr Klarecki asserts that the Judge was wrong not to consider whether or not the employer was entitled to summarily dismiss the Claimant without notice. I have dealt with that point earlier by reference to the proper construction, in my judgment, of s.97(2) ERA.

(4) A point is taken about the lack of an interpreter at the dismissal meeting on 15 March 2012. I note the Judge's finding of fact at paragraph 9.2 as to the Claimant's ability to understand English. However, and in any event, the letter of 15 March was plainly one indicating summary dismissal, confirming the oral dismissal on that day. Importantly, that letter was first seen by the Claimant's wife on 19 May and thereafter Mr Klarecki was contacted on 20 May. He, the Judge found, prepared the appeal letter referred to at paragraph 9.17. That letter accepts that the dismissal took place on 15 May.

(5) A point is taken about the Claimant's mental state. However, the Judge rejected his evidence that he suffered a nervous breakdown. That was a finding of fact with which I cannot interfere on this appeal.

Finally (6) the question of reasonable practicability, to which I have earlier referred.

21. Since there is no extant appeal in relation to the claim of race discrimination, as Mr Klarecki makes clear in his e-mail of 10 March 2014, it follows that, in my judgment, this appeal fails and is dismissed.