EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms A Sanchez Uribe	v	**Interserve FM Ltd**

PRELIMINARY HEARING

Heard at: London South **On: 10 July 2017**

Before: Employment Judge Elliott

Appearances:

For the Claimant: **Mr M Brett, Free Representation Unit**

For the Respondent: **Mr T Adkin, counsel**

Interpreter in the Spanish language: Ms A Ben-Avraham

JUDGMENT

The judgment of the tribunal is that:

1. The claims for unfair dismissal and breach of contract are out of time and the tribunal has no jurisdiction to hear those claims
2. The claimant shall pay respondent's costs in the sum of **£350.**

REASONS

1. This judgment was delivered orally on 10 July 2017. The claimant requested written reasons.

2. By a claim form presented on 18 March 2017, the claimant Ms Ana Sanchez Uribe brings a claim for unfair dismissal and notice pay.

The issues

3. The issue for this preliminary hearing is (i) what was the effective date of termination (EDT) of the claimant's employment and (ii) whether the claim is within time and therefore whether the tribunal has jurisdiction to hear the claim.

4. The claimant's position on the EDT was that it was 23 January 2017. The respondent's position is that the EDT was that it was 6 or 7 November 2016.

Witnesses and documents

5. The tribunal heard from the claimant and from her union representative Mr Alberto Durango.

6. There was a joint bundle of 38 pages and an additional claimant's bundle of 21 pages plus three authorities.

7. I had a written submission from the claimant to which the claimant's representative spoke. I had oral submissions only from the respondent. All submissions and authorities relied upon were fully considered even if not expressly referred to below. A very brief summary of the submissions is given below but is not intended to be an exhaustive account.

Findings of fact

8. The claimant worked for the respondent as a cleaner. She has lived in the UK for about three years. Her husband has been in the UK for 21 years and also works as a cleaner. Her husband has 2 adult children who came to the UK when they were teenagers. They both work in the UK. The adult children are now in their mid-30s and do not live with the claimant and her husband.

9. The claimant took leave from 25 March 2016 to travel to Columbia and returned to the UK on 23 April 2016. She was due back to work on 25 April. She attended on that day and was told by another female cleaner that she was the claimant's replacement. The claimant stayed at the workplace for around 2 hours trying to find out what had happened. She eventually spoke to the assistant manager Gustavo who said he would see whether he could clarify the position and he would write to her. No such letter was sent to the claimant at that time. It is not in dispute that the last day that the claimant performed work for the respondent was 25 March 2016 and that her last pay was received in April 2016.

10. The claimant's evidence was that "a few days later" a co-worker named Omar put her in touch with the union. The claimant attended the union's offices 29 April 2016. She saw Mr Durango a senior officer of the Cleaners and Allied Workers Union. The majority of the members of this union are Spanish speakers as is Mr Durango. The claimant was also assisted at the union by a volunteeer Ms Mary Carmen Morales. Together they sent an email to the company. The claimant says that the union did not explain to her what was in the email.

11. Mr Durango does most of the representation for the members as he has the most experience. He is bilingual in Spanish and English and gave his evidence to the tribunal in English.

12. The claimant attended a meeting with the respondent on 21 June 2016 together with Mr Durango. The claimant said she did not understand what happened at that meeting as Mr Durango did not translate for her. After the meeting he told her that there had "been no agreement".

13. The claimant was told that she had to attend the union's offices in person for advice. She said that she could only go on Fridays or Saturdays and that Mr Durango would not remember who she was so she had to explain the situation all over again. The claimant sent copies of her correspondence from the respondent to Mr Durango by photographing it and sending it by WhatsApp message. Letters were sent to the claimant on 1 August 2016, 1 September 2016 and 12 September 2016 regarding her right to work in the UK (pages 29-33 main bundle). The claimant accepted in evidence that her employer could not employ her without the correct immigration documents.

14. At page 28 of the bundle I saw the claimant's passport which showed UK entry clearance valid from 30 January 2014 to 30 October 2016. The claimant was aware that her entry clearance in the UK was due to expire on 30 October 2016.

15. On 14 October 2016 the respondent wrote to the claimant inviting her to a disciplinary meeting regarding her right to work in the UK. The meeting was on 31 October 2016. She was given her right to be accompanied.

16. The claimant did not attend the meeting and a decision was made in her absence. A letter dated 2 November 2016 (page 36) was sent to the claimant from HR Operations on behalf of Ms Jo Endean, stating that the was summarily dismissed. The claimant was given a right of appeal which she did not exercise.

17. It was put to the claimant that given her immigration status she must have been expecting a letter such as the one on page 36 of the bundle; she replied "yes".

18. The claimant's evidence was that she received the letter on 5 November 2016, a Friday. The claimant said she sent it to Mr Durango by WhatsApp. She said that he did not reply with a translation as she had hoped. She said in her witness statement that she thought it "was to do with the ongoing dispute" she was having with the respondent.

19. Mr Durango's witness statement confirmed that he received a WhatsApp message from the claimant on 5 November 2016 with a photograph of the 2 November letter. He said that the quality of the photograph was not very good.

20. On 18 November 2016 the claimant sought assistance from a friend and made scans of her new visa and passport and sent them to her manager.

21. Mr Durango explained and I find that his union is staffed predominantly by Spanish speakers many of whom are volunteers. They hold monthly meetings which all members can attend. The meetings are conducted in Spanish and deal with general matters. Mr Durango could not remember whether the claimant had ever attended. He also holds "surgeries" on Fridays and Saturdays for the benefit of individual members to advise and assist on their individual cases. This was consistent with the claimant's evidence of being able to attend for advice only on Fridays or Saturdays.

22. Mr Durango's evidence was that the union puts some onus on their members to take responsibility for time limits and deadlines. The union publishes information for its members on its website and on paper. At page 15 of the claimant's bundle I saw a leaflet in English which is also published for members in Spanish setting out how the union can help and what the individual must do. It says in relation to keeping in touch "It is your responsibility to keep in touch with us. We're extremely busy, and don't have time to contact you to discuss your case. You can best do this by coming to one of our Friday or Saturday surgeries or, if your enquiry is urgent, by sending a text message."

23. It took the claimant another two months to visit the union on 6 January 2017, to "check how the communications with the respondent were going". I asked the claimant why it took her two months to go to see the trade union she said it was because they were dealing with the case, she depended on the trade union and she does not understand English very well. The claimant said it was not until she received her P45 on 23 January 2017 that she "realised" she had been dismissed.

24. I find on the balance of probabilities that when the claimant visited her union on 6 January 2017 she was told about the meaning of the letter of 2 November 2016. I am supported in this by the email from Mr Durango to the respondent of 6 January 2017 (page 19 claimant's bundle) which refers to the letter "*dismissing her from the company*".

25. When the ET1 was presented, the claimant's representative was given as Mr Durango. The ET1 did not plead the claimant's dates of employment in the boxes designed for this information (at 5.1 of the ET1). In the grounds of complaint the claimant said "*On 23 January 2017 I received my P45 and realised I was dismissed*".

26. The dates for Early Conciliation were: Date of receipt by ACAS: 11 March 2017 and Date of Issue of EC Certificate: 14 March 2017.

27. The grounds in the ET1 said as follows: "*I called Gustavo the assistant manager and asked give me a letter to say whether he was dismissing me. I sent the letters I received to my trade union representative and we attended a meeting. I forwarded on all subsequent letters to my trade union representative but he did not respond. On 23 January 2017 I received my P45 and realised I was dismissed".*

The law

28. Section 111 of the Employment Rights Act 1996 provides that:

> *(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*
>
> *(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*
>
> *(a) before the end of the period of three months beginning with the effective date of termination, or*

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

29. What is reasonably practicable is a question of fact and therefore a matter for the tribunal to decide. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. There is a duty upon her to show precisely why she did not present the complaint within time.

30. A similar provision on the time limit appears in Rule 7 of the Extension of Jurisdiction Order 1994 (SI 1994/1623) in relation to the claimant's breach of contract claim.

31. In the leading case of ***Gysda Cyf v Barratt 2010 4 All ER 851*** the Supreme Court held that where summary dismissal was communicated to an employee in a letter, the effective date of termination was not until the employee had actually read the letter or had had a reasonable opportunity of reading it; an employee was entitled either to be informed of her dismissal or at least to have had a reasonable chance of finding out that she had been dismissed before time began to run against her.

32. The claimant included in the bundle the case of ***the Royal Bank of Scotland plc v Theobald EAT/0444/06*** and ***Widdicombe v Longcombe Software Ltd 1998 ICR 710*** but did not expressly take the tribunal to either of these authorities.

33. In ***London Borough of Newham v Ward 1985 IRLR 509*** the Court of Appeal held that the P45 has nothing whatever to do with the date on which employment terminates. It is only when the employment has been terminated that the employee has the right to require the employer to hand over his P45 (per Kerr LJ as he then was).

Submissions

34. The respondent submitted that the tribunal had to make a determination as to whether or not the claimant knew she had been dismissed on 5 November 2016 and if she did not, by which date did she have a reasonable chance of finding out? The respondent's submission on the evidence is that the claimant either did understand on 5 November 2016 or within a day or two after that date.

35. The respondent submitted that the claimant's evidence as to not understanding, lacked credibility as her husband has been in the UK the 21 years and has two adult children who have been in the UK for the same amount of time. The respondent submitted that even if the claimant should be allowed a few more days to have a reasonable chance of finding out the content of the letter it should be no more than a week or two which means on the respondent's submission the claim is still significantly out of time.

36. The respondent submitted that there were none of the usual arguments on reasonable practicability such as being physically unwell or out of the country. The respondent accepted that it might have been reasonable to wait a week or two for Mr Durango to assist but not eight or nine weeks.

37. The claimant submitted that ***Gysda Cyf*** held that there was a subjective test and I should find that the claimant was not dismissed until she had actual knowledge of her dismissal. It was submitted for the claimant that she would not have scanned her visa and passport and sent them to her manager on 18 November 2016 unless she felt obliged to do so. The claimant submitted that the fact that the claim had not been presented earlier was not due to idleness, culpable error or lack of vigour on the part of the claimant. She had been part of a long-running process in relation to her immigration status and the dismissal letter was just one more letter within that process and could not have been regarded as a momentous event. The claimant was entitled to wait and take it to someone who is well versed in these matters to translate it.

Conclusions

38. I have found as a fact above that the claimant received her dismissal letter on Friday 5 November 2016. She opened it, photographed it and sent it to her union representative Mr Durango. On her own evidence she had been expecting a letter along these lines, in the light of her immigration status. She knew that her UK entry clearance expired on 30 October 2016.

39. The claimant did not understand the content of the letter. It was in English and she speaks hardly any English at all. She needed to have the letter translated. She also wished to take union advice on the content of the letter. These are separate matters. The translation and the advice did not need to take place at the same time.

40. Other than taking the photograph and sending it to Mr Durango on 5 November 2016 the claimant did nothing about this letter for two months. She was not unwell and she was not out of the country.

41. I accept the respondent's submission that it was incumbent upon her to take steps to have the letter translated for her. She did not need a union to translate the letter, all she needed was a person who could speak both Spanish and English. I accept that she wanted the union's advice on what to do about the letter but she did not need that advice in order to understand what it said. That was purely a matter of translation.

42. The respondent submitted that the claimant should have taken those steps, reasonably, by the end of the weekend on which she received the letter namely by 7 November 2016.

43. Being generous to the claimant, and given her own limited English I accept the respondent's alternative submission that it should have taken her no more than a week or two to find out the content of the letter. The letter clearly stated that she had been summarily dismissed.

44. It was submitted for the claimant that she did not know that she had been dismissed until she received her P45 on 23 January 2017 and that it was not clear whether her dismissal had been communicated to her at the meeting with

Mr Durango on 6 January 2017. My finding on a balance of probabilities is that the content of the letter was communicated to the claimant on 6 January 2017.

45. I do not accept the claimant's submission that actual knowledge of dismissal is required before time starts to run. This is not the finding of the Supreme Court in ***Gysda Cyf.*** This holds that the claimant must either have actually read the letter or have had a reasonable opportunity of reading it. In ***Gysda Cyf*** the reasonable opportunity was from 30 November to 3 December, a matter of three days. If it were otherwise, it would create a precedent of allowing dismissed employees to take their time and avoid finding out the content of such a letter with a view to preserving their position on the time limit.

46. I find that a reasonable opportunity to obtain an understanding of the content of the letter of 5 November 2016 was no more than two working weeks and time therefore started to run for the claimant from Friday 18 November 2016. To be within time, the claim should therefore have been presented by 17 February 2017 and the claim is therefore a month out of time. Early Conciliation was not commenced until 11 March 2017 and therefore the Early Conciliation rules do not operate so as to extend time.

47. The only reason the claimant gives for not presenting her claim earlier was because, on her case she did not appreciate that she had been dismissed until 23 January 2017. She gave no evidence to the effect that she was somehow incapacitated from doing so any earlier. She was not unwell, she was not out of the country.

48. I find that it was reasonably practicable, having had a reasonable opportunity to understand the content of the letter of dismissal, for the claimant to have presented her claim within time. She gave no evidence to the contrary on the issue of reasonable practicability. Based on my finding that time began to run from 18 November 2016 I find that the claims for unfair dismissal and breach of contract are out of time and the tribunal has no jurisdiction to hear those claims.

The costs application

49. The respondent made an application for costs under Rule 76(1)(a) based on a costs warning letter of 27 June 2017 sent to the claimant's representative who has been instructed since about 13 June 2017 and on record since 21 June 2017.

50. The claim for costs was limited to £500 being the brief fee for today.

51. The respondent said that in the light of the letter it was unreasonable for the claimant to have continued (Rule 76(1)(a)).

52. The claimant accepted that the substance of the tribunal's findings was anticipated in the costs warning letter, save on the claimant's submission there was some divergence on the effective date of termination and on reasonable practicability.

53. I did not accept that there was any divergence on the issue of reasonable practicability as the claimant gave no evidence that it was not reasonably practicable for her to present the claim in time. My finding was that she did nothing about the dismissal letter for two months.

54. I accepted the respondent's submission and find that it was unreasonable for her to have continued in the light of the costs warning letter.

55. I heard evidence from the claimant as to her means (Rule 84). She is working and earns £900 per month. She and her husband occupy the same household. He is earning slightly more than the claimant. They have no dependents. They rent their accommodation and the rent is £450 per month. They have a bank loan of £11,000 and repay this at the rate of £300 per month. There are no other assets or liabilities.

56. The respondent submitted that I should award the full amount sought and the claimant submitted that I should limit the award to £250.

57. I accepted that the claimant is not a high earner and this will be difficult for her. I made an award of costs in the sum of £350.

Employment Judge Elliott

10 July 2017