Appeal No. UKEAT/0049/17/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 June 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

COSMECEUTICALS LIMITED — APPELLANT

MS T PARKIN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CAROLYN D'SOUZA (of Counsel) Instructed by: Birketts Solicitors Brierly Place New London Road Chelmsford Essex CM2 0AP
For the Respondent	MS EMILY READ (of Counsel) Instructed by: Birkett Long LLP Solicitors Essex House 42 Crouch Street Colchester Essex CO3 3HH

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

Although the parties had proceeded on the basis that the effective date of termination of the Claimant's employment had been 23 October 2015 (and, thus, that her claim of unfair dismissal had been presented to the ET in time), the ET found that the Respondent had told the Claimant that her contract had been brought to an end at an earlier date, on 1 September 2015. Notwithstanding this finding, the ET had gone on to hold that the effective date of termination of the Claimant's employment was still 23 October and, therefore, that her claim had been presented in time. The Respondent appealed.

Held: allowing the appeal

The effective date of termination was a statutory concept. Here the ET had found that the Claimant had been told that her contract of employment was at an end on 1 September 2015. That was effective to bring about the Claimant's summary dismissal (**Hogg v Dover College** [1990] ICR 39 EAT applied). In the circumstances, the ET had erred by then going on to hold that the dismissal was not effective until 23 October 2015. The appeal would be allowed and the matter remitted to the ET to determine whether it had been reasonably practicable for the Claimant to lodge her claim in time or, if not, whether she had lodged it within such period as was reasonable thereafter.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises issues concerning the approach to the determination of the effective date of termination under the **Employment Rights Acts 1996** ("ERA"). I will refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Respondent's appeal against the Judgment of the London East Employment Tribunal (Employment Judge Burgher, sitting with lay members Mr Blanco and Mr Ross, from 26 to 28 October 2016; "the ET"), sent to the parties on 15 November 2016. Representation before the ET was as it is today.

2. By its Judgment the ET (relevantly) upheld the Claimant's claim of unfair dismissal. Specifically, it held that the effective date of termination of the Claimant's employment was 23 October 2015. The Respondent challenges that finding on two bases: (1) that this constituted an error of law and a misapplication of section 97(1) **ERA** given the ET's finding that the Claimant had been dismissed on 1 September 2015, and (2) that it was, further, an error of law in that the ET had failed to appreciate that the change in terms and conditions it had found constituted a dismissal, pursuant to **Hogg v Dover College** [1990] ICR 39 EAT, gave rise to a summary dismissal and thus to an effective date of termination of 1 September 2015. That date is of significance in this case as, if the effective date of termination, it would mean that the Claimant's claim had been presented out of time.

The Relevant Background

3. The Respondent is a manufacturer and distributor of professional skincare and makeup products to businesses. The Claimant commenced her employment with the Respondent on 22

June 2009; she was employed as Managing Director, a senior role just below Board level. The Chairman of the Respondent, a Mr Sullivan, had previously worked with the Claimant in an earlier venture that had been lucratively sold in 2007.

4. From fairly early on in her employment, concerns began to arise as to the Claimant's lack of visibility within the office, initially largely due to her practice of working from home around one day a week (the Claimant was having to combine her employment with difficult personal circumstances, which became more demanding moving into 2014/2015). Mr Sullivan had raised concerns with the Claimant as to her approach to her work as Managing Director and how this was impacting upon performance, albeit he had not made clear that this might endanger her position as such. In any event, in the summer of 2015, the Claimant accepted that she would take a two-month paid sabbatical to enable her to focus on her family circumstances. The sabbatical started on 1 July 2015. During that sabbatical period, however, having made arrangements to cover the Claimant's responsibilities, Mr Sullivan's concerns about her performance increased. Upon the Claimant's return, at a meeting on 1 September 2015, Mr Sullivan referred to these performance concerns and said the Claimant could not return to her role as Managing Director, an announcement that came as a shock to the Claimant. Mr Sullivan further made what the ET described as a "*clumsy attempt*" to consider possible alternative roles, although none which would be comparable with the Claimant's previous position. It was left that there would be a further meeting on 10 September.

5. As the ET found, following the 1 September meeting the Claimant had lost all trust and confidence in Mr Sullivan, although in the correspondence that followed he reacted adversely to her suggestion that he had dismissed her or required her to resign. As from 4 September, the Claimant was put on garden leave until the next meeting, but she was unwilling to meet with

Mr Sullivan again unless it was to discuss settlement. Without prejudice correspondence followed, but no agreement was reached, and on 29 September 2015 Mr Sullivan wrote to the Claimant to inform her that (for the purposes of clarity) she was now being given notice of termination of her employment, which would come to an end on 23 October 2015.

The ET's Decision

6. It is common ground that at the outset of the Full Merits Hearing of the Claimant's claims the parties were agreed that the effective date of termination of her employment was 23 October 2015, as recorded in the pleadings and the list of issues (and see paragraph 1.1 of the ET's Judgment). During the course of the hearing, however, the ET raised with the parties the possibility that the dismissal had occurred on 1 September 2015. The parties therefore duly addressed this issue in their closing submissions.

7. The Respondent, whilst strictly neutral as to the date of dismissal, observed that if the ET found there was a dismissal on 1 September then the Claimant's unfair dismissal claim would have been presented out of time. The ET rejected that submission, reasoning as follows:

> **"53. … We do not accept that the communication of dismissal is the same as the effective date of termination. An employee can be told that they are dismissed and placed on garden leave, or that notice entitlements will be addressed separately. The effective date of termination in this matter is 23 October 2015 and as such no issue of time limit applies."**

I pause to observe that this is, at best, an unfortunately-worded passage in the ET's reasoning; at worst, it suggests the ET has conflated the giving of notice and the fact of dismissal on the termination of the employment contract. I return to this point below.

8. When considering the reason for the dismissal - which it concluded was on grounds of capability - the ET recorded its finding as to when the dismissal had been communicated as follows:

> **"55. When considering the reason for dismissal, the Tribunal concludes that the clear communication by Mr Sullivan to the Claimant on 1 September 2015 was a dismissal following the reasoning of *Hogg v Dover College*. Mr Sullivan was clearly saying to the Claimant that her contract as Managing Director of the Respondent was at an end and discussions ensued as to how the employment relationship could continue."**

9. Although the ET accepted Mr Sullivan had a genuine belief that the Claimant was unable to perform her role at the required level, it considered her dismissal had been unfair; specifically, the Claimant had not been given the opportunity to put her case on the poor performance issues in question. The ET continued:

> **"60. It was also clear that Mr Sullivan failed at anytime to inform the Claimant that possible consequences of continued poor performance would be her dismissal. This would have ensured that the Claimant was able to properly focus on her role. Mr Sullivan sought to adopt a compassionate approach during the Claimant's employment, and this contrasted with the abrupt and unreasonable decision to dismiss the Claimant on her return from sabbatical on 1 September 2015."**

10. In the circumstances the ET considered dismissal had been outside the range of reasonable responses and the Respondent had acted in a way that was procedurally unfair, not least in not affording the Claimant a right of appeal. Had the Respondent acted fairly, applying **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, the ET considered there was a 20 per cent likelihood that the Claimant would have been dismissed in any event.

The Relevant Legal Principles

11. A claim of unfair dismissal requires, first, that there has been a dismissal as defined by section 95 **ERA** (relevantly) as follows:

> **"(1) For the purposes of this Part an employee is dismissed by his employer if … -**
>
> > **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
> >
> > **…**

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

12. It is common ground that a direct dismissal for the purposes of section 95(1)(a) can arise where an employer unilaterally imposes different terms of employment, thereby effectively withdrawing the old contract; see **Hogg v Dover College** [1990] ICR 39 EAT and **Alcan Extrusions v Yates and Others** [1996] IRLR 327 EAT. Whether this is what has happened in any particular case must be a matter of fact and degree for the ET to determine, the question being whether the old contract has been withdrawn or removed from the employee.

13. The means by which an employee is dismissed may thus be by conduct rather than words, which may not always be entirely unambiguous. There does, however, have to be a communication of the dismissal and that is to be tested objectively: how would the employer's conduct or words be understood by the objective observer? See as discussed in **Sandle v Adecco UK Ltd** [2016] IRLR 941 EAT:

"28. Turning to the specific question raised by the appeal, to the extent the claimant is saying that determining whether an employer has terminated a contract of employment for the purposes of s.95(1)(a) should allow that to be implied from an employer's conduct, we do not disagree. The real issue, however, seems to us to be one of *communication.*

29. Thus, referring to the authorities relied on by the claimant as examples of cases where dismissal has been implied from the employer's conduct, we recognise that removing an employee from the payroll can amount to termination of the employment contract (see *Kirklees Metropolitan Council v Radecki* [2009] IRLR 555 CA), but we note that in that case the action in question was known to the employee ('[Mr Radecki] was aware that his employment had been brought to an end', per Rix LJ at paragraph 48, and also see paragraph 55 and per Toulson LJ at paragraph 47). Similarly, removing a teacher from one post and offering him different terms on a reduced salary could amount to a summary dismissal (see *Hogg v Dover College*, supra), but, again, the conduct in question - that from which dismissal was to be implied - was communicated to the employee (per Garland J: 'He was being told that his former contract was from that moment gone').

…

40. Did the ET thereby err? We can see the argument that an ET might get overly fixated on the issue of communication - failing to remind itself as to the language of s.95(1)(a), which requires merely that the employee's contract 'is terminated by the employer (whether with or without notice)'. Whilst we can see why an ET might look for express language before finding a dismissal under s.95(1)(a) - the employer's decision to terminate the contract should be unequivocal - and we can see a real danger from lack of certainty, we accept that certainty is not the only relevant criterion. A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer. Further, as the case law shows, an employer's termination of a contract of employment need not take the form of a direct, express

> **communication. It may be implied by the failure to pay the employee (*Kirklees*), by the issuing of the P45 (*Kelly* [*v Riveroak Associates Ltd* [2005] All ER (D) 216 (Nov)] or by the ending of the employee's present job and offer of a new position (*Hogg*). In each of those cases, however, there was a form of communication; the employee was made aware of the conduct in question, conduct that was inconsistent with the continuation of the employment contract and in circumstances where there were no other contraindications. The question is: given the facts found by the ET, given what was known to the employee and to the relevant circumstances of the case, what is the conclusion to be drawn? Has the employer communicated its unequivocal intention to terminate the contract?**
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> **41. In our judgment, the ET in the present case was not wrong: dismissal does have to be communicated. Communication might be by conduct and the conduct in question might be capable of being construed as a direct dismissal or as a repudiatory breach, but it has to be something of which the employee was aware."**

14. The time limit for bringing a claim of unfair dismissal is provided by section 111 **ERA**:

> **"(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."**

15. The effective date of termination for these purposes is a statutory concept, defined by section 97 **ERA**:

> **"(1) 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, …"**

16. In approaching section 97, I do so bearing in mind the observations of the Supreme Court in **Gisda Cyf v Barratt** [2010] IRLR 1073:

> **"36. An essential part of the protection of employees is the requirement that they be informed of any possible breach of their rights. … the doctrine of constructive knowledge has no place in the debate as to whether a dismissal has been communicated. For the short time of three months to begin to run against an employee, he or she must be informed of the event that triggers the start of that period, namely, their dismissal or, at least, he or she must have the chance to find out that that short period has begun. …"**

17. Where there is a summary dismissal in circumstances in which the employee ought to have been given notice - so, where it is not a case where the employer would have been contractually entitled to dismiss without notice - the effective date of termination for the purposes of section 97 remains the date of the summary dismissal; see as explained by the EAT in **Robert Cort & Son Ltd v Charman** [1981] IRLR 437 (albeit then referring to the statutory predecessor to section 97):

> **"12. 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 s.55(4) is the date of the dismissal and not a later date. …**
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> **(3) S.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 s.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 LJ in *Marriott v Oxford Co-operative Society* [1970] 1QB 186 at p.193 E-F. After pointing out that the statutory definition of 'the relevant date' for redundancy payment purposes (now s.90(a)(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 LJ says this:**
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> > **'That is consistent with the whole concept that a contract of employment for the purposes of the statute is brought to an end, ie it is terminated, when it is so broken that no further *full* performance of its terms will occur.'**
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> **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.**
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> **(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 right 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, ie the date on which he ceases to attend his place of employment.**
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> **13. For these reasons we hold that, where an employer dismisses an employee summarily and without giving the period of notice required by the contract, for the purposes of s.55(4) the effective date of termination is the date of the summary dismissal whether or not the employer makes a payment in lieu of notice."**

18. Similarly, in **Kirklees Metropolitan Council v Radecki** [2009] IRLR 555 - a case involving a dismissal by way of conduct - the Court of Appeal held that the effective date of termination was the date of the summary dismissal as long as the employee knows of it.

19. The key point is the communication of the fact of dismissal, whether that is by words or conduct, and, as the Supreme Court made clear in **Gisda Cyf**, the doctrine of constructive knowledge has no place in determining that fact (see also the recent case of **Newcastle upon Tyne NHS Foundation Trust v Haywood** [2017] IRLR 629 CA).

Submissions

The Respondent's Case

20. Accepting that it had not put a positive case to the ET that the Claimant was dismissed on 1 September 2015, the Respondent had raised the question as to the effect of any such finding and was entitled to expect the ET to properly explain its reasoning if it did so find. On this question the Respondent said it is apparent that the ET did unambiguously make a finding that the Claimant was dismissed on 1 September 2015, a finding based on the analysis provided in **Hogg v Dover College**; see the ET at paragraphs 50 and 55.

21. Having thus found, the ET ought further to have held that this was a summary dismissal - the point raised by the second ground of appeal. There was no finding that the Respondent had communicated that the dismissal was on notice; the ET only found that notice was served subsequently on 29 September 2015, for the purpose of clarity. Accepting that such a finding might amount to a contraindication that dismissal took effect on 1 September 2015, even if that was a finding of notice having been given, it did not account for the legal status of the

Claimant's contract between 1 September and 28 September; if the Claimant had already been dismissed - as the ET found - there could be no subsequent giving of notice.

The Claimant's Case

22. The ET had unanimously held that the effective date of termination was 23 October 2015; that had not been in dispute in the proceedings and the Respondent had not applied to amend its case, only raising the possibility of an alternative effective date of termination in its closing submissions. The evidence before the ET included the P45 sent to the Claimant confirming her employment until 23 October 2015 (and she was paid until that date and then received pay in lieu of notice), and the fact that the Respondent had repeatedly reminded the Claimant that she remained an employee, refusing to confirm the fact of her dismissal. It was important to keep in mind the distinction between an employer making a decision to dismiss and the actual fact of that dismissal taking effect, which may be brought about summarily or on notice. There could be no effective dismissal unless it had been communicated to the employee and the employee could not have been dismissed if they were unaware of that fact: communication at the effective date of termination was key and it was important that there be no scope for doubt as to the effective date of termination; the employee needed to know when it was and to know that at the time of the effective date of termination, see per Rimer LJ at paragraph 38 of **Radecki** and per the Supreme Court in **Gisda Cyf**.

23. In the present case, there was no finding that the Claimant had understood that she had been dismissed on 1 September 2015. Allowing that a dismissal could be effected by conduct - see **Hogg v Dover College** and **Alcan Extrusions v Yates and Others** - whether or not it was effective summarily or on notice would be a question of fact for the ET to determine. As for what the ET had found in the present case, although paragraph 55 suggested there had been a

communication of a dismissal, that had to be seen against the fuller reasoning and findings of fact, from which it could be seen (1) the Claimant had not been clear as to the communication on 1 September, and (2) the Respondent then denied there had been a dismissal. More generally, the Claimant contended this showed the ET was, at most, simply making a finding as to when the decision had been taken, not that this was the taking effect of a summary dismissal.

24. It was plain that a dismissal on notice need not take any particular form; it need not, for example, comply with the contractual notice entitlement. Here the ET found that the Respondent subsequently placed the Claimant on garden leave (paragraph 38) and then made clear she was being dismissed on notice, with the contract expiring on 23 October 2015 (paragraph 40). All that had happened on 1 September was the communication of a decision which still fell to be implemented. If the EAT were to allow the appeal but considered there was ambiguity in the ET's findings, the matter should be remitted back under the **Burns/Barke** procedure. Otherwise, even if the appeal were allowed, a question still arose as to whether it had been reasonably practicable for the Claimant to lodge her unfair dismissal claim in time given the Respondent's communications post-dating 1 September.

Discussion and Conclusions

25. As the Claimant has pointed out, prior to the Full Merits Hearing, it had been common ground between the parties that the effective date of termination of her employment was 23 October 2015. That had no doubt informed her decision as to when to lodge her claim. The effective date of termination is, however, a statutory concept. It is not something that the parties can simply agree and if the determination of the effective date of termination then gives rise to a jurisdictional question, that is a point that can be taken at any stage of the proceedings; it is not required that either party has raised it in advance.

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26. In the present case - contrary to the way in which either party had apparently seen the position - the ET had found that this was what is sometimes described as a dismissal by conduct, albeit still a direct rather than a constructive dismissal as such; the ET's conclusion reached following the reasoning in **Hogg v Dover College** and **Alcan Extrusions**; see above. Thus, where an employer makes clear it is withdrawing the contract of employment - even if purporting to replace it with a new contract - that is the communication of a dismissal for the purposes of section 95(1)(a) **ERA**. And it is, in my judgment, clear that this is what the ET here found had happened on 1 September 2015: what Mr Sullivan was communicating to the Claimant was that her contract of employment as Managing Director had been brought to an end; see paragraph 50 of the ET's Judgment.

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27. The Claimant makes the point that **Hogg v Dover College** did not lay down any principle that this type of dismissal was necessarily summary in nature. I can accept that might be so: whilst most such dismissals are likely to be effective summarily, I can allow this might not always be the case; I do not think it is particularly easy to think of examples when it would not be, but experience dictates it is unwise to rule out possible ways in which an employment contract might be brought to an end. The question is what did the ET find in this case? That much is clear: at paragraph 55, the ET expressly states that at the meeting of 1 September 2015 Mr Sullivan communicated to the Claimant that her existing contract of employment was at an end. Thus, this is not a case where the ET found there was any ambiguity as to what had been communicated - where it might be questioned whether the objective observer would have understood what had been said or done as amounting to the termination of the contract of employment - on the contrary, the ET found the communication was clear. The parties might then have had discussions as to the potential future of the employment relationship - an employment relationship being a looser and broader concept than an employment contract - but

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A the ET had found that what had been communicated to the Claimant on 1 September was that her contract of employment had come to an end, not, as the Claimant would argue, simply that the Respondent had reached a decision that this would happen in the future. That was sufficient for statutory purposes to amount to a dismissal.

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28. The Claimant argues that it might still have been a dismissal on notice and that must be a question of fact for the ET. Allowing that was a hypothetical possibility, I am unable, however, to see that is what the ET found here. To some extent the ET itself identified the different possibilities - see paragraph 53, which I have set out above - but it seems there to have confused the concepts of dismissal and the giving of notice or the placing of an employee on garden leave. If there is an effective dismissal then there can be no subsequent placement on garden leave or giving of notice, the employment contract has already come to an end.

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29. In any event, even allowing this was perhaps just an unfortunate expression of the ET's reasoning (perhaps arising from the confusion in the Respondent's own approach to the question of dismissal, see the ET's finding at paragraph 38), its finding at paragraph 55 does not include any concomitant finding that the Claimant was placed on garden leave or would be given notice. Indeed, if the narrative had stopped there, the only possible conclusion would be that Mr Sullivan had communicated to the Claimant the fact of her dismissal and the termination of her contract effective immediately, albeit with the possibility of future discussions as to a continued employment relationship. More than that, however, even when the ET's reasoning does continue, there is nothing that changes the picture as at 1 September 2015. When earlier determining the facts, the ET might have found that Mr Sullivan sought to deny that he had dismissed the Claimant and purported to put her on garden leave and then to give notice of the termination of her employment, but it made no finding that his

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communication to her on 1 September was mitigated by any of these suggestions; it was simply the direct communication of the fact that her contract of employment was at an end and that, following the reasoning in **Hogg v Dover College**, was a dismissal.

30. Allowing that communication is key and that an employee cannot be deemed to have constructive knowledge of their dismissal, the ET here found that Mr Sullivan *did* communicate the dismissal - the immediate termination of the Claimant's contract of employment as Managing Director - to the Claimant at the meeting on 1 September 2015. That being so I am unable to see that the findings allow for a conclusion other than that the Claimant was summarily dismissed on that day, that fact being then communicated to her, thus meaning that the dismissal was immediate and duly determinative of the effective date of termination.

31. That conclusion, in turn, has to mean that the Claimant's claim of unfair dismissal was *prima facie* presented out of time. As the Claimant observes, however, that is not a complete answer to the issue of the ET's jurisdiction: that requires determination of the further question whether it was reasonably practicable that the Claimant presented her claim within time or, if not, whether she presented it within such time as was reasonably practicable thereafter.

32. That it seems to me must be a question for the ET (and see **Jafri v Lincoln College** [2014] ICR 920 CA); the question then becomes whether that should be the same or a different ET? Having given the parties the opportunity to address me in more detail on that issue of disposal, they are in agreement that the matter should be remitted to the same ET. That strikes me as an entirely sensible and proportionate approach and I duly so order, to the extent it remains practicable.