EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102254/2017

Held in Glasgow on 30 January 2018

Employment Judge: F Jane Garvie

Mrs D McGowan	**Claimant** **In Person**
Grant Property Solutions Ltd	**Respondent** **Represented by:** **Mrs A Bennie – Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant does not have the requisite two years' qualifying service in terms of Section 108 of the Employment Rights Act 1996 to bring a complaint of unfair dismissal and accordingly the Tribunal does not have jurisdiction to consider the complaint which is therefore dismissed.

REASONS

Background

1. In her claim, (the ET1) presented on 1 August 2017 the claimant alleges that she was unfairly dismissed. She gave her dates of employment as 15 June 2015 to 15 June 2017. The respondent lodged a response, (the ET3) in which they submit that the claimant has insufficient qualifying service to bring

a complaint of unfair dismissal. The response was accepted and acknowledged by letter of 6 September 2017. Arrangements were then made for a Preliminary Hearing to deal with the issue of whether the claimant had sufficient qualifying service to bring a complaint of unfair dismissal. Notices were issued on 16 September for the Hearing to take place on 19 October 2017.

2. On 19 October 2017 the claimant attended, representing herself. The respondent was represented by Mr MacDougall, Advocate. A Note was subsequently issued dated 23 October 2017 where it was explained that it would be necessary to hear evidence in this case and accordingly the Preliminary Hearing was adjourned on that date. The case was then re-listed following letters being issued as to parties' availability. Notices for this Preliminary Hearing were issued on 7 December 2017.

The Preliminary Hearing on 30 January

3. At the start of this Preliminary Hearing Mrs Bennie confirmed that she was now representing the respondent. In addition to the documents that are referred to in the Note of 23 October 2017 she had one additional item to add to those documents.

4. The claimant gave evidence on her own behalf. Evidence was given on behalf of the respondent by Mr Andrew Hutton who is an Assistant Director of Property Management with the respondent.

5. As indicated there was a bundle of productions and these are referred to below.

Findings of Fact

6. The Tribunal found the following essential facts to have been established or agreed.

7. The claimant commenced employment with the respondent on 15 June 2015. She was based in their Stirling office. She worked in that office as a Property Manager until 11 April 2016 at which point she was then appointed to be their

Portfolio Manager, again based in Stirling. She received a written statement of terms and conditions of employment by way of an Employment Agreement, (pages 27/32) which refers to her commencing a "revised role" on 11 April 2016. This was to the new role of Portfolio Manager in the Stirling office.

8. That Agreement at Clause 6 refers to the claimant's salary and indicates that this would be paid monthly direct to her nominated bank account.

9. Clause 16 is entitled, "Termination of Employment". It reads as follows:-

> "16. **TERMINATION OF EMPLOYMENT**
>
> (a). In normal circumstances you are entitled to the following periods of notice from the Company to terminate your employment;
>
> (i) If you have accrued less than one month's continuous service, no notice.
>
> (ii) if you have accrued less than three month's continuous service, 1 weeks' notice.
>
> (iii) If you have accrued more than 3 month's continuous service, you are entitled to 1 months' notice.
>
> (b) If you wish to terminate your employment you will require to give 1 months' notice in writing.
>
> (c) The Company reserves the right to make payment in lieu of notice.
>
> (d) The Company reserves the right to require you not to attend work during any period of notice, but to remain available for work throughout that period, regardless of whether the notice was given by you or the Company."

10. The claimant was at work as usual on 18 May 2017. The Branch Manager, Mrs Simpson had recently been on annual leave but had returned to the office on 17 May 2017.

11. On 18 May she informed the claimant that Mr Hutton and a Ms Paula Russell were in the office and wished to meet the claimant. All that Mrs Simpson said to the claimant was that they wanted to have a chat with her. The claimant was then shown through to another room where Mr Hutton and Ms Russell were waiting to see her. Mr Hutton is based in Edinburgh as is his colleague, Ms Russell.

12. The meeting was short, lasting somewhere between 10 and 20 minutes. The claimant was informed by Mr Hutton that she was being dismissed with immediate effect and that she was being "let go" due to her performance. She also understood that she was to be paid for the month, this being a month's notice.

13. The claimant was given no further detail as to the reasons for her alleged failures and performance but she understood that she would be paid a month's notice. She was under the impression that this meant she would be put on to something akin to gardening leave.

14. The claimant was not aware that she had done anything which would constitute gross misconduct and she had received no warnings or appraisal meetings during the course of her employment. She had completed a probationary period in her role as Portfolio Manager in accordance with the terms at Clause 1 (a) which indicate that her revised role commenced on 11 April 2016 and that "a probationary period of 6 months will apply".

15. The claimant was not given a letter terminating her employment but was told that she should collect her belongings and leave the Stirling office immediately. She understood that she was not required to return to the office to work.

16. When she reached home she read over the terms of her Employment Agreement. She noted that there is a reference at Clause 14 to a Grievance

Procedure. She understood from the Citizens Advice Bureau and ACAS that it was open to her to put in a grievance as her understanding was that the respondent dismissed her without offering her the opportunity to proceed to hold a grievance meeting. The claimant wrote to the respondent on 22 May 2017, (pages 40/41). Her letter was addressed to a Christine Millar and a Mr John Moran who are based in the respondent's Head Office in Edinburgh. In her letter the claimant referred to the meeting on 18 May and that she was informed that a decision had been made to terminate her employment with immediate effect. The claimant then set out her reasons for raising the grievance. She did not receive a reply.

17. The claimant then sent a further letter to the respondent dated 24 May 2017 again to Mr Moran and Ms Millar, (page 42) in which she indicated that she wished to constitute a formal appeal against her dismissal She referred to having been dismissed (effective from 18 May) with pay being given to 15 June in lieu of notice on the grounds of poor performance. She explained that she would like to appeal against her dismissal.

18. In the ET1 at Section 8.2, (page 7) the claimant explained that she was dismissed from her position on 18 May 2017 by Mr Hutton "with no gross misconduct written or verbal warnings, grievance was not upheld by John Moran and my appeal was not responded too by john Moran." The claimant then continued as follows:-

> "I was given a month pay in Lieu beacausr (*sic*) had I been allowed to work out my notice period I would have worked for Grant Property Solutions Limited for 2 years and 3 days, they were constructive in my dismissal as they kept me employed there to cover while the new Branch Manager was on annual leave, she returned 17th May and had me discuss the portfolio in detail which I can now see was a handover, I was not advised that 2 associate directors would visit on 18 May this was a shock and surprise all events which happened and left me extremely embarrassed, shocked and very upset which affected my mental health issues and brought on a depressed episode."

19. In addition to sending the grievance and appeal letters the claimant e-mailed Mr Hutton. There was an e-mail chain of correspondence between them as set out at pages 33 to 38. These are in reverse order.

20. The first e-mail sent by the claimant to Mr Hutton was on 18 May 2017 at 17:39 hours. It reads:-

> "Good afternoon Andrew
>
> This morning at 10:20 am in the Grant Property Stirling office I was invited to meet with yourself and Paula.
>
> During this short meeting I was advised that my employment with Grant Property was to terminated (*sic*) with immediate affect (*sic*) and I was dismissed due to performance levels not meeting the standards and placed on what I believe is Gardening Leave (1 months' pay). During our meeting I was given brief explanations on where my performanc4e lacked as Portfolio Manager, may I please have confirmation from you as to the reasons given and explanation of each.
>
> Can you also confirm the dates of when my employment will cease with Grant Property and what is expected of me during this period.
>
> Will i also be paid holiday pay, bonuses, (bonus sheet could not be submitted due to "h" drive being down),bonus granted which I opted for arla training."

21. The claimant did not receive an immediate reply.

22. She then sent a further e-mail, (again page 37) timed at 09:45 hours on 19 May 2017 which reads as follows:-

> "Hi Andrew
>
> Can you please confirm my position to me as urgently as possible please, have I been placed on gardening leave or in lieu of pay, I need to know if I can actively seek work."

23. By e-mail dated 19 May 2017 at 10:38 hours Mr Hutton replied to the claimant as follows:-

> "Hi Dawn
>
> I confirm that you will be paid up to 15 June, however you are free to seek alternative work immediately.
>
> We are prepared to offer you the option of resignation if you wish to accept as reason for finishing with Grant Property. We would then be able to note this in any references that you require rather than us stating the contract was terminated this would not affect any final payments to you.
>
> I have been speaking to Christine in HR regarding final pay etc and I will notify you of this as soon as possible. I will also come back to you regarding the other points in your e-mail."

24. The claimant replied to this e-mail at 10:44 hours on 19 May 2017, (pages 35/36) as follows:-

> "Hi Andrew
>
> Unfortunately this does not answer my question, am I being paid in lieu or in garden leave? My understanding is that I have been dismissed due to my performance levels not being satisfactory, I do not wish to resign from my post."

25. Mr Hutton then replied at 10:49 hours on the same date as follows:-

> "Hi Dawn
>
> I can confirm it is paid in lieu of notice period."

26. Then, in an e-mail of 22 May 2017 timed at 08:38 hours Mr Hutton wrote again to the claimant setting out the decision for terminating her contract and this set out six bullet points. His e-mail ended as follows:-

"Due to problems you are aware of with internal systems this is delayed information on holidays etc to finalise your final pay. I will have this with you as soon as possible."

27. The claimant acknowledged this in an e-mail also dated 22 May 2017 timed at 09:23 hours. It read as follows:-

"Hi Andrew

Thank you for sending the reasoning to me as I explained Thursday was a bit of a blur.

I have read over this a few times and still fail to see any gross misconduct or reasoning to warrant instant dismissal in termination of contract.

I believe there is fair reasoning to this issue which require no action other than some training and support. I presume I have the right to appeal this decision and raise a grievance through the Company's grievance procedure?"

28. There does not appear to have been a reply sent to this e-mail or, if there was it was not included in the bundle of documents.

29. As indicated above, the claimant subsequently wrote to the respondent raising a grievance and then later by way of raising an appeal neither of which appear to have been responded to by the respondent.

30. Following the meeting with the claimant on 18 May Mr Hutton e-mailed his colleague Christine Millar on the same date at 16:40 hours, (page 39. His e-mail reads as follows:-

"Hi Christine

This is to confirm that Dawn's contract was terminated as of today. As per contract we have notified her that she will receive notice of 1 month's pay. Please can you confirm the final pay she will receive on 15 June along with any holiday entitlement."

31. This was acknowledged by e-mail of 19 May 2017 at 10:36 hours by Ms Millar, (page 39) this reads:-

> "Hi Andrew
>
> Just to confirm, Dawn will be paid up to and including 15 June 2017 and that up till that date she is due 14 holidays – you can let me know how many she has taken to date prior to June payroll."

32. Mr Hutton acknowledged that he did not provide the claimant with a letter setting out the reasons for dismissal although he knew when he attended the meeting on 18 May in Stirling that he was going to terminate the claimant's employment and that this was to be done with immediate effect.

33. Subsequently, the claimant was paid in the respondent's June payroll run on 15 June 2017. Although there is no correspondence lodged to this effect it was not in dispute that the claimant later wrote to the respondent, pointing out that her employment was terminated on 18 May and accordingly she was entitled to be paid to 18 June 2017. As the payment she received on 15 June was only to that date her understanding was that there were a further three days' pay due to her. The Tribunal understood that a payment for these further three days payment was subsequently paid to the claimant by the respondent.

Claimant's Submission

34. At the conclusion of the evidence the claimant did not wish to make any formal submission other than to say that she had received no prior warnings and there was nothing, in her understanding, done to constitute gross misconduct thereby entitling the respondent to dismiss her or to require her to leave immediately. No reason was given as to why she could not carry on working out her notice and she believed that the decision had been construed in this way so as to ensure that she would have insufficient qualifying service to bring a complaint of unfair dismissal. The claimant was adamant that she had been deliberately retained in the Stirling office while Ms Simpson was on holiday and there was then a handover of work on 17 May which then meant that on

18 May the respondent was in a position to dismiss her with immediate effect. Had she been allowed to work out her notice until 18 June she would then have had three days over the requisite two years' qualifying service to bring a complaint of unfair dismissal. The claimant was adamant that the respondent had been very "constructive" in the dates that they had used and knew exactly what they were doing so as to ensure that the claimant would not have the right to bring a complaint of unfair dismissal.

35. The claimant's P45, (page 43) shows a leaving date of 15 June 2017 not 18 May 2017.

36. Employees, including the claimant were paid monthly. The respondent's practice is to pay employees mid-month on the 15th of each month and to do so by payment made direct to each individual's bank account. This has the effect that employees are paid two weeks in arrears and two weeks in advance each month.

Respondent's Submission

37. Mrs Bennie commenced her submission by suggesting to the Tribunal that the claimant's own submission supports the respondent's contention, namely that the claimant has insufficient qualifying service to bring a complaint of unfair dismissal. She did not intend to offer any comment as to the fact that the claimant required two years' service or that her employment was terminated immediately on 18 May 2017.

38. The Tribunal requires to determine what was the effective date of termination. The relevant statutory provision is set out in Section 97 of the Employment Rights Act 1996, (the 1996 Act).

39. This states as follows:-

"**97 Effective date of termination**

(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 in 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…."

40. Mrs Bennie pointed out that the claimant did not speak of her employment being terminated by notice but rather by reference to payment in lieu of notice.

41. The Tribunal had heard both the claimant and Mr Hutton. Mrs Bennie invited the Tribunal to find that the evidence of the respondent should be preferred as it was consistent with all the other evidence, including the claimant who was clear in her response that she was told at the meeting, "I was told to leave with immediate effect". She understood that the respondent was letting her go due to her performance and that she was advised she would be paid one month's pay in lieu of notice and was not required to work her notice. The claimant had accepted in cross-examination that she had no choice but to accept that the decision had been made and that she was being dismissed, rightly or wrongly, due to her performance.

42. This was consistent with Mr Hutton's evidence and the question posed to him by the Tribunal Judge. The decision had already been taken before he met the claimant and was consistent with all the other evidence in the case and, in particular, the claimant's application to the Tribunal when it was submitted on 1 August 2017 where she was clear that she refers to "I was dismissed on 18 May 2017". It really could not be clearer. The claimant knew that she did not have sufficient qualifying service to bring a complaint of unfair dismissal.

43. Mrs Bennie referred to the e-mail set out on page 39 when Mr Hutton wrote to Ms Millar and he refers to "This is to confirm that Dawn's contract was terminated as of today." Having regard to Section 97(b) of the 1996 Act that is the date on which the termination of employment took place. That was the

purpose of the e-mail of 16:40 from Mr Hutton to Ms Millar, namely that the claimant's employment was "terminated as of today".

44. Also at page 37, where the claimant enquires what the position is and this was in reply to the e-mail of 18 May from the claimant, (again page 37) where she queried what the position was and this was followed this up with a further e-mail on 19 May sent at 09:45 hours. In her e-mail of 18 May the claimant states:-

> "During this short meeting I was advised that my employment with Grant Property was to terminate with immediate affect (*sic*) and I was dismissed due to performance levels not meeting the standards and placed on what I believe is gardening leave (one month's pay)."

45. That was in accordance with the contract and so accordingly the effective date of termination was 18 May 2017. The claimant, however, wrote and asked for clarification and in the e-mail set out at page 35, timed at 10:49 hours on 19 May 2017 Mr Hutton confirmed to the claimant as follows:-

> "I can confirm it is paid in lieu of notice period."

46. Mrs Bennie submitted that it was also relevant that the claimant in her letter of 22 May 2017 (this being the grievance letter) referred to:-

> "Andrew quickly advised me that a decision had been made to terminate my employment with Grant Property with immediate effect."

This follows on from the reference to the meeting held on 18 May 2017.

47. Next, at page 42 in the appeal letter the claimant in the second paragraph states:-

> "I was dismissed, effective from 18 May with pay being given to the 15th June in lieu of notice on the grounds of poor performance. I would like to appeal against my dismissal."

48. Again, the claimant accepted that she was dismissed with effect from 18 May 2017. Mrs Bennie submitted that it was always helpful to set out what is

agreed and where there is no dispute between the parties. In her submission, the e-mails set out the position clearly. Some aspects of the claimant's contract of employment, particularly at Clause 16, provide an entitlement to one month's notice but, in her submission, what is an entitlement is that the contract says the employment can be terminated and that after three months' continuous service there is an entitlement to one month's notice. However, the employer reserved the right to make a payment in lieu of notice.

49. There was no expectation on the part of the claimant that she would work beyond 18 May 2017. She was very clear in her evidence that she did not think she had a choice and this was not a case of her employment continuing and her being allowed to sit at home. She knew she had no expectation of working beyond 18 May 2017.

50. In his e-mail of 19 May at 10:38 hours Mr Hutton said to the claimant:-

> "I can confirm that you will be paid up to 15 June, however you are free to seek alternative work immediately."

51. Mrs Bennie accepted that there may be a sense of unfairness on the claimant's part as to how she was treated but that is not the issue before the Tribunal.

52. In terms of any findings of fact, Mrs Bennie would invite the Tribunal to make a finding that, on the evidence and based on the productions, the claimant's employment was terminated on 18 May 2017 by Mr Hutton and that 18 May 2017 was the date when termination took effect and, in her submission, there was no ambiguity in the evidence to support any other view. In any event, it is resolved at 10:49 hours on 19 May 2017 by Mr Hutton when he replies to the claimant, (page 35) as follows:-

> "I can confirm it is paid in lieu of notice period."

53. It was accepted by Mrs Bennie that the claimant's P45, (page 43) does give a leaving date of 15 June 2017 but, as the Tribunal understood it, that was only one adminicle of evidence.

54. In response to a question as to why the respondent did not pay the claimant's notice pay there and then (i.e. soon after the dismissal date of 18 May 2017), but rather waited until the next payroll run on 15 June 2017, Mrs Bennie accepted that the Tribunal was right to point this out. She referred the Tribunal to the Court of Appeal in *Locke v Candy and Candy Limited [2011] ICR 769* and to Lord Justice Pill at paragraph 15 where he said this:-

> "I mention one aspect of the evidence mentioned at the hearing in this court though not fully argued. Payment in lieu of notice was made by six monthly payments corresponding to the monthly salary payments if the contract had persisted. It appears to me that the payments should have been made as a lump sum upon termination, subject possibly to discount for accelerated payment, rather than by way of monthly payments. The right to the payment in lieu of notice appears to me to have accrued immediately. However, I mention the point only to make clear that it is not suggested that the monthly payments kept the employment in existence. This aspect of the evidence does not in my judgment bear upon the issue in the appeal. No separate claim has been made under this head. That is not surprising, any loss arising from the lapse of time in payment being in the circumstances very small."

55. At this juncture, the claimant reminded the Tribunal that the P45 does give the different day of 15 June 2017. She flagged that, so far as she was concerned, she had given that date when contacting the Job Centre and it might raise an issue in relation to tax.

56. Mrs Bennie then continued her submission by referring to the earlier judgment looked at in the previous Preliminary Hearing, *Adams v GKN Sankey Ltd* [1980] IRLR 416 EAT.

57. In addition, she intended to refer to House of Lords judgment in *Delaney v Staples [trading as De Montford Recruitment)* 1 AC [House of Lords] 687 where pay in lieu, if paid, is to be regarded as damages. The respondent's position was that monthly paid employees were paid mid-month on the 15th of the month and therefore, accordingly, the claimant's payment of salary on 15 May was for two weeks in arrears and two weeks in advance.

58. With reference to *Delaney* Mrs Bennie drew attention to Lord Browne-Wilkinson page 692 C to H and then A to D at page 693 and, in particular, where it is stated:-

> "The phrase "payment in lieu of notice" is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories:-
>
> (1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly call "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of notice: the lump sum payment is simply advance payment of wages.
>
> (2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.
>
> (3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.
>
> (4) Without the agreement of the employee the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu and the present case falls into this category. The employer is in breach

> of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment."

The nature of a payment in lieu falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages for breach of contract. In *Gothard v Mirror Group Newspapers Ltd* [1988] ICR 729, 733, Lord Donaldson of Lymington M.R. stated the position to be as follows:

> "If a man is dismissed without notice, but with money in lieu, what he receives is, as a matter of law, payment which falls to be set against, and will usually be designed by the employer to extinguish, any claim for damages for breach of contract, i.e. wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer."

59. In Mrs Bennie's submission, the position here is as set out at point 2 in *Delaney v Staples.* Points 1 and 3 do not apply and on point 4 the circumstances were quite different from the present circumstances and so should not be dwelled on to any extent.

60. In Mrs Bennie's submission, this was exactly what happened in this case in that the employment was terminated or came to an end on 18 May 2017 as no further services were required by the claimant.

61. The reference at Section A through D on page 693 narrates the nature of a payment as follows:-

> "In my view that statement is the only possible legal analysis of a payment in lieu of the fourth category. But it is not, and was not meant to be, an

analysis of a payment in lieu of the first three categories, in none of which is the dismissal a breach of contract by the employer. In the first three categories, the employee is entitled to the payment in lieu not as damages for breach of contract but under a contractual obligation on the employer to make the payment.

Against that background, I turn to the relevant provisions of the Act. Section 1(1) prohibits an employer from making "any deduction from any wages of any worker employed by him" unless such deduction is of kind authorised by section 1 of the Act. Therefore, to fall within the prohibition contained in section 1 two things have to be demonstrated: first, that there has been a "deduction;" second, that the deduction was made from "wages."

As to "deductions," section 8(3) provides:

> "Where the total amount of any wages that are paid on any occasion by an employer to any worker employed by him is less than the total amount of the wages that are properly payable by him to the worker on that occasion (after deductions) then, except in so far as the deficiency is attributable to an error of computation, the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

62. Mrs Bennie then referred to *Locke* and the reference at paragraph 26 on page 774 which refers to *Delaney*, (see above) where an employee who was summarily dismissed brought proceedings in the Industrial Tribunal, claiming holiday pay, commission on payment in lieu of notice. The Court of Appeal held that the Industrial Tribunal had jurisdiction to award holiday pay and commission, but no jurisdiction to award payment in lieu of notice.

63. There was then further consideration given to the phrase, "payment in lieu of notice".

64. At paragraph 28 in *Locke* it states:-

> "28. This fourfold categorisation of payments in lieu is extremely helpful. I shall bear it in mind when reaching my decision in the present case."

65. Next, Mrs Bennie referred to Clause 30 of *Locke* as follows:-

> "30 Clause 7.5 of the contract gives the defendant the right to terminate the claimant's employment summarily by making a "payment in lieu of notice". The clause does not state the measure of that payment."

66. Then, at paragraph 34:-

> "34 A bonus payment is a form of remuneration. In some contracts of employment for senior professional staff (of which this case is an example) the bonus is an important element of the employee's reward for work done. Payment in lieu of notice is conceptually different from remuneration. It sub-divides into four categories, as explained by Lord Browne-Wilkinson in *Delaney's* case. In category 1 the payment in lieu of notice may be related to remuneration, because the employee is being paid in effect to do nothing. However, categories 2, 3 and 4 are not any form of remuneration. They are compensation because the employee has, with no advance warning become unemployed."

67. In Mrs Bennie's submission, paragraph 34 is exactly right and while the claimant may have a palpable sense of unfairness that is not the issue in the case. She had nothing further in *Locke* to which she wished to refer the Tribunal.

68. Next, she referred the Tribunal to the Employment Appeal Tribunal in *Cosmeceutical Limited v Ms T Parkin Bailli* [2017] UKEAT 0049 17 2706 before her Honour Judge Eady QC on 27 June 2017.

69. Attention was directed to paragraph 15 which refers to the statutory concept set out at Section 97 of the 1996 Act, (see above).

70. Next, she directed attention to paragraph 17 as follows:-

> "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 Limited 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 Section 55(4) is the date of the dismissal and not a later date…
> >
> > (3) S.55(4)(b) defines the effective date of termination as being the date in 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 in 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 in 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 in to 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.193E – 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:-

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

This indicates that the date of the final termination of the contract does not necessarily 'the effective date of termination' or 'the relevant date'; if, as in the case of repudiation, further full performance becomes impossible, that will be the relevant date.

(4) We consider it a matter of the greatest importance that there should be no doubt or uncertainty as to the date which is the 'effective date of termination'. An employee's 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 in force. 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 fix the effective date of termination at what most employees would

understand to be the date of termination, i.e. the date in which he ceases to attend his place of employment.

(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 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."

71. In Mrs Bennie's submission, this was exactly what happened here and therefore the issue is the application of s.97 either s97(1) (a) or s 97(1)(b). In s.97(a) the employee remains in employment, subject to the notice expiring but that is not the case here. Instead, here, the claimant's employment was terminated without notice and so it is s.97(1)(b) because her employment was terminated summarily without her being given notice but with a payment in lieu. The employer here, by virtue of the contract of employment, reserved the right not to provide notice but to make a payment in lieu without being in breach of contract. In Mrs Bennie's submission, it therefore follows that the claimant was dismissed with immediate effect on 18 May 2017. The claimant's own words were that she understood she was dismissed on 18 May and her employment was therefore not continuing beyond that date. She did not have an expectation of continuing employment but she did have the right to be paid in terms of the contract but that was to damages.

72. The employer had expressly said that it could terminate summarily but then there would be the issue of what the notice period would be and this was as damages not wages. The claimant was entitled to the payment in lieu of notice and that was one month's loss of earnings. Had she not been paid it and had found a new job which she would have been entitled to do from 19 May 2017 but she would still have been entitled to the payment in lieu because there was an obligation on the respondent to pay her the one month's notice.

73. The claimant's position was that she did not receive her payment in lieu until 15 June 2017. The Tribunal's understanding is that deductions may have

been made from that payment because it was classified as wages. That is not a matter for determination, however, by this Tribunal.

74. The e-mail of 19 May from Mr Hutton made it clear that "I confirm that you (the claimant) will be paid up to 15 June, however you are free to seek alternative work immediately."

75. The respondent appeared to accept that there might have been a better way to have handled the claimant's dismissal. Indeed, Mr Hutton endeavoured to intervene to say this but as indicated this is not the issue for determination by this Tribunal.

76. Finally, for completeness, Mrs Bennie wished to refer *to IPC Business Press Limited v Gray* a Judgment of the Employment Appeal Tribunal [1977] 858 and in particular at page 861, Section E to F as follows:-

> "In most situations, if an employer who intends to get rid of an employee tells the employee that he has not to report for work again, and tenders him cash in lieu of notice, such conduct operates a summary dismissal. It is the unilateral act of the employer determining the obligation of the employee to work and his right to enter the employer's premises. Such events are usually regarded as having the effect in law of summary dismissal. It was the view of the majority of the Industrial Tribunal that that was what the effect in law here was of Mr Fitzgerald's conduct on August 13, taken in conjunction with the tender of pay in lieu of notice."

77. The Judge, Mr Justice Cumming-Bruce indicates that that is what happened in that case.

78. At page 862 at Section H he stated this:-

> "The next question that arises is this. When Mr Fitzgerald told the employee not to come into work on the following Monday, in a situation which the employers were still proposing to make a payment in lieu of notice, did the action of Mr Fitzgerald in telling the employee not to come in on Monday operate in law as a summary dismissal of the employee? Our view on that is that in most cases, if an employer unequivocally says

that he is determining an employee's service, that he does not want the employee to come to work anymore, and that he is paying him money in lieu of notice, such conduct operates as a unilateral summary dismissal of the employee and the employee cannot in law modify the legal effect of the summary dismissal by refusing to accept the money or protesting, because the dismissal is a unilateral repudiation of the contract by the employer, and on a long-established line of authority, requires no acceptance by the employee. And, in so far as the employee thought that he could force the employers to continue employing him until August 31 merely by returning the cheque and refusing to treat himself as sacked, such conduct has no effect at all.

But the question for decision here is whether, in context, the communication made by Mr Fitzgerald to the employee was intended to be, and was in law, a summary dismissal of the employee. We have learned something today which we do not suppose the Industrial Tribunal knew, but which is something that in our view we are certainly entitled to take into account. With appropriate candour for which we are grateful (and which was no less than that which we would expect from this Company) Mr Mattingly has told us that the employers took advise about the determination of the employee's contract in order to ensure that they were going to get the thing right in accordance with the law - because the employers, rather shyly, in spite of the draftsman's efforts in the statutes, were not quite sure what their rights were: a shyness which does not surprise us."

79. In Mrs Bennie's submission, that point was subsequently followed in *Cort* and by the EAT in Cosmetics in 2017.

80. I.P.C. upheld in the decision in *Cort*. The same thing was being said that the point of determination in *Cort* is relevant.

81. All the authorities to which Mrs Bennie referred support her contention as to the termination of the claimant's employment having been on 18 May 2017 and, from the evidence and the productions Mrs Bennie invited the Tribunal to find that the claimant's employment was terminated on 18 May 2017 and

since it was determined on that date then, in terms of Section 97(1) (b) of the 1996 Act, she does not have sufficient qualifying service to bring a complaint of unfair dismissal.

82. **Relevant Law**

Section 97 of the 1996 Act is set out above under the Respondent's Submission. Sections 94 and 108 are also relevant. Section 94 sets out the right of an employee not to be unfairly dismissed by an employer while Section 198 deals with the issue of qualifying service. It provides:-

"**108. Qualifying period of employment**

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

83. **Deliberation and Determination**

The Tribunal was grateful to the parties for their assistance in this case and for the detailed analysis provided by Mrs Bennie with reference to the Judgment which had been referred to in October as well as the Judgments to which she referred on 30 January. It is appropriate to explain that the claimant was given the opportunity to read these further Judgments in the lunch adjournment and she did not want to provide any comments although she was invited to do so if she wished.

84. As indicated by Mrs Bennie, this Tribunal has to determine the issue of whether the claimant has sufficient qualifying service to bring a complaint of unfair dismissal and, in order to deal with that, the Tribunal has to give consideration to the terms of s97 of the 1996 Act.

85. After careful consideration of the submissions and, having regard to the evidence and the claimant's own acceptance that her employment was terminated with immediate effect on 18 May 2017, the Tribunal concluded that this was in accordance with Section 97(1)(b) of the 1996 Act which states:-

> "In relation to an employee whose contract of employment is terminated without notice, means the date in which the termination takes effect."

In this case, the claimant's employment was terminated verbally without notice on 18 May 2017. She was aware that the respondent did not require her to return to work and that while she had an entitlement to pay this was to pay in lieu of notice and this was subsequently paid on 15 June 2017 albeit a further three days' pay was later paid to her when she brought to the respondent's attention that one month's notice from 18 May was to 18 and not 15 June 2017.

86. As was pointed out above, the respondent was asked as to why, if a payment of lieu was being made, it was deferred until 15 June 2017.

87. However, that does not assist the claimant in that the issue for determination is what was the termination date. Having regard to all the facts in this case, the evidence and the authorities to which it was referred, the Tribunal has to find that the date of termination of employment was, as the claimant indeed appear herself to have accepted, 18 May 2017. The fact that she had an entitlement to receive a payment in lieu of notice does not extend her employment through to 15 or indeed 18 June 2017. Accordingly, since she has less than two years' qualifying service she is not entitled to bring this complaint of unfair dismissal.

88. It therefore follows, applying the law to the above findings of fact, that the Tribunal concluded that this claim must be dismissed.

89. In reaching this view, the Tribunal made it clear at the conclusion of the Preliminary Hearing when judgment was reserved, that the point seemed to have been accepted by both Mr Hutton and Mrs Bennie, on behalf of the respondent, that this case could have been handled in a very different fashion but that it not what this Tribunal has to determine.

90. In all the circumstances the Tribunal concluded that the claimant's employment was terminated on 18 May 2017 and, that being the case, it does

not have jurisdiction to consider the complaint and accordingly the complaint is dismissed.

Employment Judge: F Jane Garvie
Date of Judgment: 12 February 2018
Entered in register: 13 February 2018
and copied to parties