EMPLOYMENT TRIBUNALS

Claimant: **Mrs G Burrett**

Respondent: **Triodos Bank UK Ltd**

Heard at: **Bristol** **On:** **12 September 2019**

Before: **Employment Judge Livesey**

Representation:
Claimant: Mr Burrett, the Claimant's husband
Respondent: Ms Winstone, counsel

JUDGMENT having been sent to the parties on 1 October 2019 and written reasons having been requested on 16 December 2019 and time under rule 62 (3) of the Employment Tribunals Rules of Procedure 2013 having been extended under rule 5, the following reasons are provided:

REASONS

1. The claim

1.1 By a Claim Form dated 10 September 2018, the Claimant brought complaints of breach of contract.

2. Background

2.1 A response was filed and the claim was originally listed for hearing on 18 January 2019.

2.2 The Response included an application to strike the claim out the claim which was addressed by Employment Judge Mulvaney at a preliminary hearing which took place on 18 January 2019. Having heard considerable argument, she struck out the claims for breach of contract based upon the implied duty of care in four respects (see paragraph 3 of the Case Management Summary of that date). The remaining claim of breach of contract relating to notice was permitted to proceed and directions were given for a hearing which was listed to take place on 22 March 2019.

2.3 On 6 February 2019, the Claimant applied for reconsideration of part of the Judgment relating to the provision of an alleged 'injurious reference' (paragraph 3.2 of the Case Management Summary).

2.4 In light of the fact that Employment Judge Mulvaney could not consider the reconsideration application earlier, the hearing on 22 March was postponed. The parties then invited her to consider the Claimant's application without a hearing and she provided a judgment on 2 May 2019 in which she revoked that part of her earlier Judgment relating to the reference. This hearing was then listed in order to deal with the two outstanding issues; breach of contract complaints relating to notice and the provision of a reference.

3. Evidence

3.1 The Claimant gave evidence in support of her case. The Respondent called no witnesses of its own.

3.2 The following documents were produced;
- C1; the Claimant's skeleton argument;
- R1; the hearing bundle of documents;
- R2; the Respondent's skeleton and the case of *Geys-v-Societe Generale, London Branch* [2012] UKSC 63.

4. Issues

4.1 The issues were discussed and agreed at the start of the hearing.

4.2 In relation to the claim concerning notice, the issues had been identified within paragraph 4 of Employment Judge Mulvaney's Case Management Summary of 18 January 2019;

"*Whether the respondent's dismissal of the claimant by invoking the pay in lieu of notice* ['PILON'] *provisions in the contract of employment was effective to terminate the claimant's employment on 8 August 2018, considering the judgment in the case of Societe Generale, London Branch-v-Geys [2012] UKSC 63*.
If not, what was the effective date of termination?
To what damages is the claimant entitled."

4.3 The first of those issues was refined by agreement at the start of the hearing to the identification of the date upon which the Claimant was dismissed.

4.4 The issue relating to the reference appeared to have been dependent upon the decision on the notice issue because, if the Claimant had been dismissed before the date of the reference, implied contractual duties would not have existed after the end of the contract of employment (see paragraph 15 of the Reasons of 18 January and paragraphs 4 and 5 of the Judgment on Reconsideration of 2 May 2019).

4.5 The issues were nevertheless identified as follows;
- Could the Claimant pursue such a claim of breach of contract in the event that the reference was provided after her employment had come to an end;

- If so, did the Respondent breach the duty to exercise reasonable care and skill to ensure the accuracy of facts communicated within the reference;
- If so, what were the Claimant's losses?

During the course of the hearing, it became clear that there was a further jurisdictional issue relating to the application of the Extension of Jurisdiction Order 1994 and the Claimant's ability to have brought a breach of contract claim if her employment had not been terminated, which was her case.

4.6 At the start of the hearing, there was a discussion about the identity of the Respondent. On 20 May 2019, the Respondent's representatives informed the Tribunal that all of its clients' banking business in the UK had been transferred to a new subsidiary, Triodos Bank UK Ltd. They invited the Tribunal to amend the Respondent's identity within the proceedings accordingly. The Claimant was invited to consent but, in his letter of 14 June, Mr Burrett did not agree to the change and the Tribunal indicated that the matter would be dealt with at the commencement of the hearing.

4.7 The matter was therefore re-visited and the Claimant did consent to the amendment on the basis of the Respondent's assurance that it would meet and/or carry any liability in respect of any judgment.

5. Facts

5.1 The following factual findings were made on the balance of probabilities. Any page references provided within these Reasons are to pages within the hearing bundle R1 unless otherwise stated and have been cited in square brackets.

5.2 The Claimant was employed by the Respondent as Head of Human Resources from 11 September 2017.

5.3 Her contract of employment contained the following provisions in relation to notice [51-2];

"*7. One week's notice during your first month and 12 weeks thereafter..*

9. We reserve the right to pay you in lieu of notice, based on your fixed remuneration. Any payment in lieu of notice shall be subject to deductions for income tax and national insurance contributions."

5.4 On 6 August 2018, the Claimant was invited to attend a meeting on the 8th at the offices of TLT LLP, solicitors in Bristol.

5.5 At the meeting, the Managing Director of the Respondent, Mr Watts, informed the Claimant that he had taken the decision to dismiss her. In cross-examination, the Claimant accepted that she was told that her employment was being terminated for the reasons that were subsequently given to her in writing.

5.6 Later that day, by email, the Claimant received a letter in which she was advised that she would receive payment in lieu of 12 weeks' notice plus a payment to reflect untaken holiday. An additional ex gratia sum of £3,000

was also paid. The letter stated that her employment had been terminated "*with immediate effect*" and that her "*final day of employment will therefore be Wednesday 8 August 2018*" [70-71]. The following reasons were given;

> "*The reason for this decision is, as you know from our discussions, relates to the progress to date of your development in your role, a growing lack of confidence in your ability to deliver the strategic direction that the business requires at this time, and the quality of relationship established with both myself and the Group Director of HR.*"

5.7 The Claimant had asserted that her employment ended on 8 August 2018 in section 5.1 of her Claim Form [4].

5.8 The 9 August was a Wednesday and the Claimant did not attend for work, nor did she do so thereafter.

5.9 On 9 August, however, she wrote to Mrs Verhagen, the Director of HR, and attempted to appeal against the termination of her employment. Her letter specifically referred to its termination "*yesterday, 8th August 2018*". She also expressed concern about the quality of any future reference which the Respondent may have provided.

5.10 On 13 August, Mr Verhagen provided the intended wording of any future reference and also informed the Claimant that there was no right of appeal in respect of her dismissal [76];

> "*It is Company policy to confine references to confirmation of certain factual data concerning the individual's contract of employment with us. Judgements as to the aptitude and suitability for other appointments must be the sole responsibility of prospective employers.*
>
> *This is to confirm that Gorse Burrett was employed by Triodos Bank NV from 11 September 2017 to 8 August 2018 as Head of Human Resources.*
>
> *In this case we are happy to add that Gorse brought positive energy and creative ideas to the business. Key milestones during her 10 year were the restructuring of the HR function and the creation of a Learning and Development Prospectus for Triodos Bank UK. Particular strengths were public speaking and championing her team.*
>
> *This reference is given in strictest confidence and without legal liabilities.*"

5.11 The Claimant replied on 14 August [76A-B]. She restated her case and continued to complain about the manner of the termination of her employment. She accepted in cross-examination that she had been promised and was entitled to 12 weeks' pay.

5.12 The Claimant commenced early conciliation through ACAS on 28 August and then issued her claim on 10 September 2018.

5.13 Meanwhile, she applied for other work. She secured a conditional offer from the Newbury Building Society, subject to references. The reference which was provided by the Respondent on 28 September 2018 was the same as that set out above, save that the following paragraphs were added;

> "*However, we chose to terminate Gorse's employment and the reasons for this decision related to the progress of development in the role, a growing lack of confidence to deliver the strategic direction that the business requires at this time, and the quality of relationship established with the Managing Director and the Group Director of HR.*

There were no concerns about Gorse's conduct or regulatory concerns."

5.14 The Respondent also completed a regulatory form and answered, amongst other things, the following questions [77-80];

"*QE: Have we concluded that the individual was not fit and proper to perform a function:*
Answer: No
QG: Are we aware of any other information that we reasonably consider to be relevant to your assessment of whether the individual is fit and proper? This disclosure is made on the basis that we shall only disclose something that (1) occurred or existed:
Answer: Yes" (the Respondent then referred to the text set out in paragraphs 5.10 and 5.13 above).

5.15 Regulatory references are required under the FCA rules. An employer is required to ensure that any employee is and has been regarded as 'fit and proper' for six years prior to their recruitment.

5.16 It was important to note that the Claimant was successful in her application and was employed by Newbury Building Society from 2 October 2018 as Head of HR where she continues to be employed. She stated that the reference has been removed from her personnel file but that "*it could yet ruin my career*" (paragraph 44 of her witness statement).

6. Conclusions

Notice

6.1 The effective date of termination is an objectively determined construct which the employer and employee cannot agree between themselves.

6.2 The courts had previously suggested that a repudiatory breach of contract automatically brought a contract of employment to an end without more. In *Societe Generale, London Branch-v-Geys* [2012] UKSC 63, the Supreme Court held that that approach was not sound. Where an employer sought to terminate an employment contract immediately, relying on a PILON provision to make payment of notice pay in lieu of the employee being required to work his/her notice, the contract did not come to an end automatically, but only when the employee received clear and unambiguous notification that that was what was happening.

6.3 In *Geys,* the question arose as to when the employer had validly exercised the PILON clause in the employee's contract. The Claimant had been called into a meeting on 29 November 2007 and informed that his employment was terminated there and then. On 18 December, his employer paid sums which were due to him under the PILON clause into his bank account. He became aware of the payment at some point before the end of the year. On 4 January 2008, the employer sent a letter informing him that the clause in his contract had been exercised and that the payment in lieu of notice had been made. Importantly, the relevant clause in *Geys* indicated that the employer could have terminated the employee's employment "*at any time with immediate effect **by*** [emphasis added] *making a payment to you in lieu of notice*".

6.4 The Supreme Court held, by a majority, that the PILON clause did not dispense with the requirement for the employee to have been given clear and unambiguous notice that the right to end the contract in pursuance of the clause had been exercised. In that case, the clarity was not provided until the letter of 4 January, which was deemed to have been received on the 6th. Accordingly, where an employer was expressly permitted to terminate the contract in pursuance of such a clause, there was an implied obligation to notify the employee in clear and unambiguous terms that such a payment had, or was to have been, made in the exercise of that contractual right in order for the employment to have been terminated with immediate effect (see Lady Hale's judgment at paragraph 57).

6.5 Here, the letter of 8 August 2018 made it clear what was happening; that the Claimant's employment was terminated immediately and that the Respondent was exercising its right to pay her in lieu of notice. The Respondent was not acting in breach of contract by terminating the employment. Both parties had a right to terminate the contract in accordance with the notice provisions. Similarly, the Respondent was not in breach of contract by paying notice in lieu of requiring the Claimant to have worked her notice period, since that right was expressly reserved in the contract too. There was no repudiatory breach. The case of *Geys* did not assist the Claimant in establishing some later date of termination in view, first, of the clarity in the letter of 8 August and, secondly, the absence of any repudiatory breach.

6.6 The Claimant argued that ambiguity existed because the amount of the payment was not specified. Although it was not specified in financial terms, it was sufficiently clear in order to have enabled the Respondent to rely upon 8 August as the effective date of termination. The Claimant was informed that she would have been paid 12 weeks' pay in lieu of notice and that sum then became a debt. The fact that it was not paid until 31 August did not mean that the date of dismissal was extended until that date or some later date when the amount that was paid or the breakdown of the payment, which included other elements, was properly explained. Neither of those later dates were dates anticipated by *Geys* as determinative of the effective date of termination. As was said in *Geys*, there was a need for both the employer and employee to know where they stood and when the employment was to have ceased (paragraph 57). In this case, the letter of 8 August made it entirely clear when that was. The PILON clause here, clause 9, was very different from that in Mr Geys' case.

6.7 In my judgment too, the position was clear to the Claimant; she sought to appeal against the termination of her employment on 8 August the following day, she made no attempt to attend for work after 8 August and, when she brought her claim to the Tribunal, she asserted that the effective date of termination had been that date too. In those circumstances, it was difficult for her to allege that she was confused by the circumstances.

6.8 Assuming, for a moment, that that was wrong, what *later* date ought the effective date of termination to have been? In his skeleton argument, C1, Mr Burrett argued for 2 October 2018 (paragraph 15) or 22 or 23 January 2019 (paragraph 14). In closing submissions, he stuck to 2 October, appreciating the problem of the Claimant having been employed by two employers at the same time after that date. But, with either date, a fundamental problem

existed; if the Claimant was right, she would still have been the Respondent's employee when the Claim Form was issued. Article 3 of the Extension of Jurisdiction Order 1994 only gave this Tribunal jurisdiction in certain prescribed circumstances under article 5 or in a situation in which an employee's employment had ended. That requirement would not have been fulfilled (see paragraph 15 of the Respondent's skeleton argument, R2).

Reference

6.9 The issue of the reference had not been raised in the Claim Form at all [13-14]. Employment Judge Mulvaney's Judgment of 18 January 2019 referred to it having been raised by email on 15 November 2018 following the disclosure of the reference on 8 November. Although raised in correspondence, no formal amendment was sought.

6.10 At the Preliminary Hearing which the Tribunal set up to consider strike out and/or deposit orders, the Respondent addressed the issue without reference to the lack of amendment but, rather, the fact that any duty to provide an accurate reference died with the contract in August (see paragraphs 15 to 19 of its submissions on that day). Employment Judge Mulvaney then dealt with the argument as if it were an issue in the case and as if it had been amended in, because she struck it out (see paragraphs 15 and 16 of her Reasons of 18 January 2019). She then revoked that decision and allowed the issue back in on 2 May 2019. It was implicit then, if not before, that it was a live issue in the case. It is worth noting that the Respondent did not comment upon the Claimant's reconsideration application.

6.11 This issue was addressed with Ms Winstone and she conceded that it was not her strongest point, but she had another; the complaint about the reference, she said, post-dated by some considerable period the end of the Claimant's employment. It did not therefore arise from or was outstanding upon the termination of her employment, as was required under article 3 of the 1994 Order. She was correct.

6.12 Again, however, on the assumption that she was wrong, what of the merits of the complaint?

6.13 The Claimant had always contended that the reference was "*maliciously intended to sabotage* [her] *career*" (Mr Burrett's email of 5 March 2019). She consistently alleged that it was in breach of the alleged implied duty of care.

6.14 There was no general common law duty for an employer to provide a reference but, in *Spring-v-Guardian Assurance plc and others* [1994] ICR 596, the House of Lords found that, if an employer did provide one, it was under a duty to exercise reasonable care and skill in order to ensure its accuracy. An employer which failed to comply with that duty would have been acting in breach of a duty of care in negligence and in breach of an implied term to that effect within the contract.

6.15 There was little doubt that tortious duties continued beyond the end of any employment relationship, even if the contract had ended. IDS (paragraph 3.149 of the edition on *Contracts of Employment*) suggested that the case of *Spring* enabled an employee to argue that the contractual duty continued

"*even if the employment has ended*". Although it was difficult to understand how such a duty could survive the death of the contract, Lord Woolf's judgment appeared to support the proposition (p. 647E-F);

> "*It is necessary to imply a term into the contract that the employer would, during the continuance of the engagement or within a reasonable time thereafter, provide a reference at the request of a prospective employer which was based on facts revealed after making those reasonably careful enquiries which in the circumstances a reasonable employer would make.*"

6.16 In *Bartholomew-v-London Borough of Hackney* [1999] IRLR 246, CA, the Court of Appeal suggested that the duty was slightly broader than that suggested in *Spring* in that it included the duty to provide evidence which was not misleading in giving an unfair overall impression of the employee.

6.17 In order to claim damages, a claimant would only have to show that he or she had lost a reasonable chance of employment and had thereby sustained financial loss (*Spring*, above).

6.18 Accordingly, the first issue identified above was answered in the Claimant's favour; since the request was within a reasonable time of the end of the Claimant's employment as suggested by Lord Woolf, even if it was not within the currency of the employment, the implied contractual duty still applied.

6.19 The next question was whether the reference was provided in breach of that duty, as defined in *Spring* and *Bartholomew* above. There was nothing within the Claimant's witness statement which enabled that question to be answered. Much of her statement dealt with her roles and experience and the sense of unfairness around the events of 8 August. She did not address how or why she considered the reference to have been in breach of the duty of care and/or misleading. The relevant issue simply could not have been determined in her favour on the basis of the evidence presented.

6.20 Even if that evidence had been provided, in light of the Claimant's current position and in the absence of any expectation or threat that her employment with Newbury Building Society was to come to an end, it was difficult to see that there had been any reasonable chance that she had or would sustain future financial loss. Were she to obtain new employment, the expectation would be that her current employer's reference would be relied upon by a new employer. The Respondent's reference had been expunged from her record with the Building Society and the chances of it having any material effect upon her future appeared extremely slim.

6.21 Further and in any event, the remedy which she claimed had been calculated on the basis that she expected to keep her job with her current employer for a further five years, six in total (paragraph 46 of her witness statement). Accordingly, the only regulatory reference which would have been required would then have been from her current employer, not the Respondent. Any alleged undesirable consequences of the reference would then have evaporated.

7. Costs

7.1 At the conclusion of the case, the Respondent made an application for costs. Ms Winstone argued that, following the Respondent's solicitors' letter of 29 August 2019, the Claimant had behaved unreasonably in pursuing her claim. The letter set out the Respondent's contentions in relation to the elements of her claim and concluded by making an offer of settlement in the sum of £1,500. It was asserted that, on the Claimant's best case, she might have been able to demonstrate that her employment had ended on 10 September 2018, when her claim had been brought. That would have entitled her to a further sum of £4,330.48 in net salary, but she would have been required to have given credit for the additional ex gratia sum of £3,000. By rejecting that offer and by continuing in the face of a clear explanation as to why the Respondent thought the claim was doomed to failure, it was asserted that she had behaved unreasonably within the meaning of rule 76 (1)(a).

7.2 Mr Burrett responded by referring to the decision in *Publicis Consultants-v-O'Farrell* UKEAT/0430/10. He asserted that the Respondent was wrong to have deducted the sum of the ex gratia payment and the offer was not therefore generous or reasonable on the basis of the scenario considered in the Respondent's letter.

7.3 In respect of the more general point that the Respondent had asserted that the claims were doomed to failure, it was noted that they had been considered by Employment Judge Mulvaney in detail at the hearing on 18 January 2019 and the claim in relation to the notice element had been allowed to proceed. Although the claim in relation to the reference had been dismissed, that decision was revoked without comment from the Respondent, as stated above. It was difficult to criticise the Claimant for having proceeded in light of those decisions. Although they were not encouraging green lights, it could not be said that she was conducting her litigation unreasonably in those circumstances.

7.4 Even if a different view could have been taken, and even if the Claimant could have been seen to have been acting unreasonably following the Respondent's letter, it was no appropriate to exercise discretion in the Respondent's favour; there were arguable points to have been considered under the case of *Geys*, the Claimant was effectively a litigant in person and the viability of the claims had been considered by the Employment Judge and allowed to proceed. The application was dismissed.

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Employment Judge Livesey

31 December 2019