EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111454/2019

Held in Aberdeen on 18 February 2020

Employment Judge N M Hosie

Ms I Lawrie	**Claimant** **Represented by:** **Mr D Hay - Advocate** **(Instructed by Mr F H Lefevre – Solicitor)**
Fire Protection Alliance Limited	**Respondent** **Represented by:** **Mr W Lane - Solicitor (Peninsula)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is dismissed for want of jurisdiction.

REASONS

Introduction

1. The claimant submitted a claim form on 8 October 2019. She claimed that she was unfairly dismissed from her employment with the respondent on 16 August 2019; that she was entitled to notice pay; accrued holiday pay; and an award in respect of the respondent's failure to provide her with written terms and conditions of employment.

2. She further averred, in the paper apart to the claim form, that she had entered into a Settlement Agreement ("the Agreement") with the respondent but claimed that the respondent had failed to pay her the monies due under the Agreement and that this rendered the Agreement void.

Response form

3. The claim was defended by the respondent on the following basis:

"1 The respondent asserts that a legally binding settlement agreement was reached on 26 August 2019 in full and final settlement of all claims. Such payment was made to the claimant as follows:

a. Legal fees – 23 September 2019;

b. Termination payment – 15 October 2019;

c. Salary and holiday pay – between 30 August 2019 and 27 September 2019.

2 The claimant appears to be claiming that, which is denied, the incorrect notice pay and holiday pay has been made to her. The respondent strongly denies this and asserts that it has acted in compliance with the settlement agreement. In any event, the employment tribunal does not have jurisdiction to hear such claims that have been brought as such claims have been settled.

3 Any recourse would not be in the employment tribunal's jurisdiction."

Preliminary hearing

4. This case came before me, therefore, by way of a preliminary hearing to determine whether the Tribunal had jurisdiction to consider the claim. I first heard submissions from the claimant's Counsel. I then heard submissions from the respondent's solicitor and he led evidence from Graham Morris, a Director of the respondent Company.

5. A joint bundle of documentary productions was also lodged ("P").

Claimant's submissions

6. The Claimant's Counsel sought leave to submit an additional bundle of documents comprising primarily letters, emails ("P2"). However, the respondent's solicitor objected to these documents being lodged as they had been written on a "without prejudice" basis.

7. After hearing submissions in relation to the issue, I decided that I would allow the documents to be lodged and referred to, under reservation as to their admissibility.

8. The claimant's Counsel accepted that there was no dispute that the Agreement had been signed by the Claimant and her solicitor on 26 August 2019 and by a representative on behalf of the respondent on 20 September 2019 (P45-P53).

9. The Agreement narrates at paragraph 1.1 that, *"The Employee's employment with the Company shall terminate on 16 August 2019 (the Termination Date)"* (P47). However, the Agreement was not concluded on that date and it was submitted that negotiations were still ongoing between the parties. The claimant's Counsel referred, in this connection, to an email exchange between the parties' representatives on 19 August (P2/3).

Timeline

10. Counsel then went on to detail what he referred to as the *"key dates"* which he understood were not disputed. These were as follows:-

"28/5/19 – Claimant suspended

14/6/19 – Disciplinary meeting which was rescheduled to 18/6/19 and further rescheduled to 24/6/19 when the claimant met with Graham Morris.

19/7/19 – Meeting with Mr Morris when there was discussion/negotiation about a mutual resolution of matters.

25/7/19 – Letter from respondent to claimant

1/8/19 – Further correspondence from claimant to respondent.

15/8/19 to 19/8/19 – Letters between the parties' representatives and an email from the respondent's representative to the claimant's representative (P2/1-3)

26/8/19 – Settlement Agreement signed by the claimant and her solicitor

20/9/19 – Settlement Agreement signed on behalf of the respondent"

11. Counsel submitted that the claimant remained in the respondent's employment until 26 August 2019, albeit that she had been suspended on 28 May 2019.

12. The claimant received her full month's salary for August (P63), the same as preceding months.

13. It was submitted that the Agreement was *"partially implemented"* in that in September 2019, the claimant's *"emoluments"* were paid by means of the respondent's payroll and the claimant's notice was paid by cheque.

14. However, it was submitted that this was at variance with para 2.1 of the Agreement (P47).

15. Counsel further submitted that there was, *"never any formal notice of termination by the respondent and no clear notice of termination by the claimant".*

16. In support of his submissions, Counsel referred me to ***Fitzgerald v University of Kent at Canterbury*** [2004] ICR 737. He referred, in particular, to the following passages from the Judgment of Sedley LG:-

> "**20.** *That answer in my judgment is that the effective date of termination is a statutory construct which depends on what has happened between the parties over time and not on what they may agree to treat as having happened. This was in fact the approach adopted by the Employment Appeal Tribunal, again with Judge Peter Clark presiding in* ***Caines v Hamon – Lummus Ltd (unreported) 11 January 1996.*** *There the appeal tribunal upheld the industrial tribunal's view that, in ascertaining the starting date of a period of continuous employment under what was then the Employment Protection (Consolidation) Act 1978, only the statutory provisions (viz, those now found in section 211 of the 1996 Act) were admissible. In my judgment the same is true of the other elements of the statutory computation of time.*
>
> ***21.*** *This is not for a moment to say that for purposes outside the statute the parties are not free to make binding agreements of this kind. As Mr Davidson has rightly accepted from the start, all kinds of contractual arrangement may legitimately be made for pension and other purposes which fix suitable dates that do not correspond with events. Even then, no doubt, the fiscal effect of fictitious arrangements may be open to challenge by the Inland Revenue; and so forth. We are not concerned, it should be noted, with the compromise of a genuine factual dispute about dates. We are concerned here with the impact*

of voluntary arrangements under the provisions of a statute which, it is worth recalling, bears the short title of the Employment Rights Act.

22. *The foregoing is in my judgment enough to conclude this appeal in the applicant's favour. But if it were not, section 203 would in my judgment do the same. The consensual arrangements relied on by the University as antedating the termination of her employment to 28 February falls squarely within a "provision in an agreement [which]… purports to limit the operation" of section 111, and through it section 97, of the Act. The word "purports" is not designed only to catch provisions which expressly claim to have such an effect. It is there to take account of the fact that section 203 (1) makes such provisions void. Mr Duggan conceded, in answer to a question put by Jacob LJ, that an agreement which – taking the present facts – set 2 March as the date of termination but backdated the time for presenting a complaint to 28 February would be void. The distinction between that and the present situation seems to me to be one without a difference of principle."*

17. It was submitted, therefore, having regard to the timeline, that the effective date of termination in the present case could not be earlier than 26 August 2019, the date when the Agreement was signed by the claimant and her solicitor.

18. It was submitted that it is not open to parties to contract in or out of statutory jurisdiction. Jurisdiction is a matter of competence and it must be appropriate, therefore, that the tribunal works from the effective date of termination by analysing the actual events, as opposed to leaving the matter to the vagaries of an agreement between the parties.

19. It was submitted, therefore, that the effective date of termination should be construed as 26 August 2019. It follows, therefore, that this is a claim arising from entitlements contractually arising as at the date of termination. It therefore falls within the tribunal's jurisdiction.

20. Counsel explained that he was not suggesting that paragraph 1.1 in the Agreement which narrates the "Termination Date" is automatically a nullity. He accepted that it might benefit one party or even both parties to have a notional date of termination. However, he submitted that, for the purpose of establishing jurisdiction, one should look at the actual events and the *"reality".*

Respondent's evidence

Graham Morris

21. I heard evidence on behalf of the respondent from Graham Morris, a Director of the respondent Company. He gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. Having heard his evidence and considered the documentary productions, I was able to make the following findings in fact, relevant to the issue with which I was concerned.

22. Mr Morris was in no doubt that 16 August 2019 was the effective date of termination of the claimant's employment. That was the date which was agreed between the parties and recorded in the Agreement. On 24 September 2019, the respondent sent a P45 to the claimant (P54). The leaving date on the P45 was 16 August 2019. The claimant took no issue with that.

23. So far as Mr Morris was concerned, he arranged for the claimant to be paid in terms of the Agreement, on the basis of a *"termination date"* of 16 August 2019.

24. The claimant was paid her salary to 16 August 2019, along with pay in lieu of notice. She was not entitled to any accrued holiday pay as she had already taken her full entitlement.

25. In terms of paragraphs 2.3 and 3. of the Agreement (P47/P48), the respondent paid the claimant a "termination payment" of £4,000 (P61) along with £300 in respect of legal expenses (P60).

26. As the claimant's wages were calculated by means of the respondent's payroll system before the respondent received the completed Agreement, the claimant received her full salary for August (P63) and the balance due in terms of the Agreement, taking account of the notice period, in September.

27. From 1 August 2019, the claimant was to be paid 10 weeks' salary comprising 2 weeks' up to the termination date on 16 August and 8 weeks' notice (P63 /P64).

28. There was an overpayment of holiday pay in the sum of £1,143.52. This was deducted from the final payment in September (P64).

Respondent's submissions

29. The respondent's solicitor referred to ***Miller Bros & FP Butler Ltd v Johnston*** [2002] ICR 744 in support of his submissions.

30. While he accepted that the claimant did not sign the Agreement until 26 August, he submitted that the effective date of termination of the claimant's employment was 16 August 2019, *"actually and in reality".* He submitted that both parties considered that the claimant's employment had terminated on 16 August 2019 for the following reasons:-

- The oral evidence of Graham Morris that he considered 16 August 2019 to be the termination date and the absence of conflicting evidence. It was submitted that considerable weight should be attached to this.
- The ET1 claim form, which was prepared with the benefit of legal advice, stated that the claimant's employment ended on "16/08/2019" (P5).
- The Agreement narrates that the date of termination was 16 August 2019 (P46).
- The P45 which gives the "leaving date" as 16 August 2019.
- The payments which were made to the claimant by the respondent which were "entirely consistent" with the terms of the Agreement and with the termination date being 16 August 2019.
- The additional documents which were allowed "under reservation" are not inconsistent with a termination date of 16 August 2019. It simply took the parties longer to finalise matters.

31. It was submitted, therefore, that the effective date of termination was 16 August 2019. Accordingly, having regard to the terms of Article 3 of the Extension of Jurisdiction (Scotland) Order 1994, an employment tribunal does not have jurisdiction to consider the claim.

Claimant's further submissions

32. The claimant's Counsel responded. He submitted that the issue of the effective date of termination in the present case was not as clear cut as it had been in ***Miller Bros***. He submitted that in the present case, there was a *"degree of ambiguity"*.

33. He drew to my attention the payments which were made to the claimant in August 2019 and September 2019 (P63 and P64). In August, the gross payment of "£3,096.96" equates to 4 weeks' pay which meant that if the effective date of termination was 16 August 2019, the claimant was entitled to a further 6 weeks' pay being the balance of the notice payment. Counsel submitted that payment should have been "£4,645.44. However, in September, the payment was only £4,288.08." (P64)

34. Counsel also submitted that limited weight should only be given to the evidence of Graham Morris and his opinion as to the termination date. Counsel submitted that the issue was one of *"contractual construction*" and while the intention of the parties is relevant, it is not determinative.

Discussion and decision

Claimant's additional bundle of documents

35. The respondent's solicitor objected to the claimant's additional bundle of documents (P2) being lodged as the correspondence had been written on a "without prejudice" basis. In support of his objection, he referred to ***Oceanbulk Shipping & Trading SA v TMT Asia Ltd & others*** [2010] UKSC44. He referred, in particular, to paragraph 35 of the Judgment of Lord Clarke:-

> *"35. By contrast, it was submitted on behalf of TMT that facts which (a) are communicated between the parties in the course of without prejudice negotiations, (b) form part of the factual matrix or surrounding circumstances and (c) would, but for the without prejudice rule, be admissible as a need for construction of a settlement agreement which results from the negotiations should be admissible in evidence by way of exception to the rule because the agreement cannot otherwise be properly construed in accordance with the well recognised principles of contractual interpretation and because there is no distinction in principle between this exception ("the interpretation exception") and, for example, the rectification exception."*

36. The respondent's solicitor submitted that that exception could not be applied in the present case as the terms of the Agreement could not be clearer. The exception is only appropriate where an agreement could not otherwise be properly construed.

Claimant's submissions

37. The claimant's Counsel accepted that ***Oceanbulk*** was the *"leading authority".* However, he submitted that the issue in the present case was one of construction, namely when the employment terminated.

38. In support of his submission that the effective date of termination had to be construed from the facts, he referred to ***Fitzgerald v University of Kent at Canterbury*** [2004] ICR 737.

39. In that case, the dismissal arose during the period of suspension.

40. Counsel submitted that to properly consider whether the tribunal had jurisdiction in the present case, it was necessary to ascertain the *"key dates"* by looking at all the relevant correspondence. It was necessary to examine all the events.

41. He submitted that the settlement negotiations were ongoing. The without prejudice rule is *"a broad rule*", but that is not to say that all correspondence marked "without prejudice" enjoys privilege.

42. Counsel explained that all he sought to do by referring to the additional bundle, was to rely on the fact that negotiations took place at certain times.

43. He submitted that, *"the issue of the date of termination has to have some bearing on reality".*

Decision

44. I found favour with the submissions by the respondent's solicitor. If the without prejudice rule applies, a Tribunal will generally refuse to hear the evidence. However, there are exceptions.

45. In my view, the case of ***Oceanbulk*** on which the respondent's solicitor relied was apposite. That case added a further exception to the general rule – the *"interpretation exception"* which makes it permissible to refer to evidence communicated in the course of without prejudice negotiations where this is necessary to enable the settlement agreement to be properly construed.

46. However, in the present case, the terms of the Agreement were perfectly clear.

47. Nor, in my view, could the present case be brought within one of the recognised exceptions listed in ***Unilever plc v Procter & Gamble Co*** 2001 WLR 2436, CA.

48. I decided, therefore, that the "additional documents" should not be allowed.

The issue

49. The central issue for me, therefore, was what was the effective date of termination? Once again, I was satisfied that the submissions in this regard by the respondent's solicitor were well-founded. He detailed a number of reasons why the effective date of termination was 16 August 2019 (see Para 29 above). These were compelling. It was clearly the intention of the parties that the effective date of termination would be 16 August 2019. Although, as

the claimant's Counsel submitted, this is not determinative, it was an important factor.

50. There did appear to have been some miscalculation so far as the termination payments to the claimant in August and September 2019 were concerned, but that did not mean that the termination date was other than 16 August 2019. In general terms, the payments which the respondent made to the claimant and her solicitor were in accordance with the Agreement and were consistent with a termination date of 16 August.

51. I am also bound to say that even if I had allowed the additional documents, I would still have been of the same view. As I recorded above, there was a considerable weight of evidence pointing to the fact that the effective date of termination was 16 August 2019.

52. With reference to ***Fitzgerald***, not only did the parties record in the Agreement that the *"termination date"* was 16 August 2019, that actually accorded with, *"what happened between the parties over time".* The agreed termination date *"corresponded with events*".

Jurisdiction

53. The contractual jurisdiction of employment tribunals to hear breach of contract claims is governed by s.3 of the Employment Tribunals Act 1996, together with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. A contractual claim can only be heard by a tribunal under these provisions where the claim arises or is outstanding on the termination of the employee's employment. Having established that the effective date of termination was 16 August 2019, that was clearly not so in the present case.

54. Accordingly, the tribunal does not have jurisdiction to consider this claim and it is dismissed.

Employment Judge: **Nicol Hosie**
Date of Judgment: **16 April 2020**
Date sent to parties: **17 April 2020**