



EMPLOYMENT TRIBUNALS

Claimant: Ms I Glavee

Respondent: Kings College Hospital NHS Foundation Trust

Heard on: 10 July 2020

Before: Employment Judge Martin

Representation

Claimant: Mr Price - Counsel

Respondent: Ms Ibbotson - Counsel

RESERVED JUDGMENT PRELIMINARY HEARING

1. The Claimant's claim was presented out of time and is dismissed

RESERVED REASONS

1. This preliminary hearing was heard by Cloud Video Platform due to the impracticability of conducting hearings in person due to the Covid-19 pandemic. Unfortunately, there were connection difficulties. There was a document which had agreed facts and both parties had prepared written submissions which they said they did not need to add to. Therefore, it was agreed that I would consider the issues on the papers.
2. Counsel for the Respondent provided in submissions a summary of the dispute between the parties which is reproduced here:

The dispute between the parties

- 2.1. In respect of all of the claims brought under the second claim, limitation will start to run on the date that the dismissal takes effect. There is a dispute between the parties as to what date that is.
- 2.2. The Claimant argues that the correct date is the date when the PILON was made on the basis that: 'In the case of Société

Générale, London Branch v Geys [2012] UKSC 63 [2012] UKSC 63 The court's decision means that termination under a PILON clause will only be effective if the employee is explicitly notified that the clause has been exercised and informed when the payment has been or is to be made. If the notice is given before the payment is made, as in Ms Glavee's case then the contract terminates on the date of the payment. This would of course mean that the claimant's 'Second Claim' is in time'.¹

2.3. On the other hand, the Respondent argues that the correct date is when the Respondent notified the Claimant that her employment was terminated with immediate effect and that she would be paid in lieu of notice, which was on 18 July 2019. The Claimant's interpretation of Geys set out in the paragraph above is disputed.

2.4 A preliminary point is that it appears that there is disagreement between the parties as to whether there was a PILON clause in the Claimant's contract of employment.

3. The Claimant's submissions contained the agreed facts and this part is reproduced here:

1) The Facts are as follows. The disputed words in red¹ have been included by the Respondent the blue² by the claimant.

1. Following a period of EC from 29 May 2018 to 29 June 2018, the Claimant presented an ET1 against the Respondent on 12 July 2018 ("the first claim"). The first claim includes claims of direct race discrimination and harassment related to race.

2. On 18 July 2019, the Claimant attended a final sickness absence review hearing at which she was dismissed. During the meeting, she was advised that she would receive three months' notice paid in lieu. After the meeting, on the same day, the Respondent emailed the Claimant confirming this. The email contained the following statement: *"I confirmed that your employment will end today with 3 month's pay in Lieu of notice with effect from today"*. The Claimant was told that she would be sent a detailed outcome letter in August.

3. The Claimant replied by email the same day thanking the Respondent for its email.

4. The **detailed** outcome letter was sent to the Claimant on 12 August 2019s *received at the Claimant's home on 21st August 2019.*

5. On 19 August 2019, the Claimant lodged an appeal against the decision to dismiss her.

6. On 24 September 2019, the payment in lieu of notice ("PILON") was paid to the Claimant in the sum of **£6,504.80 (gross)**. *£6368.72 Net on pay slip in bundle.*

¹ For the purposes of this judgment this is underlined

² For the purposes of this judgment this is in italics

7. On 26 September 2019, the Claimant's appeal was heard and dismissed.

8. ACAS was contacted in respect of a second claim against the Respondent on 9 October 2019 and an EC certificate was issued on 9 November 2019.

9. The Claimant presented an ET1 for the second claim on 13 December 2019 ("the second claim"). The second claim includes claims of ordinary unfair dismissal, automatic unfair dismissal (s. 104, assertion of a statutory right), victimisation (the detriment is the dismissal) and direct race discrimination (the discrimination is the dismissal).

4. I was referred to the case of Société Générale, London Branch v Geys [2012] UKSC 63 which is discussed below.

5. I first considered the payment in lieu of notice clause and whether there was a valid payment in lieu of notice clause incorporated into the Claimant's contract of employment.

6. The Claimant's contract of employment dated 20 March 2008 provides that her employment is governed by the Salaried Primary Dental Care Services (England) Terms and Conditions of Service. This has a PILON clause at 12.6 as follows:

In cases where employment is terminated, a dentist may be required to work his or her notice, or if the employer considers it more appropriate, the dentist may be paid in lieu of notice, or paid through the notice period but not be required to attend.

7. The Respondent argues that this is a valid PILON clause and implicitly so does the Claimant as the Claimant's submissions conclude by saying "This must mean that termination can only take effect when the PILON is effectively exercised with a clear description of the purpose of the payment and the payment made." My finding is that this is a valid PILON clause.

8. Much has been made of the Geys case by both parties. In considering this case I looked at the precise terms of the PILON clauses. The relevant PILON clause for the Claimant is set out above.

9. The PILON clause relating to Mr Geys was as follows (paragraph 7 of the Judgment):

SG reserves the right to terminate your employment at any time with immediate effect by making a payment to you in lieu of notice (or if notice has already been given, the balance of your notice period)....

10. In the Geys case, it was held by the Supreme Court that the effective date of employment was when payment had been made and this was notified to Mr Geys and not when he was told his contract was to terminate.

11. I find that there are distinguishing features in this case to the Geys case. In the Geys case the wording of the PILON means that the payment of the PILON is the method by which the contract would be terminated. "SG reserves the right to terminate your employment at any time

with immediate effect by³ making a payment to you in lieu of notice". The use of the word 'by' means that the actual payment of the PILON is necessary to terminate the contract and that consequently the contract is not terminated until such payment has been made.

12. Conversely in this case the wording of the PILON does not lead to the same conclusion. This clause refers to "**....cases where employment is terminated**". This does not provide that the payment of the PILON is the mechanism by which a contract is terminated. The clause goes on to say: "**if the employer considers it more appropriate, the dentist may be paid in lieu of notice, or paid through the notice period but not be required to attend.**" This presupposes that the contract is already terminated when the PILON is actually paid.
13. I then considered whether the Claimant's contract was validly terminated. A party seeking to terminate an employment contract is required to notify the other party that it is doing so in clear and unambiguous terms. This was addressed in Geys with Lady Hale giving the leading judgment:

It is "an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate". Lady Hale emphasised the importance of both parties needing to know where they stand as this may affect contractual benefits (such as continuing medical and life insurance cover), eligibility for state benefits and "a good deal of money may depend upon it";
14. In this case the Claimant was sent an email on 18 July 2019 stating "***I confirmed that your employment will end today with 3 month's pay in lieu of notice with effect from today***". My finding is that this is unambiguous and clear. The Claimant's employment ended on the day of the meeting and she would be paid three months pay in lieu of notice. As I have found that the payment of the PILON was not the mechanism required to terminate the contract, I find that the effective date of termination was 18 July 2019.
15. ACAS was contacted in respect of a second claim against the Respondent on 9 October 2019 and an EC certificate was issued on 9 November 2019. The Claimant presented an ET1 for the second claim on 13 December 2019.
16. I accept the submissions made by the Respondent that even if the ACAS certificate had an imp[act on the limitation period, the Claimant's claim would still be out of time as the limitation period ended on 9 December 2019 and the Claim was not presented until 13 December 2019.
17. The Claimant's second claim was presented out of time. No submissions have been made on whether time should be extended and I have therefore not been able to consider this and in the absence of any submissions find it was reasonably practicable (especially as the Claimant had already brought a claim) to have presented her claim in time. There is nothing before me to persuade me it would be just and equitable to extend time for the discrimination claims.
18. In all the circumstances the Claimant's second claim is struck out as being presented out of time.

³ Tribunal's emphasis

Employment Judge Martin

Date: 11 August 2020