Appeal No. UKEAT/0312/19/AT(V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 28 & 29 May 2020

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MS PATRICIA AVURU — APPELLANT

(1) FAVERNMEAD LIMITED
(2) PROFESSOR NASSER DAVID KHALILI — RESPONDENTS

Transcript of Proceedings

JUDGMENT
APPEAL & CROSS APPEAL

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APPEARANCES

For the Appellant	MR RICHARD O'KEEFFE (Case Worker) Instructed By; Southwark Law Centre Hanover Park House 14-16 Hanover Park Peckham London SE15 5HJ
For the Respondents	MR NATHANIEL CAIDEN (of Counsel) Instructed By: Ince Gordon Dadds LLP Aldgate Tower 2 Leman Street London E1 8QN

SUMMARY

Redundancy and Jurisdictional/Time Points

In this appeal the EAT considered that where the EJ had made findings that indicated that the Claimant's effective date of termination (Employment Rights Act 1996 section 97(1)(b) and 145(2)) could be established by reference to objective factors and that the EJ had held that by that date the Claimant ought reasonably to have known that her employment had been terminated; it was not possible for the EJ to fix the effective date of termination at a later date on the basis of the Claimant's subjective belief that her employment continued especially where there were unresolved conflicts of testimony as to the basis upon which the Claimant held that belief. The EAT further held that the letter that was relied on by the Claimant as constituting a claim for payment of redundancy money could not reasonably bear the meaning attributed to it and that properly understood it was a letter of enquiry written on her behalf by her MP as opposed to a claim for payment under s. 164 of the Employment Rights Act 1996.

THE HONOURABLE LORD SUMMERS

1. I am grateful to the parties' representatives for their submissions. Having heard argument yesterday by Skype and having considered the position overnight I am now in a position to give judgment.

2. In this case the Claimant submitted that she had been made redundant and that the appropriate redundancy payment had not been paid. The Claimant submitted that she had been unfairly dismissed and had been discriminated against on the grounds of race and sex. The Respondents submitted that she had brought her claim out of time. That plea was upheld by the Employment Judge. The Claimant appealed arguing that the redundancy claim was not out of time, and that the Employment Judge erred in relation to her conclusions about extension of the time limits on the other claims. The Respondents cross appealed.

Statutory Provisions

The Employment Rights Act 1996 provides at section 97(1)(b) -

(1) Subject to the following provisions of this section, in this Part *"the effective date of termination"*—
(a) -
(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect

The Employment Rights Act 1996 provides at section 145(2) –

(1) For the purposes of the provisions of this Act relating to redundancy payments "the relevant date" in relation to the dismissal of an employee has the meaning given by this section.
(2) Subject to the following provisions of this section, *"the relevant date"*—
(a) -
(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

The Employment Rights Act 1996 provides at section 164(1) and (2) –

(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—
(a) -
(b) the employee has made a claim for the payment by notice in writing given to the employer,

(2) An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee—
(a) makes a claim for the payment by notice in writing given to the employer,

(3) In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment an employment tribunal shall have regard to -
(a) the reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and
(b) all the other relevant circumstances.

The Key Issues

3. There were two key issues in this appeal. The first was when the Claimant was dismissed. In their cross appeal the Respondents argued that the effective date of termination under Section 97(1)(b) of the **Employment Rights Act 1996** ("ERA") was earlier than that found established by the Employment Judge. This was significant because if, as the Respondent contended, it was 31 March 2017 as opposed to 15 November 2017, the date found established by the Employment Judge, then the delay in bringing the claim was substantial. The Claimant accepted that a substantial delay would bar her claim. The statutory provisions relating to the effective date of termination are as I have indicated in Section 97(1) and also Section 145(2) of the **Employment Rights Act 1996**.

4. The second key issue related to the Claimant's application for a redundancy payment. The Claimant relied on a letter written on 26 March 2018 on behalf of the Claimant by her MP. The parties were agreed that the Employment Judge had failed to deal with the letter in accordance with the law. She had taken the view that Section 164(1) and 164(2) of the **Employment Rights Act 1996** were cumulative provisions rather than alternative provisions. In light of this the Employment Judge had not appreciated that a letter written on 26 March 2018 that is within six months of the date of termination that she found to be established (15 November 2017) could qualify as a notice under s. 164(1). The Claimant did not seek to appeal the Employment Judge's conclusion that it would not be just and equitable to allow a claim under Section 164(2). The Claimant relied on s. 164(1)(b) and submitted that if she was made redundant on 15 November 2017 then the letter written by her MP on 26 March 2018 was within six months of her redundancy and would be a valid claim under s. 164(1).

5. I accept that the two provisions are not cumulative. Section 164(1) relates to claims made within six months of redundancy, and Section 164(2) relates to claims made six months thereafter. The difference between the two subsections is that if a claim is made after the expiry of six months from the relevant date, the claim is subject to a further requirement, namely, that the Employment Tribunal ("the ET") should be satisfied that the payment was, "just and equitable". The Employment Judge failed to appreciate that the Claimant did not require to satisfy both subsections. In that circumstance, the Claimant's First Ground of Appeal was correctly conceded.

6. Having misdirected herself in connection with Section 164 the Employment Judge did not apply her mind to the question of whether the Claimant had stated a timeous claim in the period six months after her redundancy. The question was whether the letter written on 26

March 2018 was a claim for the purposes of the legislation. The Respondents argued that it was not a claim but a request for information. If that was correct no claim was made until the ET1was lodged on 17 January 2019.

7. The Claimant accepted that if these two key issues were decided in favour of the Respondents her appeal could not succeed.

8. With that introduction I turn now to the case.

The Facts and Circumstances

9. From May 2007 the Claimant was employed by the Respondents as a live-in carer for the Second Respondent's mother, Mrs Easton. Mrs Easton died on 26 March 2017. The Respondents' position was that they told the Claimant that her employment had ceased after the death of Mrs Easton, and that they sent her a P45 at that time that stated that her employment had terminated on 31 March 2017. This was disputed by the Claimant.

Whatever the true position there is no dispute that the Respondents ceased to pay the Claimant's wages. It is not evident when precisely the Respondents decided to stop payment, but it is clear that no wages were credited to her account at the end of April 2017. In this connection see the judgment at paragraph 3 and at paragraph 6. This is consistent with the proposition that her employment terminated, as the Respondents submitted, by at least the end of March, and a recognition that in the period from March to April the Claimant had not provided any services to the Respondents.

The First Legal Issue

10. The question in this circumstance is whether or not the combination of the death of Mrs Easton, the absence of any alternative offer of employment in the aftermath of Mrs Easton and the cessation of her wages were eloquent of the cessation of her employment. The Respondents did not communicate with the Claimant directly. The Respondents submitted that on an objective view of the facts the Claimant should have appreciated that her employers, the Respondents, were signalling that her employment was over on 31 March 2017.

11. The Employment Judge found that the effective date of termination was 15 November 2017 (paragraph 22.1.3.). That conclusion rested on a conversation which the Claimant said she had had with the Second Respondent in May 2017 in which he told her to, "Go and rest until September." The relevance of this invitation is not explained at this point in the judgment. To understand what the Employment Judge had in mind it is necessary to go back to paragraph 8 where the Employment Judge records the evidence of the Claimant. She gave evidence that the Second Respondent told her that after September 2017 she could return to work for a number of days each week. The Respondents' position was that the Second Respondent had not promised future employment on a part-time basis and that there was no promise of work in September 2017. This was a significant conflict in testimony. If the Employment Judge preferred the evidence of the Claimant on this matter the Employment Judge does so without any explanation of why she rejected the Respondent's evidence or how she resolved the contradiction in the testimony. The Employment Judge acknowledged at paragraph 22.1.3 that, "all other factors point to her employment terminating on 31 March 2017." Thus apart from the Claimant's evidence that she was promised work in September the evidence pointed to a termination date on 31 March 2017.

12. The Employment Judge went on to make a finding that is at odds with her conclusion. At paragraph 22.2.1

> **"she held as of 31 March 2017 the purpose of being a carer ceased. From 31 March 2017 the Claimant received no further payment from the Respondents other than for the two *ad hoc* cleaning jobs. Based on those two factors alone it was not in my view reasonable for the Claimant to believe that she was still employed by the Respondents. By 15 November 2017 it was however clear to the Claimant (or should have been clear to the Claimant) that she was no longer employed by the Respondents."**

13. Here the Employment Judge expresses the view that the Claimant should reasonably have appreciated by 31 March that her employment was over. The Employment Judge points to two factors that support this conclusion. First, the purpose of her employment had ceased with the death of Mrs Easton, and, second, she was no longer being paid. The Employment Judge found that "it was not reasonable for the Claimant to believe that she was still employed by the Respondents". The following sentence expresses the view that by 15 November 2017 the Claimant recognised her employment was over. It would appear that the Employment Judge accepted that the Claimant thought she was still employed up to 15 November 2017. The words, "or should have been." indicate that she should have been aware of the true position by then.

14. The law required the Employment Judge to decide whether the termination of the Claimant's employment had been communicated clearly to her by means of the Respondents' conduct. See in that connection **Sandle v Adecco UK Ltd** [2016] I.R.L.R. 941; UKEAT/0028/16/JOJ at paragraph 40.

> A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer. Further, as the case law shows, an employer's termination of

> a contract of employment need not take the form of a direct, express communication. It may be implied by the failure to pay the employee (*Kirklees*), by the issuing of the P45 (*Kelly*) or by the ending of the employee's present job and offer of a new position (*Hogg*). In each of those cases, however, there was a form of communication; the employee was made aware of the conduct in question, conduct that was inconsistent with the continuation of the employment contract and in circumstances where there were no other contraindications.

15. The two factors identified by the Employment Judge as indicative of the termination of employment were objectively establishing and were factors to which the Employment Judge was entitled to have regard. The Employment Judge concluded that the Claimant should have known her employment was over by 31 March 2017.

16. Based on those factors the Employment Judge concluded that the Claimant's belief that she had remained in employment after 31 March 2017 was not a reasonable one. It follows from this that she should have concluded it was not reasonable for the Claimant to have considered that she remained in employment until November 2017.

17. In light of this, I do not consider I can accept that the Employment Judge's conclusions at paragraph 22.1.3 that the effective date of termination was 15 November 2017. Unlike her conclusion at 22.2 there is no indication in her reasoning that the Employment Judge has sought to distinguish the Claimant's subjective belief that she had been promised employment from the objective factors supported that belief. The conclusion at paragraph 22.1.3 does not acknowledge and makes no attempt to determine the dispute over whether the Claimant's belief that she had been promised employment was supported by the evidence.

18. In that circumstance I consider that the conclusion at paragraph 22.1.3 is not supported by adequate reasoning. It is not possible to accept one witness's evidence when it is contradicted by another witness's evidence, without explaining why it has been accepted. I acknowledge in some cases little is required by way of explanation, but here the dispute was a significant one, and there was evidence that contradicted the Claimant's account. Secondly, I consider that the acceptance of the Claimant's recollection without any attempt to reconcile it with the Respondents' evidence and resolve the contradictions indicate an error of law. The law required the Employment Judge to establish the facts, and then determine whether someone in the Claimant's position could reasonably and objectively have concluded that she was still in employment, or whether, in fact, in the circumstances are eloquent of a different message, namely, the Respondents' decision to terminate.

19. The Employment Judge does not discuss the issues raised by **Sandle** (see in particular paragraph 40 of **Sandle**), and does not consider whether the Respondents had by their conduct communicated their wish to terminate her employment. Her approach indicates that she simply accepted the Claimant's account, and if that is so the Employment Judge failed to apply the law.

20. The conclusion at 22.2 by contrast is based on objective facts, and does satisfy requirements of the law. It would appear to me that even though the Employment Judge selected November 2017 as the date of termination, her own findings precluded her from doing so. I consider that she should have concluded, consistent with her own reasoning, that the date of termination occurred at a time shortly after the death of Mrs Easton. Such a conclusion was in alignment with the objective evidence. The person she had cared for over the past 10 years was dead, the Respondents had engaged to provide those services to Mrs Easton on a personal basis, the Respondents were not part of an organisation or business that provided services to the

elderly, and there is no evidence of any other person in the family requiring similar care. There is no evidence that the Respondent's had any other role she could have performed instead.

21. On those bare facts I consider that the Employment Judge's conclusion at paragraph 22.2 was inescapable. The cessation of her salary made it clear that her services were no longer required. Although the failure of the Respondents to speak or write to her with a view to clarifying her position does not look particularly good, particularly given the length of her service, the law supports the proposition that the date of termination should be identified as having occurred after the death of Mrs Easton. I consider that in paragraph 22.2 the Employment Judge reached the correct conclusion, subject to the minor modification that I will mention in a moment.

22. Had the Employment Judge been consistent in her reasoning she could not have concluded that the effective date of termination was 15 November 2017. I consider that it was open to me in this circumstance to uphold the conclusion that ought to have been formed by the Employment Judge given her findings.

23. Although the Respondents argued that the effective date for termination was 31 March 2017 I consider that argument requires modification. An unequivocal intention to dismiss can only take effect when it is communicated. I consider that the position could only have become clear to the Claimant when she was not paid. That being so the relevant communication must be located at the end of the following month when, as she acknowledged, she became aware that she was no longer being paid. That being so I consider the true date for the effective date of termination is Friday 28 April 2017.

24. I should add that there was some discussion about the nature of the promise on which the Claimant relied. It was noted that the promise, assuming that the Claimant's account was accepted, was of a different and unspecified type of employment. Plainly it could not be employment as a live-in carer. Her evidence was that this new post would be part-time as opposed to full-time employment. This raised the question of whether this was new employment as opposed to a continuation of her previous employment. However, since this issue was not explored at the Tribunal I have put that issue to one side.

25. The second legal issue. I can deal with this issue quite shortly. It was focused in the Claimant's second ground of appeal. The letter of 26 March 2018 sets out background information and then states:

> **"…I have seen Jonathan Sullivan's letter of 20 February 2018, which suggests that … she was paid £10,000 as a redundancy settlement. this was very clearly not Ms Avuru's understanding of events.**
>
> **I have encouraged Ms Avuru to seek appropriate advice, but in the meantime, I undertook to contact you directly in the hope that there can be some clarification of the matter. Would it be possible to furnish me with any written evidence that …redundancy money was paid?"**

26. While it is plain that Ms Avuru believed that she was entitled to the redundancy payment, the issue is whether or not she claimed payment by means of this letter. In my view the letter of 26 March 2018 does not make a claim. It indicates that the MP has advised the Claimant to seek advice, presumably from a lawyer, and then asks for evidence that the redundancy money was paid. The MP's enquiry is neutral in character. She expresses no view on the question of the Respondents' liability to pay, and she does not (quite properly) assume that her constituent is correct and make a claim for payment on her behalf.

27. Mr Solomon the accountant replied by letter dated 27 April 2018. There is no indication in his response that he understood the letter as a claim. He refers to the payment of £10,000

made shortly after Mrs Easton's death, and states that he understood that to be her redundancy payment.

28. That letter of 26 March 2018 shows that the Claimant was considering whether she was entitled to payment. It would not be reasonable to interpret it as constituting a claim or as indicating that she had decided to make a claim. See in that connection **Price v Smithfield & Zwanenberg Group Ltd** [1978] ICR 93. The letter shows that the Claimant was considering her position, and had not decided whether or not she would make a claim.

29. The Employment Judge did not consider the letter in detail. While it would be possible to remit the matter back so that her views on the letter could be sought, I am not disposed to do so. While I acknowledge that the sift Judge allowed Ground Two of the Grounds of Appeal to be argued, it is sometimes the case that an argument that appears to have some merit at sift on closer scrutiny at the Full Hearing can be seen to lack substance. The Claimant's counsel sought to persuade me that if it was remitted back the letter would have had to be read in the context of other correspondence, but he did not specify what correspondence this might be, and it is hard to see how it could alter the plain reading of the letter. I consider that I am as well placed as the Employment Judge to form a view on its meaning. These conclusions require me to uphold the cross appeal and to refuse the appeal.

30. Before parting with this case, I should indicate my views on other matters that were argued before me.

Grounds 3 and 4 of the Appeal

31. I consider that the Claimant is justified in his criticisms of the Employment Judge's findings in connection with the date upon which the Claimant sought legal advice. See the judgment at paragraph 10. I have been taken to the underlying emails from the firm in question, and statements provided by the Claimant and her niece, Rosalind Ahatty, who accompanied her to the meeting. I am satisfied that there was no basis for the finding that the Claimant received advice in September/October 2017. See in that connection **Yeboah v Crofton** [2002] IRLR 635. The evidence indicates that she attended a firm of solicitors in November 2017. This coincided with the time the Employment Judge found that the Claimant's employment was terminated after the Claimant's visit to the Respondents' office (see paragraph 11 of the judgment).

32. However, I see no basis for disturbing the Employment Judge's finding that she was not given erroneous advice. See the judgment at paragraph 22.2.3. The evidence I was shown supported the Employment Judge's conclusion. Emails from the solicitors she visited indicated that they were not engaged, no file was opened, no records have been kept. Of necessity there is no record of a discussion of the significance of her conversation with the second Respondent at his office the day before, or the broader context of her relationship with the Respondents. I consider that in this situation the Employment Judge was entitled to conclude that no advice was given, far less erroneous advice.

33. When she visited the Citizens Advice Bureau on 2 February 2018 she was advised that she had passed the three-month time limit for her claim (see the judgment at paragraph 13). However, despite that the claim was not initiated until the following year. There is no basis for the assertion that the Employment Judge should have accepted that the Claimant was deflected

from asserting a timeous claim by virtue of erroneous advice. In any event, given the conclusions I have reached any such advice of that nature if given was the correct advice.

Others Matters

34. I should for completeness indicate that if the date of termination was 28 April 2017, but that contrary to my conclusion the letter of 26 March 2018 was a valid claim that it might be argued that the claim was a valid one. In that circumstance I should indicate that I would have remitted the matter back to the Employment Judge to consider whether the claim should be admitted on a, "just an equitable basis". Although it is true, as the Respondents pointed out, there is no direct challenge to her conclusion to that effect on the Grounds of Appeal, it seems to me that it would have been difficult for the Claimant's representative to anticipate this particular permutation and to specifically address it. The grounds are broadly designed to support the argument that a claim was made for a redundancy payment and that, if so, it should be allowed to continue.

35. I will allow the Cross Appeal, and substitute a finding that the effective date of termination under Section 97(1) and Section 145(2) of the **Employment Rights Act 1996** was 28 April 2017. I will refuse the appeal and uphold conclusion of the Employment Tribunal that there was no jurisdiction to entertain the claims, and for completeness I dismiss grounds two to four of the appeal. Ground one having been rendered immaterial in light of upholding the Cross Appeal.