EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101691/2019

Held in Glasgow on 9 July 2019

Employment Judge M Kearns

Mr X	**Claimant** **Not present and not represented**
Kintyre Development Company Limited **Old Club House** **MacHrihanish** **Campbeltown** **Argyll** **PA28 6PT**	**Respondent** **Represented by:** **Mr W Lane - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal following the Preliminary Hearing was that:-

(1) The effective date of termination of the claimant's employment by the respondent was early December 2018.

(2) The claim for unfair dismissal was presented in time.

(3) A Preliminary Hearing is to be fixed to take place by telephone. Date listing stencils will be sent out to parties. (Time estimate half an hour).

(4) Within 21 days from the date this Judgment is sent to the parties the claimant is ordered to state in writing to the Tribunal (copied to the respondent): (i) the date of the last act of alleged discrimination; (ii) if this is more than three months before 6 February 2019, whether he asserts that it would be just and equitable for the Tribunal to hear his claim of

sexual harassment under section 26 of the Equality Act 2010, although late; and if so, the basis of this assertion (section 123 Equality Act 2010).

REASONS

1. The claimant presented an application to the Employment Tribunal on 6 February 2019 in which he claimed unfair dismissal and sexual harassment. He complied with the ACAS early conciliation rules on the same date.

2. Two issues were set down for determination at today's Preliminary Hearing. Quoting the Notice of Hearing dated 6 June 2019 they were as follows:

   "(i) What was the effective date of termination of the claimant's employment? Was it 13 September 2018 being the date provided in the ET1 or was it a later date?

   (ii) If the effective date of termination was 13 September 2018, then the issue of time bar requires to be considered. While the claimant appears to have indicated in his agenda that he is not making a complaint of discrimination, that does not accord with what is set out in the statement attached to his claim."

Procedure to date

3. In his ET1 the claimant complained of 'sexual harassment, assault and bullying'. In his agenda for the case management Preliminary Hearing ("PH") on 2 May 2019 he answered "no" to the question whether he was making a claim under the Equality Act 2010, but then completed the section at s.7 concerning discriminatory harassment under section 26 of that Act. Further and better particulars of the claim were provided by the claimant attached to an email of 1 April 2019. It is now apparent from the totality of his application that the claimant makes claims of (i) unfair dismissal and (ii) sexual harassment contrary to section 26 Equality Act 2010. Possible time bar issues were identified with the claim.

4. The precise date of termination of employment was not clear and needed to be established in order to work out whether the complaint had been presented

in or out of time. On his ET1 the claimant had put 13 September 2018 as the date of termination. However, at the PH on 2 May he mentioned a grievance meeting in February 2019 as the relevant date.

5. Where a complaint of discrimination is brought under the Equality Act 2010 then the test to be applied if the complaint *is* out of time is whether it would be just and equitable to allow the claim to proceed although late. In relation to a claim for unfair dismissal, the test is whether it was not reasonably practicable for the claim to be presented in time, and if so, whether it was presented within such further time as was reasonable in the circumstances. A Preliminary Hearing was fixed for 9 July 2019 to determine the effective date of termination of employment and issues related to possible time bar as set out above. That date had been identified as suitable by both parties.

6. At the Preliminary Hearing on 2 May 2019 the Judge ordered that both Anonymisation Orders and Restricted Reporting Orders ought to be applied. In terms of those Orders, the claimant is to be referred to as Mr X and the alleged harasser is to be referred to as Ms Y.

Claimant's application to postpone today's Preliminary Hearing

7. By e-mail sent to the Employment Tribunal on Sunday 7 July 2019 at 12 noon the claimant stated that "*due to failing health, Anxiety/Panic attacks, heart condition (Ventricular Standstill) and Epilepsy medication side effects*" it would not be possible for him to travel to the Employment Tribunal Hearing on 9 July 2019 as he was no longer allowed to travel alone. The e-mail went on to state that the claimant had been "*more or less housebound since entering the Queen Elizabeth University Hospital on 4 February 2019*" and that he was not fit to attend the Tribunal. The postponement of the next day's Hearing was requested. The e-mail was not copied to the respondent. The Tribunal forwarded a copy of the claimant's e-mail to the respondent on Monday 8 July 2019 requesting their comments by 1pm that day on the claimant's application to postpone the Hearing of 9 July. The respondent objected to the postponement application. Their grounds of objection were as follows:-

(i) The PH had been listed over 2 months ago during the case management PH on 2 May at which the claimant had confirmed that the date was suitable to him.

(ii) The respondent had incurred significant time expense and business-related difficulties on the understanding that a Hearing would take place on 9 July. Significantly, Andrew Hogan, their General Manager had already travelled to Glasgow from the respondent's premises in Campbelltown to act as a witness at the PH. It was stated that not only had this entailed the removal of Mr Hogan from the hotel during its peak season, but the respondent had also purchased hotel accommodation in Glasgow in order to enable him to attend the Hearing.

(iii) Finally, it was pointed out that the claimant had provided no medical evidence to support his asserted health condition and that he was making the application at extremely short notice. The respondent pointed out that the claimant had not complied with the 2013 Presidential Guidance on seeking postponement of a Hearing.

8. The respondent submitted that the Hearing should go ahead on the basis of the evidence led by the respondent, their submissions, and any written submissions the claimant wished to put forward. They stated: "*It will also remain open to the claimant that, should the Tribunal reach a decision on those issues that he considers amounts to an error of law, he could submit an application for reconsideration*."

9. The Duty Judge considered the representations from both parties regarding the claimant's application to postpone the hearing at short notice. The claimant was notified that the case would remain listed for 9 July unless he could provide a medical certificate to support his application. By e-mail at 14:46 on Monday 8 July the claimant produced a document in relation to a Personal Independence Payment together with a 'certificate of entitlement' and a fit note which appeared to be dated 25 June 2019, but which was mostly

illegible. However, he did not supply any certificate or letter from a doctor indicating that he was unfit to attend court. By further e-mail to the Employment Tribunal copied to the respondent at 14:55 on Monday 8 July the claimant stated: "*I wish for the Tribunal to continue tomorrow without my presence if possible*."

10. Taking into account all the facts and circumstances, the Employment Judge refused the claimant's postponement request. The principal reasons for doing so were:

   (i) That the date had been fixed for 9 July 2019 with the claimant's agreement;

   (ii) The claimant had not produced any medical evidence confirming that he was not fit to attend court, nor had he undertaken to produce this within 7 days as set out in the 2014 'Presidential Guidance on Seeking the Postponement of a Hearing';

   (iii) The claimant had indicated that he wished the Hearing to continue without his presence if possible;

   (iv) The respondent had incurred significant expense and their witness had already travelled to Glasgow and purchased hotel accommodation for tomorrow's Hearing.

Evidence

11. The parties had prepared a joint bundle of documents and they were referred to by page number ("J"). The claimant did not attend the Hearing. The respondent called Mr Andrew Hogan, General Manager of their MacHrihanish Golf Resort.

Findings in Fact

12. The following facts were admitted or found to be proved:-

13. The claimant was employed by the respondent as a laundry assistant from 13 August 2016. His salary was paid to him monthly by bank transfer. The payment for the previous month was paid into his account at some point in the first week of the next month. For example, his salary for September 2018 was paid into his account on 3 October 2018 (J173). He was hourly paid, according to the hours he had worked the previous month. His hours varied from one month to the next.

14. At some point in early to mid-2018 the claimant e-mailed the respondent's Operations Manager Mhairi Morrison and advised her that he was experiencing sexual harassment in the workplace by Ms Y. He also advised her that Ms Y was abusing prescription medication. It is not clear what steps were taken by Ms Morrison to investigate the claimant's complaint.

15. At 11.58 am on Saturday 8 September 2018 the claimant sent Ms Morrison an e-mail during his shift. The e-mail was in the following terms:-

> "*Hi Mhairi, X in the Laundry Department. Just letting you know that I will be leaving the Laundry after lunch today (12:20pm) & will not be in tomorrow. I'll also be removing myself in days where I am working alongside Ms Y from the rota. You will have to update Isabel Smith of this too.*
>
> *Can you send me a progress report on the complaint I submitted at the beginning of the year regarding the same colleague to this e-mail address, as you know the matters in the complaint are serious & I'd like to know what action is being taken or solution being devised.*
>
> *Thank you X". (J41)*

16. The claimant did not receive any reply to this e-mail and he therefore e-mailed Ms Morrison again on Tuesday 11 September 2018 at 5.38pm (J42) in the following terms:-

> "*Hi Mhairi, I still haven't received a progress report, I know you're busy but could you do this as soon as possible? As you know I feel as if I*

have had to remove myself from the rota on specific days until this issue is resolved losing approximately 2 to 3 days' worth of pay per week.

Thanks, X."

5 17. Ms Morrison did not reply to this e-mail either and on Friday 14 September 2018 at 1.35pm the claimant e-mailed her again (J43) in the following terms:-

"*Hi Mhairi, I still haven't received a progress report or even a reply on the sexual assault/harassment & drug abuse complaint I submitted at the beginning of the year regarding Ms Y. As you replied to my first e-*
10 *mail I can only assume you are not replying to the last one I sent by choice. Please get in contact with a report. Thank you X."*

18. At 1.45pm on Friday 14 September 2018 Ms Morrison replied to the claimant (J43) in the following terms:-

"*Hi X*

15 *I apologise for not having replied but there has been a lot going on over the last few weeks.*

I spoke with Peninsula at the beginning of the year regarding your complaint and was advised that without proof and it being the case of your word against her there wasn't much we could do. I did speak with
20 *Ms Y at the time and let her know that such behaviour would not be tolerated in this Company. With no further formal complaints from yourself or any other member of staff since this initial complaint I deemed that this matter was put to rest. As for the drug abuse complaint, this has also been dealt with however unfortunately I cannot*
25 *give you details of this investigation but I can assure you that it was fully investigated.*

I know you are choosing not to work on shift with Ms Y at the minute and you feel like you are losing hours, I have spoken with Isabel and

she is trying her best to keep the two of you apart but with limited shifts and in such a small department you can imagine that it is not easy.

If you are unhappy with my handling of this situation I am happy to sit down and discuss this with you or if you would prefer you could contact Andy Hogan.

Thanks Mhairi".

19. The claimant responded to this message at 2.01pm on Friday 14 September 2018 (J43):-

"*There is proof, there are witnesses to her actions. I was never informed that these investigations were closed, I repeatedly asked Isabel & to her knowledge Peninsula were still in the process of making a decision, as a few months have passed since then I decided, to enquire by myself."*

20. Ms Morrison replied (J44) to say that Peninsula had not closed the case in case there were any further incidents. She went on

"To my knowledge there was no witness to the incident between yourself and Ms Y, I am sorry if I have missed something. I will look over all the statements I had from earlier this year and contact Peninsula again next week.

Thanks Mhairi."

21. The claimant responded to this message at 5.06pm on the same date in the following terms:-

"the groping/spanking and sexual harassment occurred several times a day for months, everyone involved in the laundry are witnesses, every question and conversation Ms Y led bar a few were about sexual acts, I left my details on the report which were never used, as far as I know no statements were taken from co-workers/staff in the laundry

regarding these complaints. I am seeking my own advice in these matters after researching online as to what happens next.

Thanks X."

22. On Sunday 23 September 2018 at 7.46pm the claimant wrote a further e-mail to Mhairi Morrison in the following terms:-

"Hi Mhairi, as you will be aware by now I left the Laundry Department on Thursday 19 September due to an extremely uncomfortable working environment created by Isabel Smith (Laundry Supervisor) and Ms Y (co-worker) over a period of time. As I have depression partly caused by said working environment I felt it necessary to remove myself from the situation before I deteriorated more. I am currently seeking advice from Oakwood Solicitors regarding Ms Y and they are confident of the case brought forward, I have had no further contact from the company regarding the situation and may have to take the case to court., I am also researching my situation regarding my departure from the laundry, I will be in contact if I feel I want to take this to Tribunal. Please can the company update me on the investigation into my complaint made earlier in the year.

Thank you X. PS I can give a full statement if required regarding my departure." (J47)

23. Ms Morrison replied to the claimant's e-mail at 7.24pm on Saturday 29 September 2018 in the following terms:-

"*Hi X sorry for the delay in getting back to you. I am sorry to hear you felt you had to leave the company.*

I have contacted Peninsula regarding your complaint against Ms Y and I am still waiting on statements from your colleagues in laundry regarding this matter. As I had said to you previously I believed things had gotten better with Ms Y and that she had apologised for any inappropriate remarks she had made.

As for the "extremely uncomfortable working environment" created by Isabel this was not brought to my attention, I was unaware that you and Isabel were having any issues and my only knowledge of this was your e-mail to say you were leaving.

5 *I will get in touch when I hear from Peninsula regarding these matters. Thanks and good luck in the future.*

Mhairi."

24. The claimant replied at 7.48pm on Saturday 29 September 2018 as follows:-

"I didn't leave the company, I left the Laundry Department but I will talk
10 *that as my termination as no one has tried to contact me regarding the issue. Complaints have been made previously about Isabel Smith's behaviour towards me, although they were not filed by me, I am aware of them.*

Ms Y has never apologised to me nor even recognised the issue to
15 *me. I was completely unaware of her being 'spoken to' by anyone.*

Lastly, I've been told Peninsula take 2 days to make a decision by yourself, they have had more than an adequate amount of time to assess the situation. Statements were to be collected nearly 2 weeks ago, what is the holdup?

20 *X" (J49)*

25. The claimant went on to advise the respondent of his new address and stated: "*please send any paperwork to there, thank You"*.

26. Ms Morrison replied to the claimant's e-mail on Sunday 30 September 2018 at 8.03pm (J50):-

25 "*Hi X sorry again for the delay, I have still not received statements from your colleagues regarding the incident that took place between yourself and Ms Y and until I receive these I can't chase up the issue*

with Peninsula. As you are aware we have been extremely short staffed but I will chase this up with your colleagues this week. I talked with Ms Y at the beginning of the year regarding a couple of different issues and thought we had managed to resolve most of these. It was only in the last few weeks that I was aware you were uncomfortable working with her again and I thought that we were trying to keep you and her on separate schedules.

With regards to your leaving as you were employed in the Laundry Department I assumed that by leaving that department that meant you wished to hand your notice in with the company, I apologise if I misunderstood was your intention to be transferred to a different department?

I have not received any complaints from anyone within the company regarding Isabel Smith's conduct towards you and if you were having an issue with her you should have come to me or Andy Hogan, any formal complaint would need to be raised by you not by a third person on your behalf."

27. The claimant responded to this e-mail at 11.10am on Monday 1 October 2018 (J51):-

"*Hi Mhairi, I was originally hired to do all departments as explained by Andrew Hogan during my interview, I can work as Night Porter for 2 days a week as I am attending University at this time of year, also agreed with Andy during my interview. My Uni days are Monday and Wednesday if you can find work for me in this department at the Royal only that would be ideal.*

I won't be dropping the Ms Y situation/case as the formal complaint was filed long after raising the issue with Isabel on countless occasions. During my "get back to work interview in February 2017" with her and Kevin it was stated that I should only contact Isabel if I have a complaint to make about anything or anyone other than herself

in the laundry (stated by Isabel, witnessed by Kevin). I am already taking action on the complaint from three different directions, one of which I am already in talks with pursuing…"

28. Ms Morrison responded at 5.22pm on Monday 1 October 2018 (J51) as follows:-

"Hi X

Unfortunately we have a full staff with the night porters at both the Royal and the Ugadale Hotels at the minute and with the Ugadale closing again in a couple of months the four boys will already be struggling for shifts in just one hotel. We may have some hours available in Ugadale at the HSK with some NP shifts to cover holidays if required if that is something you would be interested in?

I don't expect you to drop your complaint against Ms Y I just don't think I realised how severe it was and didn't realise this was something that had even been discussed with Kevin during his time with us. Please send me a full statement of the incident and I will pass this on to Peninsula with the statements from your colleagues when I receive these…. "

29. The claimant e-mailed Ms Morrison again at 6.30pm on Monday 1 October 2018:-

"Hi Mhairi, thanks but I can't work in Ugadale with no transport. I'll get a full statement regarding the issue to you within a week. I heard there was night porter work available the person must have been mistaken. Thanks again X."

30. Ms Morrison replied on the same date at 6.32pm:-

"*…no sorry we do have the odd shift when someone is on holiday but more often than not the boys prefer to cover each other's holidays for the extra money. It wouldn't be guaranteed shifts every week unfortunately. Thanks again."*

31. The claimant did not respond to the above email until 12 November 2018 (J88).

32. Although the claimant was on the rota for the full month of September 2018, he did not return to complete any of his shifts after 8 September 2018. The circumstances were that he had notified the respondent that he was being subjected to serious harassment in the laundry department, which was adversely affecting his mental health. They had informed him they were taking statements from his colleagues (i.e. investigating his allegations).

33. On 3 October 2018 the claimant was paid his salary for the month of September.

34. On or before 5 November 2018 the respondent posted the claimant's last payslip in respect of accrued holiday pay (J173). On the same date, the respondent posted the claimant's P45 (J102). Both were posted to the claimant's old address and were not received by him. The claimant had notified the respondent by email of 29 September 2018 (J49) of his new address and asked that any paperwork be sent there. The claimant's P45 bore his old address and stated that his leaving date was 31/10/2018. Holiday pay accrued to the claimant but untaken, amounting to £177.41 was paid into the claimant's bank account on 5 November 2018. No further payments were made to him by the respondent in respect of his employment after that date.

35. On Monday 12 November 2018 at 10.43am the claimant e-mailed Ms Morrison:-

> *"Hi Mhairi, I am still waiting on my signed contract/paperwork and how the company is taking this complaint forward! I have been made aware that statements have been taken, can you get in touch please."*

36. Ms Morrison responded at 10.55am on the same date:-

> "*Hi X I have received one statement from a member of the laundry team but I still need to receive your statement also. … If you could send me your statement it would be appreciated."*

37. The claimant responded the same date at 10.59 am:-

> *"Hi, my statement was given as the original complaint, can you demand these other statements please, as the company should be aware the longer this takes the worse it looks on their behalf & regarding a missing contract, that's the problem."*

38. Ms Morrison responded at 11.01am on the same date:-

> "*I will chase this up again. Thanks Mhairi."*

39. The next communication between the parties was at 6.45pm on Friday 1 February 2019 when the claimant e-mailed Ms Morrison:-

> *"Hi Mhairi*
>
> *There seems to be a problem with communication here as I haven't heard from the company in months regarding my complaint and actions being taken, nor have I received a P45."*

40. On Friday 1 February 2019 at 2.55pm the claimant e-mailed a general "info" e-mail address with the subject heading "Greg Sherwood contact info?". Greg Sherwood is the President of the respondent. The e-mail stated:-

> "*Hi to whomever it may concern, I am looking to contact Greg Sherwood as I placed a complaint nearly 2 years ago with Isabel Smith (Laundry Department), Snypefield Industrial Estate, Campbeltown, Scotland) and again with both Andrew Hogan and Mhairi Morrison (GM & HR of Ugadale and Royal Hotel Scotland) early 2017, as of yet nothing has been done about it and I am constantly being brushed off by everyone, this concerns a sexual harassment/assault and bullying complaint which I assumed would be taken seriously not hidden and ignored as it was raised by Greg Sherwood in my induction that it would be if it ever happened to anyone. I have attached a partial statement can this be passed on or could I be put in contact with someone in the company who will take this further? Thank you X."*

41. Mr Sherwood queried the matter with Ms Morrison and on Thursday 7 February 2019 at 6.51pm Ms Morrison e-mailed Mr Sherwood in the following terms:-

> "*Hi Greg*
>
> *X worked with us in the Laundry Department. It was brought to my attention in the middle of last year that Ms Y had made some inappropriate comments to him.*
>
> *After speaking to everyone involved it turned out that the incident had taken place when X started work at the laundry over 2 years ago. Isabel and Paula both spoke with Ms Y at the time and as far as everyone was concerned it hadn't happened again.*
>
> *As for the bullying this was apparently Isabel Smith who made him feel that he had to leave laundry, none of this was brought to my attention until after he had walked out and refused to come back, he never gave any notice.*
>
> *He had started calling in sick quite regularly towards the end and started a new college course that hindered him to work certain shifts which Isabel was trying to accommodate.*
>
> *I had been in contact with him after the e-mail since he left and let him know that I would look into it again but again the statements I received stated that this incident was years old and had been dealt with at the time."*

42. Mr Sherwood also requested information from a previous HR Manager Kevin Lewis who had left the company. Mr Lewis recalled that there were issues with Ms Y's behaviour and a suspicion that she was abusing prescription medication. It was said that "Isabel and Andy were working through the behaviour issues by way of meetings several times with Ms Y, starting first with meetings between supervisor Isabel and Ms Y. Isabel then included HR Manager Andy into the discussions".

43. The claimant notified ACAS under the Early Conciliation procedure on 6 February 2019. On the same date ACAS issued their Certificate by e-mail to him. The claimant submitted the ET1 form to the Employment Tribunal also on 6 February 2019.

5 **Observations on the evidence**

44. I heard evidence from Mr Hogan on behalf of the respondent. Unfortunately, he was not in a position to give accurate evidence on some aspects of this case as he had not been directly involved. He stated in his evidence in chief that although the claimant had complained about Ms Y abusing prescription 10 medication during the course of his employment alongside her, he had not complained of sexual harassment. This was manifestly incorrect. It was clear from a number of the e-mails sent by Mhairi Morrison (and quoted above) that the claimant had, indeed, made such a complaint in the course of his employment. Mr Hogan's assurance in evidence that "*the claimant had raised* 15 *no issues at all regarding Ms Y's inappropriate behaviour*" undermined confidence in his evidence. The claimant's email of 29 September 2018 (J49) advised Ms Morrison of his new address and asked that paperwork be sent there. The claimant's P45 (J102) bore his old address. It was apparent from the claimant's email correspondence he had not received it (J93). However, 20 Mr Hogan assured me that it would have been sent to his new address. It was not clear what the basis for Mr Hogan's assurance on this point was and I did not accept it. I concluded in the absence of reliable supporting evidence to the contrary that the P45 was sent to the address on its face and that the claimant did not receive it.

25 **Applicable Law**

45. Section 97 of the Employment Rights Act 1996 provides so far as relevant as follows:

"***97 Effective date of termination***

(1) Subject to the following provisions of this section, in this Part "the effective 30 *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 on which 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…."

Submissions

46. On behalf of the respondent Mr Lane referred me first to page 4 of the ET1, at paragraph 5.1 where the claimant had indicated that his employment ended on 13 September 2018. Mr Lane said that this was an important indication of the claimant's position although not conclusive. The claimant had stated during the course of the correspondence that he had taken advice from solicitors and done some research so due weight ought to be given to this "significant piece of the puzzle".

47. Mr Lane accepted that the claimant's e-mail to Ms Morrison dated 8 September (J41) could be interpreted in different ways. He said that the fact that the claimant had left on 8 September and had not returned to work despite being on the rota for various shifts was an indication that he had departed at some point in September. He had said in the e-mail of 8 September that he would only come back for shifts he was not working with Ms Y. He did not, in fact, do so. Mr Lane drew my attention to the claimant's statement in his e-mail dated 23 September 2018 (J47) in which he had stated "*as you will be aware by now I left the Laundry Department on Thursday 19 September due to an extremely uncomfortable working environment created by Isabel Smith (Laundry Supervisor) and Ms Y (co-worker) over a period of time*". Mr Lane also referred to the claimant's e-mail of 29 September 2018 (J49) in which he had stated "*I didn't leave the company, I left the Laundry Department but I will talk* [sic] *that as my termination as no one had tried to contact me regarding the issue*". Mr Lane suggested that the word 'talk' was an error and that the claimant had actually meant to say 'take'. He submitted that the fact that the claimant had not worked post 8 September 2018 was also important

evidence, and that the respondent had indicated a leaving date of 31 October 2018 on his P45.

48. Mr Lane submitted in the alternative that the respondent had terminated the contract on either 31 October 2018 or on the issuing of his P45 and final payslip on 5 November 2018. Both these actions were consistent with the respondent viewing the relationship as at an end. The claimant had not queried or challenged these actions which clearly demonstrated that the relationship was over.

49. Mr Lane suggested that one final alternative analysis might be that the parties had come to the joint view that the relationship was over by 31 October or 5 November 2018 at the latest. He drew my attention to the case of Graham Group Plc v Mr D Garrett [1997] UKEAT 161 as authority for the proposition that where an employee has made an ambiguous statement such ambiguity should be construed against those seeking to rely on it. Mr Lane said this applied not only to the e-mail at J41 but to J49 as well. The e-mails also reflected the claimant's conduct in leaving mid shift and not coming back.

50. Mr Lane summarised the respondent's primary position as being that the claimant had terminated the employment relationship with an effective date of termination in September 2018. If that position was not accepted, then their alternative position was that the relationship was terminated by the respondent with a later effective date of termination in late October or early November 2018 on the issuing of the P45 and the stopping of the claimant's pay as well as the payment to him of accrued holiday pay on termination. Mr Lane pointed out that not only had the claimant been issued with a final payslip, but he had not appeared on any of the laundry rotas after the end of September 2018. Mr Lane referred me to the case of Kirklees Metropolitan Council v Radecki [2009] WL 8733816 which he said founded on the employer stopping salary in bringing the relationship to an end. Mr Lane submitted that the stopping of the claimant's salary gave rise to an effective date of termination of employment.

51. Mr Lane's third and final alternative argument was that the contract terminated at 'early November stage'. The claimant had walked off and had not come back. The respondent had stopped paying him. There was therefore a mutual termination of the relationship and an effective date of termination probably in
5 early November with the issuing of the P45 on 5 November 2018. Mr Lane submitted that the termination of employment was more than 5 months before the issue of the ACAS Certificate on 6 February 2019, and that the complaints were therefore time barred.

Time bar

10 52. In relation to the question of time bar Mr Lane stated that there were different tests for the unfair dismissal and sexual harassment cases. Taking the unfair dismissal case first, Mr Lane referred to Marks and Spencer Plc v Williams Ryan [2005] EWCA Civ 470. He said that if it were necessary to consider the section 111 (Employment Rights Act 1996 ("ERA")) test then a number of the
15 principles do not sit well with an extension of time in this case. Mr Lane referred to paragraph 24 of the decision and to the well-known case of Dedman. The ratio of that case is that "*if a man engages skilled advisers to act for him and they mistake the time limit and present it too late he is out. His remedy against them*." Mr Lane said that the claimant had conducted
20 research into the claim to the Employment Tribunal and clearly knew of the Tribunal's existence. He referred to having engaged 'Oakwood solicitors'. He submitted that the claimant should have known from his knowledge and research and from his reference to solicitors having been consulted that there was a strict time limit of 3 months from the effective date of termination of
25 employment.

53. Mr Lane referred to the documents in the bundle which suggest that the claimant may be unwell. He submitted that looking at these documents in detail they date from 2019. He submitted that the earliest document regarding the claimant's health in the bundle is at J163. This document is dated 30
30 January 2019. This would be at the very late end of the limitation period. Thus, submitted Mr Lane, the documents concerning the claimant's ill health

do not show that he was unwell throughout the relevant period. In any event he submitted that it was possible for the claimant to submit an ET1 because he did so even when these conditions were still affecting him.

54. Mr Lane acknowledged that given the wording of the test it was somewhat difficult to argue the matter in the absence of the claimant since it was incumbent upon the claimant to make the arguments himself.

Sexual harassment claim

55. With regard to the claimant's sexual harassment claim, the same considerations would apply. Mr Lane referred to the claimant's PH Agenda at J24 and also to the claimant's list of sexual remarks made to him by Ms Y at J66. He pointed out that both these documents talk about the sexual harassment lasting between August 2016 and September 2018. Mr Lane submitted that if the claimant was no longer in the workplace after September 2018 he would be having no contact with Ms Y anymore. Thus, the last act in any series of acts or course of conduct must have been on 8 September 2018 at the latest. This meant that the claim had been submitted out of time. Mr Lane referred to the well-known case of Bexley Community Centre v Robertson [2003] IRLR 434 CA in which the Court of Appeal indicated that while Employment Tribunals have a wide discretion to allow an extension of time under the just and equitable test in section 123 it does not necessary follow that the exercise of the discretion is a foregone conclusion. As the Court of Appeal said in Bexley there is no presumption that the extension of time should be exercised. It is for the claimant to convince the Tribunal that it is just and equitable to extend time so that the exercise of the discretion is the exception rather than the rule.

Discussion and Decision

Effective date of termination of employment

56. The "effective date of termination" of employment for unfair dismissal claims is a statutory concept. There was no suggestion that notice was given in this case, so the relevant part of section 97(1) Employment Rights Act 1996

defines it thus: "…*the effective date of termination" ….(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect…."*

57. In a case like the present it is quite difficult to identify from the factual matrix the date on which the termination took effect. Normally one would consider who terminated the contract and how. If the respondent dismissed the claimant, at what point was that dismissal communicated to him? If the claimant terminated the contract by resigning with or without notice, at what point did he communicate his resignation to the employer either by words or conduct? If no direct words of termination were used on either side, is it possible to infer termination from the actions of the parties?

58. I have analysed the facts as follows: At some point in early to mid-2018 the claimant e-mailed the respondent's Operations Manager Mhairi Morrison and complained that he was experiencing sexual harassment in the workplace by Ms Y. It was not clear what steps were taken by Ms Morrison to investigate the claimant's complaint. She did not give evidence and Mr Hogan's evidence on the issue was inconsistent with the documentary evidence. It appeared that the complaint was not properly investigated, and no outcome seemed to have been given to the claimant by the time of the events set out below.

59. On Saturday 8 September 2018 the claimant emailed Ms Morrison during his shift. The e-mail was in the following terms:-

> "*Hi Mhairi, X in the Laundry Department. Just letting you know that I will be leaving the Laundry after lunch today (12:20pm) & will not be in tomorrow. I'll also be removing myself in days where I am working alongside Ms Y from the rota. You will have to update Isabel Smith of this too.*
>
> *Can you send me a progress report on the complaint I submitted at the beginning of the year regarding the same colleague to this e-mail address, as you know the matters in the complaint are serious & I'd like to know what action is being taken or solution being devised.*

Thank you X". (J41)

60. In this email the claimant talks about 'leaving the laundry' but it is clear from the context that he means it in a temporary sense. These are not words of resignation. This email and the next one sent by the claimant on Tuesday 11 September 2018 (J42) raise issues with the behaviour of a colleague which appear to be so serious that the claimant has felt forced to absent himself from the laundry department to avoid contact with her. In the first email he asks what action is being taken or solution devised. The claimant sends three emails to Ms Morrison before she finally responds on Friday 14 September 2018 (J43). So far as relevant to the 'effective date of termination' issue, Ms Morrison confirms that the claimant had submitted a complaint of sexual harassment earlier in the year, that she spoke to Peninsula about it and that she had also spoken to Ms Y to tell her such behaviour would not be tolerated. However, Ms Morrison says that she then 'deemed the matter was put to rest', apparently without informing the claimant. It is clear that Ms Morrison is referring to the claimant's complaint of sexual harassment because she deals with the drug abuse complaint against the same employee separately in the remainder of the paragraph. Ms Morrison goes on: "*I know you are choosing not to work on shift with Ms Y at the minute and you feel like you are losing hours, I have spoken with Isabel and she is trying her best to keep the two of you apart but with limited shifts and in such a small department you can imagine that it is not easy."* Thus, despite the claimant's absence at this stage it is clear that both parties see the contract as continuing. There is also an implication that it may not be possible to ensure that the claimant and Ms Y are not working together.

61. Mr Lane referred me section 5.1 of the ET1 where the claimant had indicated that his employment ended on 13 September 2018. He submitted that this was an important indication of the claimant's position although not conclusive. However, the evidence before me does not suggest that the contract ended on that date and I have rejected that date as inconsistent with the documentary evidence.

62. The claimant responded to Ms Morrison's email (J43) at 2.01pm on Friday 14 September 2018 (J43): "*There is proof, there are witnesses to her actions. I was never informed that these investigations were closed, I repeatedly asked Isabel & to her knowledge Peninsula were still in the process of making a decision, as a few months have passed since then I decided, to enquire by myself."* Ms Morrison replied (J44) indicating that she thought there had only been one incident. The claimant responded (J44): *"the groping/spanking and sexual harassment occurred several times a day for months, everyone involved in the laundry are witnesses, every question and conversation Ms Y led bar a few were about sexual acts, I left my details on the report which were never used, as far as I know no statements were taken from co-workers/staff in the laundry regarding these complaints. I am seeking my own advice in these matters after researching online as to what happens next."* Nothing in this correspondence indicates that the claimant is resigning at this point. He is making a very serious complaint about intolerable working conditions and not unreasonably, expecting the respondent to address it. His explanation for his non-attendance in the laundry department in this correspondence is that he is being subjected to sexual harassment and his managers are not taking it seriously or doing anything about it.

63. On Sunday 23 September 2018 at 7.46pm the claimant wrote a further e-mail to Mhairi Morrison in the following terms:-

> *"Hi Mhairi, as you will be aware by now I left the Laundry Department on Thursday 19 September due to an extremely uncomfortable working environment created by Isabel Smith (Laundry Supervisor) and Ms Y (co-worker) over a period of time. As I have depression partly caused by said working environment I felt it necessary to remove myself from the situation before I deteriorated more. I am currently seeking advice from Oakwood Solicitors regarding Ms Y and they are confident of the case brought forward, I have had no further contact from the company regarding the situation and may have to take the case to court., I am also researching my situation regarding my departure from the laundry, I will be in contact if I feel I want to take*

this to Tribunal. Please can the company update me on the investigation into my complaint made earlier in the year.

Thank you X. PS I can give a full statement if required regarding my departure." (J47)

64. Although this email refers to an incident on 19 September, no evidence was before me about that. The claimant refers to leaving the "laundry department" and to his "departure from the laundry". However, he does not say he is resigning from the company. Indeed, he later confirms that this was not a resignation and that he had been engaged for all departments and not specifically for the laundry. His reference to taking a case to court or tribunal appears to relate to the alleged sexual harassment by Ms Y, which claim would not be dependent on the employment contract having come to an end. Continuing employees can and do bring claims of sexual harassment. I did not conclude that an ordinary reasonable employer would understand that the claimant was terminating the contract of employment, and in any event, any misunderstanding between the claimant and Ms Morrison was resolved and she appeared to accept in her reply that she had misunderstood him.

65. In circumstances where the claimant has complained about the working environment and indicated that this is exacerbating his depression, I did not conclude that his non-attendance at the laundry was either unexplained or indicative that he had left the respondent's employment in September. It is clearly incumbent on the respondent to address his very serious complaints about the workplace and revert to him with an outcome. Until they do so his absence does not, on its own denote resignation in the absence of words to that effect. Indeed, his continuing efforts to have his concerns about the working environment addressed suggest the opposite.

66. Ms Morrison replied to the claimant's e-mail at 7.24pm on Saturday 29 September 2018 saying: "*I am sorry to hear you felt you had to leave the company."* She went on to say that she was still waiting on statements from his colleagues in the laundry regarding his complaint but she thought Ms Y had apologised for any inappropriate remarks she had made. She told the

claimant that the *"extremely uncomfortable working environment" created by Isabel"* had not been brought to her attention and that her only knowledge of this had been the claimant's email 'to say he was leaving'.

67. The claimant's reply on Saturday 29 September 2018 states:- *"I didn't leave the company, I left the Laundry Department but I will talk that* [sic] *as my termination as no one has tried to contact me regarding the issue…."* Mr Lane submitted that the word 'talk' was an error and that the claimant had actually meant to say 'take'. This is clearly correct, but it is not a resignation. The claimant is saying to Ms Morrison: 'My understanding is that you have terminated my contract'. However, Ms Morrison replies the next day, 30 September 2018 (J50) to say: "*With regards to your leaving as you were employed in the Laundry Department I assumed that by leaving that department that meant you wished to hand your notice in with the company, I apologise if I misunderstood was your intention to be transferred to a different department?"* She also says she is chasing up the statements from colleagues. It appears to me that no ordinary reasonable employer would understand from this series of emails that the claimant had resigned. He has told the respondent that he cannot work in the laundry department unless or until Ms Y's and Isabel's behaviour towards him is addressed. He appears to be seeking a resolution. The respondent is apparently investigating with a view to addressing the problems raised. At this point, the indications on both sides are that the claimant is still in employment pending the resolution of his complaint.

68. Indeed, the claimant responded to Ms Morrison on Monday 1 October 2018 (J51) to say: "…*I was originally hired to do all departments as explained by Andrew Hogan during my interview, I can work as Night Porter for 2 days a week as I am attending University at this time of year, also agreed with Andy during my interview. My Uni days are Monday and Wednesday if you can find work for me in this department at the Royal only that would be ideal."*

69. Ms Morrison responded later that day to say (J51): "*Unfortunately we have a full staff with the night porters at both the Royal and the Ugadale Hotels at the*

minute and with the Ugadale closing again in a couple of months the four boys will already be struggling for shifts in just one hotel. We may have some hours available in Ugadale at the HSK with some NP shifts to cover holidays if required if that is something you would be interested in?" The claimant replied on 1 October 2018 to say he had heard there was night porter work available. Ms Morrison responded later on 1 October to say "*No sorry, we do have the odd shift when someone is on holiday but more often than not the boys prefer to cover each other's holidays for the extra money. It wouldn't be guaranteed shifts every week unfortunately."* At this point, the respondent's investigation into the claimant's complaints about the abusive working environment in their laundry is apparently still continuing and the possibility of him working in one of their other departments is under discussion with him. He has been offered an occasional night porter role on an 'odd shift when someone is on holiday' basis and has been told it would not be guaranteed shifts. The claimant's copy of the same email at J88 states that he replied to the email on 12 November 2018 indicating that no other emails intervened.

70. On 3 October 2018 the claimant was paid his salary for the month of September. Mr Hogan testified that on 5 November 2018 the claimant was sent his last payslip in respect of accrued holiday pay (J173) and his P45 (J102) stating that his leaving date was 31/10/2018. However, the claimant had notified the respondent on 29 September that his address had changed and had asked that paperwork be sent to his new address. For the reasons given above, I concluded that the claimant did not receive the P45 sent to his old address on 5 November. This is apparent from the email correspondence below when on 12 November 2018 he chases Ms Morrison to ask how the respondent is taking his complaint forward. He says he has been made aware that statements have been taken. Ms Morrison responds to say she has received one statement from a member of the laundry team and asks the claimant to send her a statement. He replies to say that his statement was given as the original complaint and asking her to demand the other statements "*as the company should be aware the longer this takes the worse it looks on their behalf…"* Ms Morrison responds to say she will chase it up again. There is no mention of his P45 having been either sent or received.

71. It was not until Friday 1 February 2019 that the claimant e-mailed Ms Morrison:-

"Hi Mhairi

There seems to be a problem with communication here as I haven't heard from the company in months regarding my complaint and actions being taken, nor have I received a P45."

72. It appeared to me from this email that the claimant had by now understood that his employment had terminated, hence his statement that he had not received a P45. On 1 February 2019 the claimant also e-mailed the respondent's president Mr Greg Sherwood in the terms set out in the findings in fact. He then notified ACAS under the Early Conciliation procedure on 6 February 2019. On the same date ACAS issued their Certificate by e-mail to him. The claimant submitted his ET1 form to the Employment Tribunal also on 6 February 2019.

73. As discussed above, I did not conclude that an ordinary reasonable employer would understand the words used by the claimant in his communications with the respondent to amount to words of resignation when considered in context. With regard to his conduct, ordinarily the failure to attend work might indicate that he was terminating the contract, but in this case his absence was explained by his complaint of verbal and physical sexual harassment in the laundry department and the respondent's indications that they were investigating this, presumably with a view to resolving it. Thus, in answer to the first issue in the Notice of Hearing, I have concluded on the facts found that the claimant's employment did not terminate on 13 September 2018 and I did not accept the respondents' primary submission that there was a termination by the claimant in September 2018.

74. The respondents' alternative position was that the relationship was terminated by the respondent with a later effective date of termination in late October or early November 2018 on the issuing of the P45 and the stopping of the claimant's pay as well as the payment to him of accrued holiday pay on

termination. Mr Lane pointed out that not only had the claimant been issued with a final payslip, but he had not appeared on any of the laundry rotas after the end of September 2018. Mr Lane referred me to the case of Kirklees Metropolitan Council v Radecki [2009] WL 8733816 which he said founded on the employer stopping salary in bringing the relationship to an end. Mr Lane submitted that the stopping of the claimant's salary gave rise to an effective date of termination of employment. I have concluded that this argument is well founded. Briefly, the facts of Kirklees were these; Kirklees Metropolitan Council had been in the course of negotiating a compromise agreement with Mr Radecki, who had been suspended on full pay from his employment with them as a teacher. An agreement had been reached subject to contract, but Mr Radecki then raised a number of queries with it and claimed that his employment was continuing. Kirklees had informed Mr Radecki via his representative that from 31 October 2006 he would be taken off their payroll and they stopped paying him from that point. In the Court of Appeal, Rimer LJ, giving the leading judgment said this: "*The obligation to pay salary to an employee is an employer's fundamental obligation under the employment contract. In this case the contract had been an unusual one in that Mr Radecki had been suspended on full pay since October 2005 and had not since done a day's work at the School. For practical purposes, the sole remaining vestige of his employment was his right to receive and Kirklees' duty to pay his salary. Yet on about 1 November his salary was to be stopped, as it was. Its stopping was a repudiation of the contract marking the severing of that last vestige and it evinced the clearest intention to bring the employment to an end.*" The ratio of the case is succinctly stated by Toulson LJ: "*I agree that the appeal should be allowed for the reasons given by Rimer LJ. I also agree with Rix LJ that on Mr Hildebrand's findings Kirklees brought Mr Radecki's employment to an end for the purposes of the statutory concept of the effective date of termination by ceasing to pay his salary from 31 October 2006 (the last vestige of any performance of the contract) which they had indicated that they would do and which Mr Radecki knew they had done when the payments ceased to come into his bank account.*"

75. I have concluded that the same principle applies to the facts of the present case. The respondent took the claimant off its payroll once it had paid him his holiday pay, accrued but untaken at termination on 5 November 2018. At the same time, they prepared and sent out a P45. It was at that point (and not in September) that the respondent by their actions evinced their intention to bring the remaining vestiges of the claimant's employment to an end. However, despite having been informed by the claimant of his change of address, the respondent failed to send his final pay slip detailing holiday pay and his P45 to his new address and he did not receive them. Thus, the claimant received from the respondent a payment of £177.41 into his bank account on 5 November 2018. In the absence of the pay slip and P45 there was nothing to inform him that this was accrued holiday pay and that the respondent was terminating the contract. Following the reasoning of Toulson LJ quoted above, in the absence of communication to that effect, the claimant would not know and no reasonable claimant would know that the respondent had taken him off their payroll until early December 2018 when no further payment came into his bank account. I have thus concluded that it was at this point that the respondent communicated to the claimant by its conduct that the contract was at an end. Therefore, the effective date of termination from which the period of limitation would run was the normal payroll date in early December. (The precise date is immaterial).

76. As Rimer LJ points out in Kirklees, (quoting Robert Cort & Son Ltd v Chapman [1981] ICR 816) it is of the greatest importance that there should be no doubt or uncertainty as to the 'effective date of termination' of employment because an employee's right to claim unfair dismissal is dependent upon his taking effective action within three months. In this case the words and actions of the parties left considerable doubt and it would have been difficult for the claimant to work out what that date was.

77. With regard to the discrimination claim, it is not apparent from the notice of hearing that this Preliminary Hearing would determine time bar in relation to that claim. The claimant has therefore not received notice to that effect and I am not in a position to consider it in the absence of evidence and submissions

from him. I have therefore ordered him to specify his position within 21 days and a telephone case management PH should then be fixed to discuss further procedure.

5

M Kearns
Employment Judge

11 September 2019
10 **Date of Judgment**

Date sent to parties **13 September 2019**