



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104107/2020 (A)

5

Heard via telephone conference call on 2 September 2020

Employment Judge: J Hendry

10 **Mr D Dawson**

Claimant

15

University of Aberdeen

Respondent

20

JUDGEMENT

The Judgment of the Tribunal is as follows:

1. **The Claimant's application for Reconsideration is continued meantime to be dealt with at a future Preliminary Hearing.**
- 25 2. **The Claimant's application for a hearing on Interim Relief to be arranged is refused as being made out of time.**

REASONS

1. A hearing took place by Telephone Conference Call on 2 September 2020 in order to discuss an application made by the claimant for reconsideration of a decision to reject a claim made by him to the Employment Tribunal on 30 July 30 2020. The respondents had not yet entered the proceedings.
2. Prior to the hearing Mr Dawson had written to the Tribunal setting out the circumstances in which his claim had been made and rejected. A subsequent

application made by him on the same grounds having been accepted. Mr Dawson explained that he wanted to preserve the earlier date of submission and for the Tribunal to reconsider its rejection of the application.

3. At the close of the hearing I asked Mr Dawson to forward me a copy of both the letter dismissing him and details of the written contractual notice provisions.

Background

4. At the outset I agreed with Mr Dawson that the significant dates appeared to be as follows:
- 10 i) On 1 July 2020 his employers wrote to him terminating his employment with immediate effect.
 - ii) He did not read the letter until 2 July 2020.
 - 15 iii) On 29 July 2020 he submitted an ET1 using the electronic system provided by the Employment Tribunal service. He completed the form without an Early Conciliation number.
 - iv) The Tribunal Service rejected his application on the 30 July. An application was re-submitted on 2 August 2020.
5. Mr Dawson explained to me that his ET1 form was created using the appropriate government website. When he reached part of the form which asked for an early conciliation number he ticked "*I don't have an ACAS number*". He then had to select part of the form which provided for reasons for not having an ACAS Certificate. He explained that he had to do this or he would not have been allowed to proceed further. He selected "the claim consisted only of a complaint of unfair dismissal which contains an application for interim relief" He emphasised that he would not have been able to submit the claim without completing this mandatory field. It appeared that the PDF document which was created once the form was completed was then checked by the Employment Tribunal Clerk in Glasgow but that it omitted this information. In the absence of an early conciliation number or an explanation

the ET1 was properly completed, at least from the standpoint of the Employment Tribunal service, it was rejected. The claimant wanted the rejection of the claim reconsidered in terms of Rule 32 of the Employment Tribunal rules.

5 6. I was sympathetic to the claimant's position. I have no reason to disbelieve his version of events and was minded to allow the reconsideration. However, I am not sure if there is any particular legal significance attached to the date on which the claim is accepted whether on the 29 July 2020 or on 2 August 2020. Nevertheless, the claimant is entitled to apply for a reconsideration to have the earlier date restored if appropriate. My concern was that whilst it seems unlikely that the respondents will have any locus to make representations on this matter or indeed would suffer any prejudice if granted they are presently unaware of the application. I indicated to Mr Dawson that I was minded to continue consideration of the application until the first case management hearing takes place in relation to his case, assuming that the respondents will lodge an ET3, and have the matter dealt with at that hearing when the respondent's agent can indicate what their client's position is. Accordingly, I will make that order.

15 7. We then turned to the question of Interim relief. I explained to the claimant that in terms of Section 128 (2) of the Employment Rights Act 1996 ("ERA") the application for such relief had to be made within 7 days of the date of dismissal. The section is in the following terms:

128 *Interim relief pending determination of complaint.*

20 (1) *An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—*

(a) *that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—*

(i) *section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or*

(ii) *paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or*

(b) *that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met,*

may apply to the tribunal for interim relief.

(2) *The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).*

8. The effective date of termination is a statutory matter (Section 97 ERA) and not a contractual matter. My understanding was that the claimant accepted that he had been dismissed summarily on 2 July 2020 when he read the letter of dismissal. In these circumstances the application was out of time when his first application was made.

9. Mr Dawson made reference to an EAT decision (*Dr Handcock v Mr Ter-Berg and Another* (EAT/0138/19/BA)) which he indicated seemed to show that an Interim Relief Hearing was held out with the 7 day period. He argued from that apparent circumstance that there must be a power to allow the hearing out of time. I indicated to him that I had not seen this case before but what he needed to do was point me to some power, of which I was unaware, to grant relief from the time limit provided for in the statute. I explained that there was a difference between the Tribunal allowing extensions of time (as provided for in the Employment Tribunal Rules) and waiving or changing statutory time limits such as the clear provision in 128 (2) which is in mandatory terms.

10. I told the claimant that I was prepared to consider any legal authorities he had (he agreed to send me copies of them which he subsequently did) but he would have to identify a power allowing me to waive or extend the time limit at issue.

11. The claimant referred me to three cases involving a Mr Ter-Berg. Unfortunately, the two Employment Tribunal Judgments were oral judgments and there is little factual detail given particularly about the effective date of termination or whether it was an issue in the litigation. Mr Dawson pointed to the paragraphs 7,10 and 11 in the Employment Appeal Tribunal Judgment suggesting that the application for Interim Relief came long after what appears to be the effective date of dismissal.
12. Reading paragraph 10 of that Judgment it seems that the application was raised on the 5 November 2018. The application was ultimately successful and took effect from the 9 November which was the effective date of termination from which time the order would take effect.(see the Judgment dated 21 January 2019). Paragraph 10 and 11 record:
- “... Instead, by letter dated 9 August 2018, the Respondents gave notice of termination of the contract. No reason was given for termination, and the Claimant was given three months’ pay in lieu of notice. 11. On 5 November 2018, the Claimant issued proceedings in the Employment Tribunal.”*
13. The proceedings were issued before the stated effective date of termination. The claimant argues that it looks as if the claimant is in the same situation that he is in and that the “correct” effective date of termination was not the day he saw the letter of termination but on the expiry of the notice provided for in his contract. The matter does look odd from the bare “facts” gleaned from this case. It does not assist the Tribunal in identifying some power of relief from the effect of the time limits for Interim Relief. However, the answer may be that either the matter has not been recorded correctly (it was not crucial to the appeal) or that the dismissal was initially in some way ineffective. The effective date of termination is dependent on the circumstances and we do not have the factual basis on which it was judged that Dr Ter-Berg’s effective date of termination was the 9 November.
14. It should be borne in mind that the appeal to the EAT concerned not the issue of when Interim Relief should be applied for but the proper approach the Tribunal should take at such a hearing when an issue, that the claimant was

not an employee, was raised in defence of the application. The Judgment was that this issue was not a preliminary matter to be decided in advance of the Interim Relief hearing but was to be considered along with the other issues. There is no indication that the application was late or this was an issue.

- 5 15. The claimant at my request helpfully supplied his letter of termination and a copy of the contractual terms he relied on regarding notice. The letter sent to him by the University dated 30 June says as follows:

10 *“This letter is to notify you that the University of Aberdeen is terminating your employment without notice in accordance with the notice clause of your contract of employment dated 17 October 2016. Your contract of employment terminates with immediate effect and your last day of employment is 1 July 2020.”*

- 15 16. This letter seems unambiguous that the contract will terminate with immediate effect. The contract provides that it is terminable at not less than three months’ notice but that the University reserved the right to make payment of salary in lieu. My understanding is that was done.

- 20 17. There is always a danger in taking some minor aspects of a Judgment to support a position without considering what the focus of the Judgment was and hence what the ultimate decision was about. It might be presumed that if there was a jurisdictional issue arising from the late presentation of the Interim Relief application then it would have been raised and addressed. It is not enough to say that as it wasn’t addressed and it looks as if the application was made late then there must be some power to allow it out of time.

18. For these reasons I refuse the application for a hearing to be fixed to consider Interim Relief. If I am in error in this analysis then the claimant's remedy is to appeal.

5

Employment Judge: J Hendry
Date of Judgment: 11 September 2020
Entered in register: 16 September 2020
and copied to parties

10