EMPLOYMENT TRIBUNALS

Claimant: Una Sault
Respondent: Empire Amusements & Cheeky Monkey's Soft Play Centre

Heard at: Nottingham **On:** 13 July 2021

Before: Employment Judge Broughton

Representation
Claimant: In Person
Respondent: Mr Williamson, Managing Partner

JUDGMENT – PRELIMINARY HEARING

1) The claim of unfair dismissal was presented within time pursuant to section 111 ERA.

2) The effective date of termination was 4 July 2020.

WRITTEN REASONS FOLLOWING ORAL JUDGMENT

Background

1. The Claimant has presented a claim of ordinary' unfair dismissal.

2. The case was listed today for a preliminary hearing to determine;

   a. Whether the claim was presented in time
   b. If it was not, whether it was reasonably practicable to present the claim in time,
   c. And if it was not, whether the time in which it was presented was itself a reasonable further period of time.

3. The Claimant's case is that her employment was terminated only when this decision was communicated to her verbally by Miss Rachel Greason, the Respondent's Café Manager, during a conversation on 4 July 2020. The Respondent's case is that the termination date is 15 March 2020, the date when it asserts that a letter of dismissal was hand delivered (not posted) to her home address informing the Claimant of the summary termination of her employment. The Claimant denies receiving that letter.

4. The claim form itself was issued on 6 October 2020 and the Acas period of early conciliation started on 3 September. The Acas certificate was issued on 25 September 2020. If the

effective date of termination is the 14 March, the claim was presented outside of the primary 3 month time limit. If the effective date of termination is 4 July, the clam was presented within time.

Evidence

5. A joint bundle of documents had been prepared although not paginated. There were additionally a few other documents which were on the Tribunal file which were not included in the bundle but were relevant and the Claimant wanted the Tribunal to consider them. Those additional documents included a medical report that the Claimant had disclosed and which confirms dates when she was admitted into hospital; a period from 26 March 2020 to 20 April 2020. The Respondent does not dispute that the Claimant was in hospital receiving treatment for her mental health, between those dates. I accept the Claimant's undisputed evidence that she was sectioned under the Mental Health Act. There is also a letter of 11 November 2020 on the Tribunal file from the Claimant, the Claimant's P45, a letter of 23 March 2020 referring to statutory sick pay and attached with it an application form for statutory sick pay.

6. Despite Regional Employment Judge Swann making an Order dated 5 December 2020, for the mutual exchange of witness statements, neither party came prepared with witness statements today (other than a short statement for Miss Greason, however, Miss Greason was not attending to give evidence), because I am told, they had not understood they were required to do so. I discussed with the parties the options open to us and both parties elected to proceed and each present oral evidence with the other party then given reasonable time (within the constraints of today) to consider that evidence and prepare their cross examination. Neither party were legally represented .

7. I heard evidence on behalf of the Respondent from Mr Anthony O'Brien, the Arcade Manager and he was cross examined by the Claimant and then by her companion and witness, Mr Norman (in respect of a conversation which Mr Norman had with Mr O'Brien).

8. The Claimant then gave evidence and was cross examined by Mr Williamson, Managing Partner of the Respondent. Mr Norman also gave evidence on behalf of the Claimant and he was cross examined.

9. It was agreed that as the parties were without legal representation, we would take a staged approach, first I would determine what the effective date of termination was before hearing evidence and submissions on whether the time limit should be extended.

10. I deliberated and gave oral judgment in the afternoon to the parties.

Findings of fact

11. The evidence of Mr O'Brien is that three letters were hand delivered to the Claimant's home address in March 2020 and whether those were received (and most importantly the second letter dated 14 March 2020, which communicated the dismissal), is the central issue in the case.

12. The Respondent's case is that a letter was sent on the 6 March 2020 to the Claimant's home which informed the Claimant that unless the Respondent heard from her within the following 7 days, there would be no option other than to terminate her employment. It is not in dispute that the Claimant had not been in touch with the Respondent for several weeks because she was unwell;

"…I hope this letter finds you well and that you are feeling a lot better in yourself. I know that you have been through some trying times of late and everybody here at Empire wished you well.

…I am writing to enquire whether to not it in your intention to return to work…sadly unless we hear from you in the next seven days, we will have no option other than to terminate your employment."

13. It is not in dispute that the Claimant did not respond to the letter of 6 March 2020.

14. There was then a further letter of 14 March 2020, which was delivered according to the Respondent, to the Claimant's home on 15 March 2020. This letter stated that the Claimant's employment had been terminated. There is no reference to notice and the Respondents position is that it was an immediate dismissal;

    "Unfortunately, as you have not responded to the letter we sent on 06/03/20 and we have not heard from you for some time we have taken the unfortunate decision to terminate your employment."

15. The Claimant denies having received either of those two letters.

16. The Claimant gave evidence that she was at home on 7 and 15 March when Mr O'Brien gave evidence that the letters of the 6 and 14 March were hand delivered by him at around 6.45am. Mr O'Brien's evidence is that he did not knock on the door and speak to the Claimant, he simply put the letters through the post box. He did not take any photographs or video himself posting the letters and he had no witness with him.

17. The Claimant gave evidence that she sent in a sick note via Mr Norman who is a tenant in a property on her grounds. Mr O'Brien does not dispute that Mr Norman brought in a sick note for the Claimant and that there was a discussion between them . Mr Norman could not recall the date he took in the sick note. Initially he gave evidence that he must have taken in the sick note after the date of the third letter of the 23 March, but then gave evidence that it must have been prior to that because the 23 March letter refers to the Claimant's entitlement to statutory sick pay. The Respondent's evidence is that the offices were closed down from 23 March when staff were put on furlough.

18. Mr O'Brien's gave evidence that his conversation with Mr Norman was either on 16, 17 or 18 March and Mr Norman did not dispute that those may well be the correct dates.

19. I am satisfied on a balance of probabilities, that Mr Norman took in the Claimant's sickness certificate on 16, 17 or 18 March. Mr O'Brien's evidence was clear on this point and these dates would appear to be consistent with the letter of 23 March. This meeting with Mr Norman, on the Respondent's own case, was therefore after Mr O'Brien says he had delivered the letter of 14 March, on the 15 March.

20. The evidence of Mr O'Brien and Mr Norman is that they had a short conversation about the Claimant's health. Mr Norman, and this is not in dispute, did not make any reference whatsoever to the Claimant receiving a letter notifying her that her employment had been terminated, which is consistent with Mr Norman's evidence that he was not aware from the Claimant that she had received any such communication. Mr Norman's evidence which is not in dispute, is that he had a regular dialogue with the Claimant about her employment situation and her ill health .Mr Norman was not just a tenant, he was a friend hence why he

took the sickness certificate into work for the Claimant. Mr Norman's undisputed evidence is that he encouraged the Claimant to obtain the sickness certificate so that she would get paid. The sickness certificate was for the following 2 or 3 week period.

21. I find it unusual that had the Claimant received the letter dated 14 March, she had failed to mention it to Mr Norman and if she had, it seems unlikely that Mr Norman would not have mentioned this to Mr O'Brien. Mr O'Brien accepts that during his discussion with Mr Norman, he had also failed to mention the fact that the Claimant was no longer employed by the Respondent. Mr O'Brien gave evidence that he would not have discussed this issue with Mr Norman and while that may well be appropriate, I find it difficult to understand why knowing that the Claimant had been unwell, he did not take the simple step of checking with Mr Norman, whether she had been at home on 15 March and/or whether Mr Norman was aware whether she had received any communication from the Respondent, or provided further sealed copies of the letters to Mr Norman to pass on to the Claimant to make sure that they had been received. Mr O`Brien's evidence was that;

    " We probably chatted about how she was and I said I will speak to accountant and see where we stand"

22. Mr O'Brien's evidence is that after Mr Norman had come into the office with the sick note, he spoke to the Respondent's accountant and it was on the advice of this accountant that the letter of 23 March was sent to the Claimant which stated;

    "I have spoken to the accountant *after receiving your sick note and unfortunately you do not qualify to receive it from* ***your employer****. You can however claim it form the government; I have enclosed the necessary form for you to do so."*

    [Tribunal Stress]

23. The Claimant accepts that she received this letter of the 23 March. This letter makes no mention of the previous correspondence or her dismissal. The letter refers to the Claimant not qualifying to receive sick pay from her "*employer*", rather than her '*previous employer'*. There is no indication in this letter that the Claimant is no longer an employee of the Respondent and indeed the language of the letter and the act of accepting the fit note, would appear consistent with an ongoing employment relationship.

24. The letter of 23 March also attached a form for the Claimant to complete to apply for payment of sick pay from the Government. The form, which is signed by the Managing Partner, Mr Williamson is dated 20 March 2020 (that post-dates when ti is alleged the Claimant had been told that her employment had been terminated). The Respondent ticked a box on the form from a list of various options, explaining why SSP cannot be paid by the Respondent and the option states that ; "*I cannot pay you SSP on or after 16 March*" because "*Your average earnings before your illness or disability were not high enough"*

25. There is another option on the form which the Responded could have selected as the reason why they could not pay the Claimant SSP, which is ; "*your contract of employment has been brought to an end*". That option/reason however, was not selected.

26. There may be an accountancy reason behind the option which was selected on the form but on the face of it the information contained within that document does not appear consistent with the Respondent's case. The Respondent had no explanation other than they acted on the advice of their accountant.

27. The Claimant gave evidence that she sent a text message in April 2020, to Rachel Greason the Café Manager. Her evidence is that after coming out of hospital, she sent a text stating; " *I will come in when you open up"* because she understood that the Respondent's business was now closed and the staff were on furlough. The Claimant did not produce the text message. The Claimant asserts that she had changed her phone.

28. A short statement was produced for Miss Greason who did not attend the hearing to give evidence under oath and submit to cross examination. She makes reference in the statement, to messages and telephone calls with the Claimant but fails to clarify what was said or the dates of those communications. No other witnesses on behalf of the Respondent appear to have knowledge about the alleged text message the Claimant asserts she sent to Miss Greason. Mr Williamson put it to the Claimant that it would not have been unreasonable for Miss Greason not to have replied because she was on furlough at the time. Mr Williamson did not challenge the Claimant on the veracity of her evidence that she sent the message

29. I find, on a balance of probabilities, that a text message was sent by the Claimant to Miss Greason in the terms as alleged, and that Miss Greason did not respond to it. The sending of a text in those terms is not I find, consistent with the Claimant understanding that her employment had been terminated.

30. Further, it is not in dispute that the Claimant had sent Mr O'Brien a text on 21 April 2020 consisting only of an emoji of a dancing gorilla, which Mr O'Brien did not reply to it. Again I consider that such a message from the Claimant is not consistent with the behaviour of employee towards their previous employer where their employment has recently been terminated summarily.

31. The Claimant's evidence is that she waited until after the furlough period had ended and the Respondent had opened again for business and on 4 July she went in and spoke to Miss Greason about work. Mr O'Brien was not in a position to give evidence about that conversation or even whether or not it had taken place. The Claimant's evidence is that she was told that she had been replaced. Mr Williamson had been given the opportunity to give evidence but had chosen not to do so however, in his submissions he attempted to give additional evidence about the likelihood of Miss Greason making this comment about replacing staff however, I have not taken that evidence into account.

32. A discussion with Miss Greason on 4 July in the terms alleged by the Claimant, is consistent with the dates that the Claimant has put in the claim form as the date of termination. The Claimant alleges that it was only when she had this discussion on 4 July with Miss Greason, that she became aware that her employment was terminated. Miss Greason statement does not comment on the allegation, despite the fact that this was contained within the claim form. Miss Greason's statement was dated 3 November 2020 and therefore post-dates the claim form.

33. I find on balance of probabilities, taking into consideration the oral evidence of the Claimant, the consistency of her evidence with what is set out in her claim form, the failure by Miss Greason to refute the alleged conversation of 4 July in her statement; that the Claimant did go in to the Respondent's premises on 4 July and had the discussion as she alleges . This conversation and behaviour of the Claimant is again, not consistent with someone who is aware that the Respondent had terminated her employment summarily back in March 2020

34. The evidence of the Claimant which is not in dispute, is that her daughter went in to the Respondent's offices to collect her P45 later in July, which is also behaviour consistent with the Claimant only being informed of the termination of her employment on 4 July.

35. The Respondent has produced within the bundle examples of text messages that Mr O'Brien had sent to the Claimant during her employment. These included messages asking the Claimant why she has not attended for shift that day etc. to which the Claimant had replied. Despite the fact that Mr O'Brien had communicated with the Claimant via text messages in February 2020, there were no text messages disclosed from him to the Claimant in March 2020 informing her that he had posted letters through her door or checking that she had received them, this is despite the evidence that he had clearly communicated in that manner with the Claimant previously.

36. The letter sent from Mr O'Brien dated 6 March, referred to him being aware that she had been through some " *trying times of late*" however, despite that knowledge, he did not text to check that the letters had been safely received and nor did he send a text or otherwise check that the Claimant was home even though he was aware of previous episodes of ill health.

37. When the P45 was produced it also has a date of leaving of 28 February 2020 which is not consistent with the Respondent's evidence that her employment had been terminated by letter on 14 March 2020.

38. The evidence of Mr O'Brien under cross examination was that he accepted that it was "*reasonable",* that the Claimant may have misplaced the letters.

Legal Principles

39. Section 111 of the Employment Rights Act 1996 (ERA) deals with the applicable time limits for a claim of unfair dismissal brought under sections 98 and 94 of the ERA and provides that :

"*An Employment Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal before the end of the period of 3 months beginning with the effective date of termination or within such further period as the Tribunal considered reasonable in a case which is satisfied that it was not reasonably practicable the complaint to be presented before the end of that period".*

40. A document sent by post will be taken to have been received on the day on which it would have been delivered in the ordinary course of post, unless the contrary is proved pursuant to rule 90(a). Section 7 of the Interpretation Act 1978, provides that service is deemed to be effected 'by properly addressing, pre-paying and posting [the] letter'. When the 'properly addressing, pre-paying and posting' of a document is proved and it is not returned through the post undelivered to the addressee, there will be a prima facie assumption that it has been duly delivered: ***A/S Cathrineholm v Norequipment Trading Ltd 1972 2 All ER 538, CA*. 10.22**

41. Where documents have been correctly posted, the burden of proving that they have not been received lies on the party alleging non-receipt.

42. If the employee is informed that he or she has been summarily dismissed by **letter**, then the EDT will be the date on which the **letter** is received and read. According to the EAT in *Brown v Southall and Knight 1980 ICR 617, EAT*, a summary **dismissal** communicated to the employee for the first time in a **letter** addressed to his or her home will not take effect

until the **letter** reaches the employee or until he or she has had a reasonable opportunity to read it.

43. The decision in *Brown* was examined and approved by both the Court of Appeal and the Supreme Court in ***Gisda Cyf v Barrett 2010 ICR 1475, SC*.**

44. At the Court of Appeal, Lord Justice Mummery took into consideration the fact that the EDT is a statutory construct within a framework that gives employees the right not to be unfairly dismissed, and three months within which to bring a claim if they are. Moreover, the act triggering the time limit is that of the employer and thus outside the employee's control. Mummery LJ also took issue with the idea that time could begin to run before the employee actually knows that he or she has been dismissed

45. The Supreme Court rejected the appeal and agreed with the Court of Appeal that Brown had been correctly decided;;

    "1) … There was no general acceptance in case law that statutory rights given to employees should be interpreted in a way that was compatible with common law contractual principles …On that basis, the well established rule that an employee was entitled either to be informed or at least to have the reasonable chance of finding out that he had been dismissed before time began to run against him was firmly anchored to the legislation's overall objective …It would be unfair for time to begin to run against an employee in relation to their unfair dismissal complaint until they knew, or at least had had a reasonable chance to find out, that they had been dismissed…"

46. The Court noted as an aside that an employer who wants to be certain that an employee is aware of a dismissal always has the option of dismissing him or her face to face.

47. One question that neither the Court of Appeal nor the Supreme Court in Gisda directly addressed was what happens when an employee deliberately seeks to avoid communication with the employer. However, Mr Justice Bean when the case was in the EAT made the comment that 'where a decision to dismiss is communicated by letter sent to the employee at home and the employee has neither gone away deliberately to avoid receiving the letter nor avoided opening and reading it, the effective date of termination is when the letter is read by the employee, not when it arrives in the post'. Thus where wilful blindness is shown, the EDT will be the date when the letter is deemed to have arrived.

Conclusion

48. The Claimant's evidence is that she never received the letters of the 6 and 14 March 2020. It was not put to the Claimant that she had received the letters and had avoided opening them or reading them, that accusation was not put to the Claimant during cross examination. Mr O'Brien considered she may have misplaced them.

49. The Claimant accepts however that she received the letter of 23 March.

50. This is not a case where an employer has delivered a letter through the postal system, where the employee is in the position of having to provide sufficient evidence that they have not received the letter which has been correctly addressed to them. This is a case where the employer alleges that it hand delivered the letter itself. The law on deemed service in these circumstances is not relevant.

51. It is fundamentally a question of whether the Tribunal finds on a balance or probabilities, that Mr O'Brien posted the letter of dismissal or whether it accepts the Claimant's evidence

that no letters were received and that she had not deliberately avoided reading them or given she was unwell, had not read them and then misplaced them.

52. The behaviour of the Respondent, after it is alleged that they sent the letter of the 14 March 2020, is not consistent with an employer who has terminated an employee's employment summarily. The letter of the 23 March and the way the form for SSP has been completed on any natural reading of it, reads as if the Respondent still considered itself to be her employer. Accepting the sick note for the next few weeks after her employment has ended is not consistent with having terminated her employment and nor is the conversation which Miss Greason had with her in on 4 July or the failure by Miss Greason to respond to her text message in April 2020.

53. The Claimant's own behaviour is also not consistent with someone who believes their employment had been terminated.

54. It is possible that the Claimant was so unwell that she had not read the letters or could not recall doing so and misplaced them, however, if that were the case, that would provide strong grounds for a finding that it was not reasonably practicable for her to bring the claim in time. However, it was agreed with the parties not to deal with the reasonable practicable issue, until a determination had been made on the date of termination, however I make that observation.

55. On a balance of probabilities, taking all the evidence into consideration, I find that the Claimant did not read or even receive the letters of the 6 and 14 March 2020 and that the most likely explanation of the Claimant and Respondent's continued behaviour after the 15 March 2020, is that the letters were not delivered as asserted by the Respondent, and that the termination of her employment was not therefore terminated until this was communicated to her verbally on 4 July 2020, at which point she accepted the termination of her employment as effective and her behaviour was consistent with that understanding.

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Employment Judge Broughton

Date: 09/10/2021

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