



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110977/201 8 Held in Glasgow on 27 October 2018

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Employment Judge Shona MacLean

10 Mr K Reeve

Claimant
Represented by:
Mr N Stewart
Solicitor Advocate

15 Babcock International Group

Respondent
Represented by:
Mr A Munroe
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Tribunal does not have jurisdiction under Section 111 of the Employment Rights Act 1996 to hear the complaint of unfair dismissal.

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REASONS

Background

1. On 26 July 2018 the claimant sent a claim form to the Tribunal complaining of unfair dismissal and payment of other unspecified amounts. In the response the respondent raised a preliminary issue that the Tribunal had no jurisdiction to hear the claim as it was presented out of time in terms of Section 111 of the Employment Rights Act 1996.

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2. The case was listed for a preliminary hearing to determine the issue of time bar.

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3. The representatives prepared an agreed chronology of events. They provided a joint set of productions and a transcript of an audio recording of a final consultation on 2 February 2018 which was played to the witnesses. Benny Roeling, Manager of Project, Energy & Marine Technology (Rosyth) gave evidence for the respondent. The claimant gave evidence on his own account.
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4. The issues to be determined were:
- 10 a. What was the effective date of termination (EDT) of the claimant's employment?
- b. Did the Tribunal have jurisdiction to consider the complaint?
5. The representatives confirmed that the dispute revolved around the EDT. The claimant accepted that if the EDT was 2 February 2018 the claim was presented out of time and he did not seek to argue that it was not reasonably practicable for the claim to be presented within time.
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Findings in Fact

6. The respondent is an international operation with its headquarters in the UK. It is involved in facilities management for major assets and infrastructure projects. The respondent employed the claimant from 11 August 2014.
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7. Under the statement of terms and conditions of employment issued to the claimant he was entitled to receive one month's notice or notice in accordance with statutory requirements - whichever was greater. The respondent also reserved the right to exclude the claimant from its premises during all or part of the claimant's notice period.
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8. From 1 May 2016 the claimant worked on the respondent's contract as a site manager at the Hyundai Heavy Industries (HHI) shipyard at Sampho in South Korea.
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9. The respondent made a company-wide announcement around November 2017 that due to prevailing circumstances including the expiry of the site contract there were risks of redundancy.
- 5 10. On 10 January 2018 the respondent wrote to the claimant advising that his position had been identified as at risk of redundancy. At this stage this was a provisional decision only.
- 10 11. The first consultation was carried out by video conference on 19 January 2018. It was chaired by Benny Roeling, Manager of Projects, Energy & Marine Technology (Rosyth). He was accompanied by Stacey Gallagher, Senior HR Adviser. A second consultation by video conference took place with same parties present on 31 January 2018.
- 15 12. The final consultation by video conference took place on 2 February 2018. The same parties were present. Ms Gallagher advised that as the respondent had been unable to find alternative employment and as the claimant's role as site manager was coming to an end the claimant was being given notice of redundancy. She said, *"Your notice period, you will have contractually four weeks' notice. Clearly, we wouldn't ask you to work but if you clearly needed to be in the office to handover or I don't know pick up of personal items or whatever that looks like that's something you could do on Monday. I am not sure if you need to do that at all or nof.* Mr Roeling confirmed that most of that had been done. The claimant did not have to go into the office. Ms
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25 Gallagher continued, *"For the moment we would not ask you to work your notice so effectively your employment ends today and we will pay your redundancy payment as well as your PILON which is pay in lieu of notice. We will pay that at the end of February."*
- 30 13. There was then discussion about the claimant returning the respondent's property; the access to work email ending and arrangements for returning to the United Kingdom.

14. By letter erroneously dated 1 February 2018, sent to the claimant by email on 7 February 2018 the claimant was advised (the Dismissal Letter):

5 *“At this consultation meeting we confirmed there were no changes or outstanding issues and it was with regret that I had to advise you that you had been selected for redundancy, as there were no suitable alternative roles available anywhere in the business. I confirm that your position is redundant and your employment will therefore be terminated by reason of redundancy.*

10 *You are entitled to 4 weeks contractual notice and you are not required to work your notice period as agreed at our meeting. Therefore your employment will terminate with effect from Friday 2nd February. You will instead receive payment in lieu of notice; this payment will be subject to deduction of tax and national insurance. You will also receive payment in lieu*
15 *of five days accrued but untaken holidays.*

You are entitled to statutory redundancy pay. This payment is calculated on the basis of your age, weekly pay (subject to the current statutory maximum) and length of service and is set out in the attached schedule. This payment
20 *will not be subject to deduction of tax and national insurance contributions.*

We regret that it has become necessary to make you post redundant.

If you wish to appeal this decision you should submit your appeal in writing
25 *and send it to me within five calendar days of the date of receiving this written confirmation. You must clearly set out the grounds of appeal.”*

15. On 12 February 2018 the claimant flew from South Korea to the United Kingdom. He received a payment of the sums due to him on 28 February
30 2018. His payslip referred to basic pay, five days holiday pay, foreign pay, lieu of notice and redundancy.

16. The claimant started early conciliation on 31 May 2018. ACAS issued an early conciliation certificate on 28 June 2018. The claimant presented his claim to the Tribunal on 2 July 2018.

5 17. Given that the parties provided a recording of the final consultation on 2 February 2018, I did not consider that Mr Reeling's evidence was of much assistance. What was apparent from the recording and his evidence was that although he nominally chaired the final consultation and signed the Dismissal Letter, it was Ms Gallagher who did most of the talking at the final consultation
10 and prepared the Dismissal Letter. My impression was that Mr Reeling had little understanding of the details of the claimant's contractual or statutory entitlement and was relying on Ms Gallagher. It was therefore unfortunate that she did not pay more attention to detail when speaking to the claimant and confirming the position in writing.

15 18. The claimant did not sound surprised hearing at the final consultation that he was being made redundant which was understandable given the discussions at previous consultations and the lack of alternative employment. The claimant obviously recorded the final consultation and could have replayed
20 the recording later. He did not expect to undertake work for the respondent after 2 February 2018. He ceased having access to his work email and had to return the respondent's property. On 7 February 2018 the claimant received the Dismissal Letter via his personal email which stated that his employment terminated on 2 February 2018. He did not question that date,
25 and returned to the UK on 12 February 2018. His payslip which referred to a payment in lieu of notice. He was paid all sums to which he was entitled on 28 February 2018. I therefore found his evidence that he thought he had been given four weeks' notice of termination on 2 February 2018 unconvincing.

The Law

30 19. Section 97 of the Employment Rights Act 1996 (the ERA) states that "the effective date of termination" -
a. in relation to an employee whose contract of employment is terminated by notice... means the date on which the 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

20. Section 111 of the ERA provides that a complaint of unfair dismissal may be presented to a Tribunal against an employer. However, a Tribunal shall not consider a complaint unless it is presented to the tribunal

a. before the end of the period of three months beginning with the effective date of termination; or

b. be within such period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

21. Subject to the provisions of Section 207B of the ERA the time limits can be extended to facilitate conciliation before the institution of proceedings.

15 **Submissions**

The Respondent

22. I was invited to find that the claimant attended the final consultation on second February 2018. He was entitled to a notice period of four weeks/one-month. He was not required to work that period and was informed that he would be paid in lieu. He was informed of his effective date of termination and this was confirmed by letter.

23. Under section 111 of the ERA time runs from the effective date of termination. Section 97 of the ERA defines that term. The applicable provision is section 97(1)(b) of the ERA. The claimant was dismissed without notice and the time runs from that date.

24. Absent section 207B of the ERA the time limit would have expired on 1 May 2018. The ACAS early conciliation procedure did not commence until 31 May 2018. The claimant therefore does not benefit from an extension of time.

25. The claim form presented out of time on 2 July 2018. The Tribunal has no jurisdiction.

26. I was referred to *Adams v GKN Sankey Ltd [1980] IRLR 416* and *McCabe v Greater Glasgow Health Board [2014] UKEAT 0004*

The Claimant

27. The claimant's position is that the effective date of termination was 3 March 2018. As such the ACAS submission deadline fell on 3 June 2018. As early conciliation started on 31 May 2018 it was within the three-month deadline. 2013. The ACAs early conciliation certificate was issued on 27 June 2018. The claim form presented on 2 July 2018 was on time.

28. The claimant's first submission was that the respondent had no basis for purporting that the claimant was dismissed on 2 February 2018. Reference was made to the claimant's contract of employment. There is a requirement of not less than one month's notice by either party. The respondent can require the claimant to stay at home during the notice period. There was no provision for PILON. The respondent were obliged to provide notice especially where there was an option for the claimant to deal with handover issues.

29. The second submission was that even if there was a basis to terminate on 2 February 2018 the respondent failed to do so. I was referred to *Societe Generale, London Branch v Geys [2012] UKSC* - what is require is clear and unambiguous terms.

30. The final consultation meeting stated that the claimant had four weeks' notice and "for the moment" he would not require to work his notice. That implied that he could in the future attend the office. The respondent said that they would finalise matters the following week.

31. The respondent's letter contained error as did the schedule. The final payment was not made until 28 February 2018.

32. There was confusion on the claimant's part. The inference was that he was getting notice on 2 February 2018 and for the moment he would not require to work. There would be discussion the following week. There were different dates on the letter. It would be wrong for the respondent to benefit from any confusion.

Deliberations

33. I started my deliberations by noting that unlike the employer in *Societe General* (above) the respondent did not have a contractual right to terminate the claimant's contract and making a payment in lieu of notice.

34. The respondent's position was that the claimant's employment was terminated orally, and the Dismissal Letter was merely confirmatory. The claimant's position was that he was given notice at the final consultation and his employment was terminated by letter.

35. I considered that the final consultation had to be considered in the round. The claimant's post had at 10 January 2018 been identified as at risk of redundancy. Ms Gallagher started the final consultation by discussing the steps that had been taken to find the claimant alternative employment. Having concluded that there was no alternative employment, Ms Gallagher said that the outcome was that the claimant was been given notice of redundancy and was contractually entitled to 4 weeks' notice. The claimant was not being asked to work that notice. The discussion then moved to the fact that the claimant did not need to return to the office. The claimant was then told that his employment "*terminates today*". At the end of February 2018, he would be paid his redundancy payment and a "*PILON which is pay in lieu of notice*". The claimant was to return all his IT equipment and his work email account was been disconnected. The videoconference on the Monday to discuss the practicality of dealing with the claimant's personal belongings and flying home, the cost of which the respondent was supporting.

36. I did not consider that during this discussion Ms Gallagher was giving the claimant four weeks' notice of the date his employment terminated. Had she done so she would not have said that the claimant's employment terminated that day and that he required to return respondent's property.

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37. Even if oral communication was unclear, which was not the position in my view, the Dismissal Letter referred only the claimant's employment terminating "*with effect from Friday, 2nd February 2018*". Instead of receiving the contractual notice to which the claimant was entitled he was receiving the payment in lieu.

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38. I considered that given that the claimant was told that his employment terminated on the day of the final consultation; he was not required return to the office; he was to return all company property; he no longer had access to his work email; future correspondence was being sent via his personal email address ; and he was flying back to the United Kingdom on 12 February 2018 a reasonable employee's understanding reading the Dismissal Letter would have been that the date of termination of employment was 2 February 2018.

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39. If the claimant believed that his employment did not terminate on 2 February 2018, as he now suggests, I found it surprising that he did not clarify the position at the time particularly as the Dismissal Letter referred to a termination date of 2 February 2018 which would not have been the termination date had the claimant be given four weeks' notice of termination but did not require to attend work during the notice period.

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40. Having concluded that the effective date of termination was 2 February 2018 and that the claim was not presented until 2 July 2018 I considered that the claim was presented out of time.

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41. Accordingly, in terms of Section 111 of the ERA a Tribunal does not have jurisdiction to hear the complaint of unfair dismissal.

Employment Judge: S Maclean
Date of Judgment: 06 November 2018
Entered in register: 08 November 2018
and copied to parties