



EMPLOYMENT TRIBUNALS

Claimant Christopher Drake
Respondent Telecom Service Centres
Limited t/a Webhelp UK

Heard at by CVP **On:** 5 December 2022
Before Employment Judge Othen

Representation

Claimant In person
Respondent Mr Byrom of counsel

RESERVED JUDGMENT

1. The claimant's effective date of termination of employment under section 97(1) of the Employment Rights Act 1996 was 30 September 2021.
2. The claimant's claim of unfair dismissal was presented to the tribunal within time and the tribunal has jurisdiction to hear it under Section 111(2)(a) and (b) of the Employment Rights Act 1996.

REASONS

Introduction

1. The claimant was employed by the respondent from 13 February 2017 latterly as a Senior Operations Manager. He was dismissed by reason of redundancy in 2021. The claimant asserts that his effective date of termination was 30 September 2021 (having previously asserted that it was 26 September 2021 in his ET1 application form) and the respondent asserts that it was 31 August 2021. He brings a claim of unfair dismissal, his claim of disability discrimination having been withdrawn by him. The respondent contests the claim.

2. On 1 August 2022, EJ Ryan directed that there be a preliminary hearing to determine the following issue:
 - 2.1 *Was the unfair dismissal complaint presented outside the time limits in sections 111(2)(a) & (b) of the Employment Rights Act 1996 and if so, should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason), should the unfair dismissal complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should a deposit order be made under rule 39 on the basis of little reasonable prospects of success? Dealing with these issues may involve consideration of subsidiary issues including whether it was "not reasonably practicable" for the unfair dismissal complaint to be presented within the primary time limit; what the effective date of termination was."*
3. The claimant represented himself and gave sworn evidence. The respondent gave evidence by way of two witnesses: Anthony McCourt and Stacey Arch. As well as their witness statements, I considered the documents from an agreed 76 page Bundle of Documents and two further documents which were adduced on the day of the hearing by the respondent and shared with the claimant and the Tribunal.
4. As the claimant was unrepresented, appropriate time was taken at the outset of the hearing to explain the above preliminary issue to him and the purpose of the hearing itself. He was also afforded additional time during the hearing to review the additional documents adduced by the respondent and to prepare his cross examination questions and submissions to me. The hearing ran on beyond its allocated time of three hours in order for me to hear all the evidence and oral submissions but it was necessary to reserve judgement as the claimant was unable to participate further due to work commitments.

Findings of fact

5. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.
6. Clause 12 of the claimant's written contract of employment states as follows:
 - 6.1 *"..the notice required by either the company or yourself to terminate the employment shall be 1 month".* The contract specifies limited circumstances in which the company would be permitted to terminate employment without notice, such as gross misconduct or conviction of a criminal offence. The circumstances do not include redundancy. It does not provide for notice of termination of employment without notice or for payment in lieu of notice in any other circumstances (30).
7. The claimant was placed at risk of redundancy in June 2021. Individual consultation meetings took place between the respondent and the claimant from 8 June 2021. The claimant went off sick from 17 August 2021 with mental ill-health symptoms and did not return to work. He was invited to a final

consultation meeting on 26 August 2021 to take place via Microsoft teams. This meeting was with Mr McCourt and Mrs Arch (formerly Ms Donoghue).

8. The typed notes from that meeting contain the following words from Mr McCourt: "*Employment end on 31/08/2021, not required to work notice, will be PILON. Will receive a detailed breakdown of payments due in written confirmation*" (47). Mr McCourt is also noted as explaining that the claimant's access to email would finish with effect from 27 August and there is some discussion about the claimant saying goodbye to his colleagues before this takes place.
9. Mr McCourt's witness statement at paragraph 6 states: "*I can't recall exactly what was said at the meeting, however if the date of termination is recorded in the minutes as 31 August 2021 then I would be led to believe that was accurate*". On questioning by me, Mr McCourt confirmed that he could not remember stating this. Mrs Arch's witness statement confirms that she took the notes at the meeting and that she believed that they are "extremely accurate". After cross-examination by the claimant and further questions from me, it was established that the notes were not a verbatim account and this would be consistent with normal HR practice in redundancy consultation meetings. Indeed, the witness statement of Mrs Arch refers to issues which she remembers being discussed during the meeting (such as the fact that the claimant was off sick at the time and an apparent decision to communicate a termination date of 31 August 2021 for payroll purposes: "to keep it clean for the month's pay [PILON]") but these are not recorded in the notes. I find that these notes were a general record of the main topics and issues which were discussed but were not an exact account of the words that were spoken.
10. The claimant's evidence was clear that he could not remember being told that his termination date would be 31 August 2021 but that if it was said, its meaning wasn't made clear and that this was referred to as a final working date. He remembers a discussion about his last day in work being 26 August 2021, his notice period, which he knew to be one month and also being told that he would not physically have to work his notice. I accept that this is what he understood.
11. On the same day, Mr McCourt sent to the claimant a copy of the typed minutes from the meeting as well as a letter of dismissal dated the same day. Attached to that letter of dismissal was a statement with a breakdown of his redundancy and other payments on termination, including a detailed spreadsheet entitled "Redundancy Calculator".
12. The letter of dismissal (50) confirms the claimant's selection for redundancy. It also refers him to the attachments and contains the following statement:
 - 12.1 "*Your employment will terminate on 30 September 2021. You will not be required to work out a formal notice period and the organisation will make payment in lieu of notice to you*".
13. In the statement attached to this letter of dismissal and the "Redundancy Calculator", his "*Date of termination of continuous employment*" and "*Leave*

Date"/"Reference Date (inc. notice)" is stated to be 30/09/2021 with his "Actual Leave Date" being 31/08/2021.

14. The respondent's case, as stated in the witness statement of Stacey Arch was that the date of 30 September 2021 was included in the above documents by mistake. I have no reason to disbelieve this.
15. On 27 August 2021, the claimant sent an email to his colleagues with the subject line "Farewell!". He explained that: *"my time working at web help has come to an end due to being made redundant and this will be my last day"*.
16. A payslip dated 31 August 2021 confirms the claimant's salary, PILON, redundancy pay and all other remuneration to that date.
17. The claimant appealed against his dismissal on 1 October 2021 and an appeal outcome letter was sent to him on 19 November 2021. Neither the claimant's appeal nor the outcome mention his termination date. The claimant's mental health difficulties during the redundancy consultation process are evident from the appeal and the outcome.
18. On 11 December 2021, the claimant contacted ACAS for early conciliation of his claim.
19. The claimant was issued with a P45 by the respondent on 4 January 2022. This confirms his termination date as 25 August 2021.
20. Eleven days later, on 25 January 2021, the claimant telephoned the respondent's HR call advisers to report that his leaving date had been noted as incorrect. He confirmed in evidence that it was the P45 which had prompted this telephone call as he needed to apply for state benefits but that the termination date noted on this document was different to the termination date which had been confirmed in his letter of dismissal. In evidence, Stacey Arch could not explain why the termination date on his P45 had been noted as 25 August 2021 as she had nothing to do with the generation of this document.
21. Stacey Arch responded to the claimant's telephone query on the same day (25 January 22) with an email as follows: *"I can... confirm that your last day of employment has been recorded as 27 August 2021"*. When questioned by me in evidence as to how and from where she had obtained this date, given that it differs from the termination date which the respondent asserts as part of this case, she clarified that it was the date that the claimant's access to its internal and email system had been terminated but that the respondent had then exercised its discretion to subsequently extend the termination date until 31 August 2021. The claimant challenged this by way of a further email dated 9 February 2021 stating *"this is not what was discussed and is also not the date on my formal letter"*. He attached a copy of his letter of dismissal and asked for it asked for it to be amended.
22. Early conciliation ended on 21 January 2022. The claimant submitted his ET1 application form on 20 February 2022.

23. It was clear to me that the claimant genuinely believed that his employment with the respondent did not terminate until the end of September 2021. I found his oral evidence to be consistent, credible and supported by the bulk of the contemporaneous documents. He did not overstate his case or exaggerate. For example, when I asked him about the contents of his contract of employment and what he understood from this, he told me honestly that he had not seen it and had not taken into account at the time. This was despite the fact that this document would appear to support his case. I do not accept the respondent's case, as put to the claimant in cross-examination, that his "farewell email" to his colleagues on 27 August 2021 indicates an understanding of his termination date of 31 August 2021 and believe that the claimant was saying goodbye to them as he would no longer be working with them in his role from that date.
24. Aside from the comment of Mr McCourt which was documented in the minutes of the final consultation meeting, there is no other contemporaneous document which recorded a termination date of 31 August 2021. Mr McCourt couldn't remember saying this and the claimant couldn't remember hearing it. It is clear that there was discussion at the time about the claimant's physical employment within the workplace coming to an end at the end of August 2021. He was told on 26 August 2021 that his access to email would be cut off the following day and that he could therefore say goodbye to colleagues, which he duly did. The latter date corresponds with the date subsequently given to him by Stacey Arch as the last day of 'recorded employment' (27 August 2021).
25. The only contemporaneous written communication to the claimant about his employment termination date was the letter of dismissal. His clear evidence was that he understood the termination date contained in that letter to be his correct employment termination date. He also understood that he had received payment for his month's contractual notice until his termination date, without being required to work during this notice. This notice period followed on straight after a period of sickness absence anyway.
26. The first time that the claimant was informed in writing of the respondent's belief that his termination date had been in August 2021 was after he entered into early conciliation. This was prompted by receipt of his P45 which he believed contained the wrong termination date. In fact, this belief was well founded. I accept the claimant's evidence that when he received the email from Stacey Arch on 25 January 2022, he believed that the termination date that she gave him of 27 August 2021 was also a mistake; that has also emerged as correct. I therefore accept his evidence that his belief in a termination date of the end of September 2021, as confirmed by his letter of dismissal, continued until submission of his ET1 application form on 20 February 2022 (and beyond), a belief which is corroborated by the wording of his email reply to Stacey Arch on 9 February 2022.
27. Although the notes of the final consultation meeting were sent to him on 26 August 2021, the claimant did not review these, instead referring to his letter of dismissal and its attachments as the most accurate, recent and clear communication of information regarding the termination of his employment at that time.

Relevant law and conclusions

28. Section 111(2) of the Employment Rights Act 1996 (ERA) states:

"an employment tribunal shall not consider a complaint under this section 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) within such further 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" (my emphasis).

29. Section 207B ERA confirms the extension of the above time limits to facilitate ACAS conciliation before a complaint is presented.

30. Section 97(1) ERA states:

30.1 *Subject to the following provisions of this section, in this Part "the effective 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 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".

31. The Supreme court in the case of Société Générale, London Branch v Geys [2013] IRLR 122, considered the issue of notice of termination of employment, how and when it is given, takes effect and the form that it should take. It held as follows:

32. *"...it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee"*

33. That case as well as the case of Sandle v Adecco UK Ltd [2016] IRLR 941 was considered by the employment appeal Tribunal in East London NHS Foundation Trust v O'Connor [2019] 10 WLUK 456. Both these cases established the principle that a communication that a contract was being terminated on a particular date should be interpreted and determined in light of the wider context and all the facts of the particular case.

34. Applying the law to the relevant facts of this case, I do not consider that the information given to the claimant about the termination of his employment in

his final consultation meeting on 26 August 2021 amounted to notice of termination under section 97(1) ERA. It is clear that the claimant was informed that the respondent had decided to dismiss him by reason of redundancy and that there would no longer be a requirement for him to attend work or to work during his notice period. Instead, he would be paid in lieu of the requirement to work. He was told that he would receive written confirmation. On that occasion, I conclude that no clear and unambiguous date of termination of employment was given to him and that any reference to an "end date" of 31 August 2021, in all the circumstances of the case, could reasonably have been regarded as the end of the requirement for him to attend work and the start of his one-month notice period.

35. Instead, I consider that the notice of termination of employment with which the claimant was provided and which conforms with the definition under section 97(1)(a) ERA was his letter of dismissal of the same date and this confirms the date of termination of his employment as 30 September 2021. I conclude this having taken account of following circumstances and for the following reasons:
- 35.1 this notice is clear, unambiguous and contains an exact date;
 - 35.2 all other dates provided to the claimant at the material time were ambiguous, unclear and inconsistent;
 - 35.3 there is no contemporaneous written notice in which the claimant was informed of a termination date of 31 August 2021;
 - 35.4 the evidence about exactly what he was told during the final consultation meeting is unclear;
 - 35.5 at the time that the final consultation meeting took place, the claimant was suffering from symptoms of mental ill-health;
 - 35.6 the respondent's evidence regarding the correct termination date is inconsistent;
 - 35.7 in all the circumstances of the case, it was reasonable for the claimant to believe the contents of the letter of dismissal and to understand the termination date contained within it;
 - 35.8 in all the circumstances of the case, it was reasonable for the claimant to believe that the PILON payment was made in lieu of the requirement for him to work during his notice period, rather than being made in lieu of any notice being given;
 - 35.9 although the claimant's ET1 and the case management order refers to his alleged termination date of 26 September 2021, this is not consistent with the contemporaneous evidence;
 - 35.10 in terms of the chronological chain of events, a termination date of 30 September 2021 is consistent with the claimant's contract of employment.

36. As such, and in accordance with section 111(2) ERA (and the extension provisions under Section 207B ERA) the claimant's claim was presented to the tribunal within the required time limit and the tribunal has jurisdiction to hear it.
37. Had I found that the claimant's effective date of termination was 31 August 2021, his claim would have been submitted out of time. In those circumstances, for the reasons explained above and which are summarised in paragraph 35, I would have found that it was not reasonably practicable for him to submit his claim in time and that it was submitted within a reasonable period thereafter.

Employment Judge Othen
14 December 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON 15 December 2022

FOR THE TRIBUNAL Mr N Roche