



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104891/2022 (V)

Open Preliminary Hearing held at Glasgow (via CVP) on 15 December 2022

Employment Judge Tinnion

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Mr. Edward McMahon

**Claimant
In Person**

RGIS Inventory Specialists Ltd.

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**Respondent
Represented by
Mr. Sheppard,
Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The Claimant's effective date of termination was 28 February 2022.

2. The Claimant's ET1 Claim Form asserting a claim of unfair dismissal under ss.94-98 of the Employment Rights Act 1996 was not presented in time.

3. The Claimant does not contend it was not reasonably practicable for him to have presented his ET1 Claim Form within 3 months of 28 February 2022.

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4. The Tribunal lacks jurisdiction over the Claimant's unfair dismissal claim.

5. The Tribunal strikes out the Claimant's unfair dismissal claim under Rule 37(1)(a) (lack of any reasonable prospect of success given lack of jurisdiction).

REASONS

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1. By an ET1 presented on 30 August 2022 [5-16], the Claimant presented a claim of unfair dismissal on the basis that his effective date of termination was 31 March 2022. By its ET3 [22-29] and paras. 30-33 of its Grounds of Response

[33], filed on 28 September 2022, the Respondent denied the Tribunal had jurisdiction over the unfair dismissal claim on the basis that the Claimant's effective date of termination was 28 February 2022, and within the following 3 months the Claimant neither presented an ET1 nor contacted ACAS (it is not in dispute that the Claimant first contacted ACAS on 23 June 2022).

2. On 5 October 2022, the Tribunal listed a 'reconsideration' Open Preliminary Hearing to determine the following issue: time-bar.

3. The OPH was held on 15 December 2022. The Claimant represented himself. The Respondent was represented by counsel Mr. Sheppard. The Claimant gave evidence on his behalf. The Respondent called HR officer Ms. Anne Simmonds to give evidence (a witness statement prepared for her was not relied upon). The Tribunal was satisfied both witnesses sought to assist the Tribunal by giving their genuine best recollection of events. Both parties were content to use a 108-page bundle prepared by the Respondent's solicitors (the Claimant confirmed the documents he wished to rely upon were in that bundle). Both parties were informed before witness evidence was given that if they wished to rely upon a document that they needed to draw that document to the Tribunal's attention in the course of giving evidence. Both parties made oral closing submissions.

4. After it was carefully explained to him, the Claimant confirmed that if the Tribunal held that his employment did terminate on 28 February 2022, he did not wish to argue that it was not reasonably practicable for him to have presented his claim within 3 months of that date. Accordingly, the only issue the Tribunal had to determine at the OPH was the Claimant's effective date of termination.

Findings of fact

5. The Tribunal makes the following findings of fact relevant to the issue it has to decide on the balance of probabilities.

6. The Respondent employed the Claimant from 2012 until 2022. When his employment ended, the Claimant was a District Manager of the Respondent's Scottish and Newcastle offices.

5 7. On 23 December 2021, the Claimant raised a grievance against his line manager relating to a phone call they had on 24 November 2021 [89].

8. By email to Ms. Simmonds on 22 January 2022, the Claimant tendered his resignation in the following terms:

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"It is with deep regret that I must tender my resignation. As per the terms of my contract of 1 week for every year served I therefore give 10 weeks notice beginning 22/1/22 and ending on 1/4/22 ... In light of the grievance I have raised I would ask you to clarify what my role would entail whilst working the notice period as I feel I have already been sidelined with regard to management of both 779 and 771 ..." [90]

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9. By email on 25 January 2022, Ms. Simmonds acknowledged receipt of the Claimant's resignation [91]. She hoped to be able to persuade the Claimant to remain with the Respondent, but was unsuccessful.

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10. On 7 February 2022, a meeting was held to discuss the Claimant's grievance.

11. By letter dated 22 February 2022 [93-96], the Claimant's grievance was not upheld by Mr. Neil Storey, the Respondent's Managing Director. Mr. Storey's letter rejecting the Claimant's grievance stated (in relevant part):

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"In the circumstances and out of respect for your service to date, it is my view that you be allowed to receive a payment of salary in respect of the balance in lieu of notice as a lump sum, rather than having to work out the balance. If this is something that would interest you, please do drop Anne a line and make the request. Whilst we have the contractual right to make that decision

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as a company, out of respect for you, we will not do so lest such action be misinterpreted.” [96]

12. By email on 24 February 2022 (at 11:54) [97], the Claimant asked Ms.
5 Simmonds: *“Just a quick question as I haven’t decided next steps yet but does the offer of finishing notice period early then cancel out the option to appeal?”*

13. By email on 24 February 2022 (at 16:52), Ms. Simmonds replied:

10 *“Thanks for your email and query. I can confirm that should you wish to finish early and receive a payment of salary in lieu of the unexpired period of notice, this would not cancel the option to appeal the grievance decision. I note that you say you have not decided on your next steps. I hope that you will take time to consider these, and hence why Neil was keen to extend the time for receipt of any appeal of his decision from 5 to 10 working days to allow you to do this. Should you decide to proceed with this option, we can be flexible on the end date, so as to allow for return of property etc. As an example, if you were to leave at close of business on Monday 28th February 2022, you would be entitled to receive a payment of £3,758.01 (which includes salary up to and including 1st April 2022) in respect of pay in lieu of notice. We would not expect you to work for the rest of what would have been your notice period, i.e. up to 1st April 2022. You would also be paid for any accrued but untaken holiday days up to 28th February 2022 (i.e. 4.81 days). These payments would be subject to deductions for tax and national insurance in the usual way. I understand you will have been paid up until the end of*
15 *February, in your February pay packet, which you will receive on Monday. The terms and conditions of your contract of employment that survive termination of your employment would continue to apply after your employment ends. I look forward to hearing from you.” [98]*

14. By email on 25 February 2022 (at 13:40), the Claimant replied:

5 “Thanks for the clarification below. I would like to take up the option of finishing notice early and receiving payments in lieu. Your example set out below sounds an ideal option therefore I suggest I work from the District Office Monday [28 February]. I can then hand over all company property to Raymund [sic], or possibly Alan Reilly if he is busy after my work day is done. Thank you for your help in this matter.” [99]

10 15. By email (precise date and time unknown), Ms. Simmonds replied to that email as follows (in relevant part): “Thanks for getting back to me and I accept your proposal. I will pass on the information below to Kiran.” [99]

15 16. It is not in dispute that Monday, 28 February 2022 was the Claimant’s last working day. He attended work, and handed in his company keys, laptop, mobile phone and credit card. In the period 1-31 March 2022 the Claimant did no work for the Respondent. The only thing the Claimant did not hand back on 28 February 2022 was his company car, which he continued to drive (for non-work purposes) until 31 March 2022, when he returned it to the Respondent.

20 17. On 28 February 2022 (at 13:30), the Claimant sent an email to his work colleagues stating (in relevant part): “My last day It’s been great working with you, meeting with you, moaning with you and drinking with you ...” [100]. Ms. Simmonds replied: “It’s been great working with you over the years and you’ve always been ‘on top of the world’. Please take care and keep in touch” [100].

25 18. On 31 March 2022, the Claimant was paid his outstanding holiday pay as well as a “PILON” payment [81]. A P45 was prepared for the Claimant which stated his leaving date was 31 March 2022 [82].

Relevant law

30 19. Section 111(2) of the Employment Rights Act 1996 (ERA) provides a Tribunal shall not consider a complaint under s.111(1) unless it is presented before the end of the period of 3 months beginning with the effective date of termination.

20. Section 97(1)(a) of ERA provides that in relation to an employee whose contract is terminated by notice, whether given by the employer or employee, the effective date of termination means the date on which the notice expires.

5 21. Neither party referred the Tribunal to any case authorities in closing submissions. However, there is relevant case law.

22. Provided it is done in a clear unambiguous way, the effective date of termination of an employee whose contract was terminated with notice can be brought
10 forward:

a. by the employer unilaterally – see Stapp v Shaftesbury Soc. [1982] IRLR 326, CA (employee dismissed resulting in effective date of termination of 23 February 1980; on 29 January employee presented a claim for unfair
15 dismissal, causing employer to write to employee on 7 February asking him to “*relinquish your duties*” with effect from 7 February and remove himself and belongings at same time; employee did so, paid pay in lieu of notice up until 23 February; Court of Appeal held no ambiguity, letter made clear the employment had ended on 7 February);

20 b. by the employee unilaterally – see Thompson v GEC Avionics Ltd. [1991] IRLR 488 (employer gave employee notice her employment would terminate on 9 November 1990 on grounds of redundancy; on 20
25 September 1990 employee served counter-notice on employer stating she was terminating her employment on 21 September 1990; EAT held that although employer had dismissed her, her effective date of termination was 21 September 1990 as per her counter-notice);

30 c. by agreement between employer and employee – see McAlwane v Boughton Estates Ltd. [1973] 2 All ER 299 (employee given notice terminating employment contract on 19 April 1972, at employee’s request employee’s employment terminated early on 12 April 1972); CPS Recruitment v Bowen [1982] IRLR 54 (employer and employee agreed

employee's employment would end one month earlier than date employer had specified in employee's notice of termination).

23. The fact an employee is paid money in lieu does not mean the employee
5 continues to be employed during that period. Dixon v Stenor Ltd. [1973] IRLR 28.

Discussion / Conclusions

24. The Tribunal concludes the Claimant's effective date of termination was
10 28 February 2022, not 31 March or 1 April. The Tribunal reached that conclusion on the following grounds:

25. First, the Tribunal is satisfied that on 22 January 2022 the Claimant resigned
15 from his employment with notice identifying his last day (and effective date of termination) as 1 April 2022. That effective date of termination remained *in situ* until 24 February 2022.

26. Second, the Tribunal is satisfied that by the exchange of emails between the
20 Claimant and Ms. Simmonds referred to at paragraphs 12-15 above, the Respondent and the Claimant - on an informed, wholly voluntary basis - entered into a written agreement on the following clear, unambiguous terms (i) the Claimant's employment would end on 28 February 2022 (ii) the Claimant's notice period would end 'early' (ie, not on 1 April) (iii) the Claimant's holiday pay would be calculated up to 28 February 2022 (iv) the Claimant would be paid in lieu of notice up to 1 April 2022 but would not have to work any notice period.

25 27. The Tribunal notes that in cross-examination, the Claimant accepted he had agreed that his employment would terminate on 28 February 2022.

28. Third, the legal effect of the agreement above was, on 25 February 2022, to
30 move the Claimant's effective date of termination forward - with both parties' consent - from 1 April to 28 February 2022. McAlwane applied.

29. Fourth, the Tribunal draws no adverse inference from the fact the Claimant was paid his outstanding holiday pay and pay in lieu of notice in the March 2022 payroll. Here, the Tribunal accepts Ms. Simmonds' evidence that monies payable at the end of February 2022 had to be finalised by 23 February, the February payroll cut-off date. Since the Claimant's agreement with Ms. Simmonds was reached on 24-25 February 2022, after the cut-off date, the monies payable to the Claimant under the terms of their agreement had to be – and were – paid at the end of March.

30. Fifth, pursuant to and consistent with their agreement, on 28 February 2022 the Claimant said goodbye to his work colleagues via email and returned all company property except his company car. The Claimant sought to argue that if he kept his company car until the end of March 2022 he must have remained an employee as otherwise he would have been driving without insurance. Although the relevant insurance policy was not produced, Ms. Simmonds explained that the Respondent insures its vehicles by vehicle, not by driver, and so long as a driver has the Respondent's consent to drive one of its vehicles, which she says the Claimant had, the driver is covered even if they are no longer a company employee. The Tribunal accepted Ms. Simmonds' explanation given (i) her expertise in corporate HR practices (ii) the plausibility of her claim that the Respondent insures its vehicles by vehicle not by driver.

31. Sixth, consistent with the above agreement, the Claimant's final 31 March 2022 payslip [81] stated his pay for that month was PILON, not 'regular' pay.

32. Seventh, the Tribunal finds that the Claimant's P45 [82] incorrectly stated his leaving date as 31 March 2022. The Tribunal accepts Ms. Simmonds' explanation that the P45 leaving date reflects the last payment made to the Claimant, which was on 31 March 2022 [81].

33. It is not in dispute that the Claimant did not present an ET1 or contact ACAS within 3 months of 28 February 2022. Applying s.111(2) of ERA, it follows that his claim of unfair dismissal was not presented in time.

34. Because the Claimant did not argue it had not been reasonably practicable for him to have presented his unfair dismissal claim within 3 months of 28 February 2022, and there was no evidence before the Tribunal suggesting that it might not have been reasonably practicable for the Claimant to have presented his claim in time, the Tribunal concluded that (i) the Claimant's unfair dismissal claim was not presented in time (ii) the Claimant's unfair dismissal must be struck out under Rule 37(1)(a) (no reasonable prospect of success given lack of jurisdiction).

10 Employment Judge: Antoine Tinnion
Date of Judgment: 19 December 2022
Entered in register: 19 December 2022
and copied to parties