EMPLOYMENT TRIBUNALS

Claimant: Mr B Sedgwick
Respondent: Phoenix Psychological Services Ltd

Heard at: Birmingham (by CVP)
On: 25 June 2024

Before: Employment Judge Meichen

Appearances
For the claimant: In person, supported by his daughter
For the respondent: Mr Hendley, consultant

JUDGMENT was sent to the parties dated 26 June 2024. I found that the claimant was dismissed with notice and notice expired on 20 March 2023. Accordingly the unfair dismissal claim and the discriminatory dismissal claim were brought in time and the Tribunal has jurisdiction to hear them. I gave oral reasons at the hearing on 25 June 2024. Written reasons for this decision were subsequently requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided.

REASONS

Introduction

1. The issue for me to consider whether the tribunal had jurisdiction to hear the claims or whether the claim form was presented out of time.

2. At the start of the hearing I clarified and it was agreed that:

   a. The claims brought are for unfair dismissal and age and sex discrimination.

   b. The last act relied upon for the discrimination claim is the claimant's dismissal. The claimant does not seek to argue that the failure to uphold his appeal was discriminatory. Further clarification was required from the claimant as to the acts he is relying on as discriminatory, but none of them postdate his dismissal.

c. The jurisdiction question turned on whether the claimant had been dismissed with or without notice. If the claimant was dismissed with notice and notice expired on 20 March 2023 then both the unfair dismissal claim and the discriminatory dismissal claim were brought in time and the Tribunal has jurisdiction to hear them. I therefore approached the issue for determination by considering whether the claimant was dismissed with or without notice.

The law

3. The time limits in relation to a claim for unfair dismissal are in section 111 of the Employment Rights Act 1996 ("ERA"). Subsection (2) provides*: "… an employment 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) 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."*

4. Where a contract is terminated by one of the parties giving notice, the EDT will be the date on which the notice expires — S.97(1)(a)/S.145(2)(a) ERA. Such notice can be given orally or in writing.

5. As regards the discrimination claim section 123 Equality Act 2010 states:

> *123 Time limits*
> *(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
> *. . .*
> *(3) For the purposes of this section—*
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

6. In discrimination claims case law has established that where the act complained of is a dismissal, the date from which the time limit runs is the date on which the dismissal takes effect and not the date when notice of termination is given — Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT.

7. The statutory time limits explained above have been extended by virtue of the early conciliation rules. Since 6 May 2014, anyone wishing to present a claim to

an employment tribunal must first contact Acas and be offered early conciliation — S.18A Employment Tribunals Act 1996.

8. The effect of the early conciliation extension is that when determining whether a time limit has been complied with, the period beginning the day after the early conciliation request is received by Acas up to and including the day when the early conciliation certificate is received or deemed to have been received by the prospective claimant is not counted — S.207B(3) ERA (and its equivalents in other legislation). In other words, the clock will stop when Acas receives the request and start to run again the day after the prospective claimant receives (or is deemed to have received) the certificate Furthermore, if a time limit is due to expire during the period beginning with the day Acas receives the request and one month after the prospective claimant receives the certificate, the time limit expires instead at the end of that period — S.207B(4) ERA (and its equivalents). This effectively gives the prospective claimant one month from the date when he or she receives (or is deemed to receive) the certificate to present the claim.

9. As I shall explain the difficulty in this case has really been caused by the fact that the dismissal letter sent by the respondent to the claimant was ambiguous as to the effective date of termination. In particular there was a contradiction between the claimant being told on the one had that he was dismissed "with effect from" the date of the letter but on the other hand the claimant was also told that this was a "dismissal with notice" and the notice period was 4 weeks.

10. As a general rule, the construction of an employer's letter of dismissal regarding the date of termination should not be a technical one, but should reflect what a reasonable employee's understanding would be in the light of facts known to him or her at the time. If the effect of the dismissal letter is unclear, it should be construed in a way that is most favourable to the employee — Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT.

11. In Stapp v Shaftesbury Society 1982 IRLR 326, CA, Lord Justice Stephenson, expressly approving Chapman, stated: *'[A] notice to terminate employment must be construed strictly against the person who gives it, the employer, and if there is any ambiguity it must be resolved in favour of the person who receives it, the employee'.*

12. Case law has also demonstrated that where the dismissal letter itself is ambiguous, anything that occurs after it has been given is irrelevant. In particular, it is not proper to have recourse to any oral or written correspondence between the parties if this takes place after dismissal, even if the correspondence may shed light on the intention behind the words used in the letter of dismissal — Minolta (UK) Ltd v Eggleston EAT 331/88. The same is true of events occurring before the letter of dismissal is sent. In Clews and anor v Hadfields Ltd EAT 585/80 the EAT ruled that where employment is terminated by letter, the EDT is to be ascertained by construction of that letter without regard to what appears to have been the employer's intentions as gleaned from earlier conversations or written correspondence.

13. The dismissal letter in this case also contained a reference to the claimant's notice period being "paid in lieu". A further cause of the ambiguity was that the letter failed to make clear what effect a payment in lieu of notice was intended to have on the date of termination. As was explained by the EAT in Adams v GKN Sankey Ltd 1980 IRLR 416 the phrase 'payment in lieu of notice' is imprecise because it can have one of two possible consequences. These alternative consequences are either:

    (i) the employee can be regarded as having been dismissed with notice but given a payment in lieu of working out that notice, or
    (ii) the employee can be regarded as being dismissed immediately with payment in lieu of the notice of which he or she has been deprived.

14. The EDT will vary according to which of the two scenarios applies. If the dismissal falls into the first category, the EDT is the date on which the notice expires in accordance with S.97(1)(a) or S.145(2)(a) ERA. If it is the second category, then termination counts as a dismissal without notice and the EDT is the date upon which termination takes effect — S.97(1)(b) or S.145(2)(b) ERA.

15. It is often difficult to ascertain which of the two scenarios applies. It may be appropriate to consider the reason for dismissal when determining whether, in making a payment in lieu of notice, the employer intended to bring about an immediate dismissal or to defer termination until the end of the notice period covered by the payment. In BT Rolatruc Ltd v Bown EAT 954/93 the claimant was dismissed for incapability and the EAT contrasted the situation with one where an employee is dismissed for having been caught stealing, His Honour Judge Hull QC observed: *'[I]f the employee has committed no gross misconduct, but his performance after two or three years is found wanting, then it is much more natural to suppose that the ordinary employer will wish to act lawfully, and say, "I have not got any excuse to dismiss you summarily, but I am going to ask you to go tomorrow, or today, and I will pay you in your notice period, but I do not require you to do any more work for me".'* The tribunal's decision that the employer's intention was not to dismiss the employee with immediate effect was upheld.

16. In McCabe v Greater Glasgow Health Board 2014 ICR D41, Mr Justice Langstaff (then President of the EAT) agreed that the fact that the employer would be in breach of contract in dismissing the employee summarily may be a pointer against immediate dismissal — particularly in the case of a large employer or public authority or if there was ambiguity as to what the parties understood the employee's date of dismissal to be. In his view, the question is whether there was, in the understanding of the parties, a dismissal there and then or whether there was to be a dismissal on notice.

Findings of fact

17. The respondent is a small independent practice that provides specialist psychological services.

18. The claimant was employed by the respondent from 13 May 2013. Latterly his job was Credit Control Manager.

19. On 7 December 2022 the claimant was suspended. The reason given for the claimant's suspension was "operational errors". The respondent has cited in its response the specific reasons it relies upon which include things like not updating invoices.

20. A disciplinary hearing took place on 30 January 2023. It was conducted by a third party consultant.

21. The recommendation from the consultant was that the claimant should be dismissed from his employment with notice and the respondent accepted that recommendation fully (see paragraph 55 of the respondent's response).

22. On 20 February 2023 Elizabeth Gillett, the Managing Director of the respondent, met with the claimant. She handed him a letter of the same date. The letter said: *"I have decided to dismiss you with effect from Monday 20 February 2023. This is a dismissal with notice. You are entitled to 4 weeks' notice which will be paid in lieu".*

23. It is not suggested that the respondent regarded the claimant as guilty of gross misconduct. The dismissal letter justified the decision to dismiss on the basis that the claimant had *"failed to provide an acceptable explanation for your conduct"*. I assume that the conduct referred to is the operational errors which had led to the claimant being suspended, such as not updating invoices.

24. The claimant's contract (see page 61 of the bundle) only referred to a right to terminate his employment without notice or payment in lieu of notice in cases of gross misconduct.

25. In her evidence to me Elizabeth Gillett claimed that when she met with the claimant on 20 February 2023 she clearly explained that the claimant would be dismissed with immediate effect. Elizabath Gillett did acknowledge however that the letter she provided the claimant with could be read in another way. The claimant's evidence was that he was told in the meeting what he was told in the letter, i.e. that he was dismissed "with notice". I did not accept Elizabeth Gillet's evidence that she made it clear to the claimant orally that he was dismissed with immediate effect. I considered it was much more likely that Elizabath Gillett repeated what she said in the dismissal letter (and indeed the appeal letter – see below) that the claimant was dismissed "with notice".

26. The respondent says that the most recent version of the claimant's contract of employment stated that he was entitled to receive 1 months' notice to terminate his employment. The claimant was paid 1 months' notice pay.

27. There is a dispute over the claimant's notice period and whether the claimant was properly paid for his notice period. The claimant points out that he had 9 years continuous service with the respondent and he did not receive his statutory notice. He also claims that his contract entitled him to 3 months' notice.

28. The claimant appealed the decision to dismiss him. Elizabeth Gillet wrote to the claimant on 3 March 2023 acknowledging the claimant's appeal. In her letter she

said *"You have appealed against the decision, confirmed to you in writing on 20 February 2023 to issue you with a notice of dismissal with effect from Monday 20 February 2023. This was a dismissal with notice. You were advised that you are entitled to 4 weeks' notice which will be paid in lieu".*

29. An appeal hearing was held on 8 March 2023. Elizabeth Gillett wrote to the claimant on 20 March 23023 with the outcome. The outcome was that the appeal was not upheld and the decision to dismiss stood.

30. The claimant was paid at the end of each month. His notice pay of £1042.99 was paid to him not at the end of February but on 31 March 2023.

31. Although he was, understandably, rather confused, by the language used in the dismissal letter the claimant believed that his employment continued until the end of his stated notice period of 4 weeks so that it would expire on 20 March 2023 and he was in effect on garden leave during this period.

32. The respondent offered the claimant a leaving party but the claimant declined that offer. In his evidence to me the claimant told me and I accept that Elizabeth Gillet had said a leaving party was appropriate as he was being dismissed with notice.

33. The claimant consulted ACAS and was informed that he had 3 months minus one day from the date of dismissal to submit his claim to the tribunal. Given the contents of the letters and the fact he was not paid his notice pay until the end of March the claimant understood the date of termination was 20 March 2023. The claimant told me, and I accept, that when he discussed matters with ACAS and worked out when he needed to do he approached the case in the belief that he was dismissed with notice which expired on 20 March 2023.

34. Early conciliation started on 15 June 2023 and ended on 27 July 2023. The claimant submitted his claim on 27 August 2023.

Analysis and conclusion

35. I have decided that the claimant was dismissed with notice, the notice period was 4 weeks from 20 February 2023 and therefore the effective date of termination was 20 March 2023. These are my reasons for that decision.

    35.1 The dismissal letter sent by the respondent to the claimant was ambiguous as to the effective date of termination. In particular there was a contradiction between the claimant being told on the one had that he was dismissed "with effect from 20 February" but on the other hand the claimant was also told that this was a "dismissal with notice" and the notice period was 4 weeks. In my judgement this made the effect of the letter unclear and I should therefore construe it in the way which is most favourable to the claimant.

    35.2 Albeit there was a lack of clarity I accepted that the claimant understood he was dismissed with notice. I consider this was a reasonable interpretation and it is what a reasonable employee would have understood at the time. Despite the apparent contradiction in the letter the letter clearly states that the claimant is being dismissed "with notice" and I think this is what would

have jumped out to a reasonable employee, particularly as the reasonable employee would know they were not accused of gross misconduct which would enable the respondent to dismiss without notice.

35.3 When an employee is told that he is being dismissed with notice I think it is reasonable for him to take that at face value and consider the letter means what it says. Despite the contradiction to which I have referred the letter does not say what the respondent now says it meant, i.e. that the claimant was to be paid compensation for the notice period to which he would have been entitled.

35.4 The dismissal letter in this case also contains a reference to the claimant's notice period being "paid in lieu". Further ambiguity arose because the letter failed to make clear what effect a payment in lieu was intended to have on the date of termination. The letter in this case did not even state that the payment was in lieu of notice – it just said payment would be made "in lieu". This made the meaning particularly unclear. I should therefore again construe it in the way which is most favourable to the claimant

35.5 As I explained above the phrase 'payment in lieu of notice' can have one of two possible consequences. I reached the firm view that in this case the actual and intended consequence of what was written was that the claimant was to be regarded as having been dismissed with notice but given a payment in lieu of working out that notice. I considered that is what a reasonable employee would have understood. This was chiefly because the preceding sentence said that the claimant was being dismissed "with notice". Read as a whole it seemed to me that that meaning was most likely what the letter was intended to convey.

35.6 In my judgment that finding is supported by the fact that the claimant was not actually treated as having been dismissed on 20 February. As I have observed the claimant's notice pay was not paid to him at the end of February but at the end of March. This supported the impression that the claimant's employment continued into March. If the respondent truly considered that the claimant's employment was terminated on 20 February they would have paid his notice pay at the end of February.

35.7 I should mention that I took into account the respondent's arguments as to why the claimant was not paid his notice pay at the end of February. The respondent said they were a small business with tight finances and also they did not want to prejudice the appeal. I did not accept either of those two arguments. The amount involved was only a little over £1000. The respondent was professionally advised and paying notice would not prejudice the appeal. The claimant only appealed on 26 February and I considered that if the respondent truly regarded the claimant's employment as having been terminated on 20 February they would already have made arrangements for his notice pay to be paid at the end of February.

35.8 The claimant was not found guilty of gross misconduct. Indeed it is debatable whether there were any serious conduct concerns at all. The operational errors identified by the respondent such as not updating invoices

appear to me to be fairly low level performance concerns, particularly in the context of a long serving employee. In my judgement this makes it less likely that the respondent's intention was to dismiss the claimant with immediate effect.

35.9 My impression that the respondent's intention was not to dismiss the claimant with immediate effect was also bolstered by the fact that the claimant was offered a leaving party. That would be a strange thing to offer somebody who was being summarily dismissed. It is much more consistent with a dismissal on notice and the natural expectation would be that the leaving party would take place during the notice period.

35.10 Although I focused on the wording of the dismissal letter it seemed quite obvious to me that in the understanding of the parties there had been a dismissal with notice. I have observed that Elizabeth Gillet used the phrase dismissal with notice both in the dismissal letter and the appeal letter. It was not therefore a one off slip of the pen. I further found that Elizabeth Gillet had repeated the message to the claimant that he was to be dismissed with notice when she met with him on 20 February. I also found that the payment of notice at the end of March rather than the end of February was consistent with an understanding that the claimant had been dismissed with notice. I found that the claimant understood he was dismissed with notice as that is why he lodged his claim when he did and it informed his discussions with acas. All in all I considered that the apparently mutual understanding that the claimant had been dismissed with notice was the natural and reasonable interpretation of what had really taken place.

36. As had been agreed the result of finding that the claimant's employment terminated on 20 March 2023 was that his claim was brought in time because he contacted acas within the statutory time limit and he submitted his claim within a month of the acas certificate. The tribunal therefore has jurisdiction to hear the claim.

Signed by: Employment Judge Meichen

Signed on: 31 July 2024