EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Commons	**v**	Digital Barriers Services Limited

Heard at: Watford **On:** 24 July 2018

Before: Employment Judge Bloch QC

Appearances
For the Claimant: Mr M Jackson, Counsel.
For the Respondent: Ms S Bowen, Counsel.

JUDGMENT

The claimant's complaint of unfair dismissal is dismissed.

REASONS

1. By notice of a preliminary hearing dated 6 May 2018, Employment Judge Manley directed that a hearing take place today to determine the following issue:

> "Whether the claimant had two years continuous employment with the respondent at the effective date of termination."

2. The complaint to the Tribunal was for unfair dismissal and if I determined that the claimant had insufficient continuity of employment, his claim would be dismissed.

3. It was common ground that the claimant's employment began on 1 October 2015. I set out below the background facts relevant to the issue to be decided today.

4. Clause 12.2 of the claimant's contract of employment with the respondent states:

> "After the successful completion of any probationary period, your employment may be ended by you giving the Company three months written notice."

Clause 12.3 states:

> "The Company shall have the discretion to terminate your employment lawfully without any notice or on notice less than that required by clause 12.1, by paying to you a sum equal to your salary in respect of that part of the period of notice in clause 12.1 which the Company has not given to you ….."

5. On 20 September 2017 there was a meeting between the claimant and employees of the respondent relating to termination of the claimant's employment. The agreed bundle of documents before the tribunal contained minutes of what was described as: "GC [the claimant] third meeting with Sharon Cooper [Chief Financial Officer of the respondent] (Vicky Malandris as a notetaker) 20/09/17". The relevant passages were as follows:

> "Sharon – That's exactly it. The definition of proactivity …. That is why S and N [of the respondent] feel it is insurmountable and why the company has concluded to terminate G's [the claimant's] employment. S is not expecting for G to work his notice. Just to handover to Adam G today …..
>
> Graeme – So terminating with payment in lieu and G [the claimant] has the right to appeal."

6. Some five days later the claimant returned the document with various comment bubbles as follows. His second comment was:

> "Didn't say in lieu, stated so terminating today with payment for notice period and GC had the right to appeal."

His fifth comment stated:

> "Subsequent to meeting GC discussed with VM HR issues and stated that if terminated today what legal position in-terms of H&S and insurance …… handover if terminated and re-iterated that he was happy to do the handover so could the termination date be tomorrow so all are covered."
>
> "After consultation VM and SC came to meeting room and stated that termination was going to be today and that a handover was required today."
>
> "GC stated ok but needed some personal time and would agree with Adam a time to do so."

7. Finally, his sixth comment said:

> "Handover with Adam happened at midday – Adam confirmed to VM and SC that he was happy with handover ….."

The comment continued:

> "GC stating that there were personal things on his PC that needed to be removed and that he would send IT equipment in once he'd had the chance to remove that information. SC insisted that it was before leaving – GC sat with […] to remove personal data from phone and PC – hand over PC, phone, access badge and office keys prior to being escorted from the building."

8. It was common ground that these notes (before the claimant's comments were added to them) were sent to the claimant on 21 September 2017 together with a letter dated 21 September 2017.

9. The letter dated 21 September 2017 stated:

> "Dear Graeme,
>
> Further to the meeting held on 19 September 2017 regarding the Company's proposal to dismiss you, having reviewed your performance, unfortunately we must now advise you that the Company has taken the decision to terminate your contract of employment."

The letter continued:

> "At the meeting, we explained to you the reasons why the Company was considering dismissing you and you were given the opportunity to respond to the Company's position. We have now taken into account your representations but nevertheless we believe we are left with no alternative other than to dismiss you with notice from your employment with the Company."

Towards the end of the letter it stated:

> "You are entitled to receive 3 (three) months' notice of termination of your employment. You are not required to work out your notice period. We therefore confirm that the date of termination of your employment will be 20 September 2017. This is your last day of service with the Company.
>
> Your P45 will be sent to you in due course and you will be paid the following amounts:
>
> (a) Your normal monthly salary will be paid on or around 22 September 2017. This covers the period 1 September to 30 September 2017.
>
> (b) Notice pay of £12,734.62 for the period of 1 October 2017 to 20 December 2017.
>
> ….."

10. I was also referred to a letter by the claimant to the respondent dated 25 September 2017. Although it was marked "WITHOUT PREJUDICE" I was told that it did not in fact contain any proposals for settlement of the case and that I was free to read it (indeed it appeared in the agreed bundle). It stated as follows:

> "I am writing following the recent events which have occurred whilst working for your company and which have now resulted in myself being summarily dismissed from the company due to allegations of unsatisfactory performance.
>
> Having now taken the time to consider the action of the company I feel extremely upset by the manner in which I have been treated and by the complete lack of process shown by the company in my situation. I have to advise that I have also taken legal advice on this due to, in my view, the complete mess the company has made of this and in light of the distress this has caused not only myself but also my family."

11. By letter dated 26 September 2017 the respondent wrote to the claimant stating amongst other things:

> "I would also like to clarify that you have not been "summarily dismissed" as stated in your letter but your employment has been terminated and you will be paid in lieu of your full contractual notice period of 3 months."

12. No oral evidence was adduced by either party, both counsel taking the position that the material set out in the bundle (and in particular the passages which I have quoted) adequately set out the factual material upon which I was to make my decision today.

13. I was greatly assisted by helpful skeleton arguments produced by counsel, although as it turned out, the issues were considerably narrowed through the exchange of skeleton arguments and the supplementary oral submissions that were made before me. At the beginning of the hearing, I sought to narrow the issue for my decision today and subject to the point in brackets, which I shall explain below, counsel were agreed that the core issue was as follows:

> "Were the words used by the respondent on 20 and 21 September 2017 clear and unambiguous words of immediate dismissal and understood as such [by the claimant] [by a reasonable employee]."

The formulation in the first brackets was that relied on by the respondent, and the formulation in the second brackets was that relied on by the claimant's counsel.

14. I was provided with a substantial bundle of authorities (containing 15 authorities in all) but I was not taken to each of these authorities. Within the time allotted to this hearing it is not possible to do full justice to all of the cases which were submitted, but it seems to me that the matter can nevertheless be dealt with relatively shortly. I have read each of the skeleton arguments in detail and have all the arguments that were set out in those skeleton arguments in mind. However, I shall refer only to what seemed to me to be the key submissions that were made on behalf of the parties.

15. The key submission by the claimant's counsel was that the words used on the 20 and 21 September 2017 by the respondent were not clear and

unambiguous. In particular, they did not indicate any intention to bring the contract to an immediate end. They were either indicative of an intention to bring the contract to an end on the 20 December 2017 (which would have given the claimant sufficient continuity of employment to bring the unfair dismissal complaint), in accordance with the pilon clause (clause 12.3). Alternatively, if and insofar as the words used were ambiguous, they should be construed (in effect) "*contra proferentem*" in accordance with the relevant legal authorities, in particular:

a. the Geys decision in the Supreme Court (Geys v Societe Generale [2013] 1 A.C. 523) to the effect that words of termination of a contract should be clearly expressed; and
b. other authorities indicating that an employee is entitled "to know where he stands",

and therefore that ambiguity of expression in terminating or purporting to terminate a contract of employment should be read strictly and against the employer. At paragraph 17 of his submissions, Mr Jackson submitted:

> "The claimant … understood either:
>
> a. That Miss Cooper had said that the PILON clause was being used;
>
> b. That he was being summarily dismissed."

16. In particular, in relation to the termination letter, Mr Jackson relied upon what he asserted were inconsistencies in the initial language of:

> "To dismiss you with notice"

and the later statement:

> "You are not required to work out your notice period.
>
> We therefore confirm that the date of termination of your employment will be 20 September 2017. This is your last day of service with the Company."

17. Mr Jackson reminded me that it was for the respondent to prove the date of termination and for the reasons set out in his skeleton argument submitted that:

> "a. Dismissal was on notice to expire on 20 December 2017; or
>
> b. Dismissal was by way of exercising the Pilon clause, taking effect on 24 October 2017.
>
> Either of those two dates would give the claimant sufficient continuity to bring his complaint of unfair dismissal."

The relevant statutory provisions

18. s.95(1)(a) of the Employment Rights Act 1996 ("ERA") states:

> "(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …. only if)—
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> ..."

s.97(1) ERA states:

> "(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—
>
> …..
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, …."

19. Ms Bowen on behalf of the respondent submitted that the words used on 20 September 2017 were clear and unambiguous. First, the respondent intended to terminate the claimant's employment on that day and that was the objective meaning of what is reflected in the minutes of the meeting on 20 September 2017 and the letter that was written on 21 September 2017 which the claimant received and read (as the claimant accepted) on the same day. She took me to various authorities and in particular the Court of Appeal decision in Sothern v Franks Charlesly and Co [1981] IRLR 278 (at paragraph 19) in which Lord Justice Fox (with whom Lord Justices Stephenson and Dame Elizabeth Lane agree, stated as follows:

> "As regards Mrs. Sothern's intentions when she said "I am resigning" , it seems to me that when the words used by a person are unambiguous words of resignation and so understood by her employers, the question of what a reasonable employer might have understood does not arise. The natural meaning of the words and the fact that the employers understood them to mean that the employee was resigning cannot be overridden by appeals to what a reasonable employer might have assumed. The non-disclosed intention of a person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is. That was the actual decision of the Tribunal in Gale v. Gilbert and, in my view, it was correct".

Miss Bowen submitted (alternatively to her primary position of an effective date of termination of the 20 September 2017 or 21 September 2017 in accordance with the clear and unambiguous language of the parties) that the claimant was dismissed immediately in accordance with clause 12.3 of the contract of employment (as per paragraph 13 of her skeleton argument).

20. The differences between counsel narrowed during their oral submissions and in particular Mr Jackson accepted paragraph 9 of Miss Bowen's submissions, namely:

> "Where there has been an oral notification of dismissal followed by a dismissal letter the communications must be construed together (Leech v Preston Borough Council [1985] IRLR 337)."

21. It was also accepted by Mr Jackson that at least at the level of this Tribunal I was bound by authority to the effect that in relation to determining the effective date of termination the automatic and not the elective theory applies. (Accordingly, I was not involved in making any conclusions in relation to paragraph 19-28 of Miss Bowen's submissions. Mr Jackson also accepted that I need not deal with paragraphs 29-33 of Miss Bowen's skeleton argument because he accepted that even if statutory notice was to be added to the 20 or 21 September dates that would still not provide the claimant with sufficient continuity of employment to bring the unfair dismissal complaint).

22. Accordingly, the point to be decided was a fairly narrow one.

23. While I accepted that the wording of the minute of 20 September 2017 and letter of 21 September 2017 were not entirely felicitous, I concluded that any difficulties of language that might be said to exist (in particular any seeming contradictions between one paragraph and another) were more apparent than real. In this regard I remind myself that it is important not to read such language in an overly technical way, but to read it in a way that would have been understood by the parties at the time ie. in a non-technical, non-legalistic manner.

24. While it is not necessary for me to resolve the key legal issue between the claimant and the respondent's counsel indicated by the bracketed passages in the formulation referred to in the outset of these reasons, it would seem to me to be very unlikely that a court or tribunal would be quick to set aside what the parties actually understood at the time in favour of a construction of their language by a "reasonable employee". Accordingly, I find (in accordance with the guidance set out in the Sothern case quoted above) that while, in relation to contractual interpretation (whether in relation to the formation or the termination of a contract) the court will normally approach the matter in an objective manner, where the parties both understood words used as bringing a contract to an end on a particular day, I should not readily circumvent that agreed meaning by reference to an understanding that a reasonable observer would have of the language which was used. However, the point does not strictly arise for decision, given that I have concluded (as I set out below) that on an objective interpretation of the words used (as reflected by the minute of 20 September and the letter of 21 September, confirmed by the letter of 25 September 2017) the respondent intended to bring the contract to an end on the 20 September 2017. Further, the claimant understood that to be the position and (it follows) reasonably understood the position to be exactly that.

25. Turning to the minutes of 20 September 2017, it seems to me to be clear that what the respondent was doing was terminating the contract of

employment on that day albeit not summarily (in the sense of accepting a repudiatory breach of contract). The language:

> "The Company have concluded to terminate G's employment"

Followed by:

> "S is not expecting for G to work his notice."

seem (although not entirely clear on its own) to indicate such an intention. The response of the claimant is telling:

> "So terminating with payment in lieu …."

It seems to me that the claimant was thereby indicating that he understood that his employment was coming to an immediate end, but that he was going to be paid for the notice period by way of a "payment in lieu". The respondent's version of this statement (see paragraph 6 above and paragraph 29 below) was even clearer that the contract of employment was to end that day

26. Even if that were not entirely clear in itself the matter was in my judgment clarified beyond peradventure by the statement in the letter of 21 September:

> "We therefore confirm that the date of termination of your employment will be 20 September 2017."

27. It is true that this sentence does not stand alone and that there are apparent contradictions in some of the other language in that letter. So, for example, the reference to (in the first paragraph of that letter):

> "Further to the meeting held on 19 September 2017 regarding the Company's proposal to dismiss you ….. we must now advise you that the Company has taken the decision to terminate your contract of employment."

The use of the word "proposal" is odd, but nonetheless the rest of the sentence indicates that a decision has been taken to terminate the contract of employment, and in the very next paragraph that is clarified further by the statement:

> "We have now taken into account your representations but nevertheless we believe we are left with no alternative other than to dismiss you with notice from your employment with the Company."

I am conscious again (as submitted by Mr Jackson) that there is some potential inconsistency in referring to dismissal "with notice" when compared to the following paragraph:

> "You are entitled to receive 3 (three) months' notice of termination of your employment. You are not required to work out your notice period. We therefore

> confirm that the date of termination of your employment will be 20 September 2017. This is your last day of service with the Company."

28. That, however, does not seem to me to create a fatal inconsistency, and if there is any inconsistency between the words "dismiss you with notice" in the early part of the letter and the latter part of this letter quoted above, it seems to me that the last sentence takes precedence. That said, I do not believe that it is necessary or appropriate to approach the matter in such piecemeal way, since it seems to me that taking the letter as a whole, what is being confirmed (beyond peradventure) is that the date of termination is to be the 20 September 2017. That is virtually determinative of the question I had to resolve today, although, as I have said, I am conscious that this sentence needs to be read in context. The context, however, is that the respondent was being careful to make clear that it was not summarily dismissing the claimant (for example) for gross misconduct but that he would be paid for the normal notice period. I also do not see any difficulty with the reference to normal monthly salary being stated to be paid on or around 22 September 2017 covering the period of 1 September to 30 September 2017. That is clearly a financial matter and not indicative of continuation of employment beyond the 21 September 2017. It is in effect payment in lieu of salary although not precisely expressed in that way. However, the financial impact is the same. I also remind myself further that that is a letter written by Sharon Cooper, Chief Financial Officer and not a lawyer.

29. Further, if there were any doubt about the matter, it is plain from the comment bubbles inserted by the claimant into the memorandum of the meeting of 20 September 2017 that he understood that his employment was terminating on 20 September – see in particular his reference to "didn't say in lieu, stated so terminating today with payment for notice period …." and his reference to "could the termination date be tomorrow so all are covered".

30. The same is the effect of the letter of 25 September 2017 where the claimant refers to himself as being "summarily dismissed".

31. Again, I do not approach these words from a technical or legalistic point of view. The claimant knew that he was to receive his "notice monies" (or damages) covering the period of his notice, and it is also noteworthy that this was a letter which he had written after receiving legal advice. There was no suggestion by him that he was at this stage still in employment.

32. Likewise, I am not troubled by the letter of 26 September 2017 written by Miss Cooper stating:

> "I would also like to clarify that you have not been "summarily dismissed" as stated in your letter but your employment has been terminated and you will be paid in lieu of your full contractual notice period of 3 months."

Again, I do not see that she was misstating the position. It was correct that the claimant had not been "summarily dismissed" (in the technical sense of

the word) but that the contract had been terminated in circumstances where the claimant would be paid in lieu for his contractual notice period of 3 months.

33. I accordingly conclude that the communications contained in the memorandum of 20 September and the letter of 21 September clearly and unambiguously brought the contract of employment to an end on 20 September 2017. I conclude that if there was any possible ambiguity, the question of the termination date was specifically addressed in the 21 September letter as follows:

> "We therefore confirm that the date of termination of your employment will be 20 September 2017."

34. Mr Jackson submitted in the alternative that the respondent should be taken as having intended to operate the Pilon clause (12.3). In my judgment it s very difficult to tease out of the communications between the parties quoted above any such intention. If this had been the respondent's intention one would have expected the clause to be referred to, if not in the meeting on 20 September, then in the correspondence which followed. In any event, even if that were the case, the contract would have terminated immediately and not at a later date, as submitted by Mr Jackson, the clause referring to "termination without any notice" and the parties (reasonably) understanding (as I have held) that the contract was intended to terminate immediately. Insofar as Mr Jackson sought to rely on the Geys decision in the Supreme Court, that decision was in relation to a contractual claim and the authorities relied upon by Miss Bowen show that the Court of Appeal and Employment Appeal Tribunals have held that Geys was restricted to common law actions and has no application to the statutory "effective date of termination". In particular, she referred to the case of Rabess v London Fire and Emergency Planning Authority [2016] IRLR 147 and also briefly to the Employment Appeal Tribunal decision referred to in paragraphs 25 and 27 of her skeleton argument. Mr Jackson accepted that those authorities were binding upon me.

35. Accordingly, I concluded that by the words used at the meeting on 20 September 2017 and the letter by the respondent of 21 September 2017 both the claimant and the respondent understood that the claimant's employment was coming to an immediate end. It is not necessary for me to resolve the further issue as to whether or not that was the 21 or 20 September 2017 since either date would mean that the claimant did not have sufficient continuity of service. That said, given the language used on 20 September, the more likely date was the 20 September 2017 rather than the 21 September 2017 (with the letter on 21 September being merely confirmatory). I also conclude that a reasonable observer would have formed exactly the same conclusion.

36. Accordingly, the claimant's complaint of unfair dismissal is dismissed on the basis that he does not have sufficient continuity of service to bring such complaint.

_____
Employment Judge Bloch QC

Date: 05.09.18……

Sent to the parties on: .....

.....
For the Tribunal Office