



EMPLOYMENT TRIBUNALS

Claimant: Miss S Fisher

Respondent: Novia Financial PLC

Heard at: Bristol (in public, by telephone) **On:** 26 November 2020

Before: Employment Judge Dawson

Appearances

For the Claimant: representing herself

For the Respondent: Mr Woodhouse, solicitor

RESERVED JUDGMENT

1. The claim of unfair dismissal is struck out on the grounds that it has no reasonable prospect of success because the tribunal lacks jurisdiction to entertain the same.

REASONS

1. The hearing was conducted by the parties attending by telephone. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so

The Issue

2. The application which I have determined was made during the last case management hearing. The claimant did not attend that hearing but confirmed that she had seen the Record of the Preliminary Hearing which was sent after it.
3. In that Record, the application was identified as follows:

In addition to a determination of the issues, Mr Woodhouse raised the possibility of the constructive unfair dismissal claim being dealt with under rule 37 (strike out). When the Claim Form had been filed, the Claimant had

not resigned. Upon its receipt, the Respondent enquired as to her position and was then told that she wished to resign. The Respondent argues that the Claimant did not have jurisdiction to bring a complaint of constructive unfair dismissal when she did so (see paragraph 24 of the Response).

4. The Case Management orders made at that hearing included the following:

2. The next hearing which may be listed will be a Case Management Preliminary Hearing to include the determination of the following matters;

2.1 ...;

2.2 The determination of the Respondent's argument that the Claimant does not have jurisdiction to pursue a complaint of unfair dismissal and, therefore, an application to have that claim struck out under rule 37;

2.3 C...

The Facts

5. The claimant accepted, before me, that at the point when she submitted her claim form she had not sent a letter of resignation to the respondent. That letter was only sent on 3 October 2019. I have seen that letter and it starts with the following paragraphs:

I am writing to inform you that I am resigning from my position of Implementation Executive within Novia Financial. Please accept this letter as my formal letter of resignation and termination of our contract. I believe that as part of my contact with Novia I need to provide you with four weeks' notice which will expire on the 31st October.

I feel that I am left with no choice but to resign in light of my recent experiences regarding the following and covered within the letter from my Solicitor dated 8 April 2019

6. The claim form was presented to the employment tribunal on 18 September 2019 and, therefore, before the letter of resignation was sent.

7. The claim form stated, in box 5.1, that the claimant's employment was continuing but in box 8.1 the claimant has ticked the box which says that she was unfairly dismissed. She has also stated in the section where a claimant can set out any other types of claim which they are bringing "constructive unfair dismissal".

8. Apart from the letter of resignation, I was not asked to consider any evidence and I heard no oral evidence.

The Law

9. Rule 37 of the Tribunal Rules of Procedure provides that a tribunal may strike out all or part of a claim on the basis that it has no reasonable prospect of success.
10. Mr Woodhouse referred to sections 95 and 97 of the Employment Rights Act 1996. He did not refer to any other authority. I raised with him the my concern that there must be some previous legal analysis of this situation but he was not able to point me to any case law. I raised with the parties the principles which I considered to be in play during the hearing but having reserved my decision it appears to me that there are authorities which have a bearing upon this application which were not discussed in the hearing. I am conscious that the parties have not had an opportunity to address me on those authorities and, if appropriate and on their application, I will reconsider this decision to take account of any further submissions they wish to make. It is, perhaps, regrettable that the tribunal was not furnished with all of the relevant authorities at the time the application was heard.
11. Miss Fisher, understandably given that she acts in person, did not refer me to any legal authorities but stated that she had been advised throughout by her solicitor and had acted in accordance with their advice. I indicated that she did not need to tell me any advice which she had been given due to the principle of legal professional privilege.
12. The Employment Rights Act 1996 contains the following relevant sections:

95.— Circumstances in which an employee is dismissed.

(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),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

97.— Effective date of termination.

(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, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

111.— Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, 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.

(2A) ...

(3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.

13. It is helpful to consider the issue in the light of what is said by Harvey on Industrial Relations and Employment Law

In unfair dismissal cases, the date from which the limitation period begins to run is the effective date of termination. That date must be objectively determined and cannot be fixed by agreement between the parties (*Fitzgerald v University of Kent at Canterbury* [2004] EWCA Civ 143, [2004] IRLR 300). Where dismissal is by notice, the effective date is the date of expiry of the notice (ERA 1996 s 97(1)(a)). In such cases, the former law was that a tribunal would have no jurisdiction to hear a claim which had been instituted before the expiry date (see, for example, *Penrose v Fairey Surveys Ltd* [1973] IRLR 28, [1973] ICR 26, NIRC). The consequence was that employees who found that their claims failed because they were made prematurely were usually too late to institute fresh proceedings by the time their cases had been dismissed. This situation was rectified by statute (originally by the EPA), so that now an employee who has been given notice may commence proceedings during the currency of the notice period and before the effective date of termination (ERA 1996 s 111(3)). The exact wording of s 111(3) is 'where the dismissal is with notice', and this has been held to apply equally to an employee's notice of termination under

EP(C)A 1978 s 55(2)(c) (*Presley v Llanelli Borough Council* [1979] IRLR 381, [1979] ICR 419, EAT). Therefore, where an employee claims constructive dismissal, he too can begin proceedings as soon as he has given his notice.

14. It goes on

“The position in unfair dismissal cases is, therefore, that a claim will be premature if it is made (a) before notice has been given, and (b) if no notice is given, before the dismissal takes effect.”¹

15. In *Presley v Llanelli Borough Council* [1979] IRLR 381 (quoted in the current edition of Harvey on Industrial Relations and Employment Law) the Employment Appeal Tribunal held that an employee could bring a claim for constructive dismissal during the notice period. In his submissions Mr Woodhouse contended that this case was different because the claim was issued before resignation and, therefore, not within the notice period.

16. In *Gisda Cyf v Barratt* [2010] I.C.R. 1475, Lady Hale stated:

5. The effective date of the termination of employment is a term of art that has been used in successive enactments to signify the date on which an employee is to be taken as having been dismissed. The fixing of the date of termination is important for a number of purposes. These include, but are by no means confined to, the marking of the start of the period within which proceedings for unfair dismissal may be taken...

41. The essential underpinning of the employer’s case, that conventional principles of contract law should come into play in the interpretation of section 97, must therefore be rejected. The construction and application of that provision must be guided principally by the underlying purpose of the statute viz the protection of the employee’s rights. Viewed through that particular prism, it is not difficult to conclude that the well established rule that an employee is entitled either to be informed or at least to have the reasonable chance of finding out that he has been dismissed before time begins to run against him is firmly anchored to the overall objective of the legislation.

42. The fact that this rule has survived, indeed has been tacitly approved by, successive enactments merely reinforces the conclusion that it is consonant with the purpose of the various provisions relating to time limits. As Mummery LJ so pithily and appositely put it, the legislation is designed to allow an employee three months—not three months less a day or two—to make a complaint of unfair dismissal. When one considers that the decision to lodge such a complaint is one not to be taken lightly, it is entirely to be expected that the period should run from the

¹ Harvey on Industrial Relations and Employment Law/Division PI Practice and Procedure/1. Employment Tribunals/F. Time Limits for Presentation of Claims/(6) Premature claims paras 127 and 131

time that the need to make such a decision is known to the employee.

Conclusions

17. Paragraph 5 of the decision in *Gisda Cyf*, as well as the extract from Harvey which I have quoted, shows that the time from which a claim of unfair dismissal can be presented to the tribunal starts from the effective date of termination.
18. Under section 97 Employment Rights Act 1997, where a contract is terminated by notice given by the employee, the effective date of termination is the date on which the notice expires.
19. However section 111(3) Employment Rights Act 1996 provides that “where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination”.
20. The claimant gave notice of her resignation on 3 October 2019. Because she gave 4 weeks’ notice of resignation, the claimant’s effective date of termination would be 31 October 2019; however the effect of section 111(3) Employment Rights Act 1996 is that the claimant would have been able to present a claim of unfair dismissal once she had given notice. However that notice had not been given on 29 September 2019 when she presented her claim form, it was only given on 3 October 2019.
21. In those circumstances the respondent’s argument that the claim was presented prematurely is correct and, as set out in the extracts from Harvey the tribunal has no jurisdiction to consider the claimant’s claim.
22. In those circumstances the claim of unfair dismissal has no reasonable prospect of success and having considered all of the matters, I consider it is appropriate to strike out that part of the claimant’s claim. This decision does not affect the discrimination claims.

Employment Judge Dawson

Date 3 December 2020

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