EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110140/2019 (V)

Preliminary Hearing Held remotely on 13 July 2020

Employment Judge A Kemp

Ms M Cation	**Claimant** **Represented by:** **Mr D Cation,** **Husband**
Fife Council	**First Respondent** **Represented by:** **Ms J Caldwell,** **Solicitor**
Midlothian Council	**Second Respondent** **Represented by:** **Mr W Venters,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The decision of the Tribunal is that

(i) the Tribunal does not have jurisdiction for the claim pursued against the first respondent and the claim against the first respondent is dismissed.

(ii) The effective date of termination of the employment of the claimant with the first respondent was 1 July 2018.

REASONS

Introduction

1. This was a Preliminary Hearing to address whether the Tribunal had jurisdiction in the case against the first respondent, and to determine the effective date of termination of employment between the claimant and first respondent. The claimant pursues claims of unfair dismissal, and for a redundancy payment. She was employed initially by the first respondent, and latterly by the second respondent.

2. The claimant accepted that her claim was presented against the first respondent outwith the statutory primary limitation period, she having commenced early conciliation on 28 May 2019, the certificate being issued on 4 May 2019, the Claim Form being presented on 14 August 2019, and arguing that her effective date of termination with the first respondent was on 29 June 2018. She argued that it had not been reasonably practicable to have done so timeously, and that it was presented within a reasonable period, such as to bring it within the jurisdiction of the Tribunal.

3. There was a separate issue as to the effective date of termination, the claimant arguing for 29 June 2018 and the two respondents for 7 June 2018, that being of relevance for the second respondent as it would determine whether or not there was continuity of service with them for each of the claims made.

4. The hearing took place remotely using a Cloud Video Platform, in accordance with the arrangements set out in the most recent Preliminary Hearing held on 12 May 2020.

5. The hearing itself was conducted successfully, with all parties, representatives and witnesses attending and being able to be seen and heard, as well as being able themselves to see and hear. I was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence before me. I had both a paper copy of the Bundle of Documents, and one sent electronically. There were occasions when the audio quality was poor, but it was adequate to hear the question and answer. There were a number

of breaks taken during the evidence. I was satisfied that the arrangements for that hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and ascertained that the appropriate notice as to that hearing was on the cause list.

Evidence

6. Evidence was given by the claimant herself, and by Mr Derek Slater for the first respondent. The parties had prepared a Bundle of documents for the purposes of the Hearing, and I had both an electronic copy and a paper version before me. Each witness joined the hearing with access to the Bundle when giving their evidence. The parties had also helpfully agreed a Statement of Agreed Facts. There were a number of documents referred to in evidence that were not however in the Bundle, as commented upon below, and not all of the documents in the Bundle were referred to in evidence.

Issues

7. The issues to be determined at the hearing were:

   (i) Was it not reasonably practicable for the claimant to have presented her Claim timeously under section 111(2) of the Employment Rights Act 1996?

   (ii) If so, was the claim presented within a reasonable time thereafter, under that same section?

   (iii) What was the effective date of the termination of the claimant's employment with the first respondent under section 97 of the Employment Rights Act 1996?

Facts

8. The Tribunal found the following facts to have been established:

9. The claimant is Ms Margaret Cation.

10. Her employment with the first respondent, Fife Council, commenced on 13 January 1996. Fife Council is a local authority.

11. Following a period of long-term absence, the claimant began a period of unpaid leave from 6 March 2017 to 6 March 2018.

12. When this period of unpaid leave came to an end the claimant requested a career break. This request was granted and the career break was scheduled to be from 7 March 2018 and continue until 31 August 2018.

13. During the career break the claimant was not in receipt of pay, and had by 7 June 2018 exhausted all entitlement to holiday pay.

14. The claimant's contract of employment with the first respondent had a provision to the effect that if she wished to resign she required to give four weeks' notice.

15. On 27 March 2018 the claimant emailed her line manager Mr Derek Slater asking whether she needed to give four weeks' notice or whether it was less.

16. At that point she was on the career break. Mr Slater replied on the same day to confirm that it was still four weeks' notice that was required.

17. On 7 June 2018 the claimant attended an interview for a post with the second respondent, Midlothian Council, also a local authority, at about 2pm. During the interview she was asked about her notice period and said that it was four weeks.

18. The prospective new line manager who had interviewed her telephoned the claimant at about 2.30pm that day, as she was driving to her home following the interview, the claimant using an in-car bluetooth connection to take the call, that her application was successful. She was not then told of when she would start work with the second respondent, but the manager said that she would telephone the first respondent and agree a start date, and that they would take account of the notice period

19. The claimant immediately thereafter telephoned Mr Slater. She told him that she had been successful in her interview at the second respondent. He congratulated her. She asked him what the next step should be and what notice she would require to give. He said something to the effect that he would check, and asked her to write to him referring to a resignation to

"get the ball rolling", or words to that effect. The claimant joked that she would need to spell check the word resignation. Mr Slater said that he would "sort everything out", or words to that effect.

20. The claimant stopped her car, and sent an email to Mr Slater timed at 14.41 on 7 June 2018 which had the heading "Resignation" and stated

> "I would like to confirm my resignation from my position as Housing Management Officer, effective from today. Thank you very much for your support during my accident and my unpaid leave, I am excited to start my new post but I will miss my colleagues who have helped me cope with Rent Arrears, Homeless and Repairs. I will however not miss these tasks and hurdles! All my managers in Cowdenbeath Area have been brilliant and it would have been good to have had a few rows from you! O I mean good for you to be my manager once again! Kind regards, Maggie".

21. When the claimant used the word "resignation" she was using the word Mr Slater had asked her to use. She believed that the notice due, however long that was to be up to four weeks', was to start with immediate effect. She did not intend during that call to give a notice of resignation to have immediate effect.

22. She did not believe that her email constituted a formal resignation, but considered that it would be followed by a formal letter to confirm her date of termination, sent by the first respondent, which she would accept in writing once the issue of how much notice was required was clarified.

23. Mr Slater on receipt of the email from the claimant made an enquiry of HR at the first respondent as to whether four weeks' notice was required. He was told that it was not, and that the claimant could leave with immediate effect if she wished. There was no discussion about continuity of service where the new employer was another local authority.

24. Mr Slater considered the email from the claimant to be a formal resignation. He thought that it had effect immediately in light of its terms, and the advice he had received from HR. He did not ask the claimant about that further.

25. He made an entry into the first respondent's computerised HR system immediately after receiving his call with HR to the effect that the claimant had a leaving date of 7 June 2018. Once so entered, the system did not permit a variation to be made to that entry.

26. Very shortly thereafter on 7 June 2018 the prospective line manager for the claimant at the second respondent telephoned Mr Slater. They had a discussion as to the claimant's start date with the second respondent, and agreed between them that it would be on 2 July 2018. That date was arranged to coincide with the new line manager's return from leave. There was no discussion specifically as to continuity of service for the claimant.

27. Immediately after having that conversation Mr Slater sent an email to the claimant, timed at 14.55, which stated "I have just come off the phone to your new employer and I just gave you a glowing reference. In fact I told her that this job is perfect for your skill set. I hope you don't mind but I seen Julie at the smoking shelter and I told her. She too was delighted for you. Best of luck and take care. Hopefully we will catch up some time and you can give me the low down on the low life in Edinburgh" lol. You will be missed, Derek x".

28. Neither Mr Slater nor any other employee of the first respondent wrote to her by email or letter to accept any resignation from the claimant, or to confirm that her employment had been considered by them to have terminated on 7 June 2018.

29. The start date with the second respondent was communicated verbally to the claimant by her new line manager afterwards, on a date not given in evidence.

30. Mr Slater was not aware in or around June 2018 of provisions for continuity of service, including for an employee moving between two local authorities such as the claimant was to be doing. The HR department of the first respondent had not provided him with any advice about that when he spoke to them earlier about the notice period required.

31. On 20 June 2018 the first respondent issued the claimant with her P45, for tax purposes. It stated a leaving date of 7 June 2018. The claimant did

not read it, but as it was the last document required to enable her to start her new employment delivered it by hand to the second respondent that day.

32. The claimant commenced her employment with the second respondent on 2 July 2018.

33. On 14 August 2018 the claimant discovered on accessing her records with the second respondent that she had not been provided with continuity of service from her employment with the first respondent such that she had a commencement date for statutory purposes of 2 July 2018.

34. That day the claimant sent Mr Slater an email stating "

> "Do you know who I should contact in Fife Council as I am not getting continual service as Midlothian said Fife has took my resignation without any notice period, but my start date was agreed by both managers and ACAS said that after my length of service notice would be required. Sorry for the inconvenience but I left Fife Council to work for Midlothian."

35. He replied in less than thirty minutes stating "OMG…. I have no idea…but leave it with me".

36. Mr Slater sent by email later that day a letter to the second respondent, copied to the claimant, in which he stated, inter alia:

> "I can confirm that I accepted Maggie's resignation on the 7th of June without realising that there would be an issue with her continuous service. At the time I took advice from our HR Department that we did not require a notice period, as she was in a no pay situation. With hindsight I should have held the notice period to the 29th of June, as I was aware that she was due to start her new position with Midlothian Council on the 2nd of July. This would have ensured that Maggie did not have a break in her service. If possible please consider the 29th of June 2018 as Maggie's leaving date with Fife Council. Please accept my apologies for the confusion caused by myself."

37. The second respondent did not accept that the claimant's start date was other than 7 June 2018. Mr Slater telephoned the claimant on or around 15 August 2018 to inform her of that. Mr Slater also sent the claimant an email on or around 27 August 2018 stating something to the effect that he had not been able to resolve the issue.

38. The claimant sought assistance from a friend, Mr D Lithgow a retired solicitor, and in about March 2019 he sent three letters to the first respondent about her position.

39. On 29 April 2019 the first respondent sent a reply to the first such letter, suggesting that "it was mutually agreed by both parties that the resignation would take place with immediate effect and no discussion regarding any transition between Fife Council and Midlothian Council took place". It also accepted that the administration of the resignation process was the responsibility of the line manager, and that they "would have normally expected written acknowledgement of resignation and this does not appear to have happened in this case." They maintained the position that the effective date of termination was 7 June 2018, that HR had not been involved in the process and that HR were "not in a position to change the resignation terms retrospectively".

40. The claimant on various occasions, the dates of which were not provided in evidence but started by 14 August 2018, contacted ACAS for advice. She also, on dates not provided in evidence, sought assistance from her union, Unison.

41. The claimant commenced early conciliation on 28 May 2019.

42. The ACAS Early Conciliation Certificate was issued by email to the claimant and the first respondent on 4 June 2019.

43. The claimant commenced a new position shortly thereafter, on a date not given in evidence. She also sought advice from Mr Lithgow on the completion of the Claim Form.

44. The claimant presented her Claim Form to the Tribunal on 14 August 2019.

Submissions for claimant

45. The following is a summary of the submissions made by Mr Cation. He argued that it had not been reasonably practicable to present the claim timeously and that it was presented within a reasonable time. The claimant was making the transition from the first respondent to the second respondent. The actings of the first respondent had been confusing, unclear and ambiguous. The claimant was entitled to rely on the contract of employment and guidance from her line manager, who should have safeguarded her continuity of service. He had made an error and the first respondent must accept responsibility for that. The second respondent had been contacted on 14 August 2018 to seek to remedy matters, with an acknowledgement of an innocent error. The second respondent refused to do so. The claimant had not been alerted to matters. It was unreasonable to expect anyone to accept termination on 7 June 2018. There was a lack of communication which breached the first respondent's procedures. They had led the claimant to believe that her continuity of service was protected. What happened was grossly unfair and inequitable, depriving the claimant of continuity. The effective date of termination was never re-iterated to the claimant in writing, and so could not be relied upon.

Submissions for first respondent

46. The following is also a summary of the submission made. The first respondent argued that it was not just and equitable to exercise discretion to extend jurisdiction. Reference was made to the case of ***British Coal Corporation v Keeble [1997] IRLR 336*** and the five factors set out there. It was argued that it had been reasonably practicable to commence the claim timeously. The email of 7 June 2018 was consistent with Mr Slater's evidence. It was the claimant's decision to resign. The post was taken up three weeks after that date. The claimant did not raise concerns over a period of notice. The P45 made the date of leaving clear.

47. Reference was also made to the case of ***Crossley v Faithful and Gould Holdings Ltd [2004] ICR 1615*** in particular paragraphs 17 and 45.

48. There was no valid explanation for the delay until 14 August 2019 when the Claim Form was presented. The letter Mr Slater sent on 14 August 2018 was a knee jerk reaction, and the date of termination could not be changed retrospectively. There was no need for negotiation between the respondents on a start date as the claimant was not then at work. Extension of time was the exception not the rule.

Submission for second respondent

49. Once again this is a summary of the submission made. Reference was made to section 97(1) including the provision that it is the date when resignation takes effect if no notice is given. It was argued that the effective date of termination, which was relevant for the second respondent, was 7 June 2018. The email that day was unambiguous. There was no legal requirement for it to be accepted. It followed discussions held when Mr Slater confirmed that the claimant could resign when she wished. The letter of 14 August 2018 was sent with hindsight, and it was argued to be irrelevant. Reference was made to ***Fitzgerald***, the citation for which is below, with the effective date of termination being a statutory concept which cannot be waived by agreement.

50. An effective date of termination at 7 June 2018 meant that the claimant did not have continuity of service and the claim against the second respondent should be struck out for having no reasonable prospects of success under Rule 37.

Law

51. Section 111 of the Employment Rights Act 1996 has provisions in relation to timebar, which goes to the jurisdiction of the Tribunal, and provides as follows:

> **"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) Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)."

52. What is the effective date of termination is set out in section 97 of the Act, the material terms of which are as follows:

"**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.

(2) Where —

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire

on a date later than the effective date of termination (as defined by subsection (1)),

for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means —

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

53. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal.

(i) Reasonably practicable

54. The question of what is reasonably practicable is explained in a number of authorities, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119***, a decision of the Court of Appeal in England. The following guidance is given:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable"

> as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

55. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

56. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.***

57. The law was examined more recently in the Court of Appeal in the case of **Lewis Beck Services Ltd v Brophy 2019 EWCA Civ 2490**, particularly in the context of a situation of ambiguity.

58. I should add that the authority relied upon by the first respondent, ***British Coal***, is not relevant as it addresses the separate test in discrimination law of what is just and equitable.

(ii) Reasonable period

59. If that issue of reasonable practicability is met by the claimant, there is a secondary issue of whether the claim was presented within a reasonable **period** of time. That is a question of fact and degree, dependent on all the circumstances.

60. In ***James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386*****,** eight employees, who were dismissed for redundancy, were told by management that they would be re-employed when work picked up again. They believed what they were told and, as a result, did not make a claim for unfair dismissal. After the time limit expired, management closed down the shipyard at which they worked, and the employees then realised that there had never been any intention of keeping it going. They made complaints to the tribunal, some of them a few days after the closure of the shipyard, some a month later. The tribunal granted extensions of time to all of them. The Court of Appeal, however, considered that a reasonable period in the circumstances was two weeks from the closure of the shipyard, and dismissed the claims that had been made after that time.

61. That case does not however state a period applicable to all cases, and a tribunal must look at the particular circumstances of the case before exercising its discretion, and ought not to focus on the extent of the delay without regard to those circumstances.

62. In ***Marley (UK) Ltd v Anderson [1994] IRLR 152***, the EAT held that a tribunal had erred in law where it decided, relying on ***Cook,*** that delays of four weeks or more were inherently unreasonable.

63. In contrast, in the case of ***Biggs v Somerset County Council [1996] IRLR 203*** the Court of Appeal held that it is not just the claimant's

difficulties that have to be considered: an extended period of time 'may be unreasonable if the employer were to face difficulties of substance in answering the claim'.

(iii) Effective date of termination

64. What is the effective date of termination (EDT) has also been the subject of authority. The terms of section 97 apply both to termination by the employer and by the employee.

65. The Supreme Court held in ***Gisda Cyf v. Barratt [2010] IRLR 1073*** that:

> "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."

66. The court added the following:

> "The construction and application of [section 97] must be guided principally by the underlying purpose of the statute, viz the protection of the employee's rights."

67. Section 97 does not refer in terms to a resignation, but includes where notice of termination is given by the employee, which can either be of immediate effect, or after a period that is specified. The circumstances for giving such notice can either be where the employee considers that the employer is guilty of repudiatory conduct that entitles the employee to resign immediately, normally referred to as a constructive dismissal, and those where the employer is not so regarded and the employee wishes for whatever reason to end the employment relationship without that element of repudiation. There is no provision setting out how the notice of termination, whether immediate or prospective, requires to be given.

68. A resignation, in the sense of the employee giving notice of the termination of the contract, can be inferred from the conduct of an employee. In ***Johnson v Monty Smith Garages Ltd EAT 657/79***. a young female employee who lived in a flat owned by her employers. Following discussions about a young man who had been dismissed by the respondents for theft, who had visited both her employers' premises and

her flat, she thought firstly that she had been dismissed, but secondly that she could not work for the employers any more in light of the nature of that discussion which had reduced her to tears. The Industrial Tribunal dismissed her claim. On appeal the EAT found that there had been a constructive dismissal, stating:

> "Provided that the facts and circumstances show that the party whose contract has been repudiated acts in such a way as to show that that repudiation is accepted, then that will be sufficient, whether or not the acceptance was expressed in any formal way."

69. The EAT also quoted the following passage from ***Walker v Josiah Wedgewood and Son Ltd [1978] IRLR 105:***

> "No one suggests that any formal assertion to that effect is necessary or appropriate. The question has been whether it is sufficient merely to act in such a way as to indicate that the contractual relationship will not be continued or whether it is necessary to do more than that, namely to indicate that the reason why it will not be continued is the conduct of the employer which is regarded as unjustified by the employee. If that is the effect of what is done, however informally it is done, then on any analysis it must be sufficient."

70. The EAT agreed that the mere fact that an employee had remained absent from work did not constitute an effective resignation. But she had also returned to collect her wages and P45 and stated that she would not have worked for the respondents ever again. The EAT held that there had been a resignation in such circumstances, with immediate effect.

71. ***Oram v Initial Contract Services Ltd EAT 1279/98*** concerned an employee who had been employed by the respondent for 23 years, and failed to return to work after a disciplinary penalty had been reduced from dismissal to a final written warning. She did not accept the respondent's proposals for her return and instead sent a letter setting out matters that concerned her. The respondent replied that it would deal with the issues she had raised upon her return, but she never did return. She claimed she had been dismissed but the respondent maintained that she had resigned.

The EAT agreed with the employment tribunal that she had resigned. The employer had written a letter to state their position, recorded as follows:

> "If the appellant did not come to work they would have to assume that she had decided to resign."

72. The Tribunal had decided that that was what happened, and the EAT considered that they were entitled to come to that conclusion, adding:

> "This resignation was not caused by any statement by the respondents such as occurred in the ***London Transport Executive*** case, but rather is simply an analysis of what the appellant did namely that she left her employment."

73. These comments are made in the context of whether or not there was a dismissal, which is a separate and different matter to the effective date of termination. I consider however that they support the view that the phrase "notice of termination" in section 97 can include not only words, whether written or oral, but also acts from which notice can be inferred. As stated above, the notice given can be of immediate or prospective effect.

74. It has been held that extrinsic matters (such as the P45) are not relevant to determination of the EDT even if in practice they are important: ***Newham London Borough v Ward [1985] IRLR 509.***

75. As it is a statutory concept it cannot be altered by agreement between the parties, confirmed by the Court of Appeal in ***Fitzgerald v University of Kent at Canterbury [2004] IRLR 300,*** with the following comment being made:

> ""….the effective date of termination is a statutory construct which depends on what has happened between the parties over time and not on what they may agree to treat as having happened.".

76. It was held that where an employee unambiguously resigns as of a certain date, that fixes the EDT which then cannot be changed by the parties' later agreement: ***Horwood v Lincolnshire County Council UKEAT/0462/11***. In that case the employee resigned unambiguously, her resignation letter including the following "in the circumstances I am resigning from the

employment of LCC with immediate effect as I am not prepared to 'waive' the Council's fundamental breaches of contract towards me". The employer for its own administrative reasons told her that the date would be taken to be later. She proceeded on that later date when presenting her Claim Form, with claims of constructive unfair dismissal and for unlawful deduction from wages, but it was held by the Tribunal to be out of time, and time was not extended, as the EDT was the date of her resignation, which had been accepted. Her appeal to the EAT was refused.

77. In ***Vasella v Eyre UKEATS/0039/11*** an employee wished to resign with immediate effect. She wrote a letter to do so, setting out reasons for doing so which were not set out in the Judgment but which are likely to have been an allegation of repudiatory breach of contract entitling the employee to resign immediately, and hand delivered that to the hotel where she worked on 21 November, a Sunday. The letter was dated 22 November. She was told that the manager to whom it was addressed was on leave until Wednesday. She knew that he worked Monday to Friday, and did not work on Sunday. She asked that the letter be placed in his pigeonhole at the hotel. She did not intend to resign on the Sunday. She also however emailed that day, 21 November, the text of her letter of resignation to the Executive PA and group administration manager who also she believed did not work on Sundays. That email was read that evening. A reply was sent to her on 22 November, accepting her resignation with effect that day. The employee presented a Claim Form on 21 February, and the respondent argued that the EDT was 21 November such that it was a day was out of time. The Tribunal held that the EDT was 22 November. An appeal to the EAT failed. It held as follows:

> "Even allowing for the letter having been delivered to the Swallow Hotel on 21 November, what it communicated was that the Claimant was intimating that she was resigning not that day but the following day. The letter could not be read as communicating a contemporaneous resignation on 21 November or that the Claimant intended to do other than resign on 22 November."

78. When commenting on the case law the EAT added this:

> "First, the EDT is to be found by considering objectively what parties did and said over whatever, in an individual case, is the relevant period. Secondly, parties cannot undo what has happened even by agreement. Thirdly, as was recognised by Judge Hague QC sitting in this Tribunal in the case of ***Newman v Polytechnic of Wales Students Union [1995] IRLR 72*** at page 74 (and relied on by HHJ Richardson in ***Potter [Potter and others v RJ Temple place UKEAT/0478/03***) ascertaining the EDT is:
>
> > "…..essentially a matter of fact to be decided in a practical and commonsense way….""

79. There was further a discussion as to the context in which the issue was to be addressed as follows:

> "20. I note that in ***Horwood***, Slade J observed that the concerns expressed in the authorities (including ***Gisda Cyf***) about protecting employees' rights do not arise when the decision to leave is that of the employee (paragraph 42) but would respectfully differ. The generality of the statutory purpose of protection of employee's rights applies, in my view, just as much when determining the EDT in a constructive dismissal case. Fairness dictates that employees should not be held to an EDT which they could not reasonably have thought was the EDT, EDT being a term of art and a date to be ascertained on an objective view of all relevant facts and circumstances."

80. There may separately require to be consideration of whether words that might appear to the recipient to be an unambiguous resignation do amount to that. Normally they will do, but there are what may be described as exceptions, although that is not necessarily the correct word to use, an issue referred to below. This is not a simple matter, and the authorities in this field are not easy to reconcile.

81. In ***Gale v Gilbert [1978] IRLR 453*** the employee said in the course of an argument with his manager: 'I am leaving, I want my cards'. The tribunal found that his manager did genuinely interpret these words as constituting a resignation but did not believe that the employee in fact intended to

resign. The tribunal held that the employer's action in relying upon the statement constituted a dismissal. The respondent's appeal to the EAT succeeded. It held that the words were on their face unambiguous and were honestly understood as amounting to a resignation, such that they were not a dismissal. The EAT did however express some disquiet about that result.

82. In ***Sothern v Franks Charlesly [1981] IRLR 278*** the employee, an office manager in a firm of solicitors, announced to the partners at the end of a partners' meeting 'I am resigning'. Later she tried to remain in post but the firm told her that she was regarded as having resigned. The Court of Appeal considered that the words unambiguously indicated a present intention to resign. Lord Justice Fox said the following:

> "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.”

83. Dame Elisabeth Lane held that words were unambiguous, but added

> "these were not idle words or words spoken under emotional stress which the employers knew or ought to have known were not meant to be taken seriously”

84. In the decision of the Inner House of the Court of Session in ***Greater Glasgow Health Board v Mackay [1989] SLT 729***, it was held that prima facie the recipient of the words of dismissal was 'entitled to assume that this was a conscious, rational decision'. But that decision did not exclude the potential for argument that an exception could be made, and was

based on the lack of evidence to entitle the Tribunal to conclude that it did fall within such an exception. The Lord Justice Clerk giving the decision of the court also said this:

> "On the findings I am satisfied that there is no justification for thinking that the appellants knew or ought to have known that the resignation of the respondent was not a conscious or rational decision. It was not a case of an employee flouncing out in a fit of temper, nor was it a case of an employee offering her resignation at a time when her employers knew or ought to have known that she was not herself but was suffering from an anxiety state."

85. In ***Barclay v City of Glasgow District Council [1983] IRLR 313*** the EAT had held that although in the normal case unequivocal or unambiguous words could be accepted at face value, there were exceptions to this principle. In that case an employee with limited mental capacity employed for ten years used unambiguous words of resignation after an altercation with his superiors. He did not appear to have appreciated the nature of his act and later turned up for work as usual, but the employer refused to accept him back. The Tribunal held by a majority that as the employee had used unambiguous words of resignation the employers were entitled to treat them at face value. The EAT upheld the employee's appeal. They expressed the law on this subject to be as follows:

> "It is true that if unequivocal words of resignation are used by an employee in the normal case the employer is entitled immediately to accept the resignation and act accordingly. This has been authoritatively decided by the Court of Appeal in ***Sothern v Franks Charlesly & Co [1981] IRLR 278*** to which we were referred. It is clear however from observations made in that case that there may be exceptions. These include cases of an immature employee, or of a decision taken in the heat of the moment, or of an employee being jostled into a decision by employers (Fox LJ at paragraph 21); they also apply to cases where idle words are used under emotional stress which employers know or ought to have known were not meant to be taken seriously (Dame Elizabeth Lane, paragraph 25). There is therefore a duty on employers, in our view,

> in an appropriate case to take into account the special circumstances of an employee'.'

86. A similar approach was adopted by the Court of Appeal in ***Sovereign House Security Services Ltd v Savage [1989] IRLR 115*** where Lord Justice May said the following:

> "In my opinion, generally speaking, where unambiguous words of resignation are used by an employee to the employer direct or by an intermediary, and are so understood by the employer, the proper conclusion of fact is that the employee has in truth resigned. In my view tribunals should not be astute to find otherwise. However, in some cases there may be something in the context of the exchange between the employer and the employee or, in the circumstances of the employee him or herself, to entitle the Tribunal of fact to conclude that notwithstanding the appearances there was no real resignation despite what it might appear to be at first sight".

87. That quotation was the basis of the decision by the EAT in ***Kwik-Fit (GB) Ltd v Lineham [1992] IRLR 156.*** In that case it was pointed out that this issue arises not in 'a purely commercial context' and held that whilst there was no general duty on an employer to ensure that an employee using apparently unambiguous words of resignation intended to resign, nevertheless in 'special circumstances' it might be unreasonable for words to be construed at face value. This includes where words are given in the heat of the moment, or in temper, or under extreme pressure. In those circumstances the employer should allow a reasonable time to elapse (usually a day or two) to see if the employee actually intended what he said. Further, a prudent employer will investigate the matter and if he fails to do so may find that the tribunal has drawn the inference that there was a dismissal.

88. This approach was later followed by the Court of Appeal in ***Willoughby v CF Capital Ltd [2011] IRLR 985***. Lord Justice Rimer commented as follows:

> "The 'rule' is that a notice of resignation or dismissal (whether oral or in writing) has effect according to the ordinary interpretation of

> its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The 'special circumstances' exception as explained and illustrated in the authorities is, I consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Wood J in paragraph 31 of ***Kwik-Fit's*** case …."

89. Whilst those words refer to resignation, I consider that they are also apt to apply to an issue of when notice of an intended resignation was to take effect. It is the notice that the terms of section 97 are directed to.

Observations on the evidence

90. Both witnesses gave evidence clearly and candidly, and both were seeking to give honest evidence. There was one material issue in dispute on fact, and that was whether or not the claimant was told by Mr Slater during a telephone call on 7 June 2018 that she should put her resignation in writing and that could be any date suitable for her, including with immediate effect if she wished as he had been told that a few days earlier by HR, which is what his position was, or whether he had said that he would check about the notice required, and he would get back to her on that but that she should confirm her resignation in writing to get the ball rolling, which is what her position was.

91. On that issue, I consider that the claimant was more likely to be correct. In his evidence Mr Slater had suggested that the call was during the morning. It was clear that it was after the interview, which the claimant had said was at 2pm, and that she had called him after it had concluded and on her way home, consistent with the timing of her email to him at 14.41. Mr Slater had also said in evidence that he had checked with HR about notice when he learned that she was submitting applications around

1 June 2018, and had been told that that was not required as she was in a no pay situation. The evidence given by Mr Slater is not consistent I consider with the letter he wrote on 14 August 2018 in which he referred to the call on 7 June 2018 and added "At the time I took advice from our HR department that we did not require a notice period as she was in a no pay situation". The words "at the time" I consider can refer only to the time immediately after the call, rather than, as he sought to suggest, a few days beforehand. His evidence, and the words of the letter, are also consistent with the email he sent her on 27 March 2018 saying that four weeks' notice was required, as by then she was already in a no pay situation having regard to the terms of the Statement of Agreed Facts. I note also that no one from HR was called by the first respondent to give evidence on this matter, although no reason for that not being done was put forward. Further, although his letter of 14 August 2018 stated that he was aware that she was due to start her new position on 2 July 2018 he did not know that during the telephone call with the claimant, as that was a date he agreed only afterwards in a call with the new line manager later that same day.

92. If there was an immediate resignation and acceptance during the telephone call between Mr Slater and the claimant on 7 June 2018, as Mr Slater suggested in evidence, I do not consider that he would later that day, albeit not much later as the timing of these events is quite short in time, have a discussion with the claimant's prospective new line manager about her start date. That is inconsistent with the claimant having by then resigned. The natural position would be, in such a situation of immediate termination having already occurred by mutual agreement between Mr Slater and the new line manager for Mr Slater to have commented something to the effect that the start date was a matter for the claimant as she had already ceased to be employed by the first respondent. But he acted in a manner that is more naturally explained I consider by the claimant still being line managed by him, and still being an employee of the first respondent at the point of the call with the second respondent.

93. The new start date was agreed for 2 July 2018, which was slightly less than four weeks from 7 June 2018. It is consistent with the first respondent

agreeing slightly less notice than had been confirmed in the email of 27 March 2018.

94. Mr Slater has throughout accepted candidly his error in not identifying an issue on continuity of service, and once that matter was raised immediately sought to address it with the second respondent. His email to the claimant on 14 August 2018 does not directly contradict his evidence that a termination date of immediate effect was agreed on the call, but the omission of any reference to there having been an immediate resignation agreed during their telephone call on 7 June 2018 is surprising if that is indeed what happened. The reaction is one of surprise. That is I consider more consistent with the claimant's evidence.

95. The terms of the email which was sent by the claimant very shortly after the conversation the claimant had with Mr Slater on 7 June 2018 had the contents that it did, using the words resignation, confirm and immediate effect, rather than more general wording to the effect that the date of resignation would be confirmed after the notice period had been looked into.

96. The claimant said that she had thought that she was not resigning in that email, but starting the process to lead to it. She did not know then whether notice of less than four weeks was acceptable, in light of the earlier email from Mr Slater on 27 March 2018. She wished to start with the second respondent as soon as she could, and made mention of "with effect from today" believing that that meant that the notice started from that day. Whilst her position may be naïve, it does give context to the words that she used In her email which I consider on the face of them to be unambiguous words of resignation with immediate effect. But I do not consider that the terms of her email are such that her evidence cannot be accepted.

97. Having regard to some extent to the manner in which each of them gave evidence, with the claimant being direct and clear in her evidence, and Mr Slater more equivocal in my judgment, and to the evidence as a whole which I have commented upon in the preceding paragraphs, I have concluded that the claimant's evidence as to what was said during the

conversation she held with Mr Slater on 7 June 2018 is to be preferred, and that she did not say that she resigned with immediate effect, he did not therefore accept that, rather he said something to the effect that he would sort everything out and that she should send an email using the word resignation to get the ball rolling.

98. The remainder of the dispute concerns the application of the law to the facts.

Discussion

99. This is an unusual set of circumstances, and resolving matters I have found particularly difficult. Doing so was not assisted by some of the documents that might have been produced, or were referred to in evidence, either not being in the Bundle or in one case only one page being provided of a document containing more than one page. A number of documents that might well have been relevant, such as the contract of employment with each respondent, the IT system entry made by Mr Slater, the email Mr Slater said he sent to the claimant on 27 August 2018 after being told by the second respondent that the proposal he made by letter of 14 August 2018 was not accepted, letters from Mr Lithgow or from Unison, were not before the Tribunal. Other documents were not complete, in particular the letter from the first respondent dated 29 April 2019, but also the part of the email showing the date and time it was sent by Mr Slater to the claimant, but which was thought to have been sent on 27 March 2018. That was not particularly satisfactory, but both the claimant and first respondent had a share in the responsibility for that.

(i) Reasonable practicability

100. I address firstly the issue of reasonable practicability. It is not in dispute that the Claim was presented outwith the primary limitation period. Taking the latest possible date for the effective date of termination of employment, 2 July 2018, and the earliest date for commencement being the start of early conciliation on 28 May 2019, and ignoring for the moment the not inconsiderable gap between the certificate and presentation of the Claim Form, the claimant was over seven months outwith the three month period provided for by statute.

101. The claimant discovered on 14 August 2018 that she did not have continuous service with the second respondent. She was aware from the end of that month that the second respondent would not accept the suggestion made by Mr Slater that her service be deemed to be from 29 June 2018. The period of time from then to March 2019 when Mr Lithgow started to write letters, which were not before the Tribunal but appeared to have been written in March 2019, was not properly explained in the evidence. From towards the end of August 2018 and up to March 2019 the claimant does not appear to have pursued matters. She did not commence early conciliation until 28 May 2019.

102. She had some advice, in that Mr Lithgow was a retired solicitor, but I take into account that he was not a practising solicitor, and was acting in the manner of being a friend rather than as a professional person. The claimant contacted ACAS, but the dates and details of what she and they said were not clearly set out in her evidence, but ACAS is referred to in her email on 14 August 2018. She also she said contacted Unison, and said that they wrote to the respondent, but those letters or emails were not before the Tribunal and no detail about them was given by the claimant in her evidence. There was before the Tribunal one page of a reply from the first respondent sent to Mr Lithgow on 29 April 2019. It was not clear why the full letter had not been produced save that it was on advice from Mr Lithgow. It was at least clear from that letter that the first respondent did not accept any termination date other than 7 June 2018.

103. Whilst I accept that the claimant was not professionally represented, and that she had limited understanding of matters as she had a 20 year period of service with the first respondent, I do not consider that she has discharged the onus of proof that it was not reasonably practicable to have presented a claim form against the first respondent timeously. It was I consider reasonably practicable to have commenced early conciliation by on or before 6 September 2018, which failing on or before 1 October 2018, and to have presented the Claim Form within one month of the certificate being issued.

104. The claimant knew that the second respondent did not consider that she had continuity of service with them in mid August 2018. She had had sight

of Mr Slater's letter to the second respondent and was aware that the approach had failed from a telephone call from Mr Slater shortly afterwards, and an email from him confirming that on 27 August 2018, which was not produced in evidence, but there is no evidence that she did anything further at that stage. I do not consider that that was reasonable. The longer matters went on without satisfactory result, the more difficult it is for her to argue the lack of reasonable practicability.

(ii) Reasonable period

105. Even if the claimant had met the first part of the test, I do not consider that she met the second part as to a reasonable period. She commenced early conciliation on 28 May 2018. On 4 June 2018 the certificate was issued. It was clear at the very latest by then that the matter would not be resolved by agreement, including by conciliation, and it was almost a year since she had sent her email headed "resignation". It was, or ought to have been in my judgment, obvious that a Claim required to be presented very quickly after that certificate was issued given the time that had passed to that point, and that the primary limitation period is of three months. In my judgment given all the circumstances, and having regard to the authorities set out above, a period of up to two weeks is reasonable, which is to say up to 18 June 2018

106. The claimant did not do so until 14 August 2018. That additional delay of nearly two months was not explained adequately. The claimant stated that she was commencing new work around that time, but when that was and why that delayed the commencement of the claim was not made clear. She said that she was also seeking advice from Mr Lithgow on finalising the Claim Form, but the detail of that was not provided, and in any event it is not a form that I consider necessarily requires such advice, and certainly not over a period as long as nearly two months.

107. I do not consider therefore that the Claim Form was presented within a reasonable period of time given all the circumstances.

108. In light of the foregoing, I must dismiss the claim against the first respondent as I do not consider that the Tribunal has jurisdiction under section 111 of the Employment Rights Act 1996.

(iii) Effective date of termination

109. I turn to the third issue of the effective date of termination. It is this issue that has been particularly difficult. Here there are a number of factors that require consideration. Firstly she was told by email from Mr Slater in March 2018 that four weeks' notice was required for a resignation, as the contract of employment with the first respondent provided. At that time the career break had started. Secondly the claimant called him after her interview from her car when she knew that she had been successful at it, but not when she would start. Understandably she was seeking guidance from her line manger on what to do. I was satisfied that her evidence about that call was to be preferred for the reasons set out above. Thirdly I have concluded that he then checked with HR about notice, not that he had done so a few days earlier as was his position in evidence, and was told that none was in fact required. That advice was different to the 27 March 2018 email, although there is no evidence that anything had changed, but nevertheless he thought that he could proceed with an immediate termination of employment formally and entered the date in the IT system to do so. Fifthly what he did was (as he has candidly accepted) in error. He was not aware of the provisions as to continuity of service at all at that point, not apparently being advised about that by HR. It may have been correct that the first respondent would accept an immediate notice period, but there was no enquiry made of HR as to any difference where the claimant was to be working could make, where that was another local authority as he knew, but in circumstances where Mr Slater had said something to the effect that he would sort everything out. Whilst he did ask HR for advice, he did not give them all the relevant facts, or they did not enquire about them, and he did not then revert to the claimant to tell her what they had said.

110. Sixthly the claimant then stopped her car, and sent an email from her telephone to Mr Slater. She did not use the words that reflected her state of mind. She said in terms that she resigned, and that that was "with effect from today". These were I consider words that could be read, on the face of them, as being unambiguous, and they were in writing. In her mind she was not resigning, as it was an email and she thought that that was an

informal method of communication. She said in evidence that she was expecting a formal letter later, confirming when she would leave, as the start date was not at that stage known. Whilst she was naïve in acting as she did, that is not a point that determines matters. What matters is not her subjective intention, but what the parties had said and done.

111. Seventhly the start date Mr Slater agreed to was on 2 July 2018. It was decided upon in consultation between him and the new line manager. That date was too late to preserve continuity of service for the claimant for a termination on 7 June 2018. That had not however been intended by either the claimant, or Mr Slater, and there is no reason to suppose that the new line manager sought to engineer such an outcome to deny her continuity of service, as the second respondent tendered no evidence.

112. This is all in the context where Mr Slater has not followed the first respondent's normal procedures by documenting his acceptance of what he thought was her resignation in writing.

113. There are some matters that I do not consider relevant, although they were raised in evidence or submission or both.. I do not derive any assistance from the P45, a matter commented upon in authority. I also do not consider that the claimant not raising the issue of notice specifically with the first respondent is to the point. She did not become aware that continuity of service was not preserved until 14 August 2018 by which time her employment with the first respondent had ended.

114. The first respondent referred to the case of ***Crossley v Faithful and Gould Holdings Ltd [2004] ICR 1615***. That was in a different context, an action in court for damages for breach of what was said to be an implied term that the employer would act with reasonable care for the employee's economic well-being. Such a term was held not to be implied. The question in this case is not one of such an implied term. I do not consider that case to be relevant.

115. The claimant argued that Mr Slater did not have authority to agree a variation of the contract of employment, and Mr Slater accepted that he did not have that authority. The contract of employment was not however produced in evidence, and I have difficulty with an argument that two

parties may not agree to act in a manner that the contract of employment does not provide for. If they do agree, then in the absence of undue pressure or similar their agreement is I consider effective in law.

116. I have considered whether the conversation on 7 June 2018 between the claimant and Mr Slater, followed by her email to him, did amount to a resignation that has effect in law. The authorities are set out above. I consider that they are to the effect that in not all circumstances do what may reasonably be considered on their face to be unambiguous words of resignation lead of themselves to a termination of contract. There are some circumstances, whether described as special, creating an exception or otherwise, where the employer is on notice that further enquiry is required. Those circumstances vary, but the common theme is that there is something from the facts known, or which ought reasonably to be known, to the employer that require such further enquiry, and that had such enquiry been made the employee's intentions would be clarified to be other than as understood from the words that had been used.

117. In the present case this is, I consider, a finely balanced decision. I have concluded that in all the circumstances Mr Slater did know, or ought reasonably to have known, that the claimant had not resigned during the telephone conversation, and that the email she sent immediately thereafter was not intended to be notice of an immediate resignation of her employment with the first respondent. The factors that led me to that conclusion are as follows:

(i) The claimant was, as Mr Slater knew, calling from her car, almost immediately after the interview with the second respondent held on 7 June 2018 about half an hour earlier.

(ii) She had been told of her success at interview almost immediately before she called him.

(iii) She did not at that stage have a start date for her new position.

(iv) She was on a career break with the first respondent.

(v) She was not in receipt of pay.

(vi) She believed from the email sent to her by Mr Slater on 27 March 2018 that four weeks' notice was required by her but was seeking advice from her line manager.

(vii) She had over 20 years' service with the first respondent such that she was unfamiliar with the process of leaving one employer and starting with another.

(viii) She asked her line manager about the next step she should take during the call on 7 June 2018.

(ix) Mr Slater was unaware of issues of continuity of service but was aware of the identity of the second respondent.

(x) Mr Slater said that he would check about notice, and sort everything out, or words to that effect. He asked her to write to confirm matters using the word resignation to get the ball rolling, or words to that effect. The claimant did not resign with immediate effect during that call.

(xi) The claimant acted on the request to write and refer to resignation, and added personal comments to her email rather than send a purely formal document

(xii) Mr Slater contacted HR once he received the email on 7 June 2018, was told that the termination could be without notice, and thinking that the email was intended to be a formal resignation immediately acted on it, but without checking that with the claimant.

(xiii) He immediately entered a leaving date on the first respondent's IT system but did not write to her to confirm that he had acted on the email that way.

(xiv) Mr Slater very shortly afterwards had a discussion with the second respondent as to the claimant's start date, and did not say that it was a matter for the claimant and them to resolve, but agreed a start with the second respondent without referring to the claimant. That he did agree a start date was consistent with the claimant still being employed and Mr Slater still being her line manager. It was also consistent with him sorting things out for the claimant.

(xv) He did not refer to that agreement over a start date in his email to the claimant that day following that conversation, nor did he state within it that he had considered that she had formally resigned with effect that day. His response contained informal comments in similar vein to her own email to him.

(xvi) The period of time between the call to Mr Slater by the claimant, and his email to her following his agreeing a start date, was about thirty minutes.

(xvii) He did not write to the claimant formally accepting what he thought was her resignation with immediate effect and confirming the termination date of 7 June 2018, nor did any other employee of the first respondent do so.

(xviii) There is no evidence that whether the claimant resigned with effect from 7 June 2018, 29 June 2018 or 1 July 2018 made any difference to the first respondent as the claimant was not entitled to any payment from them at any of the periods up to those dates.

(xix) There is no evidence from the second respondent that it would have acted any differently had the date of the termination of employment between the claimant and first respondent been either of those two later dates.

118. The authorities set out above, ***Horwood*** and ***Vasella***, do not address this issue, of whether what are on the face of them unambiguous words of resignation with immediate effect amount in law to that, directly. The former is a constructive dismissal case, and the facts of the latter indicate that it may well be too. The present case does not have that element. The facts of ***Vasella*** are of course different, not least as the date given in the letter sent was specified as 22 November such that it qualified the use of the word “immediate”, but there was in that case an email sent on 21 November repeating the words of the letter, and all of the circumstances were taken into account when assessing when the EDT arose.

119. In the present case it is not disputed by the claimant that she was intending to resign generally, that was clear from her call after the interview, the issue is about whether she formally was intimating that intended resignation and the date that that would take effect. That was in the context of her understanding from Mr Slater’s earlier email of a four week period for notice, but a desire to start the new role as quickly as she could.

120. The respondents both argue that the claimant provided a clear and unambiguous date, and that she was responsible for looking after her own

position. There is considerable strength in that argument, but I have concluded, not without hesitation, that it is unduly simplistic. In light of all of the factors set out above I consider that the circumstances are such that the events of 7 June 2018 did not amount to a resignation without notice effective that day, looking at matters in the commonsense way described above, and recognising the context that the provision has as its purpose the protection of employees described in ***Gisda***. I consider that Lady Smith in ***Vasella*** is correct in her view that there is no different treatment where the employee resigns.

121. It is certainly the case that a prudent employee would wait for both a start date to be confirmed and have an offer of new employment in writing before tendering any form of resignation, and the claimant's actions in sending the email of 7 June 2018 were somewhat naïve as I have already noted, but having regard to all of the evidence and particularly the factors set out in paragraph 117 the first respondent was, I consider, on notice that the claimant did not intend to resign with immediate effect by her email of 7 June 2018 as a start date had not been identified, there had been no resignation in the earlier telephone call that day, and had enquiry been made of the claimant it would have become clear that she was intending to give notice of four weeks but ascertain whether it might be agreed to be less than that. That would then have resulted in an agreement for termination of the employment with the first respondent on 1 July 2018 if she was to start with the second respondent on 2 July 2018.

122. That is I consider the analysis required by the section of the Act. The notice of termination of employment was effected in my judgment by a combination of the telephone conversation between the claimant and Mr Slater, and the email to Mr Slater, the later conversation when Mr Slater agreed a start date with her new employer the second respondent, his email to her thereafter, all of which took place on 7 June 2018, that start date then being communicated to the claimant by the second respondent, followed by the claimant commencing employment with the second respondent on 2 July 2018. The notice of termination from the claimant was accordingly a combination of her words and acts, those of Mr Slater,

and the agreement between the two respondents that the claimant commence her new role on 2 July 2018

123. I do not consider that the date for the EDT proposed by the claimant of 29 June 2018 can be correct, as there is no warrant for it from the evidence of what the parties said and did. It was a proposal made on the basis of common sense after the event, and parties cannot change the EDT by such means, as made clear in ***Fitzgerald***. I consider that the date must be 1 July 2018 being the date immediately before the commencement by the claimant of her new role. That is the date when the notice of termination of her employment with the first respondent took effect, applying the terms of section 97.

124. The foregoing Judgment and Reasons contains a number of matters, and authorities, that were not raised by any of the parties in submission. I did consider whether to inform parties of the points that I had identified, and the authorities I had found, but doing so would not have been at all straightforward. I concluded that it was preferable to set out my Judgment with the Reasons as I have done, and state that if any party considers that this causes injustice and they wish to make further submissions in respect of the applicable legal principles, case law, or the application of the law to the facts, this may be done by way of an application for reconsideration under rule 70.

Conclusion

125. I answer the first and second issues in the negative, and the third issue with the date 1 July 2018.

126. The claim against the first respondent is dismissed for want of jurisdiction.

127. The claim against the second respondent shall proceed to a Final Hearing.

128. A Preliminary Hearing to be held by telephone shall be fixed for the case management required.

Employment Judge:	**Alexander Kemp**
Date of Judgment:	**20 July 2020**
Date sent to parties:	**21 July 2020**