



EMPLOYMENT TRIBUNALS

Claimant: Mr R Gibbons

Respondent: Newcode Partnership Limited

Heard at: Manchester (remotely, by CVP)

On: 24 August 2022

Before: Employment Judge K M Ross
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms H Hogben (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The name of the respondent is amendment to the correct legal name, Newcode Partnership Limited.
2. The effective date of termination of employment was 22 February 2022.
3. However whether or not the claimant is entitled to the statutory extension of time to bring his claim within the service requirement of 2 years will be decided at the next hearing when his wages claim and holiday pay claim will also be decided.

REASONS

Introduction

1. The claimant brought a claim for “ordinary” unfair dismissal pursuant to section 95 and section 98 Employment Rights Act 1996. He also brought a claim for unpaid wages and unpaid holiday.

2. At the outset of the hearing, it was agreed that the Tribunal would deal with the preliminary issue of whether or not the claimant had sufficient service to bring a claim for unfair dismissal. The parties agreed that the claimant's employment started on 25 February 2020 but there was a dispute as to the date of termination. The respondent said the effective date of termination was 16 February 2022. The claimant was unclear about the precise date because he had never been given it but stated it was later, giving him sufficient service to bring a claim for unfair dismissal.

3. Unfortunately, the parties had originally been notified in error that the case would take place in person at the Liverpool Employment Tribunal. Although they were later sent links for a video hearing, that was sent too late to the claimant and he attended at the Liverpool Employment Tribunal.

4. Accordingly, arrangements were made for the claimant to attend by video from that venue.

5. There was also a dispute about documentation. Both parties had prepared a bundle of documents. In addition the respondent disclosed a screenshot of an HR portal. The claimant disclosed two further emails and a P60.

6. There was potentially an issue about whether or not some of the documents in the claimant's bundle were admissible. Counsel for the respondent, after seeking instructions, helpfully took a pragmatic view and I had regard to all the documentation.

The Issues

7. The issues for the Tribunal to decide were:

- (1) What was the effective date of termination of employment? The relevant law is section 97(1) Employment Rights Act 1996 for unfair dismissal.
- (2) Was the claimant's contract terminated by notice? Or was it terminated without notice?
- (3) Having regard to the effective date of termination, did the claimant have two years' continuous service within the meaning of section 108(1) Employment Rights Act 1996.

- (4) Depending on the above, the effect of the statutory extension of effective date of termination and relevant date.(if applicable).

The Facts

8. I find the following facts.

9. I heard from the claimant and from Mr Dev, the Managing Director of the business.

10. There was no dispute that there was a telephone conversation on 16 February 2022. I accept the claimant's evidence that the phone call was unexpected. The claimant made detailed notes of the conversation. Both men agreed that Mr Dev told the claimant that he was "letting him go" because the claimant was not "gelling with me".

11. Where there is a dispute about the contents of the conversation, I accepted the claimant's recollection largely because he made notes at the time which were provided to me.

12. Mr Dev by contrast was not always a reliable witness. In his witness statement, which he said was true to the best of his knowledge and belief, he stated that the claimant was dismissed on 16 February at a verbal conversation at "our offices". He also stated that he "shook the claimant's hand and he left the office" (paragraph 6). In cross examination he conceded that that description was wrong and in fact the conversation had taken place over the telephone.

13. Mr Dev says he told the claimant that his employment would be terminated immediately. The claimant disputed that he was told his employment would be terminated immediately. I am not satisfied Mr Dev used the word "immediately". The claimant's contemporaneous note does not record it. Also I find the claimant's recollection of events more reliable than Mr Dev's. In addition, Mr Dev's further correspondence with the claimant is inconsistent with telling the claimant that his employment had ended immediately on 16 February.

14. It was not disputed Mr Dev stated that in the telephone call of 16 February he told the claimant he was willing to pay him one month's lieu in notice. (The claimant has a contractual provision which accords with one month's notice for this level of service).

15. It is not disputed is that the claimant was never given a specific date of when his employment would end. No formal letter of dismissal was ever sent to the claimant. The closest document to a letter of dismissal is a letter sent by Mr Dev to the claimant on 22 February 2022 (respondent's bundle pages 110-11) which suggests other concerns of the respondent. However, that letter is ambiguous, referring to "if we can agree to part ways...".

16. I rely on the claimant's evidence that in the verbal conversation on 16 February he was told that Mr Dev would follow up the conversation with an email detailing specifics. The claimant did not receive such an email so he chased the

matter up.p107. In response he received the letter of 22 February by email. P110. That letter is ambiguous. On the one hand it lists various factors and suggests "...you will be a better fit for another company" but then appears to suggest the claimant remains employed " If we can agree to part ways-I would offer that I continue paying you until April 2022. My wish is we can move on."

17. By a further email of 28 February Mr Dev told the claimant he was "on garden leave". (He said in evidence he did not mean to use that term). He then said he would pay the claimant until 16 March. Also on the 28 February, the claimant presented a grievance about "my contract being ended unfairly"

18. It is clear that by 1 March the claimant has been dismissed because when the claimant sent a resignation letter dated 1 March (see page 120) Mr Dev replied (see supplementary email from the claimant) saying, "I have already let you go".

19. There is no dispute that after the conversation on 16 February the claimant was not sent any further work by the respondent.

20. The claimant explained he was normally assigned work via an app although sometimes in the past he had been paid when he had not been assigned work. The timesheet (page 204) shows that there were "no jobs" for the claimant on 17 and 18 February. I find the claimant presented timesheets for those days and was paid.

21. I accept Mr Dev's evidence that the claimant was paid at the end of each month for the time period up to 20th of each month. 20 February 2022 was a Sunday. I find therefore that the last day for which the claimant received payment was 18 February 2022.

22. The claimant had a car, a laptop and a uniform belonging to the respondent. Mr Dev said he was seeking recovery of those items over the telephone during the phone call on 16 February, although there is no documentary evidence of that. The claimant's line manager was certainly seeking recovery of these items from 1 March as text messages in the bundle show.

23. Contradictory dates have been given for the claimant's termination date. The P45 (which the claimant received in May 2022) states the claimant left on 28 February. Mr Dev's explanation for that is that payroll function was outsourced, and the claimant was not processed as a leaver until the end of the month.

24. The screenshot of the HR "Bamboo" programme shows a leaving date of 22 February 2022 for the claimant. It states "Terminated 22/2/02". That date was inputted by the claimant's line manager, Mr Alex Jukes. Mr Dev says he gave Mr Jukes that date.

Applying the Law to the Facts

25. The first issue is: what was the effective date of termination? Section 97(1)(a) states that the effective date of termination:

“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.”

26. Section 97(1)(b) states the effective date of termination:

“In relation to an employee whose contract is terminated without notice means the date on which the termination takes effect.”

27. Where there is ambiguity around words or conduct in relation to dismissal I must take all the circumstances into account.

28. I find, and both parties agree, that Mr Dev told the claimant he was “letting him go” in a telephone call on 16 February. I find he did not say he was dismissing him immediately. The claimant clearly understood he was going to work during any notice period because his handwritten notes at the time say, “I would act professionally during my notice period”. This is supported by his email (page 108R), “I will carry out my normal working duties that the company requires of me in the utmost professional manner until my termination date and forementioned agreement has been agreed between myself and Newcode”. He goes on to state, “Moving forward you stated you would be emailing me with details relating to my contract termination shortly”. The claimant also states that he understands that Mr Dev has “made it clear the decision was final”.

29. I find that this is evidence that the claimant’s employment was not terminated summarily and immediately by Mr Dev on 16 February. Rather Mr Dev informed the claimant that he was going to end his employment. He did not give the claimant a date of termination.

30. I am satisfied that by 1st March the respondent had terminated the contract because Mr Dev stated he had already “let the claimant go”. I find the claimant’s employment was ended by Mr Dev on 22 February 2022. I find that was the termination date Mr Dev instructed the claimant’s line manager to enter onto the HR system.

31. Regrettably Mr Dev did not clearly inform the claimant of that fact. Instead he sent him an ambiguous letter on that date, 22 February 2022.

32. I turn to section 97(1)(b)- in relation to an employee whose contract is terminated without notice means the date on which the termination takes effect. I find that Mr Dev terminated the claimant's contract on the day of the on 22 February 2022. I find he did not make it clear to the claimant that he was terminating the claimant’s employment with immediate effect.

33. However, I find the fact that the claimant was not provided with any work after that date and that the claimant's car, uniform and other items were being sought from him after that date are suggestive that Mr Dev had terminated the claimant's contract on that date. I find the fact the claimant received no payment after 18 February is consistent with a termination date of 22 February.

34. Having found the effective date of termination was on 22 February 2022, on the face of it the claimant appears to have insufficient service to bring a claim for unfair dismissal under the Employment Rights Act 1996 having regard to section 108.

35. However, I remind myself of the provisions of the statutory extension of effective date of termination. An employee is entitled to rely on the statutory provision for extending the effective date of termination if the employer has dismissed him with no notice or less than the minimum statutory notice stipulated in section 86 Employment Rights Act 1996. I find the claimant was not given any notice.

36. The statutory extension of the effective date of termination would therefore bring the claimant's claim within time.

37. However, an employee is only entitled to rely on this provision which extends the date of termination to the date on which the proper statutory notice would have expired if the respondent was not entitled to dismiss for gross misconduct. The provisions in section 86 Employment Rights Act 1996 setting out minimum periods of notice are subject to the proviso in section 86(6) Employment Rights Act 1996, "preserving a party's right to treat a contract as terminable without notice by reason of the other party's conduct". In other words, if an employer summarily dismisses an employee in circumstances where at common law it was entitled to do so (i.e. for gross misconduct) then the claimant is not entitled to statutory notice.

38. The case of **Lancaster and Duke Limited v Wileman [2019 ICR 125 EAT]** reminds me that I must therefore make a finding on whether or not the respondent was entitled to dismiss the claimant at common law, summarily.

39. I remind myself that on 16 February the claimant was simply told he was not "gelling" with Mr Dev and others. Later, on 22 February Mr Dev sent an email referring to various other matters. He says in his statement, "I felt I could not continue to work Ryan because he was not a good fit for the business and his presence was causing disruption amongst colleagues".

40. However, at the outset of the hearing it was agreed I would not deal with the alleged reasons for dismissal and therefore this issue must be determined at the next hearing

Employment Judge K M Ross

Date: 12 September 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
13 September 2022

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