EMPLOYMENT TRIBUNALS

Claimant: **Mr K Murphy**

Respondent: **Leos Management Services Limited**

Heard at: **London South Hearing Centre (in public by CVP)**

On: **1/02/ 2024**

Before: **Employment Judge McLaren**

Appearances

For the claimant: In Person
For the respondent: Mr S Liberadzki, Counsel

PRELIMINARY HEARING IN PUBLIC JUDGMENT

1. The claims of unfair dismissal and unpaid holiday pay are dismissed on withdrawal by the claimant.

2. The claims of wrongful dismissal and failure to pay wages were not presented within the applicable time limit. It was reasonably practicable to do so. These claims are therefore dismissed.

REASONS

3. This was a remote open hearing, having been converted from a full merits hearing, to consider the respondent's application that in accordance with rule 37 of Schedule 1 in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"), the Claimant's Claim be struck out on the grounds that the claim is out of time and has no reasonable prospect of success.

4. The parties referred to a bundle indexed up to page 1055 and I was taken to a number of pages of this evidence. The claimant and the respondent provided written submissions which they expanded upon.. In reaching my decision I have taken account of the evidence to which I was taken and the helpful submissions of both parties.

The claims

5. The complaints indicated on the claim form were unfair dismissal, notice pay, holiday pay, arrears of pay, and another type of claim, with the particulars: "I was wrongfully dismissed and the employer breached the contract in a number of ways".

6. The claimant accepted that he did not have two years service and therefore could not bring a claim for unfair dismissal. He was content for this to be dismissed. He confirmed that he was not pursuing any claim for unpaid holiday and that this should be dismissed on his withdrawal.

7. We discussed his other claims. He confirmed that he had not in fact been paid wages by the respondent from December 2022. In his claim form, however, he had referred to wages only from March 2023. It seemed to me that his claim for unpaid wages was therefore limited from March 2023.

8. It was the claimant's contention that his dismissal was 16 June and he felt he was entitled to be paid wages from March until 16 June, that is some £25,000 and then three months notice pay. He was able to mitigate his loss and worked for two months from 16 June. His best position therefore is that he would be entitled to one months notice pay. That would be in the region of £7,000.

9. After some further discussion we agreed that he was bringing his claim as wrongful dismissal that is a breach of contract claim. His claim for unpaid wages is brought as a claim for unlawful deduction from wages.

Jurisdiction/time bar

10. The ET1 was lodged on 15.9.23 after ACAS early conciliation which started and ended on 13.9.23 The respondent's application is made on the basis that the employment relationship ended on 3 March 2023. In the alternative it was ended on 16 March 2023 or potentially 16 April 2023. In all of those scenarios the claim for wrongful dismissal is made outside the relevant three month time limit. Wages would only be properly payable while employment continued, therefore the last date on which the appropriate time for a deduction from wages claim could arise would be the date of termination or possibly the next salary payment date after employment ended. Whether that is the end of March or the end of April, again the claims are clearly made outside that three-month time limit.

11. The claimant says that his employment was ongoing until 9 June 2023 when he gave notice to end his contract on 16 June 2023. These claims are therefore in time.

12. The issues I must determine are therefore

    12.1. What was the effective date of termination?

    Unpaid Wages

12.2. Was the unauthorised deduction made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

12.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of date of payment of the wages from which the deduction was made ?

12.2.2. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

12.2.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

12.2.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Breach of contract (wrongful dismissal)

12.3. Was the claimant's contract claim presented within the time limit under article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 ? The Tribunal will decide

12.3.1. Was the claim made within the period of three months (plus early conciliation extension) beginning with the effective date of termination of the contract giving rise to the claim, or

12.3.2. where there is no effective date of termination, was the claim made within the period of three months (plus early conciliation extension) beginning with the last day upon which the employee worked in the employment which has terminated, or

12.3.3. If it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, was it presents within such further period as the tribunal considers reasonable.

Relevant Law

Limitation period –Unlawful deduction from wages

13. An employment tribunal shall not consider a complaint about a deduction from wages unless it is presented before the end of the period of three months beginning with—

"2(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

2(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."

Limitation period –breach of contract(wrongful dismissal)

14. Employment tribunals have jurisdiction to hear certain types of breach of contract claims by virtue of the Employment Tribunals Act 1996 (ETA) and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623.

15. Article 7 of the 1994 Order provides that a breach of contract claim must normally be made to an employment tribunal within three months, beginning with the effective date of termination of the contract giving rise to the claim, or, where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment.

16. If it was not reasonably practicable for the complaint to be presented within the applicable period it can be accepted if it was presented within such further period as the tribunal considers reasonable.

17. When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, the rules should be given a 'liberal construction in favour of the employee'. What is reasonably practicable is a question of fact and a matter for the tribunal to decide. The onus of proving that presentation in time was not reasonably practicable rests on the claimant.

The EDT

18. At common law, the date of termination is the date upon which the contract comes to an end. If the employment is ended with notice, that date will be the expiry of the notice period. Where no notice is served, it is the date when the employee ceases to work (in a case of resignation), or is summarily dismissed by the employer.

19. I was referred to Geys v Société Generale, London Branch [2013] ICR 117 (SC). It is now settled that employment contracts are subject to the same rule so that a purported dismissal which is in breach of a contractual term does not automatically terminate the contract. Instead, it is a repudiatory breach of contract, which the employee can elect to accept (ending the contract on the date of acceptance), or waive and affirm the contract as continuing. In such a case the tribunal must look to establish whether, and if so when, the employee accepted the employer's repudiatory breach.

20. While at common law the elective approach applies to contracts of employment, for statutory purposes the date of termination is the date on which the employee is dismissed. I was referred to and considered the EAT's decision in Robert Cort and Son Ltd v Charman 1981 ICR 816, EAT. I was also directed to Meaker v Cyxtera Technology UK [2023] IRLR 365 (EAT) which confirmed that Robert Cort remains good authority on the interpretation of S.97 and is not affected by the approval by the Supreme Court in Geys of the 'acceptance theory' of termination. Acceptance of a breach or not is not the relevant test. The contract is terminated when that is communicated. In Meaker it was set out in this way

> *"……even if it was a repudiatory breach that was not accepted by the claimant at common law, the effective date of termination for the purposes of the unfair dismissal claim was the date of receipt of that letter. The tribunal had not erred in so deciding. Robert Cort v Charman [1981] ICR 816 and Rabess v London Fire and Emergency Planning Authority [2017] IRLR 147 considered and applied"*

21. It was noted in Rabess, that given its statutory setting and importance,S.97(1)(b) requires words or conduct which in their context amount to a plain and unambiguous termination by an employer. The termination may be by words or conduct or a mixture of the two, but it must unequivocally convey to the employee, on an objective reading or understanding, that the employer is terminating the contract. Words or conduct that reasonably leave the employee in doubt as to whether the employer has terminated the contract will not crystallise the effective date of termination.

Findings of Facts

Contract terms/policies

22. The claimant was employed under the terms of a service agreement which he signed on 12 November 2021. There are a number of clauses that are potentially relevant to the dispute.

23. At clause 16.1 the respondent was required to give the employee two months notice to terminate his employment. Clause 20.1 provided the right to make payment in lieu of notice. Clause 21 provided for termination with "immediate effect and without notice" in certain circumstances, including if the employee is guilty of any gross misconduct. Clause 29.4 specified that any notice given under the agreement would be invalid if sent by email. The contract also made reference to disciplinary procedures.

24. There was also a noncontractual staff handbook which set out in clause 9.10 (page 130) that the individual would be informed in writing of any disciplinary outcome.

Termination discussions

25. The claimant agrees that following a meeting on 16 January 2023 he was clear that his employment was to end on two months notice. It was also agreed that on 19 January he was told that he would be on garden leave until 16 March 2023. The claimant accepts that this point he had been given clear and unambiguous notice in writing. He understood that employment was going to end on 16 March 2023. This is in accordance with the notice provision in the service agreement.

26. There was some question as to whether his notice had been extended until the 16th or 19th of April. In the grounds of resistance the respondent specified that it had been agreed that notice from the company would also be three months and not two and the claimant's employment would end on 19 April. It is unclear why that was not 16 April. The claimant explained that he had a discussion with the office manager and had asked that he be given the amount notice as he was contractually obliged to give the respondent, that is three months. It appears that may have been agreed.

27. In February 2023 an investigation was undertaken into allegations made against the claimant which led to a disciplinary process. The claimant was invited to disciplinary meeting and was sent a letter on 15 February at pages 721-723 which advised him of this meeting and which explained that if the allegations were substantiated he could be dismissed for gross misconduct. The letter contained a paragraph headed "Your Obligations" which stated that the claimant would continue to be employed and would remain on garden leave and remain bound by his terms and conditions of employment. In particular he would not disclose any confidential information or undertake any other paid employment.

28. The claimant tells me that he understood that this instruction superseded the email that gave him notice. He understood from this that he was to remain an employee of the company until he was told something different. On his account this cancelled the unambiguous instruction that his contract was to end on 16 March (or 16 April). He was at this point employed until a new notice that his employment was going to end was issued to him.

29. The disciplinary meeting duly took place on 3 March. It opened with the manager saying *"Listen, obviously I looked carefully, considered everything*

through yesterday evening after our meeting yesterday, and I've got my findings here, which I am gonna read out to you now in brief. And then obviously we will send you a letter confirming the same".

30. The manager went on to explain that the decision was to end employment. The claimant was told that "*it's my duty to inform you that employment has been terminated with immediate effect without notice or payment in lieu of notice. But as I said this will be detailed to you".* That comment is repeated further on in the meeting. In response to the claimant asking if there anything else to discuss or is that *"pretty much the end",* the response is "*that's pretty much this is it. As I said, it would be detailed to you".*

31. I accept that the claimant understood there would be some written communication after this meeting. I also find, however, that the dismissal was not expressed to be conditional or subject to any further thoughts. I find that the claimant was clearly told at the time that employment was ended with immediate effect and he understood that was "*pretty much the end"* of it.

32. On the same day, 3 March at page 766 the claimant contacted the company asking for payment of his salary now the disciplinary hearing had been concluded. He is seeking payment of his salary until the end of February. He talks about having always acted in the company's interest at all times during his time working with them. This is in the past tense and I find it implies an acceptance and an understanding that his employment has ended. At page 773 there is a further exchange of emails also on 3 March about non-payment of salary. In that the claimant says *"no problem about summary dismissal*". I find that he understands that is what has happened to him.

33. On 7 March at page 780 the claimant informed the respondent that he had started proceedings to recover January's salary. In that email he also sets out that he is seeking monies owed up until 3 March 2023. This includes accrued but untaken holiday. I find that seeking that holiday pay and monies up to this date is consistent with the claimant at this point understanding that his employment had ended.

34. On 10 March 2023 the claimant emailed said he wants to appeal the decision of the disciplinary hearing. He does not dispute the dismissal has occurred. I find again this is consistent with the claimant understanding his employment had ended.

35. Thereafter the claimant continued to correspond with both the company and the respondent's solicitors requesting his unpaid wages, in particular in emails on 21 March, 28 March, 29 March and 21 April 2023. These emails ask for confirmation of his situation as regards employment status specifying the claimant believes his employment status has still not been clarified in writing. In the first of these emails the claimant refers to the fact that he had been advised that if his employment was terminated this would be confirmed in writing but he had received nothing. Again, I find that the claimant had understood his employment was terminated at the time and had been advised of that, but his view evolves and at this point he now believes that it requires a further step of written confirmation.

36. On 9 June he emails again asking for the matter to be resolved and at that point stated that as the respondent had been in breach of his contract he had no choice but to end the contract between them as of 16 June 2023.

37. From 21 March onwards the claimant's conduct suggests that while he was fully aware he had been told that his employment was terminated on 3 March, he came to believe that a further step was required. I find that that was not his original reaction to the termination of his employment but a subsequent thought.

Reasonably practicable

38. The claimant also made submissions on this point. He considers that justice requires his case to be heard .He strongly refutes the validity of the allegations made against him. He feels very passionately that he should have an opportunity to clear his name. He considers the allegations to be based on incorrect if not false evidence. He feels that he has been wronged by the findings of the company and finds the nature of the allegations particularly hurtful and distressing. They do not reflect the person he knows that he is.

39. He submitted that it is in the interests of justice in the circumstances and in the context of the particular nature of the allegations that the matter goes to a full hearing.

40. On the timing point, he explained that he had spoken to ACAS who believed there was ambiguity and that he needed something in writing from the company based on what his service agreement said. He also said, however, that in hindsight he should have acted straightaway.

41. Unfortunately, the claimant suffered some mental health difficulties following his dismissal and a bereavement which also had some impact on his ability to bring a claim. During this period, however, he was actively seeking work. He was also able to bring County Court proceedings.

42. I find that it was reasonably practicable for the claimant to have brought a claim before the employment tribunal from 3 March. He did not do so because he continued to chase the written confirmation of the decision rather than for any other reason or because of any inability to put a claim in earlier.

43. I find that this was not a claimant who had been misled on the time limit point. The claimant clearly understands the three months time point. He was aware that there was some uncertainty about the time limit point based on what ACAS had told him and I find it would have been practicable for him to have filed his claim on a precautionary basis. He did not do so.

Submissions

44. The respondent's primary case is that the contract was terminated on 3 March 2023 and that the language was clear and unambiguous at that time. Further, while that is not the relevant legal test, it was submitted that the claimant

clearly understood the position as evidenced by the language used at the time, his subsequent emails and his exercising the right of appeal.

45. The respondent's secondary submission was that if employment was not terminated on 3 March, there was still in place written notice of termination which ended on 16 March. Even if the additional month was conceded the claim for breach of contract is made out of time. Similarly, as no wages were paid after the contract was terminated, any series of deductions also ended on 16 March or at least at the date on which March salary would have been paid. Again this claim is out of time.

46. The claimant's submissions are in essence that he understood the letter from the director of 15 February to supersede the notice that he had been given. Thereafter he was waiting for clear and unambiguous confirmation of his employment position. While he does not dispute what was said at the disciplinary hearing, he understood that this was also to be confirmed in writing and this was never done. It follows that his understanding is that because his summary dismissal was not confirmed and his original notice was not running he remained employed pending anything in writing from the respondent. In the absence of that, his employment was ended when he accepted the respondent's repudiatory breach in not paying him.

47. It is the claimant's submission that his actions evidence that he did not understand that employment had ended and it was objectively reasonable for him not to understand that in the context in which he found himself. This is an industry in which matters are always put in writing, his contract requires written notice, the staff handbook requires written notice he was told it would come and he was reasonably entitled to expect that. He was reasonably entitled not to understand his employment had terminated on the basis of a conversation in a meeting alone.

Conclusion

48. Having considered the submissions and relevant law, and the findings of fact as I have set them out above I conclude as follows.

49. For both of the claims brought by the claimant the key point is what is the effective date of termination. I conclude that case law means that the acceptance theory of termination does not apply to a statutory claim. Whether the respondent acted in breach of its contract by not giving notice in an appropriate written form and/or whether the claimant did/did not accept that breach and the date he did so is not relevant. These are claims brought under the statutory regime. That means that the respondent can breach its contract with the employee, it can act outside its own noncontractual policies which may lead to a claimant's ability to seek compensation, but it does not affect the date on which the employment contract ends.

50. The contract ends whether that action is in breach of contractual terms or not when it's ending is communicated. This can be verbal and with no requirement for it to be in writing. It must, however, be clear but on an objective basis. I have to determine whether the words or conduct of the respondent would

reasonably leave an employee in no doubt that their employment had been terminated.

51. The claimant has explained that there was no ambiguity in his mind at the point notice was initially given. The ambiguity was raised by the letter of 15 February and by the failure to confirm his dismissal in writing. Considering matters in context, but on objective basis, I do not find that the letter of 15 February would properly be understood to indefinitely extend the employment relationship. I find that in the context of a disciplinary hearing it is telling the claimant that notwithstanding his potential dismissal for gross misconduct, it does not change the current position. The current position was the claimant was on garden leave working out the rest of his notice. I'm satisfied that it was reasonable to understand that the contract would end in any event on 15 March 2023 (or 16 April).

52. I also conclude, however that matters were overtaken by events and the claimant was summarily dismissed on 3 March 2023. The claimant relies on the fact that dismissal was not confirmed in writing. While I have found that he was led to expect some further written communication and it is indeed very surprising that no such communication was ever issued, nonetheless, I accept that the words at the disciplinary hearing were clear and unambiguous. On an objective basis an individual would have understood that he was dismissed with immediate effect. I also find that the claimant did in fact understand this to be the position initially as he understood he was summarily dismissed and his actions in the sums of money he was seeking support his understanding at the time was that it was all over.

53. On this basis I conclude that the effective date of termination was 3 March. It was reasonably practicable for the claimant to have submitted his claim within the three month time limit. This applies to both his breach of contract claim and his deductions from wages claim.

54. For all of these reasons the employment tribunal does not have jurisdiction to hear the claims brought and they are therefore dismissed.

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Employment Judge McLaren
Date:1 February 2024