NEW LAW JOURNAL

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Termination dates

Date: 19 November 2010
Authors: Sarah Crowther
Issue: Vol 160, Issue 7442
Categories: Features, Employment, Terms&conditions, Disciplinary&grievance procedures

Sarah Crowther reflects on the human dimension of effective determination dates

The Supreme Court has handed down its judgment in *Gisda Cyf v Barratt* [2010] UKSC 41, the latest instalment in the legal uncertainty which has surrounded determination of the effective date of termination (EDT) in employment cases. It has upheld the decision of the majority of the Court of Appeal, but does the final word leave the law sufficiently certain for practitioners, employers and employees?

Section 97(1)(b) of the Employment Rights Act 1996 provides that the EDT is, in a case of termination of employment without notice, the date on which termination takes effect. This somewhat elusive provision is hugely important in employment cases.

- Most obviously it determines the date on which time starts to run for limitation purposes in unfair dismissal claims and discrimination claims where the act complained of is dismissal or where dismissal is the last event in a course of conduct.
- It is relevant in determining which substantive law applies, such as in recent changes to the law regarding dispute resolution procedures and also the Equality Act 2010.
- In unfair dismissal claims the existence of the right to claim depends on the EDT as a claimant must establish sufficient continuous employment in order to qualify.
- In a small handful of claims there is additionally the right to seek so-called interim relief within seven days of the EDT. There is no discretion vested in the employment tribunal to extend the time-limit for this last remedy.

However, these are just the situations in which the parties have had need for recourse to the tribunals. In every termination of employment, the employer and the employee need to be clear about when their respective obligations arising out of the employment relationship come to an end.

- When can an employer cease paying an employee or providing other benefits?
- When is the employee free from his covenants restricting his ability to seek alternative employment or compete with his former employer?

Gisda Cyf v Barratt: the facts

Ms Barratt was employed by *Gisda Cyf*, a charitable organisation. Following allegations of gross misconduct relating to a private party at which the organisation's clients were present, she faced disciplinary charges. A disciplinary hearing on 28 November 2006 was held at the close of which Ms Barratt was informed that she should expect a letter informing her of the outcome on 30 November 2006. The decision to dismiss summarily was taken on 29 November 2006 and a letter informing Ms Barratt was sent by recorded delivery the same day, such that it arrived and was signed for by Ms Barratt's boyfriend's son on 30 November 2006 as promised.

In fact, by that time, Ms Barratt was no longer at her home address. She had left at 8am to travel to London to visit her sister who had recently had a baby. She left no instructions for the letter to be read or opened during her absence and did not ring over the weekend to enquire whether it had arrived.
She returned home late on Sunday of 3 December 2006 but did not ask about the letter until the next morning when it was located in amongst the boy's homework. It was therefore on Monday 4 December 2006 that Ms Barratt discovered that she had been dismissed for gross misconduct. Her internal appeal against that decision was dismissed on 19 December 2006.

The claim form was issued on 2 March 2007 alleging unfair dismissal and sex discrimination. Therefore, if the EDT was on or after 3 December 2006, the claim was in time. The employment judge granted an extension of time for the sex discrimination claim, but held that there was no factual basis for permitting an

extension of time for the claim for unfair dismissal when considering the more limited grounds in ERA 1996, s 111 .

The employment judge held that there was no reasonable opportunity in the circumstances for Ms Barratt to have been aware of the contents of the letter until 4 December 2006 and applying *Brown and McMaster* her claim was accordingly in time (see box opposite). Although the employer subsequently appealed that finding all the way to the Supreme Court, not a single judge was tempted by this point. According to Lord Kerr, delivering the judgment of the Supreme Court, what mattered was the "human dimension" of the "fairly unenviable" prospect faced by an employee whose employment stands to be terminated on grounds of gross misconduct and accordingly comparisons to commercial and shipping cases where receipt of a fax in normal office hours was taken to amount to it having been read, eg *The Brimnes* [1973] 1 WLR 386, were inappropriate.

Time to question *Brown & McMaster?*

But, were the cases of *Brown and McMaster* correctly decided? On a contractual analysis of the employment relationship, it was said by the employer that there should not be any scope for consideration of the subjective circumstances of the recipient of a communication of dismissal when fixing the date at which the dismissal is effective. It is highly desirable that it should not be difficult to work out what the EDT was in any given case (as per Browne-Wilkinson J in *Robert Cort & Son v Chapman* [1981] ICR 816 at 821 F-H).

In particular, the recent decision of the Court of Appeal in *Kirklees Metropolitan Council v Radecki* [2009] EWCA Civ 289, appeared to lend considerable support to the employer's position that a contractual approach was appropriate. In that case, during the course of negotiations to terminate a teacher's contract of employment, the local authority had stopped paying his salary. The employee contended that in fact communication of dismissal had not taken place until several months later. The Court of Appeal (Rix and Toulson LJJ, Rimer LJ dissenting) held that the stoppage of pay was an overt act inconsistent with continuation of the employment relationship sufficient to terminate it at that point.

The fact that the employee was unaware of the termination by conduct until some time later, did not affect the fact that the EDT was at the point at which payment ceased. At first blush, such reasoning is not consistent with the *Brown* or *McMaster* view that knowledge of the employee is necessary. However, even Lloyd LJ (who dissented in favour of the employer) concluded that factually the situation of dismissal by letter was distinguishable from the position in *Radecki.* If an employer chooses to communicate by a means other than direct contact, he runs the risk of that means of communication not operating as would normally be expected.

Discrepancies

Gisda Cyf then pointed to the discrepancy which exists between termination by an employee in acceptance of an employer's repudiatory breach (where a contractual approach to notice of termination is adopted, see for example *Potter v RJ Temple plc (in liquidation)* [2003] All ER (D) 327). However, Lord Kerr, giving the judgment of the Supreme Court, rejected this comparison, stating that the EDT is a statutory concept which does not require employers and employees to be "placed on an equal footing. Employees as a class are in a more vulnerable position than employers". Section 97 therefore stands to be interpreted against the background of a "charter" protecting employees' rights and not as an adjunct to the contract of employment.

The justices were quick to scotch the employer's suggestions that practical considerations militated in favour of certainty. It was felt that such investigations as the tribunal would need to undertake would not, "as a matter of generality", occupy a significantly greater time than that required to investigate the time of posting a letter and when it was delivered. Only time will tell whether this prediction holds good. However, it does little to resolve everyday practical problems such as when to stop paying the dismissed employee.

For the concerned employer, unhappy to rely on the vagaries of the post, there is cold comfort offered by the Supreme Court: he can apparently resort to the "prosaic expedient of informing the employee in a face-to-face interview that he or she has been dismissed".

A risky business

However, this approach is surely risky for an employer in terms of compliance with the ACAS Code of Practice (Disciplinary & Grievance Procedures (2009)) which requires considered reflection on decision-making and for information to be provided in writing to an employee, including the reasons for the dismissal, the date on which the contract ends and the right of appeal. As Lloyd LJ pointed out in the Court of Appeal: "It seems to me that it would be undesirable to discourage employers from taking time after such a hearing to reflect on the outcome and to formulate their reasons for dismissal" [para 72]. The only obvious alternative would be to inform the employee of the decision twice: once in person and then again in writing. Quite apart from the unnecessary anguish this would cause both employee and employer, to introduce the need for the information to be communicated twice can only create confusion and more scope for argument. It is difficult to see in this context what the "face-to-face" interview really adds to employee protection.

Despite the courts' insistence that time limits are strictly applied in employment tribunal cases and the exceptions only sparingly invoked, respondents and those representing them will view this decision as a further in-road into legal certainty, and more likely to generate than reduce dispute and the need for its resolution. While the human dimension has prevailed over legal certainty on this occasion, the question

remains whether it is at all satisfactory that a concept as fundamental as the EDT is not amenable to simple arithmetic calculation.

Sarah Crowther, barrister, 3 Hare Court.
E-mail: ***sarahcrowther@3harecourt.com***