

WATSON FARLEY & WILLIAMS

BRIEFING

EFFECTIVE DATE OF TERMINATION OF EMPLOYMENT MAY 2018

- WRONGFUL DISMISSAL AND BREACH OF CONTRACT
- NOTICE OF TERMINATION
- IMPLICATIONS FOR EMPLOYERS



There are a number of situations where it is important to establish the exact date when a contract of employment has come to an end. There have been several cases where this date has been an issue due to a dispute as to whether an employment tribunal claim had been filed in time that is within three months of the effective date of termination of employment. In the case of *Gisda Cyf v Barratt*, a dismissal letter was not deemed to have taken effect until the employee returned home and read the letter a few days after it arrived. She had not deliberately avoided opening or reading the letter and therefore her unfair dismissal claim was correctly presented within three months of her termination date.

“...THE DATE OF TERMINATION IS CRUCIAL TO THE EMPLOYEE ESTABLISHING THE RIGHT TO A CONTRACTUAL SUM.”

There are also cases where the date of termination is crucial to the employee establishing the right to a contractual sum. In *Société Générale v Geys* the date that the contract came to an end meant the difference between the departing employee receiving a termination payment of €7m rather than one of €12m. The bank's staff handbook contained a payment in lieu of notice (“PILON”) clause, which reserved the bank's right to terminate G's employment at any time with immediate effect by making a payment in lieu of notice or, if notice had already been given, the balance of his notice period. G was summarily dismissed on 29 November 2007, in breach of the terms of the contract. On 18 December 2007, the bank paid into his bank account the correct sums due to him under the PILON clause. On 2 January 2008, G's solicitors wrote to the bank saying that he had decided to affirm his contract and requested further details of the termination payment. On 4 January 2008, the bank wrote to G confirming that it had given notice to terminate his employment with

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immediate effect on 29 November 2007 and that his PILON had been paid into his bank account on 18 December 2007.

G brought claims for wrongful dismissal and breach of contract, asserting that his employment did not terminate until 6 January 2008 when he was deemed to have received the bank's letter of 4 January, meaning he was entitled to a termination payment of more than €12m. The bank's case was that the contract was terminated on 29 November 2007, meaning G was entitled to a termination payment of no more than €7m.

The Supreme Court held that, where an employer repudiates a contract of employment, the contract will end only when the employee elects to accept the repudiation. The contract does not come to an end immediately on repudiation. G's employment did not terminate until he received the bank's letter of 4 January 2008 confirming that it had exercised the PILON clause in the handbook, on 6 January 2008. He was therefore entitled to be paid the higher sum.

The latest case to look at this issue was *Newcastle upon Tyne NHS Foundation Trust v Haywood*. The Trust sent a letter to H terminating her employment by reason of redundancy with 12 weeks' notice on 20 April 2011. H was out of the country on holiday. The Trust sent the letter by recorded delivery. H's father-in-law collected the letter from the Post Office on 26 April and left it at her home the same day. H arrived back from holiday in the early hours of 27 April and did not read the letter until about 8.30am on 27 April.

The Court had to decide whether the notice of termination expired after H's 50th birthday on 20 July 2011, as she was then entitled to a significantly higher pension. The Trust had to have given notice of termination by 26 April for the lower pension to be payable.

The case reached the Supreme Court. The Trust argued that notice was given, and therefore notice only started to run when the letter was delivered i.e. when it would have arrived in the ordinary course of post. H argued that notice was not given until the letter came to her attention and she had had a reasonable opportunity to read it. On that basis, notice only started to run on 27 April and expired on 20 July, her 50th birthday. The Supreme Court, by a majority, agreed with H. In the absence of an express contractual term dealing with the situation, notice of termination is only effective when it comes to the employee's attention and they have had a reasonable opportunity to read it. As a result, H had still been employed on her 50th birthday and was entitled to an enhanced early retirement pension.

Implications for employers

Where an employer needs to ensure that employment will terminate by a particular date, it is obviously best to hand the letter containing the notice of termination to the employee personally.

If notice is posted it is always open to an employer to specify in the employment contract how notice must be given and when it takes effect. If H's contract had said that written notice will be deemed to be served 48 hours after it has been sent by first class post the Trust would have been able to terminate her contract before her 50th birthday and avoid triggering her entitlement to the higher pension. However, that will only work from a contractual viewpoint. It will not assist in cases like *Gysda Cyf*

“...TERMINATION IS ONLY EFFECTIVE ONCE THE EMPLOYEE HAS READ THE LETTER (UNLESS THEY HAVE DELIBERATELY AVOIDED DOING SO), REGARDLESS OF WHAT THE CONTRACT SAYS.”

where an employment tribunal has to decide the effective date of termination in order to work out if the employees has the two years' service needed to bring an unfair dismissal claim. In such cases termination is only effective once the employee has read the letter (unless they have deliberately avoided doing so), regardless of what the contract says.

FOR MORE INFORMATION

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