Case Number: 2300295.2017

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr L Sanderson	and	Apogee Corporation Limited

Held at Ashford on 9 March 2017

Representation	**Claimant:**	In Person
	Respondent:	Mr A Pierpoint, Company Secretary

Employment Judge Kurrein

JUDGMENT

The claimant's claim alleging unfair dismissal and public interest disclosure dismissal was presented in time and the Tribunal has jurisdiction to hear it.

REASONS

1 This matter was listed before me for an open preliminary hearing to determine whether the claimant's claim presented on 12 January 2017 had been presented in time.

2 I heard the submissions of the parties, and considered the documents to which I was referred. I make the following findings of fact.

3 The claimant started his employment on 19 April 2013.

4 The claimant's contract of employment contained the following express terms:-

4.1 At clause 12, a provision that stated explicitly that disciplinary and grievance procedures were not contractual.

4.2 At clause 15.3, terms relating to being placed on gardening leave

4.3 At clause 19.1, a provision providing that the claimant was entitled to 4 week's notice, save in cases of gross misconduct.

4.4 At clause 19.2, a PILON clause in the following terms,

> "The company reserves the right (at its absolute discretion) with immediate effect, on termination of your employment, to make a payment in lieu of notice equivalent to your salary and contractual benefits for the notice period."

5 In August 2015 the Claimant was subject to disciplinary proceedings which resulted in him being given a final written warning live for one year.

6 It is the Claimant's case that he raised issues concerning breach of the working time regulations in late July 2016.

7 The claimant was then invited to a disciplinary hearing concerning alleged breaches of his contract regarding timekeeping.

8 That hearing took place before Mr Pierpoint on 6 September 2016. He informed the claimant that he would consider his judgement overnight and inform the claimant of the outcome the following day.

9 On 7 September 2016 Mr Pierpoint telephoned the claimant to inform him that he was being dismissed. I received no evidence as to precisely what was said in that telephone call. In the course of his submissions to me, however, Mr Pierpoint told me that he had used words similar to those he used in a letter to the claimant dated 8 September 2016.

10 That letter set out in some detail Mr Pierpoint's reasons for coming to the conclusion that the claimant should be dismissed. He went on to say,

> "The circumstances of the termination of your employment do not justify summary dismissal without notice, and therefore you are entitled to receive the four weeks' notice of termination I gave to you yesterday afternoon. You are however not required to work out your notice period and you will receive monies in lieu. You will of course also receive …."

11 The Claimant told me that he did not receive those payments until 28 September 2016, and the relevant payslip was dated 30 September 2016.

12 In emails shortly after these events the Claimant acknowledged that he had been dismissed. He also appealed.

13 The Respondent's policy on appeals contains a clause in the following terms:-

> "No disciplinary action which is subject to appeal will be confirmed until after the outcome of the appeal is known."

14 The appeal was heard on 29 September 2016 and the Claimant was informed it had been unsuccessful in a letter dated 30 September 2016.

15 It was the Respondent's case that the Claimant was out of time because the Claimant's EDT was 8 September 2016 so that, taking account of early conciliation, it should have been presented no later than 8 January 2017.

16 It was the Claimant's case that his claim was presented in time because his EDT was four weeks after he was given notice on 7 September, that four weeks starting on the following day and expiring on 5 October 2016. In that circumstance he had until early February 2017 to present his case.

17 I was referred to the decisions in

Dixon v. Stenor Ltd [1973] IRLR 28a

Chapman v. Letheby & Christopher Ltd [1981] IRLR 440

by the Respondent.

18 I referred myself to the following decisions, which I concluded had overtaken those earlier cases:-

18.1 Société Générale v. Geys [2013] IRLR 122, for the proposition that an employer must make specific reference to a PILON clause if it wishes to exercise its right under it;

18.2 Delaney v. Staples [1992] IRLR 191, for the following extract from the speech of Lord Browne-Wilkinson,

> '"Without attempting to give an exhaustive list, the following are the principal categories:
>
> 1. An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period as a lump sum. In this case (commonly called 'garden leave') there is no breach of contract by the employer. The employment continues until the expiry of notice; the lump sum payment is simply advance payment of wages.
>
> 2. The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case, if the employer summarily dismisses the employee, he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is not a payment of wages in the ordinary sense, since it is not a payment for work to be done under the contract of employment.
>
> 3. At the end of the employment, the employer and the employee agree that the employment is terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages, since it is not remuneration for work done during continuance of the employment.
>
> 4. Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most common type of payment in lieu … The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended, no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense, since it is not payment for work done under the contract of employment."'

19 I concluded that the Respondent had not expressly relied on its contractual PILON position and had not informed the Claimant of that fact or intention.

20 I accepted the Claimant's submission that, in any event, the Respondent had not complied with the terms of that provision because it required "immediate" payment which had not been made.

21 I concluded the position was closer to that at point one in the above speech, albeit that the words "garden leave" were not used.

22 I concluded the Respondent did give the Claimant the four weeks notice to which he was contractually entitled. It did so both orally, on 7 September, and

confirmed it in writing the following day. It did not inform the Claimant that he was being dismissed without notice, "summarily" or "forthwith" or any similar form of words.

23 In my judgment the proper interpretation of the words used in this contractual setting was that the Claimant was being given notice that he was not required to work and would be paid in lieu of having to work for his pay.

24 To the extent there is any ambiguity in the words used by the Respondent I construe that ambiguity, as the Respondent accepted I should in favour of the Claimant.

25 I therefore find that the Claimant's EDT was 5 October 2016 and his claim was presented in time.

Employment Judge Kurrein

29 March 2017