THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms A Kilcooley	**(1) London Borough of Hammersmith and Fulham** **(2) The Governors of Woodland High School**

Heard at: London Central **On**: 22 March 2019

Before: Employment Judge H Clark

Representation:
Claimant: Mr A Line - Counsel
Respondent: Mr B Gil - Counsel

JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

The Respondents' application to strike out the Claimant's claim is refused.

Employment Judge Clark

Date: 27 March 2019

JUDGMENT SENT TO THE PARTIES ON

3 April 2019

FOR THE TRIBUNAL OFFICE

REASONS

1 Until her dismissal, the Claimant was a Lead Teacher for Computing and Key Stage 4 Enrichment at Woodlane High School in Shepherds Bush, West London. The School is a community special school and it is common ground that the Claimant was employed under the "Burgundy book" conditions of service for teachers in England and Wales. There is a dispute between the parties as to the correct date of her dismissal for both statutory and common law purposes. She has presented two Claim Forms in this Tribunal on 5 December 2017 (case number 2207986/2017) and 11 June 2018 (case number 2204955/2018) respectively. The claims carry different termination dates. In the first claim, it was asserted that the Claimant's employment ended on 4 August 2017 and in the second, an alternative date of 16 March 2018 was put forward. The first claim had been listed for a full merits' hearing from 25 – 27 June 2018, but, at the Claimant's request, this was vacated to enable her second claim to be joined to it.

2 Both Claim Forms include claims of unfair and wrongful dismissal. Further, the Claimant seeks to amend her second claim to include (or make explicit) a claim for a deduction of wages from 1 January 2018 to the second contended date of her dismissal, together with notice pay from 14/16 March 2018. The Respondents accepted that the Claimant was owed notice pay in relation to her dismissal in August 2017 and has paid it. The unfair dismissal claim is still to be determined. The Respondents suggest that the Claimant's second claim in its entirety has no reasonable prospects of success and should be struck out. That is the application for determination today.

3 For the purposes of this hearing I have been provided with written skeleton arguments from both Counsel, on which they expanded in oral submissions. The case throws up an interesting point arising from the respective powers of dismissal of school governing bodies and their local authority as provided for by statute and statutory instrument.

Factual Background

4. The reason for dismissal put forward by the Respondents is the Claimant's long-term sickness absence. The governing body of the school took a decision on 20 July 2017 that the Claimant should be dismissed and wrote to her on 4 August 2017 explaining this. The Claimant appears to have acted consistently with an understanding that she had been dismissed on 4 August 2017, in that she appealed against this decision on 13 September 2017.

Although she did not attend the appeal hearing on 2 November 2017, the appeal was held in her absence and she was notified of the outcome in writing by letter dated 7 November 2017.

5. The Claimant then presented an Employment Tribunal claim on 5 December 2017, asserting a termination date of 4 August 2017 and dismissal was admitted in the Response Form filed on behalf of both Respondents on 22 February 2018. They also agreed with the dates of employment set out by the Claimant in her first Claim Form (including a termination date of 4 August 2017). The Respondents assert that the Claimant ceased submitting sick notes after her 4 August 2017 dismissal, although Mr Line did not have instructions as to whether this was the case. He submitted that the need for evidence such as this, is a good reason why the issue should be determined at a full merits' hearing.

6. On 14 March 2018 the First Respondent wrote to the Claimant referring to the outcome of her appeal, which confirmed her dismissal in a letter dated 7 November 2017. The First Respondent's letter concluded, "*for the avoidance of any doubt, please note that your dismissal date was effective from 4 August 2017."* Mr Line points out in his submissions that, on any view, this date is wrong as the Claimant was not summarily dismissed. It was this letter which prompted the Claimant's second Employment Tribunal claim. The Respondents state that its effect is to ratify the decision of the governing body in August 2017, whereas the Claimant submits it was the lawful termination of her employment. It is common ground that there were no grounds for summary dismissal, so the Claimant suggests (further) notice pay and arrears of pay are outstanding.

7. In her first Claim Form, the Claimant expressly reserved her position as to the validity of her dismissal. In paragraphs 21 and 22 the Claimant asked the Tribunal to consider as a preliminary issue whether she had in fact been validly dismissed by the Respondents in light of the provisions of the School Staffing (England) Regulations 2009, Regulation 20. The latter provides that the Second Respondent governing body should have first given notice of the First Respondent local authority of its decision to terminate the Claimant's employment. The First Respondent should then (within 14 days of the Second Respondent's notification) have given the Claimant notice of termination. The Claimant did not receive the letter of dismissal from the First Respondent until 16 March 2018.

<u>The Law</u>

8. The Tribunal's power to strike out a claim is set out in rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 in circumstances which include "*where a claim is scandalous, vexatious or has no reasonable prospects of success*". If that threshold is passed, there remains a discretion as to whether to strike out a claim. Such discretion is subject to the overriding objective in the 2013 Rules to do justice between the parties.

9. For the Claimant's statutory claim for unfair dismissal, section 95(1) of the Employment Rights Act 1996 provides:

   "*For the purposes of this Part an employee is dismissed by his employer if […] the contract under which he is employed is terminated by the employer (whether with or without notice).*"

   The effective date of termination ("EDT") is determined pursuant to section 97(1)(a) of the 1996 Act as follows:

   "*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.*"

10. The case of *Geys v Societe Generale [2011] EWCA Civ 307* confirmed that the EDT under the 1996 Act and the termination date for contractual purposes are not necessarily the same.

11. The Respondents rely on the case of *Newman v Polytechnic of Wales Students [1995] IRLR 72* which concerned the correct date of dismissal for a Claimant employed by a Student Union for time-limit purposes. In that case the Claimant argued that a meeting of the executive committee of the student union which informed the Claimant of his summary dismissal on grounds of redundancy had not been properly convened in accordance with the Union rules. As a result, his dismissal did not take place until his receipt of a subsequent letter terminating his employment. The EAT held that the Claimant's employment had "effectively terminated" on the date when he was informed of the executive committee's decision to dismiss him, notwithstanding the fact that the meeting at which the decision had been taken was not properly convened. The EAT observed that the effective date of termination "*was essentially a matter of fact to be decided in a practical and common sense way by the Industrial Tribunal" (*paragraph 10). Both parties had understood the Claimant to have been dismissed. Even though the decision to dismiss was invalid as contrary to the Union rules, ratification operated retrospectively to validate the executive committee's actions.

12. The Claimant distinguishes *Newman* on the grounds that there is a statutory scheme relating to the employment of teachers, which makes express provision for the termination of the employment of school staff. Woodlane High School, as a community special school, is one which is wholly maintained by the local authority (the First Respondent). Section 35(2) of the Education Act 2002 provides:

"*Any teacher or other member of staff who is appointed to work under a contract of employment at a school to which this section applies is to be employed by the local authority."*

13. The School Staffing (England) Regulations 2009 were introduced under powers conferred by the Education Act 2002, Regulation 20 sets out the procedure for the dismissal of staff:

"*(1) subject to regulation 21, where the governing body determines that any person employed or engaged by the authority to work at the school should cease to work there, it must notify the authority in writing of its determination and the reasons for it.*

(2) If the person concerned is employed or engaged to work solely at the school (and does not resign), the authority must, before the end of the period of 14 days beginning with the date of the notification under paragraph I(1), either –

(a) Terminate the person's contract with the authority, giving such notice as is required under that contract; or
(b) terminate such contract without notice if the circumstances are such that it is entitled to do so by reason of the person's conduct."

14. The Regulations thus specify that a governing body which wants to dismiss a member of staff, such as the Claimant in this case, must notify the local authority and then the latter must, within 14 days' of the notice effect the termination of the employee's contract. The decision to dismiss is made by the governing body but that decision is put into effect and communicated by the local authority.

15. The Education (Modification of Enactments Relating to Employment) (England) Order 2003, Article 6 provides that an application to an Employment Tribunal must be made against the governing body of a community school but that any decision or remedy (apart from reinstatement or re-engagement) are effective against the local authority. The local authority is, therefore, entitled to be joined as a party to

Employment Tribunal proceedings. Articles 3 and 4 of the 2003 order provide that, for purposes of an unfair dismissal claim, the governing body is deemed to be the employer, even though the statutory employer is the local authority. There is no similar deeming provision in relation to a wrongful dismissal claim.

16. The effect of the statutory scheme for the employment and dismissal of school staff was explored in *Birmingham City Council and another v Emery [2013] UKEAT/0248/13/SM*. This held, in the context of a wrongful dismissal claim, that the Claimant's employment was not terminated by a decision of the governing body, but from the date that the local authority subsequently gave written notice in accordance with Regulation 20. At paragraph 12 the EAT observed that the local authority had no power to delegate its function in terminating employment to the governing body.

17. Paragraph 18 of *Emery*, however, lends some support to the Respondents' contentions in relation to the EDT for unfair dismissal purposes, in that it was observed that "*For the purposes of an unfair dismissal claim, there being none in fact, it is the decision of the governing body which would have to be scrutinised and not that of the local authority.*"

Submissions

18. The Respondents suggests that the Claimant's position displays a misunderstanding of the difference between the statutory concept of unfair dismissal and the construction of the EDT for those purposes and wrongful dismissal. In relation to the latter, a dismissal in breach of contract will entitle a Claimant to damages to put them in the position they would have been in if their contract had not been breached. Normally, this is limited to the net value of the salary during the notice period. The Claimant has received that, since a payment in lieu of notice was made to the Claimant in respect of her dismissal in August 2017. The Claimant admits that she has received this notice pay in paragraph 23 of the Particulars of her second claim. Further, it is an established principle that a party in breach (in this case the Respondent(s)) is assumed to have terminated the contract in the manner most favourable to itself (*Lavarack v Woods of Colchester Ltd [1967] 1 QB 278)*, ie. as soon as lawfully possible.

19. The suggestion that the employment relationship had carried on, notwithstanding the parties' mutual understanding that it had been terminated was unsustainable. Mr Gil suggested it was farcical to make a claim for unfair and wrongful dismissal and then subsequently argue that dismissal had not occurred. This is particularly so where the Claimant bears

the burden of proving dismissal, asserted a termination date of 4 August 2017 in her first claim and the Respondents both conceded dismissal on that date and made a payment in lieu of notice in satisfaction of the claim for wrongful dismissal. The Claimant was aware she had been wrongfully dismissed, accepted the Respondents' repudiatory breach and made a claim in relation to it, which has been satisfied. He illustrated the alleged absurdity of the Claimant's position by the use of an analogy. An employee with a contract specifying that they can only be dismissed by the Managing Director of their employer, but who is dismissed by the CEO (and does not subsequently present themselves for work), cannot, years later, make a claim to an Employment Tribunal arguing they remain employed and are owed years of salary.

20. Mr Line does not take issue with the Respondents' statement of the basic principles of determining the EDT for unfair dismissal purposes or the measure of damages for wrongful dismissal. He points out, however, that the Claimant expressly reserved her position in relation to the validity of her purported dismissal in August 2017 in her first Claim Form. She was not in any event attending work for health reasons. The Tribunal at the full merits hearing will need to make findings of fact as to what happened from August 2017 onwards and then determine the termination date for both unfair and wrongful dismissal purposes, bearing in mind that the two dates might be different. The Claimant has simply tried to protect her statutory rights in light of the Respondents' own apparent misunderstanding of the process. Any confusion in this case has arisen because the Respondents have not complied with their statutory obligations.

21. As to unfair dismissal, the right not to be unfairly dismissed arises in against a Claimant's "employer" pursuant to section 94 of the 1996 Act. The Second Respondent was not the Claimant's employer, the local authority was. The latter did not give notice until 2018, so it is arguable that 14 March 2018 is the EDT for statutory purposes.

22. There is a significant distinction between the facts of this case and those in *Newman* because there was no statutory procedure governing the dismissal process in the latter. In *Newman* there was only one employer – the Student Union – the question as to whether the Executive Committee was correctly constituted was a procedural one and did not raise doubts as to whether the Student Union had authority to terminate employment.

23. *Emery* quite clearly supports the Claimant's contention that the only valid dismissal at common law occurred on the 14 March 2018, when the First Respondent complied with its Regulation 20 duty.

Conclusions

24. The EDT for the purposes of the Claimant's unfair dismissal claim is largely academic, as it is not suggested that there were two operative dismissals and, therefore, potentially two unfair dismissal claims. The EDT might have a bearing on the calculation of compensation should the Claimant succeed with her claim and it is conceivable that procedural issues around the termination, whenever it was, might have a bearing on the fairness of the dismissal (procedurally, at least). *Newman* does support the Respondents' contention that the EDT for statutory purposes was 4 August 2017, given the EAT's view it must be determined in a, "*practical and common sense manner, having regard particularly to what the parties understood at the time of dismissal*." Whilst the Tribunal at the full merits hearing will be better placed to make findings about the parties' respective understandings of the position with the benefit of evidence concerning the provision of sick notes, the P45, the contents of any correspondence concerning the internal appeal and the like, it appears that the Claimant acted consistently with an understanding that she had been dismissed in August 2017. That would also be the practical and common-sense interpretation of a letter from the Governors of the school at which a teacher is employed which purports to terminate employment.

25. In the absence of evidence concerning the parties' respective understandings of the validity of a dismissal by the governors in August 2017 and in light of the Claimant's express reservation of her position in the first Claim Form, however, I am unable to conclude that her contention that the correct EDT for statutory purposes was 14 March 2018 has no reasonable prospects of success. It seems to me it has little reasonable prospects of success in light of *Newman*, such as might justify a deposit order being made. However, that was not something which was canvassed with the parties and the Tribunal has no evidence as to the Claimant's ability to pay such an order or in what amount. Even where the conditions for a deposit order are satisfied, the Tribunal retains a discretion whether or not to make such an order. Since the costs of the Tribunal hearing relating to the unfair dismissal claim will be materially unaffected by the EDT, that may well be why no such application was made in the alternative.

26. As to the wrongful dismissal claim, the identification of the termination date is potentially much more significant in financial terms for both parties. Whilst a termination date of March 2018 would be an anomalous outcome and, taken to the extreme (as in Mr Gil's example), it produces an absurdity, *Emery* does lend support to the Claimant's contention. Mitting J described the situation in *Emery* at paragraph 4 as follows:

"*it is the governing body which determines if a teacher employed by the local*

authority should cease to work at the school, and if he is employed to work solely at the school and does not resign the local authority must, within 14 days of receipt of written notice from the governing body, either terminate the teacher's contract of employment on due notice or dismiss summarily if entitled to do so. This is a simple scheme. The governing body decides whom to appoint and dismiss. The local authority must give effect to the governing body's decision in both respects, but it is the local authority which is throughout the employer."

27. Where the Respondents' analysis of the contractual position is potentially flawed is that it has focused on the implications of the Claimant's having been dismissed in breach of contract in August 2017, for which they have rightly concluded she has received the correct compensation for that breach (assuming it was accepted). If the governors were not acting as agents for the local authority in August 2017 there was no breach by the local authority capable of acceptance by the Claimant, because, arguably, the local authority had not taken any steps to terminate the Claimant's contract (with or without notice). They did not do so until March 2018. History does not relate when or how the Second Respondent notified the First Respondent of their decision to dispense with the Claimant's services in August 2017. *Emery* makes clear at paragraph 12 that section 101 of the Local Government Act 1972, "*does not confer power on a local authority to delegate the exercise of any of their functions to third parties, and I have not been referred to any statutory authority for the delegation of the function of dismissing an employee of a local authority to a third party body such as the governors of a community school."* Whether the local authority could retrospectively ratify the governors' decision is by no means clear.

28. *Emery* acknowledged at paragraph 18, that the conclusion in the case produced an anomalous outcome, "*for the purpose of an unfair dismissal claim it is the governing body which is deemed to be the employer and to have dismissed the Claimant. At common law, it is not the governing body which is the employer. I accept that there is an anomaly. It is an anomaly, however, which is created by express words of primary and secondary legislation. It does not produce an unworkable scheme, even though the scheme is an anomalous."*

29. Mitting J observed at the end of his judgment in *Emery*: "*although I do not exclude the possibility that future facts will reveal an awkward anomaly there is none in this case. The anomaly, if it arises, arises from conflicting statutory schemes which it is for Parliament to reconcile not this Tribunal. This Tribunal must attempt, and in so far as it can, succeed, in loyally applying Parliament's decisions. I believe that in the outcome of this case I have loyally applied Parliament's decision and arrived at a conclusion which fits as comfortably*

as can be within the difficult statutory schemes."

30. The facts of this case may well give rise to the awkward anomaly contemplated by Mitting J, assuming it is the case that all parties understood the Claimant's employment to have been terminated in August 2017. How the Tribunal will ultimately resolve the question of the correct termination date at common law is unclear, but it is arguable that the Claimant's contract was not terminated until 14 March 2018 when the notice required by Regulation 20 was served, however unattractive that conclusion might be. It is a potential consequence of the statutory arrangements for the division of responsibilities between local authorities and governing bodies. The doctrine of judicial deference requires due weight to be given to these arrangements. As such, I am not satisfied that the Claimant's Second Claim has no reasonable prospects of success in relation her wrongful dismissal claim. The conditions for a strike out are, therefore, not met.

31. The Claimant's claim for unpaid wages from 1 January 2018 to 14 March 2018 logically follows from her contention that she was not dismissed in August 2017. The claim itself is foreshadowed in the second Claim Form in that at section 8 of the Form, the Claimant ticked the box indicating that she was owed notice pay and stated that she was making another type of claim, namely, for breach of contract. She did not tick the box indicating that she was owed arrears of pay. However, the factual basis for her claim is pleaded in the Particulars of Claim attached the second Claim Form. Mr Gil accepts there is no material prejudice to the Respondents in granting the application to amend. In these circumstances, the balance of prejudice is in favour of granting leave to amend to reflect the Claimant's potential claim for unpaid wages from 1 January 2018 to 14 March 2018 either as a breach of contract or unlawful deductions claim. The consequential directions are set out in the accompanying order.

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