IN THE INDUSTRIAL TRIBUNAL

Case No. 16 of 2013

KAINE BOSANO

Complainant

-and-

GIBRALTAR DEFENCE ESTATES and GENERAL SERVICES LIMITED

Respondent

Kaine Bosano - representing himself

Ms Danielle Victor for the Respondent

JUDGEMENT

The Complainant on the 22nd day of August 2013 filed an originating application in the Industrial Tribunal complaining of "Constructive Dismissal Bullying and Breach of Contract. Unfair dismissal". The Respondent in a Notice of Appearance dated the 20th day of September 2013 contested the Complainants' ability to claim unfair dismissal on the grounds that he was employed for less than the statutory fifty two weeks required and, in any event, denied that the Complainant had been bullied, instead asserting that the Complainant had been dismissed because "he was found to be incapable of performing his duties to an adequate standard."

At this stage of the proceedings we are merely concerned with the preliminary point of whether the Complainant is entitled to have his claim for constructive dismissal and breach of contract heard by this Tribunal; the complaint relating to bullying is not caught by the preliminary point raised. It is the contention of the Respondent that the Complainant was not employed with the Respondent for the required fifty-two week statutory period prescribed by section 60 (1) of the Employment Act ("the Act") and that therefore the tribunal does not have jurisdiction to hear said complaints. The Complainant, on the other hand, avers not only that the Respondent twisted events so as to ensure that he was denied his statutory rights, but also that in any event he did complete the afore-mentioned fifty-two weeks prescribed cut off requirement.

The only person who gave evidence in the course of the hearing of the preliminary point on the 11th February 2015 was the Complainant. The Complainants' evidence was not contested in any way by Ms Victor and therefore the factual background, insofar as the preliminary point is concerned, is not contested.

Background

The Complainant on the 8th June 2012 entered into an employment contract with the Respondent. The Complainant was employed for a three year period as from the 8th June 2012 as a junior clerk of works. For the purposes of the preliminary point presently being considered, the important provision in the contract signed by both parties is Clause 14 which provides as follows:-

"14 Termination of Employment

14.1 Subject to clause 3 of this agreement, the employment of the Employee may be terminated:-

(a) by either party on giving to the other party not less than one month's notice in writing provided that the Company may pay 1 months salary in lieu of such notice;

(b) by the company without notice or payment instead of notice in the event of serious or persistent misconduct or unpunctuality, neglect of duty or breach by the Employee of any of the General Principles of Conduct, any rules or regulations made by the Corporation and the provisions contained in clause 14.1 of this agreement are without prejudice to this right.

14.2 The period of notice shall commence from the working day following the day on which notice is given."

I would also at this stage refer to Clause 4 of the said contract which provides as follows:-

"4 Remuneration

The Company shall pay the Employee by direct credit transfer in to the employee's Bank Account monthly in arrears three working days before the end of each calendar month, the annual sum specified in part 3 of the First Schedule"

Once the Complainant commenced his employment with the Respondent, the Complainants' world was turned upside down since his daughter was diagnosed with a brain tumour in rather unfortunate circumstances to say the least. As a result, the Complainants' wife and daughter had to go to the UK so that medical treatment could be given to the child; the child having to undergo two intrusive brain operations. Not unnaturally the Complainant was deeply affected by the circumstances surrounding his daughters case and it affected his mental and physical state as well as his work. For the purposes of this preliminary point there is no need for me to delve deeper into what transpired during this period. On the 14th May 2013, the Complainant had a meeting with his superior Mr. Gil. At this meeting Mr. Gil informed the Complainant that he was being dismissed, and indeed on the 16th May 2013, the Complainant was handed a letter dated the same day which, in the operative paragraph, stated as follows:-

" As explained to you during this meeting, your consistently poor performance has left the company with no option but to terminate your employment. This termination of employment will be effective at the end of May 2013 at which time, in addition to your salary for May 2013, the Company will pay you 1 months salary in lieu of notice, in accordance with paragraph 14(1) of your contract of employment."

I stop to note that the language used in this paragraph clearly suggests that the 1 months salary in lieu of notice was to be paid at the end of May 2013.

The Complainant, in accordance with the terms of his contract, was paid the sum of £1,687.23 on the 24th May 2013. The Complainant continued to attend work until the 31st May 2013 and thereafter did not attend work again. The Complainant on the 21st June 2013 was paid the sum of £1,268.26, and on the 28th June 2013 was paid the further sum of £632.17; said two sums equating to the one months salary in lieu of notice and being made in accordance with the provisions of the afore-mentioned Clause 4.

As previously stated the Complainants evidence with respect to the preliminary point issues went unchallenged and therefore I accept his version of events as being accurate for the purposes of this preliminary point.

Turning then to the arguments put before me by each party.

The Issue

It is the Respondents' case that the Complainant was not continuously employed by the Respondent for a period of 52 weeks or more and that consequently pursuant to the provisions of section 60(1) (a) of the Act the Complainant is not entitled to bring, and the Tribunal to hear, the claims for unfair dismissal and/or breach of contract before the Tribunal.

To this the Complainant counters that under the provisions of his employment contract he was entitled to one months notice of termination of employment and, consequently, said months notice commenced either on the 14th or 16th May (the date on which he was informed of his termination) and, in either case, this took him over the 52 week requirement of employment. To this, the Respondent submits that the one month salary payment made in lieu of notice, permitted under the provisions of the employment contract, allowed the Respondent to advance the Complainants termination date and therefore to terminate the Complainants' employment on the 31st May 2013, and that consequently the provisions of section 60(1)(a) of the Act kicked in. To this so called Payment In Lieu of Notice ("PILON") argument, the Complainant counters by stating that in order to rely on it, the Respondent must pay all monies due with respect to said month payment in lieu of notice on or by the date he terminated his employment (i.e. the 31st May) and as he was not paid until the 21/28 June 2013 the Respondent cannot shelter behind the PILON argument in order to breach his statutory rights. In effect the Complainant contends that although the employment relationship was dead for all practical purposes from the 31st May 2013, and the Complainant contributed nothing to the Respondents' fortunes after that date, technically his employment contract limped on as a formal shell until the 21st June 2013 at the earliest.

In essence, those are the arguments of both parties as I have understood them to be. I therefore turn to the law.

The Law

The starting point in the consideration of the issues raised is section 60(1) of the Act which provides as follows:-

"60.(1)Subject to the provisions of subsections (2) to (4) and of section 62, section 59 shall not apply to the dismissal of an employee from any employment if the employee:-

(a) was not continuously employed for a period of not less that 52 weeks ending with the effective date of termination; or

(b) on or before the effective date of termination attained the age which, in the undertaking in which he was employed, was the normal retiring age of sixty-five, or, if a woman, attained the age of sixty."

The first point that arises on reading section 60(1)(a) for the purposes of the preliminary point before me is..... "What is the effective date of termination of the Complainants employment?" The Complainant, would argue that it is as early as the 21st June and as late as the 28th June whilst the Respondent firmly contends that it was the 31st May.

If the "effective date of termination" is the 31st May 2013, then quite clearly I have to dismiss the complaints of unfair dismissal and breach of contract since the Complainant would not have completed the required 52 weeks of employment and therefore this tribunal would not have the necessary jurisdiction to hear the complaints. The Complainant accepts this to be the case whilst contending that the effective date is not the 31st May.

It is trite employment law that the general rule is that an employment contract terminates when the notice expires and not when it is given; said notice can be either oral or written. Pursuant to the Complainants' contract, he was entitled to one months notice of termination. However, the law further provides that an employer can contractually provide for a payment in lieu of notice as an alternative to the employee working out the notice period so that the effective date of termination becomes not the date on which a notice expires but rather the date notified by the employer to the employee as being the termination date. Under the terms of the Complainants contract the Respondent was entitled to "pay 1 months' salary in lieu of such notice". The Complainant at the time of signing his employment contract freely accepted the PILON clause and therefore accepted the Respondents' right to exercise such a clause. The Respondent, in my opinion, in its letter of the 16th May 2013 clearly and unambiguously informed the Complainant not only that it was exercising its contractual right to pay one months salary in lieu of notice, but also that the effective date of termination was the end of May (i.e. the 31st May 2013); indeed the Complainant recognised that the 31st May was the effective date of termination since he did not attend his work place after that date thereby accepting the repudiation of the contract.

Does the fact that the Respondent paid the notice in lieu of salary sum well after the 31st May 2013 either invalidate the Respondents' attempt to bring forward the effective date of termination to the 31st May and/or postpone the effective date of payment was actually effected? This is the issue which has given me the most to think about. In my opinion it does not since I have come to the conclusion that immediately on the Respondent having validly exercised this PILON clause the action crystallised and became one of debt with all the consequences for both employer and employee which such a state of play has (See Cavenagh v William Evans Limited (2012) IRLR 679). This being the case, the Complainant was as from the 31st May 2013 entitled to sue the Respondent for the monies owed to him (i.e. the sum equivalent to the one months salary in lieu of notice) plus interest together with any legal cost and expenses incurred but such a fact did not affect his then employment status. The Respondent was obliged to pay all monies owed to the Complainant on the 31st May 2013, but the fact that it did not pay on or by said date does not mean that the PILON clause became inoperable and/or invalid and/or that the effective date of termination was somehow suspended until payment was made. In coming to such a conclusion I have taken into account the case of Geyes v Société Générale, London Branch (2013 IRLR 122) and more particularly the judgement of Lady Hale, but in my view said case, which essentially held that a PILON clause is only effective if communicated to the employee, is easily distinguished from the facts of this case and, in any event, did not hold that a PILON clause only becomes effective upon payment being made by the employer.

In the circumstances of all of the above, and for the reasons given, I hold that the Complainant was not employed by the Respondent for the 52 week period prescribed by section 60 (1) (a) of the Act and consequently I hereby dismiss the complaints of constructive dismissal and breach of contract brought by the Complainant.

Dated this 15th day of April 2015.

Joseph Nuñez
Chairman