

**EXTRA DIVISION, INNER HOUSE, COURT OF
SESSION**

[2205CSIH56]

XA116/04

OPINION OF THE COURT

delivered by **LORD REED**

in

APPEAL

Lord Hamilton

under section 37 of the Employment Tribunals
Act 1996

Lord Macfadyen

by

Lord Reed

PACITTI JONES

Appellants:

against

CLAIRE O'BRIEN

Respondent:

Act: Napier, Q.C.; Harper Macleod

Alt: Murdoch, Solicitor-Advocate; Henderson Boyd Jackson, W.S.

12 July 2005

Introduction

[1]This appeal raises a short but not unimportant point concerning the computation of time in connection with employment rights.

[2]On 8 April 2002 the respondent commenced employment with the appellants. On 27 March 2003 a letter terminating her employment was delivered to her home. Another copy of the letter was posted to her on the same date. The letter, which was dated 27 March 2003, stated:

" ... we are now terminating your employment with one week's notice from today".

The respondent was away from home on 27 March 2003, and did not receive the letter until 31 March 2003.

[3]The respondent then made an application to an employment tribunal, claiming that she had been unfairly dismissed. In response, the appellants maintained, as a preliminary point, that the respondent did not have the necessary qualifying period of employment to proceed with a claim for unfair dismissal. That argument was upheld by the employment tribunal. They held that the period of notice commenced on 28 March 2003 and

expired on 3 April 2003, on which date the respondent had not been continuously employed by the appellants for a period of one year, as required by section 108(1) of the Employment Rights Act 1996 as amended ("the 1996 Act"). On appeal, the Employment Appeal Tribunal held that the period of notice commenced on 1 April 2003 and expired on 7 April 2003, and that the claim for unfair dismissal was therefore admissible.

[4]In the present appeal, it is accepted by both parties that the period of notice expired on 7 April 2003. The appellants have however argued, for the first time, that the respondent had not on that date been continuously employed for a period of one year: they maintain that the period of one year from 8 April 2002 ended on 8 April 2003.

The statutory provisions

[5]Section 94 of the 1996 Act confers on an employee the right not to be unfairly dismissed by his employer. Section 108(1) provides:

"108.-(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination."

The expression "effective date of termination" is defined by section 97: it is agreed in the present case that that date was 7 April 2003. Section 211(1) provides:

"211.-(1) An employee's period of continuous employment for the purpose of any provision of this Act -
(a)(subject to subsections (2) and (3)) begins with the day on which the
employee starts work".

As we have explained, it is agreed in the present case that the respondent started work on 8 April 2002. The only other provision which need be noted is section 210(2):

"210.-(2) In any provision of this Act which refers to a period of continuous employment expressed in months or years -
(a)a month means a calendar month, and
(b)a year means a year of twelve calendar months".

The submissions

[6]On behalf of the appellants, it was submitted that a calendar month generally ran from a date in one month to the corresponding date in the succeeding month: for example, from 8 April to 8 May. The position was different only if the months were not of the same length: for example, the calendar month starting on 31 January ended on 28 February. Reference was made in that connection to *Dodds v. Walker* [1981] 1 WLR 1027, where the concept of a calendar month was discussed by Lord Diplock and by Lord Russell of Killowen. It followed that the period of twelve calendar months commencing on 8 April 2002 did not end until 8 April 2003, by which date the respondent was no longer employed by the appellants. It was acknowledged that a different view had been taken by the Employment Appeal Tribunal in *West v. Kneels Ltd.* [1987] ICR 146, but it was observed that there had been no argument before the tribunal in that case based upon *Dodds v. Walker* or upon the statutory definition of a year as twelve calendar months. Reference was also made to the decision of the Employment Appeal Tribunal in *Pruden v. Cunard Ellerman Ltd.* [1993] IRLR 317, and to the discussion of the term "month" in the *Stair Memorial Encyclopaedia of the Laws of Scotland*, volume 22, paragraph 813, each of which, it was submitted, supported the appellants' contention.

[7]On behalf of the respondent, it was submitted that the approach advocated on behalf of the appellants disregarded the requirement, imposed by section 211(1)(a), to include the first day of employment in the computation of time. The period from 8 April 2002 to 8 April 2003, if both those days were included in the computation, was not a year, but a year and a day. The year which started on 8 April 2002 ended on 7 April 2003. *Dodds v. Walker* did not lay down a rule which was applicable in all circumstances. Section 211(1)(a) required a different approach. The respondent's approach also reflected common understanding: if a person commenced employment on 1 January, then he would ordinarily be regarded on 31 December as having been in employment for a period of a year.

Discussion

[8]The method by which time should be computed varies from one context to another. In order to determine the appropriate method in any particular circumstances, it is necessary to consider the terms of the relevant provision (whether of a statute, or of some other document such as a contract or will), in the context in which it has to be applied.

[9]In the present case, the question to be resolved is whether section 94 applies to the respondent's dismissal. Under section 108(1), that question turns on whether the respondent was continuously employed for a period of not less than one year "ending with the effective date of termination", i.e. 7 April 2003. It is clear from section 211(1)(a) that the relevant period "begins with the day on which the employee starts work", i.e. 8 April 2002. The issue is therefore whether the period beginning with 8 April 2002 and ending with 7 April 2003 is a period of less than one year, each of those dates being included in the period under consideration.

[10]As a matter of ordinary language and common understanding, the answer to that question is in the negative. An affirmative answer would, indeed, have surprising implications. If the period of one year beginning with 8 April in one year did not end until 8 April in the succeeding year, a year would comprise 366 days (or 367, in a leap year), rather than 365 (or 366, as the case may be). Equally the period commencing on 1 January and ending on 31 December would not be a year, but one day short of a year. As a matter of common sense, the view adopted in *West v. Kneels Ltd.* - that an employee whose employment commenced on 23 July 1984 had on 22 July 1985 been employed for one year - would appear to be correct. It is therefore necessary to consider with care the contention that a different result flows from the statutory definition of a year, for the purposes of the 1996 Act, as twelve calendar months.

[11]The calendar divides the year into twelve months. Each of those months can be described as a calendar month; but the expression can also be used to refer to a period of time which begins in one month and ends in the succeeding month, and may be from 28 to 31 days in duration, depending on the length of the months in question.

[12]The expression was used in the latter sense in the landlord and tenant legislation considered by the House of Lords in *Dodds v. Walker*. The relevant provision entitled a tenant, whose tenancy had been terminated by notice given to him by his landlord, to apply to the court for a new tenancy, provided the application was made not more than "four months after the giving of the landlord's notice". In construing that provision, Lord Diplock said (at page 1029):

"My Lords, reference to a 'month' in a statute is to be understood as a calendar month. The Interpretation Act 1889 says so. It is also clear under a rule that has been consistently applied by the courts since *Lester v Garland* (1808) 15 Ves. Jun. 248, that in calculating the period that has elapsed after the occurrence of the specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. It is equally well established, and is not disputed by counsel for the tenant, that when the relevant period is a month or specified number of months after the giving of a notice, the general rule is that the period ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given."

The corresponding date rule is simple. It is easy of application. Except in a small minority of cases, of which the instant case is not an example, all that the calculator has to do is to mark in his diary the corresponding date in the appropriate subsequent month. Because the number of days in five months of the year is less than in the seven others the inevitable consequence of the corresponding date rule is that one month's notice given in a 30 day month is one day shorter than one month's notice given in a 31 day month and is three days shorter if it is given in February. Corresponding variations in the length of notice reckoned in days occur where the required notice is a plurality of months.

This simple general rule which Cockburn C.J. in *Freeman v. Read* (1863) 4 B. & S. 174, 184 described as being 'in accordance with common usage ... and with the sense of mankind,' works perfectly well without need for any modification so long as there is in the month in which the notice expires a day which bears the same number as the day of the month on which the notice was given. Such was the instant case and such will be every other case except for notices given on the 31st of a 31 day month and expiring on a 30 day month or in February, and notices expiring in February and given on the 30th or the 29th (except in leap year) of any other month of the year. In these exceptional cases, the modification of the corresponding date rule that is called for is also well established: the period given by the notice ends upon the last day of the month in which the notice expires."

[13]What Lord Diplock described as the corresponding date rule applies, in his Lordship's words, "when the relevant period is a month or specified number of months after the giving of a notice". The rule has the effect of excluding from the computation the day on which the notice was given: if, for example, notice is given by the landlord on 8 July, and the application has to be made by the tenant on or before 8 August, then the tenant has 31 days (leaving 8 July out of account). As Lord Diplock observed, that is consistent with the general rule, long established in Scots as well as English law, that in calculating the period that has elapsed after the occurrence of a specified event such as the giving of a notice, the day on which the event occurs is excluded from the reckoning. That is not, however, an invariable rule. In the present context, in particular, section 211(1)(a) makes it clear that the day on which the employee starts work is to be included in the reckoning. On that basis, the period from 8 July to 8 August (taking 8 July into account) is 32 days: a period which does not correspond to any month known to the calendar.

[14]The dependence of the decision in *Dodds v. Walker* upon the exclusion of the *terminus a quo* is equally apparent from the speech of Lord Russell of Killowen (at page 1030):

"My Lords, it is common ground that in this case the period of four months did not begin to run until the end of the date of the relevant service on September 30 - i.e. at midnight September 30/October 1. It is common ground that ordinarily the calculation of a period of a calendar month or calendar months ends upon what has been conveniently referred to as the corresponding date. For example in a four month period, when service of the relevant notice was on September 28, time would begin to run at midnight September 28/29 and would end at midnight January 28/29, a period embracing four calendar months."

This approach cannot be applied if, by statute, the court is required to count the date on which the relevant event occurred (in the present case, the employee starting work) as part of the relevant period.

[15]This point was recognised by the Employment Appeal Tribunal in *Pruden v. Cunard Ellerman Ltd*. The case concerned a statutory requirement that a complaint of unfair dismissal must be presented "before the end of the period of three months beginning with the effective date of termination". In a judgment delivered by Wood J., the tribunal held that the three months expired on the date, three months later, corresponding to the day before the effective date of termination: for example, if the effective date of termination was 8 April, then the three month period would expire on 7 July. Wood J. declined to apply the dictum of Lord Diplock in *Dodds v. Walker*, on the ground that that dictum concerned a situation where the date of the event in question was excluded from the calculation of the period which had elapsed, whereas in the case before the tribunal that date was included in the reckoning. In the present case, equally, we consider that Lord Diplock's dictum is inapplicable.

Conclusion

[16]For the foregoing reasons, we consider that the period of twelve calendar months, which began with 8 April 2002, ended with 7 April 2003. When the appellant's employment was effectively terminated on that date, she had therefore been continuously employed for a period of not less than one year. Section 94 therefore applied to her dismissal.

[17]We shall therefore refuse the appeal and remit the case to the Employment Tribunal to proceed as accords.