Geys - it's not cricket!

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The Rules of Cricket are famously complex. As a child, my family had a humorous tea-towel – 'The *Rules of Cricket Explained to a Foreigner'* – which included the following line:

'*Each man that's in the side that's in goes out, and when he's out he comes in and the next man goes in until he's out. When they are all out, the side that's out comes in and the side that's been in goes out and tries to get those coming in, out. Sometimes you get men still in and not out… there are two men called umpires who stay out all the time and they decide when the men who are in are out….'*

Deciding whether and when someone's employment has terminated should be simple, by comparison. But it's not. Even the 'umpires' (employment lawyers and judges) can't always agree when someone's *'in'* and when they're *'out.'*

The difficulties were recently highlighted by the Supreme Court's decision in *Société Générale, London Branch v Geys*. Mr Geys' contract with SocGen had a three-month notice period. SocGen also had a contractual right to *'terminate your employment at any time with immediate effect by making a payment to you in lieu of notice.'*

On 29 November 2007 SocGen met with Mr Geys and handed him a letter notifying him that they had ' *decided to terminate your employment with immediate effect'* – he was then escorted from the building and did not return. On 7 December 2007, Mr Geys' lawyers wrote to SocGen reserving his rights; on 18 December 2007, SocGen paid the equivalent of three months' basic salary and flexible benefits into his bank account (although Mr Geys did not immediately become aware of the payment); and then, on 4 January 2008 the Bank wrote to Mr G stating that his employment had terminated *'with immediate effect on 29 November 2007 (your Termination Date)'_and that_'your notice payment was credited to your bank account on 18 December and your final salary slip and P45 was sent to your home address'.* Mr Geys was deemed to have received this letter on 6 January 2008.

The actual date of termination of Mr Geys' contract of employment was crucial in determining the value of a contractual termination payment – the value increased significantly if his employment continued beyond 31 December 2007 – thus the litigation. SocGen argued that Mr Geys' employment terminated on 29 November, or 18 December at the latest; Mr Geys argued that it ended on 6 January.

The Supreme Court agreed with Mr Geys. SocGen only validly exercised its contractual right to terminate, on 6 January 2008 – when Mr Geys was deemed to have received the letter of 4 January 2008 – and that was his termination date for the purposes of valuing his contractual entitlements to the disputed, contractual termination payment.

The logic for the Supreme Court's decision is as follows: the employee has contractual rights that determine how and when the employment contract may terminate; the employee will have a notice period (say, three months); and often the employer will have a right to terminate the contract immediately and to pay the employee instead of ('in lieu of') continuing to employ the employee for that notice period (a 'PILON' clause). If the employer terminates the employment in breach of that contract – be it, by incorrectly giving the employee less than the stated notice period and / or by failing to correctly exercise its right under a PILON (if there is one) – the employee may elect to either: accept the breach (and sue for damages – if any); or affirm the contract, holding the employer to its terms and thus prolonging the contract (the emphasis here is important) until it is validly terminated. Thus, a purported termination that is in breach of contract will not be automatically effective.

So far, so good – why should the employer automatically benefit from failing to do what they have contractually agreed they should do? As you would expect, the same principle works both ways – the employee can't just walk away, without giving the employer proper notice.

But, why my emphasis on the contract?

One of the first things an employment lawyer will explain to a client, is that there are contractual rights (to salary, notice etc) and there are statutory rights (crucially, the right not to be unfairly dismissed). And this is where the confusion arises.

Let's say the employer has told the employee that he or she is dismissed with immediate effect, but has failed to comply with the employer's contractual notice obligations (as happened to Mr Geys). According to the Supreme Court, contractually speaking the employee is 'still in and not out' – and remains entitled to whatever benefits the contract provides, until he or she is 'out'. But what of the employee's statutory rights?

1) Qualifying service

The employee has a statutory right not to be unfairly dismissed but (save in limited circumstances) that right does not apply unless the employee has been continuously employed for a period of not less than two years (or one year, if the employment commenced before 6 April 2012). This is known as 'qualifying service'.

To establish whether the employee has qualifying service, you need to know the 'effective date of termination' (' EDT'). This is defined by statute (the Employment Rights Act, s.97(1) & (2)) and in most circumstances, it's straight-forward:

(A) if the contract of employment is terminated on notice, the EDT is the date on which that notice expires; or

(B) if the contract of employment is terminated without notice, the EDT is the date on which the termination takes effect; save that

© if the employee has received less than statutory notice you are deemed to have been dismissed on the date on which statutory notice would have expired.

But, imagine a scenario where: the employee has been employed for 23 months (or 11, if the employment commenced before 6 April 2012); the employee has a three month contractual notice period; and the employer purports to terminate the employment with immediate effect and in breach of contract – whether that is because there is no contractual PILON clause or because they have failed to exercise the PILON clause in a manner compliant with the contractual terms (a la SocGen). Does the employee have qualifying service to claim unfair dismissal?

The established view would be 'no'. No notice has been given, rather the employee has been dismissed with immediate effect – so the EDT is the date on which the termination takes effect (see (B) above). Even allowing for the extra 'one week for each year of employment' required under © above, the EDT is only 23 months + one week into the employment – so, three weeks short of the magic two year mark for qualifying service.

However, this is entirely inconsistent with the decision in Geys. It would mean that for the purposes of determining whether the employee may enforce fundamental, statutory rights, an unlawful termination (in breach of contract) will be automatically effective – whether the employee seeks to affirm the contract or not. Whereas Geys is clear that in exactly the same situation, the contract of employment would continue until the employee elects to accept the breach, or until it is validly terminated – which in our example may well be 23 months + three months' contractual notice into the employment (ie, well over two years).
Does the law really intend it to be possible for an employee to have two termination dates: one contractual; and another statutory? Can the employee be 'out' as regards statutory rights but at the same time 'still in and not out' as regards contractual rights…?

Unfortunately the 'umpires' in Geys did not have to determine this.

But, even if the employee plainly does have qualifying service, that's not the end of the confusion.

2) Time limits

Most employment claims are subject to a short, three-month limitation period – an unfair dismissal claim must be brought before the Employment Tribunal, within three months of the EDT.

But in our example above, what is the EDT? It is established that the EDT for the purposes of calculating the three-month limitation is the date on which the employee learns of his or her dismissal, and that conventional contractual principles do not necessarily apply. This has been recently confirmed by the Supreme Court in Gisda Cyf v Barratt.

But, Gisda Cyf dismissed Ms Barratt summarily (ie, without notice) for gross misconduct – there was no requirement for notice – so when Ms Barratt learned of her dismissal, it was absolute. Would the decision have been the same in our example above – or, hypothetically, in Mr Geys' case?

Certainly one school of thought is that it would; that in Mr Geys' case, the EDT for the purposes of calculating his three-month time limit would have been 29 November – the date on which he learned that his employment was being terminated 'with immediate effect'.

But again, this seems entirely inconsistent with the Supreme Court's decision in Geys. If an employee, being notified of his dismissal in breach of contract, elects to affirm that contract – thus prolonging it – is it not right that the date on which the termination takes effect is the same, both for contractual and for statutory rights?

The law is unclear, as regards both qualifying service and time-limits. But following Geys, there must be strong arguments that however hard the employer may try to get the employee 'out' with immediate effect, unless and until they do so in the way the contract says they must, the employee may elect to remain *'still in and not out'*, preserving not just contractual but also statutory rights.

For suggestions as to how to deal with the problems this case throws up for employers please see Meriel Schindler's latest video of practical tips on HR dilemmas.