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TERMINATING EMPLOYMENT CONTRACTS: WHEN THE DATE MATTERS

By Christopher Fisher

The date of termination of an employment contract is sometimes very important in calculating the value of contractual compensation due to employees. Incentive schemes will often require an employee to remain employed at a certain date in order to receive a bonus.

In a recent case, the employer thought that it had terminated an employee's contract before the year end and thus avoided a final year bonus payment. The High Court disagreed and ruled that the employee was due his bonus, costing the employer around €2.5 million.

The facts of the case

Raphael Geys had been employed by Société Générale (the "Bank") since 2005 as a Managing Director in its European Fixed Income Sales division. Part of Mr Geys' remuneration package was a sales incentive scheme which only paid a bonus to employees still employed by the Bank at the end of each calendar year.

On 29 November 2007, Mr Geys was called to a meeting at which he was handed a letter stating that the Bank "*has decided to terminate your employment with immediate effect*". He was allowed to clear his desk and was then escorted from the building. On 18 December 2007, the Bank paid a little over £30,000 directly into Mr Geys' bank account as a payment in lieu of notice (although it did not tell Mr Geys it was doing this).

On 2 January 2008, Mr Geys' solicitors wrote to the Bank saying that Mr Geys had decided to "affirm" his employment contract. On 4 January 2008, the Bank wrote to Mr Geys stating: "*Under the terms and conditions of employment, you are entitled to three months' notice of termination of your employment. Société Générale gave you notice to terminate your employment with immediate effect on 29 November 2007 (your termination date) and will pay you in lieu of your notice period*". The letter went on to say that the payment in lieu of notice had already been credited to Mr Geys' account on 18 December 2007.

Contract not terminated before the year end

The Bank argued that the termination date of Mr Geys' contract was 29 November 2007 when they first wrote to him terminating with "immediate effect". Alternatively, they argued a termination date of 18 December 2007 when the payment in lieu of notice had been made.

The Court ruled that neither of these dates was correct. Whilst the Bank had the right to terminate with immediate effect if they operated a payment in lieu of notice clause contained in Mr Geys' contract, it had not done this. The letter of 29 November made no reference to the pay in lieu provision and, indeed, the Bank did not make any payment in lieu of notice at that time.



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The payment in lieu of notice made on 18 December was similarly not sufficient to terminate the contract. For there to be a payment in lieu of notice within the meaning of Mr Geys' contract, the Bank not only had to make the payment to Mr Geys, it also had to give him notice that it was making a payment in lieu of notice.

So when did the contract terminate?

Since it had not used its pay in lieu clause, the dismissal on 29 November was a repudiatory breach of the employment contract. This gave Mr Geys the choice of accepting the breach as terminating his contract or affirming it. Through his solicitors' letter on 2 January 2008, Mr Geys had chosen to affirm the contract.

The Court's conclusion was that the contract was terminated by the letter written by the Bank on 4 January 2008. That letter clearly conveyed the Bank's decision to exercise its right to terminate Mr Geys' employment by making him a payment in lieu of notice and said that the amount he had received on 18 December 2007 constituted such a payment. Since Mr Geys was therefore still employed at the end of 2007, he qualified for his bonus.

Conclusion

The Bank could have saved itself €2.5 million if it had used the language of its 4 January 2008 letter when it first wrote to Mr Geys on 29 November 2007. It would even have been sufficient to send him such a letter when the payment was made on 18 December 2007.

The golden rule for employers looking to avoid such problems is to take care in the wording of the termination letter. If a pay in lieu of notice clause is being operated, make clear in the letter that the employment is being terminated with immediate effect because the employer has elected to make a payment in lieu of notice in accordance with the contract. Further, tell the employee in the same letter when he can expect to receive the payment in lieu of notice, which should follow as soon as possible. If it is not to follow straight away because other points are being negotiated around the exit package, make sure to agree with the employee that the pay in lieu of notice will be postponed until those other points have been agreed. This will prevent the employee from claiming that the failure to make the pay in lieu of notice is a breach of contract.